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

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. APHIS–2012–0079]

Golden Nematode; Removal of Regulated Areas in Livingston and Steuben Counties, NY

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the golden nematode regulations by removing areas in Livingston and Steuben Counties in New York from the list of generally infested areas. Surveys and other data have shown that certain areas in these two counties are free of golden nematode, and we have determined that regulation of these areas is no longer necessary. As a result of this action, areas in Livingston and Steuben Counties in New York that have been listed as generally infested will be removed from the list of areas regulated for golden nematode. This action is necessary to relieve restrictions on certain areas that are no longer necessary.

DATES: This interim rule is effective January 9, 2013. We will consider all comments that we receive on or before March 11, 2013.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0079-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0079, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0079* 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: Mr. Jonathan M. Jones, National Program Manager, Emergency and Domestic Programs, Plant Protection and Quarantine, APHIS, 4700 River Road Unit 160, Riverdale, MD 20737; (301) 851–2128.

SUPPLEMENTARY INFORMATION:

Background

The golden nematode (*Globodera rostochiensis*) is a destructive pest of potatoes and other solanaceous plants. Potatoes cannot be economically grown on land that contains large numbers of the nematode. The golden nematode has been determined to occur in the United States only in parts of the State of New York.

In 7 CFR part 301, the golden nematode quarantine regulations (§§ 301.85 through 301.85–10, referred to below as the regulations) set out procedures for determining the areas regulated for golden nematode and impose restrictions on the interstate movement of regulated articles from regulated areas.

Paragraph (a) of § 301.85–2 states that the Deputy Administrator, Plant Protection and Quarantine, Animal and Plant Health Inspection Service (APHIS), shall list as regulated areas each quarantined State or each portion thereof in which golden nematode has been found or in which there is reason to believe that golden nematode is present, or which it is deemed necessary to regulate because of their proximity to infestation or their inseparability for quarantine enforcement purposes from infested localities. The areas in Livingston County and Steuben County have been regulated since the early 1980s and the 1960s, respectively.

Paragraph (c) of § 301.85–2 states that, in accordance with the criteria listed in § 301.852(a), the Deputy Administrator shall terminate the designation of any area listed as a regulated area and suppressive or generally infested area when he or she determines that such designation is no longer required. Surveys and other data have revealed that certain areas in Livingston and Steuben Counties are free of golden nematode. As a result, it is no longer necessary to regulate these areas or restrict the interstate movement of golden nematode regulated articles from these areas.

Immediate Action

Immediate action is warranted to relieve restrictions that are no longer necessary on the specified areas in Livingston and Steuben Counties in New York that have been regulated for golden nematode. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this action effective less than 30 days after publication in the **Federal Register**.

We will consider comments we receive during the comment period for this interim rule (see **DATES** above). After the comment period closes, we will publish another document in the **Federal Register.** The document will include a discussion of any comments we receive and any amendments we are making to the rule.

Executive Order 12866 and Regulatory Flexibility Act

This interim rule is subject to Executive Order 12866. However, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. The full analysis may be viewed on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov) or obtained from the person listed under **FOR FURTHER INFORMATION CONTACT**.

This rule codifies a Federal Order issued in February 2012, removing certain areas in Livingston and Steuben Counties in the State of New York from the golden nematode domestic quarantine regulation in § 301.85,

thereby reducing the golden nematode regulated area by a total of 262,847 acres.

Golden nematode is a major pest of potato plants and also attacks eggplant, tomato plants, and soybeans, among other crops. The golden nematode quarantine negatively affects the sales of these agricultural commodities, and the operations of non-agricultural businesses that use earth-moving equipment as well. The pest is spread by the transport of cysts in soil, in particular through the inadvertent movement of infested soil attached to agricultural products, farming equipment, and other regulated articles.

In 2007, there were 38 farms that harvested potatoes in these two counties in New York, 10 farms in Livingston County and 28 farms in Steuben County. These 38 farms represented about 4.4 percent of potato farms in the State of New York. New York farms that harvested potatoes in 2007 represented about 6 percent of such farms in the United States and planted about 2 percent of the Nation's acres from which potatoes were harvested.

Affected entities will benefit from no longer needing to satisfy compliance requirements of the quarantine. They may also find improved export opportunities. While the potato farms in the two counties qualify as small entities, they are few in number and their share of the Nation's potato industry is small.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

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

List of Subjects in 7 CFR Part 301

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

Accordingly, we are amending 7 CFR part 301 as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

■ 1. The authority citation for part 301 continues to read as follows:

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

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

■ 2. In § 301.85–2a, under the heading ''New York,'' paragraph (1), the entries for Livingston County and Steuben County are revised to read as follows:

§ 301.85–2a Regulated areas; suppressive and generally infested areas.

* * * * *

New York

(1) *Generally infested area:*

* * * * *

Livingston County. (A) That portion of land in the town of Avon bounded as follows: Beginning at a point marked by latitude/longitude coordinates 42°90′56″, -77°68′72″; then east along a farm road to coordinates 42°90′54″, -77°68′50″; then east along a farm road to coordinates 42°90′60″, -77°68′25″; then north along a drainage ditch to coordinates 42°90′69″, 77°68′23″; then north along a drainage ditch to coordinates 42°90′79″, -77°68′47″; then north to coordinates 42°91′03″, -77°68′44″; then west along the south side of a farm road to coordinates 42°91′03″, -77°68′57″; then south along a farm road to point of beginning at coordinates 42°90′56″, -77°68′72″;

(B) The area known as ''South Lima North Muck'' in the town of Lima bounded as follows: Beginning at a point along the north side of South Lima Road marked by latitude/longitude coordinates 42°85′53″, -77°67′38″; then north along a farm road to coordinates 42°85′88″, -77°67′12″; then east along a farm road and along a forested edge to coordinates 42°85′94.7″, -77°66′60.1″; then north along an irrigation ditch to coordinates 42°86′10.9″, 77°66′59.0″; then east along a forested edge to coordinates 42°86′11.2″, -77°66′47.7″; then north along a farm road to coordinates 42°87′35″, -77°66′51″; then west along a farm road to coordinates 42°87′35″, -77°66′84″; then south along Little Conesus Creek to coordinates 42°87′12.56″, -77°66′93.38″; then west to include a portion of an access road and gravel clean off site to coordinates 42°87′12.60″, -77°67′05.50″; then south to coordinates 42°87′11.19″, 77°67′04.43″; then east to coordinates 42°87′11.05″, -77°66′99.68″; then north to coordinates 42°87′12.03″, -77°66′98.99″; then east to coordinates 42°87′11.97″, -77°66′93.67″; then south along Little Conesus Creek to coordinates 42°86′88″, -77°67′02″; then west along a farm road to coordinates 42°86′88″, -77°67′13″; then south along a farm road to coordinates 42°86′59″, 77°67′33″; then south along a farm road to coordinates 42°86′42″, -77°67′40″; then west along a farm road to coordinates 42°86′43″, -77°67′61″; then south along a farm road to coordinates 42°85′67″, -77°68′02″; then east to coordinates 42°85′64″, -77°67′41″, then south along Little Conesus Creek to coordinates 42°85′53″, -77°67′45″; then east to point of beginning at coordinates 42°85′53″, -77°67′38″;

(C) The area known as ''South Lima South Muck'' in the town of Lima bounded as follows: Beginning at a point along the south side of South Lima Road marked by latitude/longitude coordinates 42°85′52″, -77°67′74″; then south to coordinates 42°85′48″, 77°67′74″; then east to coordinates 42°85′48″, -77°67′67″; then south to coordinates 42°85′09″, -77°67′70″; then south to coordinates 42°84′47″, -77°67′72″; then east to coordinates 42°84′46″, -77°67′39″; then north along a farm road to coordinates 42°84′77″, 77°67′28″; then east along a farm road to coordinates 42°84′88″, -77°67′00″; then north along a farm road to coordinates 42°85′12″, -77°67′01″; then west along a farm road to coordinates 42°85′12″, -77°67′20″; then north along a farm road to coordinates 42°85′16″, 77°67′20″; then west along a farm road to coordinates 42°85′18″, -77°67′40″; then north to coordinates 42°85′41″, -77°67′40″; then west to coordinates 42°85′45″, -77°67′66″; then north to coordinates 42°85′52″, -77°67′65″; then west to point of beginning at coordinates 42°85′52″, -77°67′74″; and

(D) The area known as ''Wiggle Muck'' in the town of Livonia bounded as follows: Beginning at a point along the west side of Plank Road (State Highway 15A) marked by latitude/longitude coordinates 42°84′89.0″, -77°61′36.7″; then west to coordinates 42°84′91″, -77°62′03″; then south along a farm road to coordinates 42°84′68″, -77°61′92″; then south along a farm road to

coordinates 42°84′19″, -77°61′88″; then east to coordinates 42°84′22″, -77°61′61″; then north along a farm road to coordinates 42°84′87.2″, 77°61′68.1″; then east to the west side of Plank Road marked by coordinates 42°84′87.2″, 77°61′35.9″; then north to point of beginning at coordinates 42°84′89.0″, -77°61′36.7″.

* * * * *

Steuben County. (A) The towns of Prattsburg and Wheeler;

(B) The area known as ''Arkport Muck North'' located in the town of Dansville and bounded as follows: Beginning at a point along the west bank of the Marsh Ditch that intersects a farm road marked by latitude/longitude coordinates 42°42′30″, -°71′21″; then north along the Marsh Ditch to coordinates 42°42′96.1″, -°71′54.0″; then west along a 45-foot wide hedgerow to coordinates 42°42′83.1″, -°72′00.3″; then south through woods, along a farm road, and field border to coordinates 42°42′55″, -°71′89″; then east along a tree line to coordinates 42°42′54″, -°71′80″; then south along a tree line to coordinates 42°42′30″, -°71′57″; then east to point of beginning at coordinates 42°42′30″, -°71′21″;

(C) The area known as ''Arkport Muck South″ located in the town of Dansville and bounded as follows: Beginning at a point along the west side of New York Route 36 marked by latitude/longitude coordinates 42°40′54.5″, -°69′79.0″; then north along the west side of New York Route 36 to coordinates 42°41′45″, -°69′99″; then west along a farm road to coordinates 42°41′45″, -°70′29″; then north along a farm road to coordinates 42°41′60″, -°70′36″; then west along a farm road to coordinates 42°41′62″, -°70′83″; then north along the Marsh Ditch to coordinates 42°41′86″, -°70′97″; then west along a farm road to coordinates 42°41′81″, 77°71′21″; then south along a farm road to coordinates 42°41′76.0″, -°71′18.0″; then west along a fallow strip to coordinates 42°41′75.6″, -°71′40.2″; then south along a fallow strip to coordinates 42°41′61.3″, -°71′42.0″; then west along a farm road to coordinates 42°41′60.4″, 77°71′68.1″; then south along a farm road on the east side of the Conrail right-of-way (Erie Lackawanna Railroad) to coordinates 42°40′50″, -°71′07″; then east along a farm road to coordinates 42°40′49″, -°70′38″; then north along an irrigation ditch to coordinates 42°40′69.9″, -°70′46.8″; then east along an irrigation ditch to coordinates 42°40′69.7″, 77°70′34.3″; then south along the Marsh Ditch to coordinates 42°40′55.0″, -°70′26.5″; then east to point of beginning at coordinates 42°40′54.5″, -°69′79.0″;

(D) The property in the town of Cohocton (formerly known as the ''Werthwhile Farm″) bounded as follows: Beginning at a point along the north side of Brown Hill Road marked by latitude/longitude coordinates 42°45′03.5″, -°53′56.2″; then north along a forest edge to coordinates 42°45′27.5″, -°53′55.7″; then west along a forest edge to coordinates 42°45′27″, -°53′72.9″; then north along a forest edge to coordinates 42°45′47.6″, -°53′72.2″; then west along a forest edge and a hedgerow to the east side of Rex Road to coordinates 42°45′48.7″, -°54′40.7″; then southwest along the east side of Rex Road to coordinates 42°45′39.4″, -°54′53.6″; then south along a hedgerow and a forest edge to coordinates 42°45′05.7″, -°54′54.7″; then east along a hedgerow and the north side of Brown Hill Road to point of beginning at coordinates 42°45′03.5″, 77°53′56.2″; and

(E) The property located in the town of Fremont that is bounded as follows: Beginning at a point on Babcock Road that intersects a farm road marked by latitude/longitude coordinates 42°43′68.06″, -°57′51.11″; then west along the farm road to coordinates 42°43′67.22″, -°57′80.56″; then south to coordinates 42°43′60.00″, 77°57′80.28″; then west to coordinates 42°43′59.44″, -°58′07.50″; then south to coordinates 42°43′35.28″, -°58′06.39″; then east to coordinates 42°43′33.06″, 77°57′78.89″; then south to coordinates 42°43′18.61″, -°57′77.78″; then east to coordinates 42°43′23.06″, -°57′71.39″; then north to coordinates 42°43′30.28″, 77°57′63.89″; then east to coordinates 42°43′30.28″, -°57′61.39″; then north to coordinates 42°43′49.44″, -°57′56.94″; then east to coordinates 42°43′49.17″, 77°57′49.72″; then north to the point of beginning at coordinates 42°43′68.06″, 77°57′51.11″.

* * * * *

Done in Washington, DC, this 2nd day of January 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–00206 Filed 1–8–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 925

[Doc. No. AMS–FV–11–0090; FV 12–925–1 FR]

Grapes Grown in Designated Area of Southeastern California; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule increases the assessment rate established for the California Desert Grape Administrative Committee (Committee) for the 2012 and subsequent fiscal periods from $0.0125 to $0.0150 per 18-pound lug of grapes handled. The Committee locally administers the marketing order, which regulates the handling of grapes grown in a designated area of southeastern California. Assessments upon grape handlers are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period began January 1 and ends December 31. The assessment rate will remain in effect indefinitely unless modified, suspended or terminated.

DATES: *Effective Date:* January 10, 2013.

FOR FURTHER INFORMATION CONTACT: Kathie M. Notoro, Marketing Specialist, or Kurt J. Kimmel, Regional Director, California Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906, or Email: *Kathie.Notoro@ams.usda.gov* or *Kurt.Kimmel@ams.usda.gov.*

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Laurel.May@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 925, as amended (7 CFR part 925), regulating the handling of grapes grown in a designated area of southeastern California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, grape handlers in a designated area of southeastern California are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein is applicable to all assessable grapes beginning on January 1, 2012, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule increases the assessment rate established for the Committee for the 2012 and subsequent fiscal periods from $0.0125 to $0.0150 per 18-pound lug of grapes.

The grape order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of grapes grown in a designated area of southeastern California. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2011 and subsequent fiscal periods, the Committee recommended, and the USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on November 3, 2011, and unanimously recommended 2012 expenditures of $95,500 and an assessment rate of $0.0150 per 18-pound lug of grapes handled. In comparison, last year's budgeted expenditures were $89,616. The assessment rate of $0.0150 per 18-pound lug of grapes handled recommended by the Committee is $0.0025 higher than the $0.0125 rate currently in effect. The higher assessment rate is necessary to cover the Committee's budgeted expenses which include an increase in research and general office expenses. While the Committee's crop estimate of 5.8 million, 18-pound lugs is higher than the 5.4 million, 18-pound lugs handled last year, the higher assessment will generate $87,000 of revenue. This revenue plus the operating reserve should be sufficient to cover the increase in anticipated expenses.

The major expenditures recommended by the Committee for the 2012 fiscal period include $15,500 for research, $17,500 for general office expenses, and $62,500 for management and compliance expenses. The $15,500 research project is a for a new vine study proposed by the University of California Riverside. In comparison, major expenditures for the 2011 fiscal period included $10,000 for research, $15,616 for general office expenses, and $64,000 management and compliance expenses.

The assessment rate recommended by the Committee was derived by the following formula: Anticipated 2012 expenses ($95,500) plus the desired 2012 ending reserve ($70,000), minus the anticipated 2012 beginning reserve ($78,500), divided by the estimated 2012 shipments (5.8 million, 18-pound lugs) equals $0.0150 per lug.

Income generated through the $0.0150 assessment ($87,000) plus anticipated carry-in reserve funds ($78,500) should be sufficient to meet anticipated expenses ($95,500). Reserve funds by the end of 2012 are projected at $70,000 or about one fiscal period's expenses. Section 925.41 of the order permits the Committee to maintain about one fiscal period's expenses in reserve.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate will be in effect for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate the Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2012 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 13 handlers of southeastern California grapes who are subject to regulation under the order and about 41 grape producers in the production area. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small agricultural producers are defined as those whose annual receipts are less than $750,000. Nine of the 13 handlers subject to regulation have annual grape sales of less than $7 million. Based on data from the National Agricultural Statistics Service (NASS) and the Committee, the crop value for the 2011 season was about $46,574,000. Dividing this figure by the number of producers (41) yields an average annual producer revenue estimate of about $1,135,951. However, according to the Committee, at least 10 of 41 producers would be considered small businesses under the Small Business Administration threshold of $750,000. Based on the foregoing, it may be concluded that a majority of grape handlers and at least ten of the producers could be classified as small entities.

This rule increases the assessment rate established for the Committee and

collected from handlers for the 2012 and subsequent fiscal periods from $0.0125 to $0.0150 per 18-pound lug of grapes. The Committee unanimously recommended 2012 expenditures of $95,500 and an assessment rate of $0.0150 per 18-pound lug of grapes handled. The assessment rate of $0.0150 is $0.0025 higher than the 2011 rate currently in effect. The higher assessment rate is necessary to cover the Committee's budgeted expenses, including increases in research and general office expenses. While the Committee's crop estimate of 5.8 million, 18-pound lugs is higher than the 5.4 million, 18-pound lugs handled last year, the higher rate will generate $87,000 of revenue. This revenue plus the operating reserve should be sufficient to cover the increase in anticipated expenses. Reserve funds by the end of 2012 are projected at $70,000 or about one fiscal period's expenses.

The major expenditures recommended by the Committee for the 2012 fiscal period include $15,500 for research, $17,500 for general office expenses, and $62,500 for management and compliance expenses. The $15,500 research project is a for a new vine study proposed by the University of California Riverside. In comparison, major expenditures for the 2011 fiscal period included $10,000 for research, $15,616 for general office expenses, and $64,000 management and compliance expenses.

The assessment rate recommended by the Committee was derived by the following formula: Anticipated 2012 expenses ($95,500) plus the desired 2012 ending reserve ($70,000), minus the anticipated 2012 beginning reserve ($78,500), divided by the estimated 2012 shipments (5.8 million, 18-pound lugs) equals $0.0150 per lug.

The Committee reviewed and unanimously recommended 2012 expenditures of $95,500, which included increases in research and general office expenses. Prior to arriving at this budget, the Committee considered alternative expenditures and assessment rates, to include not increasing the $0.0125 assessment rate currently in effect. Based on a crop estimate of 5.8 million 18-pound lugs, the Committee ultimately determined that increasing the assessment rate to $0.0150 combined with funds generated from the reserve should adequately cover increased expenses and provide an adequate 2012 ending reserve.

A review of historical crop and price information, as well as preliminary information pertaining to the upcoming fiscal period indicates that the producer price for the 2012 season could average about $7.93 per 18-pound lug of grapes handled for California grapes. To calculate the percentage of producer revenue represented by the assessment rate for 2011, the assessment rate of $0.0125 per 18-pound lug is divided by the estimated average producer price of $7.93 per 18-pound lug. NASS data for 2012 is not yet available. However, applying these same calculations above using the July 2011 producer price would result in an estimated assessment revenue as a percentage of total producer revenue of 0.189 percent for the 2012 season ($0.0150 divided by $7.93 per 18-pound lug). Thus, the assessment revenue should be well below the 1 percent of estimated producer revenue in 2012.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be offset by the benefits derived by the operation of the order. In addition, the Committee's meeting was widely publicized throughout the grape production area and all interested persons were invited to attend and participate in Committee deliberations on all issues. Like all Committee meetings, the November 3, 2011, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0189. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This rule imposes no additional reporting or recordkeeping requirements on either small or large California grape handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A proposed rule concerning this action was published in the **Federal Register** on July 2, 2012 (77 FR 39184).

Copies of the proposed rule were also mailed or sent via facsimile to all grape handlers. Finally, the proposal was made available through the Internet by USDA and the Office of the Federal Register. A 30-day comment period ending August 1, 2012, was provided for interested persons to respond to the proposal. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *www.ams.usda.gov/MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Laurel May at the previously-mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2012 fiscal period began on January 1, 2012, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable grapes handled during the fiscal period; (2) the Committee needs to have sufficient funds to meet its expenses, which are incurred on a continuous basis; and (3) handlers are aware of this action, which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued. Also, a 30-day comment period was provided for in the proposed rule.

List of Subjects in 7 CFR Part 925

Grapes, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 925 is amended as follows:

PART 925—GRAPES GROWN IN A DESIGNATED AREA OF SOUTHEASTERN CALIFORNIA

■ 1. The authority citation for 7 CFR part 925 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 925.215 is revised to read as follows:

§ 925.215 Assessment rate.

On or after January 1, 2012, an assessment rate of $0.0150 per 18-pound lug is established for grapes grown in a designated area of southeastern California.

Dated: January 3, 2013.

Rex A. Barnes,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2013–00190 Filed 1–8–13; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 77

[Docket No. APHIS–2012–0087]

Approved Tests for Bovine Tuberculosis in Cervids

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are adding the CervidTB Stat-Pak® and DPP® tests as official tuberculosis tests for the following species of captive cervids: Elk, red deer, white-tailed deer, fallow deer, and reindeer. We are taking this action because we have determined that the tests can reliably detect the presence or absence of antibodies to bovine tuberculosis in certain species of captive cervids. This action is necessary on an immediate basis in order to provide regulated entities with more options in order to meet the testing requirements for captive cervids within the regulations.

DATES: This interim rule is effective January 9, 2013. We will consider all comments that we receive on or before March 11, 2013.

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

- *Federal eRulemaking Portal:* Go to: *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0087-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0087, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0087* 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. C. William Hench, Senior Staff Veterinarian, Eradication and Surveillance Team, National Center for Animal Health Programs, VS, APHIS, 2150 Centre Avenue, Building B–3E20, Fort Collins, CO 80526–8117; (970) 494–7378.

SUPPLEMENTARY INFORMATION:

Background

Bovine tuberculosis is a contagious and infectious granulomatous disease caused by the bacterium *Mycobacterium bovis.* Although commonly defined as a chronic debilitating disease, bovine tuberculosis can occasionally assume an acute, rapidly progressive course. While any body tissue can be affected, lesions are most frequently observed in the lymph nodes, lungs, intestines, liver, spleen, pleura, and peritoneum. Although cattle are considered to be the true hosts of *M. bovis,* the disease has been reported in several other species of livestock, most notably bison and captive cervids. There have also been instances of infection in other domestic and nondomestic animals, as well as in humans.

Through the National Cooperative State/Federal Bovine Tuberculosis Eradication Program, the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) works cooperatively with the Nation's livestock industry and State animal health agencies to eradicate bovine tuberculosis from domestic livestock in the United States and prevent its recurrence.

Federal regulations implementing this program are contained in 9 CFR part 77, ''Tuberculosis'' (referred to below as the regulations) and in the ''Uniform Methods and Rules—Bovine Tuberculosis Eradication,'' which is incorporated by reference within the regulations. The regulations restrict the interstate movement of cattle, bison, and captive cervids to prevent the spread of bovine tuberculosis. Subpart C of the regulations (§§ 77.20 to 77.41, referred to below as the captive cervid regulations) addresses captive cervids.

Currently, in the captive cervid regulations, there are several instances in which we require captive cervids to be tested with an official tuberculosis test. For example, in § 77.35, in order for a herd of captive cervids to be recognized as accredited, all cervids in the herd must have tested negative to at least two consecutive official tuberculosis tests, conducted at 9 to 15 month intervals, with certain, limited exceptions.

In § 77.20 of the captive cervid regulations, the definition of *official tuberculosis test* has provided that the single cervical tuberculin (SCT) test, a primary test, and comparative cervical tuberculin (CCT) test, a supplemental test, are recognized by APHIS as official tuberculosis tests, provided that they are applied and reported in accordance with the captive cervid regulations.

In the same section, the definitions of *single cervical tuberculin (SCT) test* and *comparative cervical tuberculin (CCT) test* provide how to apply each test; the sequence in which the tests should be administered and the manner in which test results should be interpreted are specified in § 77.34. The individuals who may administer each test and the reporting requirements for each test are found in § 77.33.

We recently received a request to evaluate the CervidTB Stat-Pak® test, a primary test, and Dual Path Platform (DPP)® test, a supplemental test, as official tests for bovine tuberculosis in the following species of captive cervids: Elk, red deer, white-tailed deer, fallow deer, and reindeer. Based on our evaluation, we have determined that the tests can reliably detect the presence or absence of antibodies to bovine tuberculosis in these species of captive cervids. Accordingly, we are amending the captive cervid regulations to recognize these two tests as official tuberculosis tests. We discuss these amendments immediately below, by section.

Definitions (§ 77.20)

As we mentioned previously, prior to issuance of this interim rule, the definition of *official tuberculosis test* in § 77.20 of the captive cervid regulations specified that only the SCT and CCT tests are official tuberculosis tests. We are amending the definition of *official tuberculosis test* so that it specifies that the CervidTB Stat-Pak® and DPP® tests are also official tuberculosis tests.

We are also adding definitions of *CervidTB Stat-Pak® test* and *Dual Path Platform (DPP®) test* to § 77.20. We are defining *CervidTB Stat-Pak® test* as: ''A serological assay to determine the presence of antibodies to bovine tuberculosis (*M. bovis*) in elk, red deer, white-tailed deer, fallow deer, and

reindeer, in which a blood sample taken from a captive cervid is placed on a strip containing an antibody-detecting reagent. The sample is then diluted by using a buffer solution. Once sufficient time has elapsed, the strip indicates if antibodies are present in the sample.'' We are defining *Dual Path Platform (DPP®) test* as: ''A serological assay to determine the presence of antibodies to bovine tuberculosis (*M. bovis*) in elk, red deer, white-tailed deer, fallow deer, and reindeer, in which a blood sample taken from a captive cervid and a buffer solution are placed on a strip. The diluted sample then migrates to another strip, which contains an antibody-detecting reagent. This latter strip indicates if antibodies are present in the sample.''

The definition of *designated accredited veterinarian* in § 77.20 has stated that a designated accredited veterinarian is an accredited veterinarian who is trained and approved by cooperating State and Federal animal health officials to conduct the SCT test on captive cervids. As we discuss at greater length below, we are also allowing designated accredited veterinarians to draw the blood samples needed for the CervidTB Stat-Pak® and DPP® tests. Accordingly, we are amending the definition of *designated accredited veterinarian* to specify that designated accredited veterinarians may draw such samples.

Finally, prior to issuance of this interim rule, the definitions of *negative, reactor,* and *suspect* in § 77.20 presupposed that only the SCT and CCT tests are official tuberculosis tests for purposes of classifying captive cervids according to these classifications. We are amending these definitions to reflect that the CervidTB Stat-Pak® and DPP® tests are now also considered official tuberculosis tests for such purposes.

Testing Procedures for Tuberculosis in Captive Cervids (§ 77.33)

Section 77.33 of the captive cervid regulations specifies, among other things, who may administer official tuberculosis tests, which diagnostic laboratories have been approved by APHIS, the reporting requirements for each test, and how the tests will be interpreted.

Paragraph (a) of § 77.33 provides the approved testers for each official tuberculosis test. Prior to issuance of this interim rule, the section had specified that official tuberculosis tests may only be given by a veterinarian employed by the State in which the test is administered or by a veterinarian employed by USDA, except that designated accredited veterinarians, for whom correct application of the SCT test is part of their accreditation training, could conduct the SCT test. Because collecting blood samples is also part of such training, and because both the CervidTB Stat-Pak® and DPP® test are serological assays that rely on blood samples, we are amending paragraph (a) of § 77.33 to specify that designated accredited veterinarians may also draw blood for the CervidTB Stat-Pak® or DPP® test. The veterinarian who draws the sample will then ship it to the National Veterinary Services Laboratories (NVSL) in Ames, IA, for testing using these tests.

(Paragraph (b) of § 77.33 specifies that, with one, limited exception, histopathology and culture results for all tuberculosis diagnoses will only be accepted from NVSL. While we recognize that both the CervidTB Stat-Pak® and DPP® tests could be administered outside of NVSL, we would need to evaluate any use of the tests outside of NVSL at length in order to assess the likely reliability of test results for tests administered in such a manner. Pending the conclusion of such evaluations, we will require the tests to be administered by NVSL.)

Paragraph (d) of § 77.33 provides reporting requirements for the various official tuberculosis tests for captive cervids. Paragraph (d)(1) of § 77.33 contains reporting requirements for the SCT and CCT tests. A number of these reporting requirements pertain only to tests that are intradermally administered and require interpretation of palpation at the injection site, as both the SCT and CCT tests are, and are thus not applicable to the CervidTB Stat-Pak® and DPP® tests.

Accordingly, we are adding a paragraph (d)(2) to § 77.33. This paragraph provides that, for the CervidTB Stat-Pak® and DPP® tests, the veterinarian who draws blood from the captive cervid must submit a request to NVSL to perform the CervidTB Stat-Pak® and, if necessary, the DPP® test on the blood sample.

The request must be on a form specified by APHIS for such requests. The form, currently Veterinary Services (VS) form 10–4, ''Specimen Submission,'' is available at: *http://www.aphis.usda.gov/library/forms/#vs.* The completed form, including appendices, must be sent along with the blood samples to the address provided by NVSL on their Web site, *http://www.aphis.usda.gov/animal_health/lab_info_services/about_nvsl.shtml.* The veterinarian must also fill out the relevant portions of a test record; this record is currently VS form 6–22, ''Tuberculosis Test Record.'' The form may be obtained by contacting the local area VS office, information regarding which is available at *http://www.aphis.usda.gov/animal_health/area_offices/.* This record must be sent to the offices of the State and Federal animal health officials in the State.

Paragraph (e) of § 77.33 contains information regarding interpretation of test results. We are amending paragraph (e) to specify that interpretation of CervidTB Stat-Pak® and DPP® test results will be in accordance with the relevant paragraphs of § 77.34.

Official Tuberculosis Tests (§ 77.34)

As we mentioned previously, § 77.34 of the captive cervid regulations contains requirements regarding the sequence in which official tuberculosis tests should be administered and the manner in which test results should be interpreted for purposes of the captive cervid regulations. Requirements regarding the SCT test, a primary test for tuberculosis, are contained in paragraph (a) of § 77.34; requirements regarding the CCT, a supplemental test, are in paragraph (b). We are adding requirements regarding the CervidTB Stat-Pak® test, a primary test, to paragraph (a) of § 77.34, and requirements regarding the DPP® test, a supplemental test, to paragraph (b).

As amended, paragraph (a) of § 77.34 specifies that the CervidTB Stat-Pak® test is a primary test that may be used in individual captive elk, red deer, white-tailed deer, fallow deer, and reindeer, and in herds of these species that are of unknown tuberculous status. It further requires, with limited exceptions, that each captive cervid that has non-negative test results to the CervidTB Stat-Pak® test must be classified as a suspect and retested with the DPP® test; a captive cervid that has non-negative test results to the CervidTB Stat-Pak® test must not be retested using the SCT or CCT test. (We are also adding reciprocal language to the paragraph to specify that each captive cervid that responds to the SCT test must not be retested with the CervidTB Stat-Pak® or DPP® tests.) Finally, it allows the CervidTB Stat-Pak® test to be used in affected herds of captive elk, red deer, white-tailed deer, fallow deer, and reindeer, and in herds of these species that have received captive cervids from an affected herd; in such instances, each captive cervid that has non-negative test results to the CervidTB Stat-Pak® test must be classified as a reactor, unless the designated tuberculosis epidemiologist (DTE), the State or Federal epidemiologist designated by the Administrator of APHIS to make

decisions concerning the interpretation of diagnostic tests in a State, determines that the captive cervid should be classified as a suspect because of possible exposure to a tuberculous animal. This is consistent with our current protocol for interpretation of test results for SCT tests administered to captive cervids from such herds.

We are specifying that most captive cervids that have non-negative test results to the CervidTB Stat-Pak® test must be classified as suspects and retested using the DPP® test. This is because of the nature of the CervidTB Stat-Pak® test. The CervidTB Stat-Pak® test produces results that indicate the presence or absence of antibodies for bovine tuberculosis in blood drawn from a captive cervid. It does not, however, indicate the level at which these antibodies have been determined to be present in the blood. Moreover, because the CervidTB Stat-Pak® test does not have a specificity level of 100 percent, there is a degree of uncertainty regarding non-negative test results provided by the test.

We are requiring that this corroboratory testing use the DPP® test because both the CervidTB Stat-Pak® and the DPP® are serological tests that can be conducted in succession within a laboratory environment, and because the specificity of the DPP® test, in conjunction with the sensitivity of the CervidTB Stat-Pak®, gives us a high degree of confidence regarding our ultimate determination of the tested cervid's disease status.

As amended, paragraph (b) of § 77.34 specifies that the DPP® test is a supplemental test that may only be used in order to retest captive cervids that have been classified as suspects after being tested with the CervidTB Stat-Pak® test, and may not be used as a primary test. It further specifies that a captive cervid that has non-negative test results to its first DPP® test must be classified as a suspect, unless the DTE determines, based on epidemiological evidence, that the captive cervid should be classified as a reactor.

A captive cervid classified as a suspect on its first DPP® test may be retested using the DPP® test to evaluate a new blood sample drawn from the cervid no less than 30 days after this first DPP® test. A captive cervid that has non-negative test results on two successive DPP® tests must be classified as a reactor.

If a captive cervid has non-negative test results to its first DPP® test and is classified as a suspect, the owner of the cervid will have the option of having the cervid taken for slaughter or necropsy for a final determination of status or of having the cervid retested, using the DPP® test, no less than 30 days later. (In the intervening period, a quarantine of the herd will remain in effect prohibiting the interstate movement of captive cervids from the herd. We discuss this at greater length later in this document.) If the cervid again has non-negative test results to the DPP® test after 30 days, it is reasonable to classify the cervid as a reactor. This is consistent with our current policy for captive cervids that have non-negative test results to the CCT test.

Interstate Movements (§ 77.39)

Section 77.39 of the captive cervid regulations contains restrictions on the interstate movement of captive cervid herds involved in an epidemiological investigation or subject to affected herd management.

Paragraph (a) of § 77.39 contains restrictions on the interstate movement of herds containing a cervid classified as a suspect. Paragraph (a)(1) of § 77.39 contains restrictions on the movement of the suspect itself. We are amending paragraph (a)(1) to specify that, if a captive cervid is classified as a suspect on the CervidTB Stat-Pak® test, it must be quarantined until it is slaughtered or retested and found negative for tuberculosis based on the DPP® test. It further specifies that, if a captive cervid is classified as a suspect on an initial DPP® test, it must be slaughtered or quarantined for no less than 30 days and retested using the DPP® test. If it has non-negative test results to this second DPP® test, it must be classified as a reactor, with the attendant movement restrictions of such a classification.

We are requiring cervids classified as suspects to be quarantined because any cervid classified as a suspect may potentially be infected with bovine tuberculosis. Allowing its interstate movement other than directly to slaughter or necropsy may contribute to the spread of tuberculosis.

Paragraph (a)(2) of § 77.39 contains restrictions on the interstate movement of all other cervids in a herd that contains a suspect. Prior to issuance of this interim rule, the paragraph had specified that a herd containing a suspect must remain under quarantine until the suspect is retested using a supplemental test or is inspected at slaughter or necropsied and found negative. However, it did not specify that the DPP® test is one of the supplemental tests that may be administered to the animal. We are amending paragraph (a)(2) accordingly.

Paragraph (e) of § 77.39 contains restrictions on the interstate movement of herds that have received captive cervids from an affected herd. Prior to issuance of this interim rule, the introductory text of the paragraph had specified that if a herd receives captive cervids from an affected herd, the receiving herd must be placed under quarantine, and the captive cervids from the affected herd of origin must be considered exposed to tuberculosis, and must be slaughtered, necropsied, or tested with the SCT test. We are amending the paragraph so that it provides that the exposed cervids may also be tested using the CervidTB Stat-Pak® test.

Paragraph (e)(3) of § 77.39 has provided that, if all these exposed captive cervids test negative for tuberculosis, the receiving herd may be released from quarantine, but must be retested with the SCT test 1 year after release from quarantine in order for captive cervids from the herd to continue to be moved interstate. We are amending the paragraph so that it also allows the cervids to be retested using the CervidTB Stat-Pak® test.

Paragraph (f) of § 77.39 contains restrictions on the movement of captive cervids from herds suspected of being the source of tuberculosis. Prior to issuance of this interim rule, the paragraph had specified the restrictions that must be placed on the herd if any of the captive cervids in the herd respond to the SCT test. The paragraph now also specifies the restrictions that must be placed on the herd if any of the animals in the herd have non-negative test results to the CervidTB Stat-Pak® test.

Immediate Action

Immediate action is warranted to provide regulated entities who must have their captive cervids tested in order to comply with the captive cervid regulations with additional testing options. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this rule effective less than 30 days after publication in the **Federal Register.**

We will consider comments we receive during the comment period for this interim rule (see **DATES** above). After the comment period closes, we will publish another document in the **Federal Register** in which we will respond to the comments we receive and finalize or, as necessary, revise the provisions of this interim rule.

Executive Order 12866 and Regulatory Flexibility Act

This interim rule is subject to Executive Order 12866. However, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities.

This rule adds the CervidTB Stat-Pak® and DPP® tests as official tuberculosis tests for captive cervids. The current official tuberculosis tests are the SCT and CCT tests. It is APHIS policy that owners are responsible for assuming the costs associated with primary official tuberculosis tests for bovine tuberculosis in captive cervids; the Agency assumes the cost of corroboratory testing. Bovine tuberculosis testing using the SCT test, including veterinary fees, costs about $10 to $15 per head. We have estimated bovine tuberculosis testing using the CervidTB Stat-Pak® test, including veterinary fees, to cost approximately $13 to $15 per head. Owners of captive cervids will not be required to now use the CervidTB Stat-Pak® test instead of the SCT test, but may choose to do so if they determine such use to be cost-effective for their operations.

That being said, we do anticipate that producers may, in certain instances, experience benefits because of the availability of the CervidTB Stat-Pak® and DPP® tests as official tuberculosis tests for captive cervids. This is because of the nature of the CervidTB Stat-Pak® and DPP® tests. As serological tests, they are relatively easy to administer, in comparison to the SCT and CCT tests, and do not require the animals to be held for a significant period of time while the test is applied. There is thus a lower risk of misapplication of the tests and morbidity due to handling of the animals during application.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

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 rule has been reviewed under Executive Order 12988, Civil Justice Reform. It has no preemptive effect.

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 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–2012–0087. Please send a copy of your comments to: (1) Docket No. APHIS–2012–0087, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this rule.

This rule requires individuals who wish to have their cervids tested to fill out an application.

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 0.13 hours per response.

Respondents: Captive cervid producers.

Estimated annual number of respondents: 975.

Estimated annual number of responses per respondent: 2.

Estimated annual number of responses: 1,950.

Estimated total annual burden on respondents: 253 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

List of Subjects in 9 CFR Part 77

Animal diseases, Bison, Cattle, Reporting and recordkeeping requirements, Transportation, Tuberculosis.

Accordingly, we are amending 9 CFR part 77 as follows:

PART 77—TUBERCULOSIS

■ 1. The authority citation for part 77 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

■ 2. Section 77.20 is amended as follows:

■ a. In the definition of *designated accredited veterinarian,* by adding the words ''or draw blood for the CervidTB Stat-Pak® test and DPP® test'' after the words ''(SCT) test'';

■ b. In the definitions of *negative, reactor,* and *suspect,* by removing the words ''the SCT test or the CCT test,'' and adding the words ''an official tuberculosis test'' in their place;

■ c. By revising the definition of *official tuberculosis test;* and

■ d. By adding, in alphabetical order, definitions of *CervidTB Stat-Pak® test* and *Dual Path Platform (DPP®) test.*

The revision and additions read as follows:

§ 77.20 Definitions.

* * * * *

CervidTB Stat-Pak® test. A serological assay to determine the presence of antibodies to bovine tuberculosis (*M.*

bovis) in elk, red deer, white-tailed deer, fallow deer, and reindeer, in which a blood sample taken from a captive cervid is placed on a strip containing an antibody-detecting reagent. The sample is then diluted by using a buffer solution. Once sufficient time has elapsed, the strip indicates if antibodies are present in the sample.

* * * * *

Dual Path Platform (DPP®) test. A serological assay to determine the presence of antibodies to bovine tuberculosis (*M. bovis*) in elk, red deer, white-tailed deer, fallow deer, and reindeer, in which a blood sample taken from a captive cervid and a buffer solution are placed on a strip. The diluted sample then migrates to another strip, which contains an antibody-detecting reagent. This latter strip indicates if antibodies are present in the sample.

* * * * *

Official tuberculosis test. Any of the following tests for bovine tuberculosis in captive cervids, applied and reported in accordance with this part:

(1) The single cervical tuberculin (SCT) test.

(2) The comparative cervical tuberculin test (CCT) test.

(3) The CervidTB Stat-Pak® test.

(4) The Dual Path Platform (DPP®) test.

* * * * *

■ 3. Section 77.33 is amended as follows:

■ a. In paragraph (a), introductory text, by removing the words ''paragraph (a)(1)'' and adding the words ''paragraphs (a)(1) or (a)(2)'' in their place;

■ b. In paragraph (a)(1), by removing the words ''in § 77.34(a)(2)'' and adding the words ''in § 77.34(a)(1)(ii)'' in their place;

■ c. By adding a new paragraph (a)(2);

■ d. By adding a new paragraph (d)(2); and

■ e. By adding new paragraphs (e)(3) and (e)(4).

The additions read as follows:

§ 77.33 Testing procedures for tuberculosis in captive cervids.

(a) * * *

(2) A designated accredited veterinarian may draw blood for the CervidTB Stat-Pak® or DPP® test.

* * * * *

(d) * * *

(2) *CervidTB Stat-Pak® and DPP® test.* For the CervidTB Stat-Pak® and DPP® test, the veterinarian who draws blood from the captive cervid must submit a form specified by APHIS for such requests to NVSL to perform the CervidTB Stat-Pak® and, if necessary, DPP® test on the blood sample. The form is available at *http://www.aphis.usda.gov/library/forms/#vs.* The completed form, including any appendices, must be sent along with the blood samples to the address provided at the following Web site: *http://www.aphis.usda.gov/animal_health/lab_info_services/about_nvsl.shtml.* The veterinarian must also fill out the relevant portions of a test record. This form may be obtained by contacting the local area VS office, information regarding which is available at *http://www.aphis.usda.gov/animal_health/area_offices/.* This record must be sent to the offices of the State and Federal animal health officials in the State.

(e) * * *

(3) Interpretation of CervidTB Stat-Pak® test results will be in accordance with the classification requirements described in § 77.34(a).

(4) Interpretation of DPP® test results will be in accordance with the classification requirements described in § 77.34(b).

* * * * *

■ 4. Section 77.34 is revised to read as follows:

§ 77.34 Official tuberculosis tests.

(a) *Primary tests.* (1) *Single cervical tuberculin (SCT) test.* (i) The SCT test is a primary test that may be used in individual captive cervids and in herds of unknown tuberculous status. Each captive cervid that responds to the SCT test must be classified as a suspect until it is retested with the CCT test and is either found negative for tuberculosis or is classified as a reactor, unless, with exception of a designated accredited veterinarian, the testing veterinarian determines that the captive cervid should be classified as a reactor based on its response to the SCT test. A designated accredited veterinarian must classify a responding captive cervid as a suspect, unless the DTE determines, based on epidemiological evidence, that the captive cervid should be classified as a reactor. A captive cervid that responds to the SCT test must not be retested using the CervidTB Stat-Pak® or DPP® tests.

(ii) The SCT test is a primary test that may be used in affected herds and in herds that have received captive cervids from an affected herd. When used with affected herds or in herds that have received a captive cervid from an affected herd, the SCT test may only be administered by a veterinarian employed by the State in which the test is administered or employed by USDA. In affected herds or herds that have received captive cervids from an affected herd, each captive cervid that responds to the SCT test must be classified as a reactor, unless the DTE determines, based on epidemiological evidence, that the cervid should be classified as a suspect because of possible exposure to a tuberculous animal.

(2) *CervidTB Stat-Pak® test.* (i) The CervidTB Stat-Pak® test is a primary test that may be used in individual captive elk, red deer, white-tailed deer, fallow deer, and reindeer, and in herds of these species that are of unknown tuberculous status. Except as specified in paragraph (a)(2)(ii) of this section, each captive cervid that has non-negative test results to the CervidTB Stat-Pak® test must be classified as a suspect and retested with the DPP® test. A captive cervid that has non-negative test results to the CervidTB Stat-Pak® test must not be retested using the SCT or CCT test.

(ii) The CervidTB Stat-Pak® test is a primary test that may be used in affected herds of captive elk, red deer, white-tailed deer, fallow deer, and reindeer, and in herds of these species that have received captive cervids from an affected herd. In such herds, each captive cervid that has non-negative test results to the CervidTB Stat-Pak® test must be classified as a reactor, unless the DTE determines that the captive cervid should be classified as a suspect because of possible exposure to a tuberculous animal.

(b) *Supplemental tests.* (1) *Comparative cervical tuberculin (CCT) test.*

(i) The CCT test is a supplemental test that may only be used in order to retest captive cervids that have been classified as suspects after being tested with the SCT test. The CCT test may be used in affected herds only after the herd has tested negative to at least two whole herd SCT tests and only with the prior written consent of the DTE. The CCT test may not be used as a primary test.

(ii) A captive cervid tested with the CCT test must be classified as negative if it has a response to the bovine PPD tuberculin that is less than 1 mm.

(iii) Unless the testing veterinarian determines that the captive cervid should be classified as a reactor because of possible exposure to a tuberculous animal, a captive cervid tested with the CCT test must be classified as a suspect if:

(A) It has a response to the bovine PPD tuberculin that is greater than 2 mm and that is equal to the response to the avian PPD tuberculin; or

(B) It has a response to the bovine PPD tuberculin that is equal to or greater than 1 mm and equal to or less than 2 mm and that is equal to or greater than

the response to the avian PPD tuberculin.

(iv) A captive cervid tested with the CCT test must be classified as a reactor if:

(A) It has a response to the bovine PPD tuberculin that is greater than 2 mm and that is at least 0.5 mm greater than the response to the avian PPD tuberculin; or

(B) It has been classified as a suspect on two successive CCT tests.

(C) Any exceptions to the reactor classification under the conditions in paragraph (b)(1)(iv) of this section must be justified by the testing veterinarian in writing and have the concurrence of the DTE.

(2) *Dual Path Platform (DPP®) test.* (i) The DPP® test is a supplemental test that may only be used in order to retest captive cervids that have been classified as suspects after being tested with the CervidTB Stat-Pak® test. The DPP® test may not be used as a primary test.

(ii) A captive cervid that has non-negative test results to its first DPP® test must be classified as a suspect, unless the DTE determines, based on epidemiological evidence, that the captive cervid should be classified as a reactor. A captive cervid classified as a suspect on its first DPP® test may be retested using the DPP® test to evaluate a new blood sample drawn from the cervid no less than 30 days after this first DPP® test.

(iii) A captive cervid that has non-negative test results on two successive DPP® tests must be classified as a reactor.

■ 5. Section 77.39 is amended as follows:

■ a. By adding new paragraphs (a)(1)(iii) and (a)(1)(iv);

■ b. In paragraph (a)(2), by removing the words ''CCT test or the BTB test'' and adding the words ''CCT test, DPP® test, or the BTB test'' in their place;

■ c. By revising paragraph (e), introductory text;

■ d. By revising paragraph (e)(3);

■ e. By revising paragraph (f)(1); and

■ f. In paragraph (f)(2), by adding the words ''or the CervidTB Stat-Pak® test'' after the words ''SCT test''.

The revisions and additions read as follows:

§ 77.39 Other interstate movements.

(a) * * *

(1) * * *

(iii) A captive cervid classified as a suspect on the CervidTB Stat-Pak® test must be quarantined until it is slaughtered or retested using the DPP® test and found negative for tuberculosis based on the DPP® test.

(iv) A captive cervid classified as a suspect on an initial DPP® test must be slaughtered or otherwise must be quarantined until it is retested using the DPP® test. A captive cervid that has negative test results to this second DPP® test may be released from quarantine. A captive cervid that has non-negative test results to this second DPP® test must be classified as a reactor and may only be moved in accordance with paragraph (b) of this section.

* * * * *

(e) *Herds that have received captive cervids from an affected herd.* If a herd has received captive cervids from an affected herd, the captive cervids from the affected herd of origin will be considered exposed to tuberculosis. The exposed captive cervids and the receiving herd must be quarantined. The exposed captive cervids must be slaughtered, necropsied, or tested with the SCT test by a veterinarian employed by the State in which the test is administered or employed by USDA, or tested with the CervidTB Stat-Pak® test. Any exposed captive cervid that responds to the SCT test must be classified as a reactor and must be inspected at slaughter or necropsied. Any exposed captive cervid that has non-negative test results to the CervidTB Stat-Pak® test must be classified as a reactor and must be inspected at slaughter or necropsied. Any exposed captive cervid that tests negative to the SCT or CervidTB Stat-Pak® test will be considered as part of the affected herd of origin for purposes of testing, quarantine, and the five annual whole herd tests required for affected herds in paragraph (d) of this section.

* * * * *

(3) If all the exposed captive cervids test negative for tuberculosis, the receiving herd will be released from quarantine if it is given a whole herd test and is found negative for tuberculosis and will return to the herd classification in effect before the herd was quarantined. In addition, the receiving herd will must be retested with the SCT or CervidTB Stat-Pak® test 1 year after release from quarantine in order for captive cervids from the herd to continue to be moved interstate. Supplemental diagnostic tests may be used if any captive cervids in the herd show a response to the SCT test or have non-negative test results to the CervidTB Stat-Pak® test.

(f) * * *

(1) If the herd is identified as the source of captive cervids having lesions of tuberculosis and *M. bovis* has been confirmed by bacterial isolation from the slaughter animal, all captive cervids in the herd that respond to the SCT must be classified as reactors. All captive cervids in the herd that respond to the CervidTB Stat-Pak® test must be classified as reactors. If none respond to the SCT test or have non-negative test results to the CervidTB Stat-Pak® test, the herd may be released from quarantine and will return to the herd classification status in effect before the herd was quarantined, unless the DTE determines that additional testing is appropriate to ensure the herd's freedom from tuberculosis.

* * * * *

Done in Washington, DC, this 2nd day of January 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–00208 Filed 1–8–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1314; Directorate Identifier 2012–NM–227–AD; Amendment 39–17312; AD 2012–26–51]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Airbus Model A318, A319, A320, and A321 series airplanes. This emergency AD was sent previously to all known U.S. owners and operators of these airplanes. This AD requires revising the airplane flight manual (AFM) to advise the flight crew of emergency procedures for addressing Angle of Attack (AoA) sensor blockage. This AD also provides for optional terminating action for the AFM revision, which involves replacing AoA sensor conic plates with AoA sensor flat plates. This AD was prompted by a report that an airplane equipped with AoA sensors installed with conic plates recently experienced blockage of all sensors during climb, leading to autopilot disconnection and activation of the alpha protection (Alpha Prot) when Mach number was increased. We are issuing this AD to prevent reduced control of the airplane.

DATES: This AD is effective January 24, 2013 to all persons except those persons

to whom it was made immediately effective by Emergency AD 2012–26–51, issued on December 17, 2012, which contained the requirements of this amendment.

The Director of the Federal Register approved the incorporation by reference of a certain publication identified in the AD as of January 24, 2013.

We must receive comments on this AD by February 25, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this AD, contact Airbus, Airworthiness Office—EAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.*

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–227–1405; fax: 425–227–1149; email: *sanjay.ralhan@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On December 17, 2012, we issued Emergency AD 2012–26–51, which requires revising the airplane flight manual (AFM) to advise the flight crew of emergency procedures for addressing AoA sensor blockage. This emergency AD also provides for optional terminating action for the AFM revision, which involves replacing AoA sensor conic plates with AoA sensor flat plates. This emergency AD was sent previously to all known U.S. owners and operators of these airplanes.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Emergency Airworthiness Directive 2012–0264–E, dated December 17, 2012 (referred to after this as the Mandatory Continuing Airworthiness Information or ''the MCAI''), to correct an unsafe condition for the specified products.

EASA has advised that an Airbus Model A330 airplane equipped with AoA sensors installed with conic plates recently experienced blockage of all sensors during climb, leading to autopilot disconnection and activation of the alpha protection (Alpha Prot) when Mach number was increased. Based on the results of subsequent analysis, it is suspected that these conic plates may have contributed to the event. Investigations are ongoing to determine what caused the blockage of these AoA sensors.

Blockage of two or three AoA sensors at the same angle may cause the Alpha Prot of the normal law to activate. Under normal flight conditions (in normal law), if the Alpha Prot activates and Mach number increases, the flight control laws order a pitch down of the airplane that the flight crew might not be able to counteract with a side stick deflection, even in the full backward position. This condition, if not corrected, could result in reduced control of the airplane.

EASA also issued Emergency AD 2012–0258–E, dated December 4, 2012, for Airbus Model A330 and A340 airplanes to require an amendment of the AFM to ensure that flight crews apply the applicable emergency procedure.

AoA sensor conic plates of similar design are also installed on Model A320 series airplanes. Installation of these AoA sensor conic plates was required for Model A318, A319, A320, and A321 series airplanes by EASA AD 2012–0236, dated November 9, 2012 (corrected November 12, 2012). Subsequently, EASA issued AD 2012–0236R1, dated December 17, 2012, to remove the requirement to install AoA sensor conic plates.

Relevant Service Information

We reviewed Airbus A318/A319/A320/A321 Temporary Revision TR286, Issue 1.0, dated December 17, 2012, to the Airbus A318/A319/A320/A321 Airplane Flight Manual (AFM). The temporary revision provides information to advise the flight crew of emergency procedures for addressing AoA sensor blockage.

FAA's Determination

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI referenced above. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

AD Requirements

This AD requires revising the Emergency Procedures section of the Airbus A318/A319/A320/A321 AFM to incorporate Airbus A318/A319/A320/A321 Temporary Revision TR286, Issue 1.0, dated December 17, 2012, to advise the flight crew of emergency procedures for addressing AOA sensor blockage. This AD also provides for optional terminating action for the AFM revision, which involves replacing AoA sensor conic plates with AoA sensor flat plates.

Interim Action

We consider this AD to be an interim measure to mitigate risks associated with the installation of AoA sensor conic plates. Further AD action might follow.

Clarification of Service Information References

In the ''Relevant Service Information'' section of this AD and paragraph (h) of this AD, we have clarified that Airbus A318/A319/A320/A321 Temporary Revision TR286, Issue 1.0, dated December 17, 2012, is to the Airbus A318/A319/A320/A321 Airplane Flight Manual (AFM). We had not specified ''to the Airbus A318/A319/A320/A321 Airplane Flight Manual (AFM)'' in those locations in the emergency AD. This change does not affect AD compliance.

We have also included Airbus A318/A319/A320/A321 Temporary Revision TR286, Issue 1.0, dated December 17, 2012, to the Airbus A318/A319/A320/A321 AFM in paragraph (l)(2) of this AD, which specifies references for related information. We had not listed the temporary revision in the corresponding paragraph of the emergency AD (paragraph (l)(3) of the emergency AD). This change does not affect AD compliance.

We incorrectly referred to a service bulletin number as ''Airbus Mandatory Service Bulletin A320–32–1521, dated * * * '' in the ''Differences Between the AD and the MCAI or Service Information'' section in the preamble of the emergency AD. The correct service bulletin reference is ''Airbus Mandatory Service Bulletin A320–34–1521, dated * * * '' That reference is correct in the regulatory section of the emergency AD. We have revised the ''Differences Between the AD and the MCAI or Service Information'' section of this AD accordingly. This change does not affect AD compliance.

Differences Between the AD and the MCAI or Service Information

The applicability of EASA Emergency AD 2012–0264–E, dated December 17, 2012, is limited to airplanes having an AoA sensor conic plate installed either in production or in service. However, this emergency AD applies to all of the affected airplane models; and this AD prohibits installation of an AoA sensor conic plate in service as specified in Airbus Mandatory Service Bulletin A320–34–1521, dated May 7, 2012; and Revision 01, dated September 12, 2012; on any airplane as of the effective date of this AD.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because we received a report indicating that an airplane equipped with AoA sensors installed with conic plates recently experienced blockage of all sensors during climb, leading to autopilot disconnection and activation of the alpha protection (Alpha Prot) when Mach number was increased. This condition could result in reduced control of the airplane. Therefore, we find that notice and opportunity for prior public comment are impracticable and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2012–1314 and Directorate Identifier 2012–NM–227–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

Costs of Compliance

We estimate that this AD affects 793 airplanes of U.S. registry. (We have confirmed that at least 65 airplanes have the affected configuration; however, there could be as many as 100.)

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM Revision (100 airplanes)	1 work-hour × $85 per hour = $85	$0	$85	$8,500

We have received no definitive data that would enable us to provide cost estimates for the optional terminating action specified in this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2012–26–51 Airbus: Amendment 39–17312; Docket No. FAA–2012–1314; Directorate Identifier 2012–NM–227–AD.

(a) Effective Date

This AD is effective January 24, 2013 to all persons except those persons to whom it was made immediately effective by Emergency AD 2012–26–51, issued on December 17, 2012, which contained the requirements of this amendment.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A318–111, –112, –121, and –122 airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; Model A320–111, –211, –212, –214, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes; certificated in any category, all serial numbers.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 34: Navigation.

(e) Unsafe Condition

This AD was prompted by a report indicating that an airplane equipped with Angle of Attack (AoA) sensors (with conic plates installed) recently experienced blockage of all sensors during climb, leading to autopilot disconnection and activation of the alpha protection (Alpha Prot) when Mach number was increased. We are issuing this AD to prevent reduced control of the airplane.

(f) Compliance

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

(g) Airplane Flight Manual Revision

For airplanes on which an AoA sensor conic plate is installed in production by Airbus modification 153213 or 153214, or in-service as specified in Airbus Mandatory Service Bulletin A320–34–1521, dated May 7, 2012; or Revision 01, dated September 12, 2012: Within 5 days after the effective date of this AD, revise the Emergency Procedures of the Airbus A318/A319/A320/A321 Airplane Flight Manual (AFM) by inserting Airbus A318/A319/A320/A321 Temporary Revision TR286, Issue 1.0, dated December 17, 2012, to advise the flight crew of emergency procedures for addressing AoA sensor blockage. When the information in Airbus A318/A319/A320/A321 Temporary Revision TR286, Issue 1.0, dated December 17, 2012, is included in the general revisions of the AFM, the general revisions may be inserted in the AFM, and the temporary revision may be removed.

(h) Optional Terminating Action

Modification of an airplane by replacing AoA sensor conic plates with AoA sensor flat plates, in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, constitutes terminating action for the AFM revision required by paragraph (g) of this AD; and after the modification has been done, Airbus A318/A319/A320/A321 Temporary Revision TR286, Issue 1.0, dated December 17, 2012, to the Airbus A318/A319/A320/A321 AFM, may be removed from the AFM.

(i) Parts Installation Prohibition

As of the effective date of this AD, no person may install an AoA sensor conic plate in service using Airbus Mandatory Service Bulletin A320–34–1521, dated May 7, 2012; or Revision 01, dated September 12, 2012; on any airplane.

(j) Special Flight Permit

Special flight permits, as described in Section 21.197 and Section 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199), are not allowed.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Branch, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.*

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

(l) Related Information

(1) For further information about this AD, contact: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–227–1405; fax: 425–227–1149; email: *sanjay.ralhan@faa.gov.*

(2) Refer to Mandatory Continuing Airworthiness Information European Aviation Safety Agency Emergency Airworthiness Directive 2012–0264–E, dated December 17, 2012; and Airbus A318/A319/ A320/A321 Temporary Revision TR286, Issue 1.0, dated December 17, 2012, to the Airbus A318/A319/A320/A321 AFM; for related information.

(m) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Airbus A318/A319/A320/A321 Temporary Revision TR286, Issue 1.0, dated December 17, 2012, to the Airbus A318/ A319/A320/A321 Airplane Flight Manual.

(ii) Reserved.

(3) For Airbus service information identified in this AD, contact Airbus, Airworthiness Office—EAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.*

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference 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/cfr/ibr-locations.html.*

Issued in Renton, Washington, on December 27, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–31683 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1124; Directorate Identifier 2012–CE–041–AD; Amendment 39–17304; AD 2012–26–09]

RIN 2120–AA64

Airworthiness Directives; Burkhart GROB Luft- und Raumfahrt GmbH Sailplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for Burkhart GROB Luft- und Raumfahrt GmbH Models GROB G 109 and GROB G 109B sailplanes. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as corrosion and/or cracking of the elevator control rod that could lead to failure of the elevator control rod with consequent loss of control. We are issuing this AD to require actions to address the unsafe condition on these products.

DATES: This AD is effective February 13, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of February 13, 2013.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

For service information identified in this AD, contact Grob Aircraft AG, Lettenbachstrasse 9, D–86874 Tussenhausen-Mattsies, Germany; phone: +49 (0) 8268 998 139; fax: +49 (0) 8268 998 200; email: *productsupport@grob-aircraft.com;* Internet: *www.grob-aircraft.com/62.html*. You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

FOR FURTHER INFORMATION CONTACT: Jim Rutherford, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4165; fax: (816) 329–4090; email: *jim.rutherford@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on October 22, 2012 (77 FR 64437). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

Corroded and cracked elevator control road in the vertical fin on a Grob G 109B powered sailplane has been reported.

The technical investigation revealed that water had soaked into the elevator control rod through a control bore hole and resulted in corrosion damage and, in case of water freeze between the external control rod and the internal mass balance, in crack of the elevator control rod in the vertical fin.

This condition, if not detected and corrected, could lead to failure of the elevator control rod, possibly resulting in loss of control of the sailplane.

To address this unsafe condition, Grob Aircraft AG published Service Bulletin (MSB) 817–64 providing instructions for elevator control rod inspection and replacement.

For the reasons described above, this AD requires accomplishment of inspections of the elevator control rod in the vertical fin and, depending on finding, its replacement with a serviceable part, as well as a revision of powered sailplane Aircraft Maintenance Manual (AMM).

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (77 FR 64437, October 22, 2012) or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (77 FR 64437, October 22, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (77 FR 64437, October 22, 2012).

Costs of Compliance

For Model G109 Sailplanes

We estimate that this AD will affect 31 products of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of the AD on U.S. operators to be $5,270, or $170 per product.

In addition, we estimate that any necessary follow-on actions would take about 1 work-hour and require parts costing $680, for a cost of $765 per product. We have no way of determining the number of products that may need these actions.

For Model G109B Sailplanes

We estimate that this AD will affect 28 products of U.S. registry. We also estimate that it would take about 3.5 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts would cost about $78 per product.

Based on these figures, we estimate the cost of the AD on U.S. operators to be $10,514, or $375.50 per product.

In addition, we estimate that any necessary follow-on actions would take about 1 work-hour and require parts costing $738, for a cost of $823 per product. We have no way of determining the number of products that may need these actions.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM (77 FR 64437, October 22, 2012), the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2012–26–09 Burkhart Grob Luft-Und: Amendment 39–17304; Docket No. FAA–2012–1124; Directorate Identifier 2012–CE–041–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective February 13, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Burkhart GROB Luft- und Raumfahrt GmbH Models GROB G 109 and GROB G 109B sailplanes, all serial numbers, certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 27: Flight Controls.

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as corrosion and/or cracking of the elevator control rod. We are issuing this AD to detect and correct corrosion and/or cracking of the elevator control rod, which could lead to failure of the elevator control rod with consequent loss of control.

(f) Actions and Compliance

Unless already done, do the following actions:

(1) Within the next 25 hours time-in-service (TIS) after February 13, 2013 (the effective date of this AD) or within the next 60 days after February 13, 2013 (the effective date of this AD), whichever occurs first, and repetitively thereafter at intervals not to exceed every 5 years, inspect the elevator control rod in the vertical fin for corrosion or cracking following the accomplishment instructions in Grob Aircraft AG Service Bulletin No. MSB817–64/2, dated September 6, 2012.

(2) For the purposes of this AD, we define slight corrosion as corrosion you can remove with metal wool and that has no visible pitting in the base metal. If you cannot remove the corrosion with metal wool or if there is visible pitting in the base metal, we define it as heavy corrosion.

(3) If any cracks or heavy corrosion are found during any of the inspections required in paragraph (f)(1) of this AD, before further flight, replace the elevator control rod with an airworthy part following the accomplishment instructions in Grob Aircraft AG Service Bulletin No. MSB817–64/2, dated September 6, 2012, for your applicable sailplane model.

(4) If only slight or no corrosion of the elevator control rod is found during any of the inspections required in paragraph (f)(1) of this AD, before further flight, clean the rod surface and apply a corrosion inhibitor, as applicable, following the accomplishment instructions in Grob Aircraft AG Service Bulletin No. MSB817–64/2, dated September 6, 2012.

Note 1 to paragraph (f) of this AD: Grob Aircraft AG incorporated the repetitive inspections required by this AD into the instructions for continued airworthiness of the aircraft maintenance manual for the applicable sailplanes.

(g) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Jim Rutherford, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4165; fax: (816) 329–4090; email: *jim.rutherford@faa.gov.* Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(h) Related Information

Refer to European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, AD No.: 2012–0181, dated September 7, 2012; and Grob Aircraft AG Service Bulletin No. MSB817–64/2, dated September 6, 2012, for related information.

(i) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Grob Aircraft AG Service Bulletin No. MSB817–64/2, dated September 6, 2012.

(ii) Reserved.

(3) For service information identified in this AD, contact Grob Aircraft AG, Lettenbachstrasse 9, D–86874 Tussenhausen-Mattsies, Germany; phone: +49 (0) 8268 998 139; fax: +49 (0) 8268 998 200; email: *productsupport@grob-aircraft.com;* Internet: *www.grob-aircraft.com/62.html.*

(4) You may view this service information at FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

(5) You may view this service information that is incorporated by reference 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/cfr/index.html.*

Issued in Kansas City, Missouri, on December 21, 2012.

John Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–31364 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0885; Directorate Identifier 2012–NE–18–AD; Amendment 39–17307; AD 2012–26–12]

RIN 2120–AA64

Airworthiness Directives; Thielert Aircraft Engines GmbH Reciprocating Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Thielert Aircraft Engines GmbH (TAE) TAE 125–02–99 and TAE 125–02–114 reciprocating engines. This AD requires inspection of the oil filler plug vent hole at the next scheduled maintenance or within 110 flight hours after the effective date of this AD. If chips are found to be blocking the vent hole, additional corrective action is required before next flight. This AD was prompted by an in-flight shutdown of an airplane equipped with a TAE 125–02–99 engine. We are issuing this AD to prevent engine in-flight shutdown or power loss, possibly resulting in reduced control of the airplane.

DATES: This AD becomes effective February 13, 2013. The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of February 13, 2013.

ADDRESSES: The Docket Operations office is located at Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

FOR FURTHER INFORMATION CONTACT: Frederick Zink, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; email: *frederick.zink@faa.gov;* telephone: 781–238–7779; fax: 781–238–7199.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on August 31, 2012 (77 FR 53154). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> An engine in-flight shutdown has been reported on an aeroplane equipped with a TAE 125–02–99 engine. The results of the investigation showed that this was due to blockage of the gearbox oil filling plug vent hole, which caused pressurisation in the gearbox, resulting in oil leakage and a slipping clutch. This condition, if not corrected, could result in further cases of engine in-flight shutdown and consequent loss of control of the aeroplane.

Further investigation revealed that the blockage to the oil cap vent was the result of a residual chip from machining the oil cap vent hole. The chip is from the manufacturing process and did not fall off the oil plug. This is not the result of material in the oil system causing the blockage. You may obtain further information including the affected gearbox serial number list by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

We estimate that this AD will affect about 45 engines installed on airplanes of U.S. registry. We also estimate that it will take about 2.5 hours per product to comply with this proposed AD. The average labor rate is $85 per hour. Required parts will cost about $30 per engine. Based on these figures, we estimate the cost of the AD to U.S. operators to be $10,913.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2012–26–12 Thielert Aircraft Engines GmbH: Amendment 39–17307; Docket No. FAA–2012–0885; Directorate Identifier 2012–NE–18–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective February 13, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Thielert Aircraft Engines (TAE) TAE 125–02–99 and TAE 125–02–114 reciprocating engines.

(d) Reason

This AD was prompted by an in-flight shutdown of an airplane equipped with a TAE 125–02–99 engine. We are issuing this AD to prevent engine in-flight shutdown or power loss, possibly resulting in reduced control of the airplane.

(e) Actions and Compliance

Unless already done, within 110 flight hours after the effective date of this AD, or at the next scheduled maintenance, whichever occurs first, do the following.

(1) Remove the oil filler plug and check for chips blocking the vent hole in accordance with TAE Service Bulletin (SB) TM TAE 125–1015 P1, Initial Issue, dated April 27, 2012.

(2) If chips are found during the inspection in paragraph (e)(1) of this AD, disassemble the gearbox and check the radial shaft sealing rings (at the clutch and the propeller shaft) for leakage. If leakage is noted, replace the gearbox before the next flight.

(f) Installation Prohibition

After the effective date of this AD, do not install a gearbox with a S/N listed in TAE SB TM TAE 125–1015 P1, Initial Issue, dated April 27, 2012, into any engine unless the oil filler plug has passed the inspection required by paragraph (e)(1) of this AD.

(g) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19.

(h) Related Information

(1) For more information about this AD, contact Frederick Zink, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; email: *frederick.zink@faa.gov;* telephone (781) 238–7779; fax (781) 238–7199.

(2) Refer to MCAI Airworthiness Directive No. 2012–0112, dated June 22, 2012, and TAE SB TM TAE 125–1015 P1, Initial Issue, dated April 27, 2012 for related information.

(i) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Thielert Aircraft Engines GmbH (TAE) Service Bulletin TM TAE 125–1015 P1, Initial Issue, dated April 27, 2012.

(ii) Reserved.

(3) For TAE service information identified in this AD, contact Thielert Aircraft Engines GmbH, Platanenstrasse 14 D–09350, Lichtenstein, Germany, telephone: +49–37204–696–0; fax: +49–37204–696–2912; email: *info@centurion-engines.com.*

(4) You may view this service information at FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

(5) You may view this service information 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/cfr/ibr-locations.html.*

Issued in Burlington, Massachusetts, on December 27, 2012.

Colleen M. D'Alessandro,

Assistant Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2012–31589 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0601; Directorate Identifier 2008–SW–033–AD; Amendment 39–17306; AD 2012–26–11]

RIN 2120–AA64

Airworthiness Directives; Bell Helicopter Textron Inc. Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the Bell Helicopter Textron Inc. (BHTI) Model 205A, 205A–1, and 205B helicopters with certain starter/generator power cable assemblies (power cable assemblies). This AD requires replacing the power cable assemblies and their associated parts, and performing continuity readings. This AD was prompted by the determination that the power cable assembly connector (connector) can deteriorate, causing a short in the connector that may lead to a fire in the starter/generator, smoke in the cockpit that reduces visibility, and subsequent loss of helicopter control.

DATES: This AD is effective February 13, 2013.

The Director of the Federal Register approved the incorporation by reference of certain documents listed in this AD as of February 13, 2013.

ADDRESSES: For service information identified in this AD, contact Bell Helicopter Textron, Inc., P.O. Box 482, Fort Worth, TX 76101; telephone (817) 280–3391; fax (817) 280–6466; or at *http://www.bellcustomer.com/files/*. You may review a copy of the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth Texas 76137.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, any incorporated-by-reference service information, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (phone: 800–647–5527) is U.S. Department of Transportation, Docket Operations Office, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Andy Shaw, Aviation Safety Engineer, Safety Management Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 222–5110; email *andy.shaw@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

On June 13, 2012, at 77 FR 35306, the **Federal Register** published our notice of proposed rulemaking (NPRM), which proposed to amend 14 CFR part 39 to include an AD that would apply to BHTI Model 205A, 205A–1, and 205B helicopters with power cable assemblies, part numbers (P/N) 205–075–902–017 and P/N 205–075–911–007, installed. That NPRM proposed to require replacing the power cable assemblies and their associated parts, and performing continuity readings. The proposed requirements were intended to prevent a short in the connector that may lead to a fire in the starter/generator, smoke in the cockpit that reduces visibility, and subsequent loss of helicopter control.

Comments

We gave the public the opportunity to participate in developing this AD, but we received no comments on the NPRM (77 FR 35306, June 13, 2012).

FAA's Determination

We have reviewed the relevant information and determined that an unsafe condition exists and is likely to exist or develop on other products of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed.

Related Service Information

We have reviewed BHTI Alert Service Bulletin (ASB) No. 205–07–94, Revision A, dated December 8, 2008, for Model 205A and 205A–1 helicopters; and BHTI ASB No. 205B–08–50, dated December 8, 2008, for the Model 205B helicopter. These ASBs describe procedures for replacing the power cable assemblies and associated parts. The ASBs specify that operators can obtain a starter/generator cable kit that contains the required replacement parts.

Costs of Compliance

We estimate that this AD will affect 31 helicopters of U.S. registry. The actions will take about 10 work-hours per helicopter to accomplish at an average labor rate of $85 per work hour. Required parts will cost about $12,654

for the power cable assembly replacement kit. Based on these figures, the cost of the AD on U.S. operators will be $13,504 per helicopter, or $418,624 for the fleet.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

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

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; and

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

We prepared an economic evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2012–26–11 Bell Helicopter Textron Inc.: Amendment 39–17306; Docket No. FAA–2012–0601; Directorate Identifier 2008–SW–033–AD.

(a) Applicability

This AD applies to Bell Helicopter Textron Inc. (BHTI) Model 205A, 205A–1, and 205B helicopters with starter/generator power cable assemblies (power cable assemblies), part number (P/N) 205–075–902–017 and P/N 205–075–911–007 installed, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as the power cable assembly connector (connector) deterioration, which can cause a short in the connector potentially leading to a fire in the starter/generator. A fire would result in smoke in the cockpit, reducing visibility, and risking loss of control of the helicopter.

(c) Effective Date

This AD becomes effective February 13, 2013.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless accomplished previously.

(e) Required Actions

Within six months, replace the power cable assemblies using the parts contained in starter/generator kit P/N CT205–07–94–1, perform a continuity test, and connect wires to the starter generator as follows:

(1) For Model 205A and 205A–1 helicopters, follow the Accomplishment Instructions, paragraphs 2 through 16(c), of BHTI Alert Service Bulletin No. 205–07–94, Revision A, dated December 8, 2008.

(2) For the Model 205B helicopters, follow the Accomplishment Instructions, paragraphs 2 through 16(c), of BHTI Alert Service Bulletin No. 205B–08–50, dated December 8, 2008.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Andy Shaw, Aviation Safety Engineer, Safety Management Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 222–5110; email *andy.shaw@faa.gov*.

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

(g) Subject

Joint Aircraft Service Component (JASC) Code: 2497, electrical power system wiring.

(h) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Bell Helicopter Textron Inc. Alert Service Bulletin No. 205–07–94, Revision A, dated December 8, 2008.

(ii) Bell Helicopter Textron Inc. Alert Service Bulletin No. 205B–08–50, dated December 8, 2008.

(3) For Bell Helicopter Textron Inc. service information identified in this AD, contact Bell Helicopter Textron, Inc., P.O. Box 482, Fort Worth, TX 76101; telephone (817) 280–3391; fax (817) 280–6466; or at *http://www.bellcustomer.com/files/*.

(4) You may view this service information at FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this service information that is incorporated by reference 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/cfr/index.html*.

Issued in Fort Worth, Texas, on December 20, 2012.

Kim Smith,

Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2012–31586 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1032; Directorate Identifier 2012–NM–079–AD; Amendment 39–17296; AD 2012–26–01]

RIN 2120–AA64

Airworthiness Directives; Saab AB, Saab Aerosystems Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Saab AB, Saab Aerosystems Model SAAB 2000 airplanes. This AD was prompted by reports of chafing on the bottom panel of the center cabin. This AD requires a general visual inspection to determine if certain fasteners are installed, and related investigative and corrective actions. We are issuing this AD to detect and correct any chafing on the bottom panel of the center cabin, which could affect the structural integrity of the affected wing-to-fuselage connection.

DATES: This AD becomes effective February 13, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 13, 2013.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1112; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on October 2, 2012 (77 FR 60073). That NPRM proposed to correct an unsafe condition for the specified products. The Mandatory Continuing Airworthiness Information (MCAI) states:

> On two SAAB 2000 aeroplanes, signs of chafing have been found on the bottom panel of the centre cabin between fuselage station (STA) 562 and STA 622. The investigation results have shown that the chafing is caused by certain Hi Lok fasteners, installed as a repair during production, through the upper wing skin panel.
>
> This condition, if not detected and corrected, could affect the structural integrity of the affected wing-to-fuselage connection.
>
> To address this potential unsafe condition, SAAB issued Service Bulletin (SB) 2000–53–057 to provide instructions for a general visual inspection to detect chafing in the area between the upper wing skin and the cabin centre bottom panel and to verify if there are Hi Lok fasteners installed with the collar up.
>
> For the reasons described above, this [European Aviation Safety Agency (EASA)] AD requires a one-time inspection of the designated area, the accomplishment of corrective action(s) [repair], depending on findings, and the reporting of all inspection results * * *.
>
> This [EASA] AD is considered an interim action and further AD action may follow.

Related investigative actions include measuring the distance between the fastener and bottom panel and a boroscope inspection for chafing and damage of the bottom panel. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (77 FR 60073, October 2, 2012) or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

We estimate that this AD will affect 10 products of U.S. registry. We also estimate that it will take about 4 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $3,400, or $340 per product.

We have received no definitive data that would enable us to provide a cost estimate for the on-condition actions specified in this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM (77 FR 60073, October 2, 2012), the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2012–26–01 Saab AB, Saab Aerosystems: Amendment 39–17296. Docket No. FAA–2012–1032; Directorate Identifier 2012–NM–079–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective February 13, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Saab AB, Saab Aerosystems Model SAAB 2000 airplanes, certificated in any category, all serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by reports of chafing on the bottom panel of the center cabin. We are issuing this AD to detect and correct any chafing on the bottom panel of the center cabin, which could affect the structural integrity of the affected wing-to-fuselage connection.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Inspection

Within 12 months after the effective date of this AD, do a general visual inspection of the area between the upper part of the wing skin and the center bottom panel to determine if any Hi Lok fasteners are installed with the collar up, and do all applicable related investigative actions, in accordance with the Accomplishment Instructions of Saab Service Bulletin 2000–53–057, dated November 22, 2011.

(h) Repair

If any chafing or damage is found during any inspection required by paragraph (g) of this AD: Before further flight, repair in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA) (or its delegated agent).

(i) Reporting

Submit a report of the findings (both positive and negative) of the inspection required by paragraph (g) of this AD to Saab AB, Saab Aerosystems, in accordance with the Accomplishment Instructions of Saab Service Bulletin 2000–53–057, dated November 22, 2011, at the applicable time specified in paragraph (i)(1) or (i)(2) of this AD. The report must include the inspection results, the airplane serial number, and the number of landings and flight hours on the airplane.

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1112; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(k) Related Information

Refer to MCAI EASA Airworthiness Directive 2012–0068, dated April 25, 2012; and Saab Service Bulletin 2000–53–057, dated November 22, 2011; for related information.

(l) Material Incorporated by Reference

(1) The Director of the **Federal Register** approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Saab Service Bulletin 2000–53–057, dated November 22, 2011.

(ii) Reserved.

(3) For service information identified in this AD, contact Saab AB, Saab Aeronautics, SE–581 88, Linköping, Sweden; telephone +46 13 18 5591; fax +46 13 18 4874; email *saab2000.techsupport@saabgroup.com;* Internet *http://www.saabgroup.com.*

(4) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference 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/cfr/ibr-locations.html.*

Issued in Renton, Washington, on December 14, 2012.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–31035 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0820; Directorate Identifier 2010–NE–31–AD; Amendment 39–17308; AD 2012–26–13]

RIN 2120–AA64

Airworthiness Directives; Thielert Aircraft Engines GmbH Reciprocating Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding an existing airworthiness directive (AD) for all Thielert Aircraft Engines GmbH models TAE 125–01, TAE 125–02–99, and TAE 125–02–114 reciprocating engines. That AD currently requires installation of full-authority digital electronic control (FADEC) software version 2.91. This new AD requires removing all software mapping versions prior to 292, 301, or 302, applicable to the TAE engine model. This AD was prompted by reports of possible power loss on airplanes equipped with TAE 125 engines. We are issuing this AD to prevent engine power loss or in-flight shutdown, resulting in reduced control of or damage to the airplane.

DATES: This AD is effective February 13, 2013.

ADDRESSES: For service information identified in this AD, contact Thielert

Aircraft Engines GmbH, Platanenstrasse 14 D–09350, Lichtenstein, Germany, phone: +49–37204–696–0; fax: +49–37204–696–55; email: *info@centurion-engines.com.* You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; email: *robert.green@faa.gov;* phone: 781–238–7754; fax: 781–238–7199.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2011–07–09, Amendment 39–16646 (76 FR 17757, March 31, 2011). That AD applies to the specified products. The NPRM published in the **Federal Register** on September 17, 2012 (77 FR 57041). That NPRM proposed to require removing all software mapping versions prior to 292, 301, or 302, applicable to the TAE engine model.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting the AD as proposed.

Costs of Compliance

We estimate that this AD will affect about 112 engines installed on airplanes of U.S. registry. We also estimate that it will take about 0.5 work hours per product to comply with this proposed AD. The average labor rate is $85 per work hour. Based on these figures, we estimate the cost of the AD to U.S. operators to be $4,760

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2011–07–09, Amendment 39–16646 (76 FR 17757, March 31, 2011), and adding the following new AD:

2012–26–13 Thielert Aircraft Engines GmbH: Amendment 39–17308; Docket No. FAA–2010–0820; Directorate Identifier 2010–NE–31–AD.

(a) Effective Date

This airworthiness directive (AD) is effective February 13, 2013.

(b) Affected ADs

This AD supersedes AD 2011–07–09, Amendment 39–16646 (76 FR 17757, March 31, 2011).

(c) Applicability

This AD applies to Thielert Aircraft Engines GmbH models TAE 125–01, TAE 125–02–99, and TAE 125–02–114 reciprocating engines installed in, but not limited to, Cessna 172 and (Reims-built) F172 series (European Aviation Safety Agency (EASA) Supplemental Type Certificate (STC) No. EASA.A.S.01527); Piper PA–28 series (EASA STC No. EASA.A.S. 01632); APEX (Robin) DR 400 series (EASA STC No. A.S.01380); and Diamond Aircraft Industries Models DA 40, DA 42, and DA 42M NG airplanes.

(d) Unsafe Condition

This AD was prompted by reports of possible power loss on airplanes equipped with TAE 125 engines. We are issuing this AD to prevent engine power loss or in-flight shutdown, resulting in reduced control of or damage to the airplane.

(e) Compliance

Unless already done, do the following. Within 55 flight hours or within 3 months of the effective date of the AD, or during the next scheduled maintenance, whichever occurs first, remove all full-authority digital electronic control (FADEC) software prior to versions 292, 301, and 302. Tables 1, 2, and 3 to paragraph (e) provide the software mapping and respective part numbers for software versions 292, 301, and 302, installed on the TAE 125–01, TAE 125–02–99, and TAE–125–02–114 engines, respectively.

TABLE 1 TO PARAGRAPH (e) FOR TAE 125–01 ENGINES

Software mapping	Part No.
T14V292CES	20–7610–55104R9.
T28V292CES	20–7610–55105R7.
T14V292PIP	40–7610–55106R9.
T28V292PIP	40–7610–55107R7.
T14V292APEX	60–7610–55106R9.

TABLE 1 TO PARAGRAPH (e) FOR TAE 125–01 ENGINES—Continued

Software mapping	Part No.
T14V292DIA	50–7610–55105R9.
R28V292DIA	50–7610–55107R5.

TABLE 2 TO PARAGRAPH (e) FOR TAE 125–02–99 ENGINES

Software mapping	Part No.
O14V301CES	20–7610–E000110.
O28V301CES	20–7610–E001110.
O14V301PIP	40–7610–E000110.
O28V301PIP	40–7610–E001110.
O14V301APEX	60–7610–E000110.
O14V301DA40	50–7610–E000110.
O28V301DA42	52–7610–E000505.

TABLE 3 TO PARAGRAPH (e) FOR TAE 125–02–114 ENGINES

Software mapping	Part No.
P14V302CES	20–7610–E002007.
P28V302CES	20–7610–E003007.
P28V302PIP	40–7610–E003007.
P14V302APEX	60–7610–E002007.
P14V302DA40	50–7610–E002007.

(f) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(g) Related Information

(1) For more information about this AD, contact Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; email: *robert.green@faa.gov;* phone: 781–238–7754; fax: 781–238 7199.

(2) Refer to MCAI European Aviation Safety Agency Airworthiness Directive No. 2012–0116, dated July 3, 2012, and Thielert Aircraft Engines Service Bulletin TM TAE 000–0007, Revision 19, dated August 31, 2012, for related information.

(3) For service information identified in this AD, contact Thielert Aircraft Engines GmbH, Platanenstrasse 14 D–09350, Lichtenstein, Germany, phone: +49–37204–696–0; fax: +49–37204–696–55; email: *info@centurion-engines.com.* You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

(h) Material Incorporated by Reference

None.

Issued in Burlington, Massachusetts, on December 27, 2012.

Colleen M. D'Alessandro,

Assistant Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2012–31605 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1315; Directorate Identifier 2012–NM–191–AD; Amendment 39–17310; AD 2012–26–15]

RIN 2120–AA64

Airworthiness Directives; Honeywell International Inc. Air Data Pressure Transducers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Honeywell International Inc. air data pressure transducers as installed on various aircraft. This AD requires various tests or checks of equipment having certain air data pressure transducers, and removal of equipment if necessary. As an option to the tests or checks, this AD allows removal of affected equipment having certain air data pressure transducers. This AD was prompted by a report of a pressure measurement error in the pressure transducer used in various air data systems, which translates into air data parameter errors. We are issuing this AD to detect and correct inaccuracies of the pressure sensors, which could result in altitude, computed airspeed, true airspeed, and Mach computation errors. These errors could reduce the ability of the flightcrew to maintain the safe flight of the aircraft and could result in consequent loss of control of the aircraft.

DATES: This AD is effective January 24, 2013.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of January 24, 2013.

We must receive comments on this AD by February 25, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, 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 Honeywell service information identified in this AD, contact Honeywell Aerospace, Technical Publications and Distribution, M/S 2101–201, P.O. Box 52170, Phoenix, AZ 85072–2170; telephone 602–365–5535; fax 602–365–5577; Internet *http://www.honeywell.com.* For Airbus service information identified in this AD for Model A330 series airplanes, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330–A340@airbus.com;* Internet *http://www.airbus.com.* For Airbus service information identified in this AD for Model A318, A319, A320, and A321 series airplanes, contact Airbus, Airworthiness Office—EAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Blake Higuchi, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5315; fax: 562–627–5210; email: *blake.higuchi@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We received a report of a pressure measurement error in the air data pressure sensor used in various air data systems, which translates into air data parameter errors, possibly related to sleeks (micro-scratches on the polished glass tube pressure port) and the anodic bond of the glass tube to the sensor die. Errors in the pressure sensor measurements could impact other aircraft systems using the pressure measurements. The primary concern is the impact on the air data system and the associated airspeed (Mach, computed airspeed, and true airspeed) and computations. This error in the static pressure measurement will result in a higher indicated altitude than the actual altitude and a higher indicated airspeed than actual airspeed. This error in the pitot pressure sensor will result in a lower indicated airspeed than actual airspeed. The error in the pressure sensor measurement is a result of a leak within the pressure sensor's vacuum reference that is compared with the actual applied pressure. This condition, if not corrected, could reduce the ability of the flightcrew to maintain the safe flight of the aircraft and could result in consequent loss of control of the aircraft.

Relevant Service Information

We reviewed Honeywell Alert Service Bulletin ADM/ADC/ADAHRS–34–A01, dated November 6, 2012. This service bulletin describes procedures for an indicated altitude test of equipment (i.e., air data modules (ADM), air data computers, air data attitude heading reference systems, and digital air data computers) having certain air data pressure transducers, repetitive pressure sensor tests if necessary, and removal of equipment if necessary. This service bulletin also specifies optional actions, including repetitive pitot-static certification testing and removal of equipment having certain air data pressure transducers.

We have also reviewed Airbus Alert Operators Transmission (AOT) A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A318/A319/A320/A321 series airplanes; and Airbus AOT A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A330 series airplanes. These AOTs describe procedures for doing a repetitive ADM check or a functional test of the ADM accuracy, and replacing the ADM if necessary.

FAA's Determination

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

AD Requirements

This AD requires accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the AD and the Service Information.'' The AD also requires sending the test or check results (both pass and fail) to the FAA and Honeywell.

Differences Between the AD and the Service Information

The service information that follows specifies certain corrective actions for various conditions. However we differ from these actions and conditions in that this AD requires removing affected equipment and returning the equipment to Honeywell if those conditions are found.

- Airbus Alert Operators Transmission (AOT) A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A318/A319/A320/A321 series airplanes; and Airbus AOT A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A330 series airplanes; specifies to replace the ADM if the ADM check fails.
- Honeywell Service Bulletin ACM/ADC/ADAHRS–34–A01, dated November 6, 2012, specifies to refer to ''applicable procedures'' if the indicated altitude test exceeds 75 feet (23 meters).
- Honeywell Service Bulletin ACM/ADC/ADAHRS–34–A01, dated November 6, 2012, specifies to remove the affected equipment if the pressure test is greater than 0.70 millibar (mB).

In addition, the service information that follows is missing corrective actions for certain conditions; however, this AD requires removing affected equipment and returning the equipment to Honeywell for those conditions that are missing corrective actions.

- Airbus Alert Operators Transmission (AOT) A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A318/A319/A320/A321 series airplanes; and Airbus AOT A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A330 series airplanes; does not specify any corrective action if the functional test of the ADM accuracy fails.
- Honeywell Service Bulletin ACM/ADC/ADAHRS–34–A01, dated November 6, 2012, does not specify any corrective action if the pitot static certification test fails.

Interim Action

We consider this AD interim action. The manufacturer is currently developing a modification that will address the unsafe condition identified in this AD. Once this modification is developed, approved, and available, we might consider additional rulemaking.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because inaccuracies of the pressure sensors could result in altitude, computed airspeed, true airspeed, and Mach computation errors. These errors could reduce the ability of the flightcrew to maintain the safe flight of the aircraft and could result in consequent loss of control of the aircraft. Therefore, we find that notice and opportunity for prior public comment are impracticable and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2012–1315 and Directorate Identifier 2012–NM–191–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

Costs of Compliance

We estimate that this AD affects 90 appliances installed on, but not limited to, various aircraft of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Indicated altitude test	2 work-hours × $85 per hour = $170	$0	$170	Up to $15,300.
Removal	2 work-hours × $85 per hour = $170	0	170	Up to $15,300.
Pitot static certification test	3 work-hours × $85 per hour = $255	0	255	Up to $22,950.
ADM check or test	2 work-hours × $85 per hour = $170	0	170	Up to $15,300.

We estimate the following costs to do any necessary pressure sensor tests or removals that would be required based on the results of the tests or checks. We have no way of determining the number of aircraft that might need these pressure sensor tests or removals:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Pressure sensor test	2 work-hours × $85 per hour = $170	$0	$170
Removal	2 work-hours × $85 per hour = $170	0	170

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2012–26–15 Honeywell International Inc.: Amendment 39–17310; Docket No. FAA–2012–1315; Directorate Identifier 2012–NM–191–AD.

(a) Effective Date

This AD is effective January 24, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to air data pressure transducers, as installed in air data computers (ADC), air data modules (ADM), air data attitude heading reference systems (ADAHRS), and digital air data computers (DADC) having the part numbers and serial numbers identified in Honeywell Alert Service Bulletin ADM/ADC/ADAHRS–34–A01, dated November 6, 2012. This appliance is installed on, but not limited to, the aircraft specified in paragraphs (c)(1) through (c)(11) of this AD.

(1) Airbus Model A318–111, –112, –121, and –122 airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; Model A320–111, –211, –212, –214, –231, –232, and –233 airplanes; Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes; Model A330–223F, –243F, –201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes; and Model A340–211, –212, –213, –311, –312, –313, –541, and –642 airplanes.

(2) AGUSTA S.p.A. Model AW139 helicopters.

(3) Bell Helicopter Textron Canada Limited Model 429 helicopters.

(4) The Boeing Company Model 767–200, –300, –300F, and –400ER series airplanes; and Model 777–200, –200LR, –300, –300ER, and 777F series airplanes.

(5) Cessna Aircraft Company Model 560XL (560 Excel and 560 XLS) airplanes.

(6) Dassault Aviation Model Mystere-Falcon 900 airplanes and Model FALCON 2000 airplanes.

(7) Empresa Brasileira de Aeronautica S.A. (Embraer) Model EMB–135BJ airplanes.

(8) Gulfstream Aerospace Corporation Model GIV–X and GV–SP airplanes.

(9) Learjet Inc. Model 45 airplanes.

(10) Pilatus Aircraft LTD. Model PC–12/47E airplanes.

(11) Viking Air Limited (Type Certificate previously held by Bombardier Inc.; de Havilland, Inc.) Model (Twin Otter) DHC–6–400 airplanes.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 34, Navigation.

(e) Unsafe Condition

This AD was prompted by a report of a pressure measurement error in the pressure transducer used in various air data systems, which translates into air data parameter

errors. We are issuing this AD to detect and correct inaccuracies of the pressure sensors, which could result in altitude, computed airspeed, true airspeed, and Mach computation errors. These errors could reduce the ability of the flightcrew to maintain the safe flight of the aircraft and could result in consequent loss of control of the aircraft.

(f) Compliance

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

(g) Actions

Within 30 days after the effective date of this AD: Do the actions in either paragraph (g)(1) or (g)(2) of this AD, except as provided by paragraphs (h) and (i) of this AD.

(1) Remove the affected equipment (i.e., ADC, ADM, ADAHRS, and DADC), as identified in paragraph (c) of this AD, and return the equipment to Honeywell at the applicable address specified in table 1 to paragraphs (g)(1), (g)(2), (h)(1), (h)(2)(i), (i)(1)(i), and (i)(2) of this AD. Before continued operations, the operator must ensure that all of the required equipment is properly installed in the aircraft.

TABLE 1 TO PARAGRAPHS (g)(1), (g)(2), (h)(1), (h)(2)(i), (i)(1)(i), AND (i)(2) OF THIS AD—ADDRESSES FOR RETURNED PARTS

For part numbers identified in—	Return parts to—
Tables 12 and 13 of Honeywell Service Bulletin ADM/ADC/ADAHRS–34–A01, dated November 6, 2012.	Honeywell Aerospace, 23500 West 105th Street, Olathe, KS 66061.
Tables 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 14 of Honeywell Service Bulletin ADM/ADC/ADAHRS–34–A01, dated November 6, 2012.	Honeywell Aerospace, 1850 West Rose Garden Lane, Phoenix, AZ 85027.

(2) Do a pitot-static certification test, and repeat the test thereafter at intervals not to exceed 30 days, in accordance with paragraph 1.C.(4)(a)*3* of Honeywell Alert Service Bulletin ADM/ADC/ADAHRS–34–A01, dated November 6, 2012. If any pitot-static certification test fails, remove the affected equipment (i.e., ADC, ADM, ADAHRS, or DADC) and return the equipment to Honeywell at the applicable address specified in table 1 to paragraphs (g)(1), (g)(2), (h)(1), (h)(2)(i), (i)(1)(i), and (i)(2) of this AD. Before continued operations, the operator must ensure that all of the required equipment is properly installed in the aircraft.

(h) Optional Actions for Certain The Boeing Company Airplanes, Gulfstream Aerospace Corporation Airplanes, and PILATUS AIRCRAFT LTD., Airplanes

For The Boeing Company Model 777–200, –200LR, –300, –300ER, and 777F series airplanes; Gulfstream Aerospace Corporation Model GIV–X and GV–SP airplanes; and PILATUS AIRCRAFT LTD., Model PC–12/47E airplanes: In lieu of doing the actions required by paragraph (g) of this AD, within 30 days after the effective date of this AD, do an indicated altitude test, in accordance with the Accomplishment Instructions of Honeywell Alert Service Bulletin ADM/ADC/ADAHRS–34–A01, dated November 6, 2012.

(1) If the indicated altitude exceeds 75 feet (23 meters) from the current aircraft elevation, before further flight, remove the affected equipment (i.e., ADC, ADM, ADAHRS, or DADC) and return the equipment to Honeywell at the applicable address specified in table 1 to paragraphs (g)(1), (g)(2), (h)(1), (h)(2)(i), (i)(1)(i), and (i)(2) of this AD. Before continued operations, the operator must ensure that all of the required equipment is properly installed in the aircraft.

(2) If the indicated altitude is equal to or less than 75 feet (23 meters) of the aircraft elevation, before further flight, do a pressure sensor test, in accordance with the Accomplishment Instructions of Honeywell Alert Service Bulletin ADM/ADC/ADAHRS–34–A01, dated November 6, 2012.

(i) If the pressure error is greater than 0.70 millibar (mB), before further flight, remove the affected equipment (i.e., ADC, ADM, ADAHRS, or DADC) and return the equipment to Honeywell at the applicable address specified in table 1 to paragraphs (g)(1), (g)(2), (h)(1), (h)(2)(i), (i)(1)(i), and (i)(2) of this AD. Before continued operations, the operator must ensure that all of the required equipment is properly installed in the aircraft.

(ii) If the pressure error is greater than 0.50 mB, but less than or equal to 0.70 mB, repeat the test within 30 days after the most recent test.

(iii) If the pressure error is greater than or equal to 0.25 mB, but less than or equal to 0.50 mB, repeat the test within 120 days after the most recent test.

(i) Optional Actions for Certain Airbus Airplanes

For Airbus Model A318, A319, A320, and A321 airplanes having a manufacturer serial number (MSN) and an ADM identified in Appendix A of Airbus Alert Operators Transmission (AOT) A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A318/A319/A320/A321 series airplanes; and for Airbus Model A330 series airplanes having an MSN and ADM identified in Appendix A of Airbus AOT A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A330 series airplanes: In lieu of doing the actions required by paragraph (g) of this AD, within 30 days after the effective date of this AD, do the actions specified in paragraph (i)(1) or (i)(2) of this AD.

(1) Do an ADM check to determine the raw pressure data values from integrated standby instrument system (ISIS) and the affected ADMs, in accordance with Appendix B, ''Air Data Module Check Procedure and Reporting Table,'' of Airbus AOT A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A318/A319/A320/A321 series airplanes; or Airbus AOT A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A330 series airplanes. These checks must be performed by authorized maintenance personnel.

(i) If ''P_ISIS—P_ADM'' is greater than 22, before further flight, remove the affected ADM and return the ADM to Honeywell at the applicable address specified in table 1 to paragraphs (g)(1), (g)(2), (h)(1), (h)(2)(i), (i)(1)(i), and (i)(2) of this AD. Before continued operations, the operator must ensure that all of the required equipment is properly installed in the aircraft.

(ii) If ''P_ISIS—P_ADM'' is greater than or equal to 16, but equal to or less than 22, within 30 days after the most recent check, do the ADM check specified in paragraph (i)(1) of this AD.

(iii) If ''P_ISIS—P_ADM'' is less than 16, within 120 days after the most recent check, do the ADM check specified in paragraph (i)(1) of this AD.

(2) Perform a functional test of the ADM accuracy, in accordance with Airbus AOT A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A318/A319/A320/A321 series airplanes; or Airbus AOT A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A330 series airplanes. Repeat the test thereafter at intervals not to exceed 30 days. If any test fails, before further flight, remove the affected ADM and return the ADM to Honeywell at the applicable address specified in table 1 to paragraphs (g)(1), (g)(2), (h)(1), (h)(2)(i), (i)(1)(i), and (i)(2) of this AD. Before continued operations, the operator must ensure that all of the required equipment is properly installed in the aircraft.

(j) Reporting

(1) For any airplane on which any test specified in paragraph (h) of this AD has been done: At the applicable time specified in paragraph (j)(1)(i) or (j)(1)(ii) of this AD, submit a report of the findings (both pass and fail) of the test specified in paragraph (h) of this AD to Honeywell by email *AeroTechSupport@honeywell.com* or fax 602–365–1871. The report must include the information specified in Appendix A of Honeywell Alert Service Bulletin ADM/ADC/ADAHRS–34–A01, dated November 6, 2012.

(i) If the test was done on or after the effective date of this AD: Submit the report within 15 days after the test.

(ii) If the test was done before the effective date of this AD: Submit the report within 15 days after the effective date of this AD.

(2) For any airplane on which any test specified in paragraph (h) of this AD, or any check specified in paragraph (i)(1) of this AD, has been done: At the applicable time specified in paragraph (j)(2)(i) or (j)(2)(ii) of this AD, submit a report of the findings (both pass and fail) of the test specified in paragraph (h) of this AD; or the check specified in paragraph (i)(1) of this AD; as applicable; to the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137.

(i) If the test or check was done on or after the effective date of this AD: Submit the report within 15 days after the test or check.

(ii) If the test or check was done before the effective date of this AD: Submit the report within 15 days after the effective date of this AD.

(3) For Airbus Model A318, A319, A320, A321, A330–200 Freighter, A330–200, and A330–300 series airplanes: At the applicable time specified in paragraph (j)(3)(i) or (j)(3)(ii) of this AD, submit a report of the findings (both pass and fail) of the check required by paragraph (i)(1) of this AD to Honeywell by email *AeroTechSupport@honeywell.com* or fax 602–365–1871. The report must include the information specified in the reporting sheet in Appendix B, ''Air Data Module Check Procedure and Reporting Table,'' of Airbus AOT A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A318/A319/A320/A321 series airplanes; or Airbus AOT A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A330 series airplanes.

(i) If the check was done on or after the effective date of this AD: Submit the report within 15 days after the check.

(ii) If the check was done before the effective date of this AD: Submit the report within 15 days after the effective date of this AD.

(k) Parts Installation Limitation

As of the effective date of this AD, no person may install air data pressure transducers in air data computers, air data modules, air data attitude heading reference systems, and digital air data computers, having the part numbers and serial numbers identified in Honeywell Alert Service Bulletin ADM/ADC/ADAHRS–34–A01, dated November 6, 2012, on any aircraft.

(l) Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(m) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles ACO, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

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

(n) Related Information

For more information about this AD, contact Blake Higuchi, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles ACO, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5315; fax: 562–627–5210; email: *blake.higuchi@faa.gov*.

(o) Material Incorporated by Reference

(1) The Director of the **Federal Register** approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Honeywell Alert Service Bulletin ADM/ADC/ADAHRS–34–A01, dated November 6, 2012.

(ii) Airbus Alert Operators Transmission (AOT) A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A318/A319/A320/A321 series airplanes.

(iii) Airbus AOT A34N001–12, including Appendices A and B, dated November 15, 2012, for Airbus Model A330 series airplanes.

(3) For Honeywell service information identified in this AD, contact Honeywell Aerospace, Technical Publications and Distribution, M/S 2101–201, P.O. Box 52170, Phoenix, AZ 85072–2170; telephone 602–365–5535; fax 602–365–5577; Internet *http://www.honeywell.com*. For Airbus service information identified in this AD for Model A330 series airplanes, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330–A340@airbus.com;* Internet *http://www.airbus.com*. For Airbus service information identified in this AD for Model A318, A319, A320, and A321 series airplanes, contact Airbus, Airworthiness Office—EAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com*.

(4) You may view this service information at FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference 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/cfr/ibr-locations.html*.

Issued in Renton, Washington, on December 21, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–31587 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0632; Directorate Identifier 2011–SW–044–AD; Amendment 39–17305; AD 2012–26–10]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Eurocopter France (Eurocopter) Model SA–365N, SA–365N1, AS–365N2, AS 365 N3, EC 155B, EC155B1, SA–365C, SA–365C1, SA–365C2, and SA–366G1 helicopters. This AD requires inspecting portions of the main gearbox (MGB) for the presence of sealing compound and corrosion. This AD was prompted by reports of corrosion on the main MGB casing lower area between the two servo-control anchoring fitting attachment ribs. An investigation determined that the corrosion was associated with sealing compound on the lower part of the fitting/casing attachment. The actions in this AD are intended to detect corrosion on the MGB casing, which could lead to a crack, failure of the MGB, and subsequent loss of control of the helicopter.

DATES: This AD is effective February 13, 2013.

The Director of the Federal Register approved the incorporation by reference of certain documents listed in this AD as of February 13, 2013.

ADDRESSES: For service information identified in this AD, contact American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005, telephone (800) 232–0323, fax (972) 641–3710, or at *http://www.eurocopter.com*. You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, any incorporated-by-reference service information, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (phone: 800–647–5527) is U.S. Department of Transportation, Docket Operations Office, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Rao Edupuganti, Aviation Safety Engineer, Regulations and Policy Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–4389; email: *rao.edupaganti@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

On June 18, 2012, at 77 FR 36220, the Federal Register published our notice of proposed rulemaking (NPRM), which proposed to amend 14 CFR part 39 to include an AD that would apply to Eurocopter Model SA–365N, SA–365N1, AS–365N2, AS 365 N3, EC 155B, EC155B1, SA–366G1, SA–365C, SA–365C1, and SA–365C2 helicopters, with an MGB installed. That NPRM proposed to require inspecting the lower parts of the MGB casing anchoring fittings for sealing compound, and if there is sealing compound on the lower parts of the anchoring fittings, removing the sealing compound and inspecting the anchoring fittings for corrosion. If there is corrosion, the NPRM proposed repairing the affected area. If there is no corrosion, the NPRM proposed applying touch up protective treatment and renewing any damaged sealing compound bead in the lower part of the anchoring fitting.

The proposed requirements were intended to detect corrosion on the MGB casing, which could lead to a crack, failure of the MGB, and subsequent loss of control of the helicopter.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued AD No.: 2011–0127, dated July 1, 2011 (AD No. 2011–0127), which supersedes Directorate General for Civil Aviation (DGAC France) AD F–2008–04, dated June 4, 2008, for the Eurocopter Model EC 155 B, EC 155 B1, SA 365 N, SA 365 N1, AS 365 N2, AS 365 N3, SA 366 G1, SA 365 C, SA 365 C1, SA 365 C2, and SA 365 C3 helicopters with a MGB, all part numbers, that was delivered before December 5, 2007, installed on helicopters delivered before December 5, 2007, or overhauled or repaired before September 30, 2008. EASA states that in 2008, it received two reports of atmospheric corrosion on the MGB casing lower area of two helicopters between the two servo-control anchoring fitting attachment ribs. The investigation showed that the corrosion occurred in this area due to the presence of ''PR sealing compound'' on the lower part of the fitting/casing attachment. The ''PR sealing compound'' may have been applied incorrectly on some helicopters due to a misinterpretation of the Eurocopter documentation during installation. EASA states that this condition, if not corrected, could lead to ''crack initiation and crack growth in the affected area of the casing,'' which could cause this area to fail and result in loss of control of the helicopter.

Comments

We gave the public the opportunity to participate in developing this AD, but we did not receive any comments on the NPRM (77 FR 36220, June 18, 2012).

FAA's Determination

These helicopters have been approved by the aviation authority of France and are approved for operation in the United States. Pursuant to our bilateral agreement with France, EASA, its technical representative, has notified us of the unsafe condition described in the EASA AD. We are issuing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed, except we have removed the words ''with a main gearbox installed'' from the applicability paragraph because that language is unnecessary. This minor change is consistent with the intent of the proposals in the NPRM and will not increase the economic burden on any operator nor increase the scope of the AD.

Differences Between This AD and the EASA AD

The EASA AD requires inspecting the anchoring fittings for ''PR sealing compound'' within 15 flight hours, while this AD requires inspecting within 30 hours TIS. The EASA AD applies to the Model SA–365C3, and this AD does not include this model because it does not have an FAA-issued type certificate. This AD does not allow the compliance times provided in Appendix 1 of the EASA AD, since it is desirable to accomplish any required repairs before further flight.

Related Service Information

Eurocopter has issued one Emergency Alert Service Bulletin (EASB), Revision 0, dated May 7, 2008, with five different numbers. EASB No. 63.00.17 is for the Model AS 365-series helicopters; EASB No. 63.00.12 is for the military Model AS 565-series helicopters, which are not FAA type certificated; EASB No. 63A011 is for the Model EC 155-series helicopters; EASB No. 65.03 is for the Model SA 366-series helicopters; and EASB No. 65.47 is for the Model SA 365-series helicopters and the non-FAA type certificated Model SA 360-series helicopters. The EASB specifies inspecting for ''PR sealing compound'' on the lower parts of the MGB anchoring fittings, removing any ''PR sealing compound,'' and repairing any corrosion. EASA classified this EASB as mandatory and issued AD No. 2011–0127 to ensure the continued airworthiness of these helicopters.

Costs of Compliance

We estimate that this AD will affect 31 helicopters of U.S. Registry. We estimate that operators may incur the following costs in order to comply with this AD. Inspecting the anchor fittings for sealing compound and corrosion will require about 0.5 work hour at an average labor rate of $85 per hour, for a cost per helicopter of about $43 and a cost to the entire U.S. fleet of $1,318. Removing any sealing compound and repairing any corrosion damage will require about 8 work hours at an average labor rate of $85 per hour, for a cost per helicopter of $680.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

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

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; and

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

We prepared an economic evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2012–26–10 Eurocopter France Helicopters: Amendment 39–17305; Docket No. FAA–2012–0632; Directorate Identifier 2011–SW–044–AD.

(a) Applicability

This AD applies to Eurocopter France (Eurocopter) Model SA–365N, SA–365N1, AS–365N2, AS 365 N3, EC 155B, EC155B1, SA–366G1, SA–365C, SA–365C1, and SA–365C2 helicopters, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as corrosion on the main gearbox (MGB) casing lower area between the servo-control anchoring ribs, caused by sealing compound on the lower part of the fitting/casing attachment. This condition could result in a crack, failure of the MGB, and subsequent loss of control of the helicopter.

(c) Effective Date

This AD becomes effective February 13, 2013.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

(1) Within 30 hours time-in-service, inspect the lower parts of the MGB servo-control anchoring fittings (anchor fittings) for sealing compound, referring to Figure 1 of Eurocopter Emergency Alert Service Bulletin No. 63.00.17 (for Models SA–365N, SA–365N1, AS–365N2 and AS 365 N3); No. 63A011 (for Models EC 155B and EC155B1); No. 65.03 (for Model SA–366G1); and No. 65.47 (for Models SA–365C, SA–365C1, and SA–365C2), Revision 0, dated May 7, 2008 (EASB).

Note 1 to paragraph (e)(1): The Eurocopter EASB is one document with multiple EASB numbers, each applicable to different base model Eurocopter helicopters.

(2) If there is sealing compound on the lower part of an MGB anchor fitting, remove the sealing compound and inspect for corrosion in the lower area of the MGB casing.

(i) If there is corrosion, before further flight, repair the corrosion area.

(ii) If there is no corrosion, apply touch up protective treatment, if required, and renew the bead of any damaged sealing compound in the upper part of the anchor fitting.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Rao Edupuganti, Aviation Safety Engineer, Regulations and Policy Group, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–4389; email: *rao.edupaganti@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office, before operating any aircraft complying with this AD through an AMOC.

(g) Additional Information

(1) Eurocopter Repair Sheet 365–63–36–08, dated April 4, 2008, and Standard Practices Manual (MTC) Work Cards 20.04.04, 20.04.05, and 20.05.01, which are not incorporated by reference, contain additional information regarding the subject of this AD and in particular regarding the procedures for corrosion repair, protective treatment touch-up, and renewing the damaged sealing bead. For service information identified in this AD, contact American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005, telephone (800) 232–0323, fax (972) 641–3710, or at *http://www.eurocopter.com.* You may review a copy of the service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

(2) The subject of this AD is addressed in European Aviation Safety Agency AD No. 2011–0127, dated July 1, 2011.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 6320: Main Rotor Gearbox.

(i) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Eurocopter Emergency Alert Service Bulletin No. 63.00.17, Revision 0, dated May 7, 2008.

(ii) Eurocopter Emergency Alert Service Bulletin No. 63A011, Revision 0, dated May 7, 2008.

(iii) Eurocopter Emergency Alert Service Bulletin No. 65.03, Revision 0, dated May 7, 2008.

(iv) Eurocopter Emergency Alert Service Bulletin No. 65.47, Revision 0, dated May 7, 2008.

Note 2 to paragraph (i)(2): Eurocopter Emergency Alert Service Bulletin (ASB) Nos. 63.00.17, 63A011, 65.03, and 65.47, all Revision 0, and all dated May 7, 2008 are co-published as one document along with Eurocopter Emergency ASB No. 63.00.12, Revision 0, dated May 7, 2008, which is not incorporated by reference in this AD.

(3) For Eurocopter service information identified in this AD, contact American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005, telephone (800) 232–0323, fax (972) 641–3710, or at *http://www.eurocopter.com.*

(4) You may view this service information at FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this service information that is incorporated by reference 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/cfr/ibr-locations.html.*

Issued in Fort Worth, Texas, on December 20, 2012.

Kim Smith,

Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2012–31682 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–1237; Airspace Docket No. 08–AWA–5]

RIN 2120–AA66

Amendment to Class B Airspace; Atlanta, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies the Atlanta, GA, Class B airspace area to ensure the containment of large turbine-powered aircraft operating to and from the Hartsfield-Jackson Atlanta International Airport (ATL). The FAA is taking this action to enhance safety and reduce the potential for midair collision in the Atlanta, GA, terminal area.

DATES: *Effective Date:* 0901 UTC, March 7, 2013. The Director of the **Federal Register** approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace Policy and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

On February 3, 2012, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to modify the Atlanta, GA, Class B airspace area (77 FR 5429). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. A total of 159 commenters responded to the NPRM. The FAA considered all comments received before making a determination on this final rule.

Discussion of Comments

Of the 159 responses received, 135 concerned the airspace in the vicinity of Dekalb-Peachtree Airport (PDK). All of these commenters opposed the Class B modification in the vicinity of PDK contending that it would result in lower flight paths for ATL arrivals, and PDK arrivals and departures, thus leading to various adverse impacts, such as: increased noise, increased air pollution and health problems, lower property values, detrimental effect on local businesses, decreased tax revenues due to lower property value and decreased commerce, inability to sell homes and decreased quality of life.

The above perceived impacts appear to be based on the belief that the Class B change would lead to IFR flights operating at lower altitudes than they do today. This is incorrect. The Class B modifications, including those in the PDK area, are based on the need to contain IFR aircraft that are now operating below Class B airspace. It is important to note that existing IFR operating altitudes will not change.

Noise concerns were a recurring theme in the PDK-related comments, in that the main concern was that lowering the floor of the Class B airspace would allow more aircraft to fly lower over residential areas. The vast majority of the noise experienced by these residents is caused by aircraft flying at or below 3,000 feet MSL during takeoff and/or landing operations at the PDK airport. Those aircraft will continue to fly at those altitudes regardless of any changes made in the Atlanta Class B airspace. In addition, an FAA study done in response to comments at the Informal Airspace Meetings, held in 2010, shows that almost 98 percent of the aircraft that fly in the vicinity of PDK are already operating below 5,000 feet MSL. Therefore, lowering the floor of the Class B airspace will not have an appreciable effect on the amount of noise experienced by the residents in neighborhoods surrounding PDK.

Further, the FAA is not changing air traffic procedures. Where IFR aircraft fly today is where they will continue to fly after implementation of the Class B modification. This rule addresses the issue that these aircraft are currently operating at altitudes that are below the floor of the existing Class B airspace. In order to minimize the potential for midair collisions in the Atlanta terminal area, FAA directives require that large turbine powered aircraft arriving at and departing from the primary airport (in this case, ATL) be contained within Class B airspace. Since the routes and altitudes that ATL IFR arrivals and departures are currently flying will not change, there will not be an increase of over-flights or noise from what residents in the PDK area are already experiencing today. Aircraft operating to and from Hartsfield will not begin flying lower over residential areas near PDK Airport due to lowering the Class B floor.

The commenters also contend that the Class B changes would increase IFR delays for PDK departures and arrivals, resulting in wasted fuel and increased operating costs as well as causing PDK IFR arrivals to circle over the neighborhoods while waiting to land.

The FAA does not agree. Today, PDK IFR departures are initially cleared to climb to the highest available altitude, typically 5,000 feet MSL, but sometimes lower based on other traffic. These aircraft climb at their normal rate until reaching their assigned altitude, so even if an aircraft is cleared to 4,000 feet instead of 5,000 feet, its initial rate of climb would be the same and there would be no increased impact on the ground that might be caused by a slower climb rate. Lowering the floor of the Class B in the vicinity of PDK will not alter this practice, since 5,000 feet will continue to be assigned by the satellite controller. PDK IFR arrivals operate on final approach at minimum altitudes that are based on obstacle clearance criteria and descent profiles defined by instrument procedure design standards. These IFR procedure altitudes cannot be lowered. Additionally, the established VFR traffic patterns at the satellite airports are not changing due to this rule.

ATL arrivals currently fly in the PDK area at 6,000 feet today and they will continue to operate at that altitude after the Class B change. The purpose of lowering the floor to 5,000 feet in the PDK area is to contain, within Class B airspace, the ATL departures that are now flying at 5,000 feet underneath the arrivals. Since arrivals and departures at both ATL and PDK will continue to operate at the same altitudes as they do today, none of the above listed impacts would occur as a result of the Class B airspace modification.

However, in view of the large number of comments received, and the Ad Hoc Committee recommendation concerning the Class B changes near PDK, we explored the possibility of modifying

the Class B airspace design in that area. We determined that we can move the proposed north boundary of the 5000 foot area (Area F) to the south of PDK, and move the proposed boundary of the 6000 foot area (Area J—located northeast of PDK) to the east by 2 miles. This design change will lower the Class B floor over PDK from the current 8,000 feet to 7,000 feet instead of 5,000 feet as proposed in the NPRM. We believe that this accommodation will not compromise safety. The reduced size of the 5,000 foot area will still contain ATL departures operating beneath the arrivals as well as provide a higher Class B floor above PDK.

In addition to the PDK comments discussed above, 24 commenters stated that lowering the floor of the Class B airspace would cause increased IFR departure delays out of both Fulton County Airport-Brown Field (FTY) and PDK.

The FAA does not agree. The existence of Class B airspace has no impact on IFR delays from these airports. The determining factors for IFR delays are normally traffic volume and weather. Traffic volume delays exist today from time to time. Lowering the floor of the Class B airspace does not equate to an increase in traffic volume. The traffic that flows through the affected airspace is already there—the only difference is that the aircraft that are currently operating below Class B airspace will now be contained within the Class B airspace, which increases the margin of safety. There is also an incorrect perception that IFR aircraft departing satellite airports are kept out of the Class B. This is not true. With the modified Class B, aircraft departing satellite airports will be worked within Class B airspace more frequently. For example, a turbojet aircraft departing Runway 8 at FTY, going eastbound, is normally assigned 5,000 feet MSL shortly after take-off. Today, that aircraft is outside Class B airspace. With the modified Class B floor, that same aircraft will still be assigned 5,000 feet MSL but will now be contained within Class B airspace.

Many commenters asserted that there would be a decrease in safety margins for flights due to compression of VFR traffic into less airspace beneath the new Class B floors. Considering terrain and obstacles in the area, the commenters stated that there could be a higher risk of collision and less time for pilots to react to an in-flight emergency. The commenters argued that compressing a significant amount of traffic into an even smaller amount of airspace would cause safety concerns and inefficient operation of aircraft. In addition, the commenters contend that the lower floors could create unsafe operating conditions for pilots transiting above the Class D airspace areas that underlie the new Class B floor.

The FAA acknowledges that pilots electing to fly below the floor of Class B airspace may be compressed. However, the lower floors are necessary to segregate those aircraft operations from the large turbine-powered aircraft arriving and departing ATL. The Atlanta terminal area encompasses not only the world's busiest airport (with over 920,000 airport operations in CY 2011), but also PDK & FTY airports in close proximity, with their combined airport operations total that exceeded 212,000 in CY 2011. Plus, numerous other airports are situated in and around the Atlanta terminal area. These factors create a complex, high density airspace environment containing a highly diverse mix of aircraft types and aviation activities. Currently, large turbine-powered aircraft and VFR aircraft are flying simultaneously in the same airspace. It is essential to segregate the ATL traffic from nonparticipating aircraft that may not be in communication with ATC. Consequently, some nonparticipating VFR aircraft may have to fly further, or at different altitudes, in order to remain clear of the modified Class B. Ultimately, it is the pilot's responsibility to evaluate all factors that could affect a planned flight and determine the safest course of action whether it is circumnavigating the Class B, flying beneath the area, utilizing a charted VFR flyway, or requesting Class B clearance from Atlanta TRACON.

One commenter stated that the new 6,000 foot floor in the southern portion of the Class B is not prudent for safe operation of small airplanes in the area. The commenter said less maneuvering room would be available for avoiding obstructions, clouds and turbulence, and for training activities such as practice stalls.

It is a pilot responsibility to determine if there is enough altitude/airspace available to conduct training maneuvers. If a pilot believes that there is not enough airspace to conduct a particular maneuver, it is his/her responsibility to conduct the operation in appropriate airspace. The FAA finds that the new 6,000-floor still provides sufficient space for safe operations in this area. While this may result in some inconvenience to non-participating aircraft operating outside/under the Class B airspace, it is necessary to ensure the safety of the system overall.

Another commenter stated that lower Class B floors are not necessary because airlines prefer to stay high and perform idle descents. This commenter discussed arrivals only, even though many of the Class B floors are being lowered due to the requirement to contain ATL departures within the Class B airspace.

Another commenter claimed that the FAA did not adopt any suggestions from the Ad hoc Committee and did not consider the Committee's proposed alternative design.

The FAA does not agree. The FAA fully considered the Ad Hoc Committee's recommendations and alternative design. In fact, a number of Committee suggestions were incorporated, such as removing Covington Municipal Airport (9A1) from beneath the proposed Class B; eliminating the existing and proposed ''wings'' at the four corners of the Class B; and developing T-routes and VFR reporting points at key points around the Class B to aid VFR navigation. The NPRM also explained specific reasons why the Committee's alternative design could not be adopted, including that the alternative design did not ensure the containment of large turbine powered aircraft in certain sections and/or would require changing ATC procedures to fit the proposal instead of amending the airspace to fit the procedures.

Another commenter said that, although the NPRM mentioned the possibility of new T-routes and VFR flyways, the FAA has done no work on defining them. Additionally the commenter related that obtaining clearance through the Class B is the exception and not the rule.

With regard to T-Routes, the FAA is currently designing T-Routes in the ATL terminal area. The effective date of the T-Routes will coincide with the implementation of procedural changes that are currently being developed as part of the Atlanta Metroplex Project. As noted in the NPRM, the FAA will establish additional VFR reporting points and VFR waypoints that will be depicted on the Atlanta Terminal Area Chart. With regard to clearance into or through the Atlanta Class B airspace, the commenter is correct; clearance into or through the Class B airspace is the exception and not the rule. This is due to the traffic volume surrounding the world's busiest airport. However, it remains the policy of Atlanta TRACON to authorize aircraft to transition through the Class B airspace to the maximum extent practical based on operational demands.

Some commenters stated that the Class B floors to the north and south do not need to be lowered at all, and that the FAA instead should consider having

jet traffic intercept the glideslope at a higher altitude. The commenters contend that this would be more fuel efficient and would lower the noise impact since the traffic would be higher and that aircraft excluded from the Class B would not be as compressed into the small remaining airspace.

The FAA does not agree. With regard to intercepting the glide slope at a higher altitude, the comments do not account for the fact that ATL conducts simultaneous triple ILS approaches. As described in the NPRM, this procedure requires that aircraft being turned onto parallel final approach courses be separated by 3 miles longitudinally, or 1,000 feet vertically until they are established on the final approach course. As a result, lower floors to the north and south of ATL are required to provide Class B airspace to contain those operations. That, combined with the 3-degree ILS glideslope, results in a long, low final approach course. For aircraft to intercept the glideslope higher than they do today (e.g., 7,000 feet on the center final) would force the Class B to be even bigger, the finals to be longer, and extend the pattern outside of the service volume of the ILS NAVAID. Additionally, ATL utilizes triple departure procedures which further add to the need for modifying the Class B airspace. It should be noted that ATL is not unique in this regard. Other locations conducting simultaneous triple ILS approaches, such as Chicago O'Hare International and Charlotte/Douglas International, have similar Class B airspace considerations.

Several commenters criticized the modified Class B design contending that it can only be identified with an RNAV-quality mapping device. They argue that this is not practical in pleasure aircraft and would require the purchase of additional equipment. Furthermore, they state that the lateral limits of the airspace are best defined by radials and distances unless landmarks clearly visible in both daylight and darkness can be used.

The FAA does not agree that the rule requires the purchase of additional equipment. Some boundaries in the ATL Class B design are not based on NAVAID radials and distances. Although that is the preferred method, it was found that to define all boundaries based on NAVAID references, and still achieve the required containment of ATL operations, it would be necessary to move the new boundaries in such a way that the Class B airspace would be expanded beyond FAA requirements and the Class B would be larger than that defined in this rule. This would impact nonparticipating aircraft to an unnecessary degree. Therefore, identifying the new boundaries cannot always be accomplished solely with reference to conventional navigation instruments. A variety of means may be required including VORTAC, RNAV and/or by visual reference using the sectional chart or TAC depictions. This situation is not unique. There are other Class B airspace areas and many military special use airspace areas depicted on sectional charts that are not defined by NAVAID radials, and where pilots must avoid the airspace or receive clearance for entry. As noted in the NPRM, the FAA is establishing new VFR reporting points and waypoints to assist VFR pilot navigation in the Atlanta terminal area. These points will be located over areas that can be easily identified visually. The FAA is also establishing VFR routes that can be used to circumnavigate the Class B airspace when necessary. The VFR Flyway Planning Chart, on the back of the Atlanta Terminal Area Chart, will be updated to reflect these new features. In addition, the FAA has recently introduced a new product called ''VFR Class B Enhancement Graphics.'' The new graphics show the geographic coordinates of each Class B boundary intersection, as well as a NAVAID radial/DME fix for each point and the length (in nautical miles) of each straight-line Class B boundary segment. The new graphics are designed to increase safety and aid pilots in gaining situational awareness within or around the Class B area. A graphic will be produced depicting the modified Atlanta Class B airspace to coincide with the effective date of the Class B changes. This will provide pilots a way to use the ATL VORTAC to identify the Class B boundaries. Therefore, it is not necessary for pilots to purchase additional equipment in order to navigate around the Atlanta Class B airspace area.

A commenter stated that the Class B changes will not save airline fuel. Since airlines favor longer, idle power descents and uninterrupted climbs to more fuel efficient altitudes, lowering the Class B floors only gives more opportunity for unwanted level segments.

The FAA does not agree. The Atlanta Class B is designed to accommodate both arriving and departing aircraft operations. Some Class B airspace floors are designed to contain ATL departures, including those aircraft that do not have a sufficient climb rate capability to remain within the existing Class B airspace during departure. Although these aircraft may be cleared for an unrestricted climb, their limited climb capability is insufficient to remain within the rising Class B floors of the current airspace configuration.

A commenter contended that the addition of the fifth runway and new RNAV procedures at ATL have decreased the need for expanded Class B airspace. The commenter asserted that the fifth runway has been open since 2006 with excellent results in the existing Class B and the new RNAV procedures at ATL actually increase navigational accuracy and require less airspace, not more.

The current Class B airspace is not adequate. Atlanta TRACON has documented hundreds of aircraft that exit the existing Class B airspace on a daily basis. Simulations have been run to validate the proposed Class B airspace design and virtually every aircraft that exited the existing Class B airspace would have been contained within the new Class B airspace design.

Several commenters stated that the ATL Class B should not be changed based on the reason specified in the NPRM that air traffic controller workload is increased because they are required to notify aircraft leaving the Class B when they exit, and again, when they reenter the airspace. The commenters said that this requirement is obsolete and should be eliminated rather than changing the Class B airspace to reduce the workload.

FAA orders require large turbine-powered aircraft to be retained within Class B airspace to the maximum extent possible. Containment of these aircraft within Class B airspace is a major item of interest of the FAA's Office of Aviation Safety Oversight. The main reason for this rulemaking action is not the advisory to aircraft that they are leaving or re-entering the Class B, but rather that aircraft cannot routinely be contained within the existing Class B airspace due to the existing airspace design. This is a safety issue, and the fundamental reason for the change. The Class B modifications will have the added benefit of reducing controller workload because the need to issue such advisories will be significantly reduced. This will allow controllers to devote attention to aircraft separation responsibilities.

One commenter suggested that the FAA publish ''ATC climb rates,'' in addition to the minimum rate required for obstacle clearance for heavy aircraft departures during summertime operations that are unable to climb into the existing Class B. Pilots would understand that if they can meet the obstacle rate, but not the ATC rate, they

may notify ATC prior to takeoff and request relief. This would reduce the number of aircraft inadvertently outside the Class B while giving ATC sufficient time to anticipate when those situations might occur.

Atlanta TRACON researched the possibility of implementing published ''ATC climb rates.'' Unfortunately, the current criteria for the development of Area Navigation Standard Instrument Departures (RNAV SIDs) does not allow a procedure to be designed that would retain all departing aircraft within the existing Class B airspace on their current routes. Also, this would not satisfy the requirement to contain aircraft within Class B airspace to the maximum extent.

Another commented that lower floors to the north and south of ATL do not improve satellite airport safety.

The FAA does not agree. The justification for lowering the Class B floors is to contain all existing large turbine-powered aircraft departing from and arriving at the primary airport (ATL) within the Class B airspace. This enhances the safety of satellite airport operations by segregating the large turbine-powered aircraft from other aircraft that are not in communication with ATC.

A commenter questioned the rationale in the NPRM regarding the need to keep all Missed Approach Procedures (MAP) within Class B. The commenter said it is well known that ATC rarely uses the published MAP, and instead controllers offer vectors or alternate instructions; the charted MAP is for emergencies or loss of communications purposes. The commenter said that normally aircraft conducting a missed approach would be directed to remain within Class B and the use of the published MAP is extremely rare. The commenter objected to a major airspace change for such infrequent occurrences.

The FAA disagrees. The commenter interpreted statements in the NPRM concerning MAP as meaning only the published MAPs. Although the published MAPs are also a concern, the aircraft that are vectored following a missed approach must remain at 3,000 feet south of the airport. This is required procedurally to vertically separate missed approach aircraft off of runways 10/28 from aircraft missing approach off runways 9R/27L that are climbing to 4,000 feet on the same tracks. This procedure has been in place since the fifth runway opened at ATL in May 2006, and causes aircraft to exit the existing Class B airspace configuration. Climbing aircraft higher is not an option due to the corridor over the top of the Atlanta Airport that serves general aviation satellite airport departures and arrivals at 5,000 and 6,000 feet.

One commenter objected to the Class B change for cost reasons. The commenter stated that the current airspace has served well since 2006 and increased efficiency has been gained since then with GPS and RNAV procedures. Considering the vast number of products that would need updating, the commenter said this project should be abandoned.

The problems with the Class B configuration since 2006 were addressed in a previous comment. Regarding the costs of updating various products to reflect the airspace changes, FAA charts and related aeronautical products are continually updated to reflect current aeronautical, terrain and other information. Charts and other products are published on a regular cycle to accommodate these changes. As an example, new editions of the VFR Terminal Area Charts are published twice a year. An average of 100 chart changes are incorporated in each new edition. These changes are considered part of the ordinary cost of chart revision, and therefore, the FAA will not incur any additional costs due to the Class B changes.

A commenter alleged that there is no need to modify the airspace in Atlanta because there are no current conflicts between commercial carriers and private flights and that changing the airspace would only impact private flights, making access into and out of the ATL Class B more difficult.

The commenter is incorrect regarding the mix of aircraft in the Atlanta terminal area. There are sections where Atlanta IFR large turbine-powered aircraft and nonparticipating VFR aircraft share the same airspace. However, incidents between these IFR and VFR aircraft do not occur because controllers routinely take action to prevent them. The Class B modification is required to provide Class B containment to ensure that those operations continue to be safe without the need for controller intervention. Regarding the comment that the change will make access to the Class B more difficult, the FAA agrees that access to the Atlanta Class B airspace is limited. However, such access is based on the traffic situation. The overall size of the Class B airspace is being reduced from a maximum of 42 miles down to 30 miles which frees up many cubic miles of airspace and converts it from Class B to Class E airspace. There is no permission needed from ATC to operate in Class E airspace. As discussed above, the FAA is taking a number of steps to enhance VFR navigation in the ATL terminal area.

A few commenters stated that modifying the Class B would not improve the flow of traffic into ATL, but would have the effect of ''compacting'' general aviation aircraft into lower altitudes.

The commenters are correct, changing the Class B airspace will not, in and of itself, improve the traffic flows into Atlanta, but it will ensure that current traffic flows are contained within the Class B airspace. The purpose of this change is not specifically to improve traffic flow, but to ensure safety in the Atlanta terminal area. The issue of compression of VFR traffic is addressed previously.

Two pilots that fly IFR in the Atlanta area were concerned about the amount of time they are held below the present Class B airspace, resulting in inefficiency and added fuel costs.

IFR flights are restricted to lower altitudes when necessary to ensure separation from other traffic, not because of the Class B airspace. The initial altitudes assigned IFR aircraft departing the satellite airports around Atlanta will not change due to this Class B change. Efforts are underway as part of the Atlanta Metroplex Project to find ways of climbing satellite jet departures to higher altitudes as soon as possible. Class B airspace will not affect that on-going project.

A commenter said there is no need to expand the Class B airspace because the construction of the fifth runway at ATL, along with the decreased traffic count in recent years, has reduced the need for additional airspace.

The FAA does not agree. Regarding the addition of the fifth runway, the commenter did not consider the fact that ATL conducts simultaneous triple ILS approaches. As described in an earlier response (see above), this procedure requires that aircraft being turned onto parallel final approach courses be separated by 3 miles longitudinally, or 1,000 feet vertically until they are established on the final approach course. This is one of several reasons for modifying the Class B airspace. Regarding the decreased traffic count, the commenter is correct that ATL's traffic count has decreased since 2008 (as has traffic system-wide) reflecting the general U.S. economic downturn. However, ATL's traffic figures are still 3 times more than the threshold required qualifying for Class B airspace. In addition, the latest validated passenger enplanements for ATL (CY 2011) are more than 8 times the threshold requirement for Class B airspace and reflect nearly a 3 percent

rise from the previous year. As the economy improves, Atlanta traffic volume is expected to increase to exceed the 2008 level. Even at the current volume, containment of Atlanta traffic is the issue that needs to be addressed for safety reasons.

A commenter supported the FAA's plan to establish VFR waypoints, VFR reporting points, VFR routes, and RNAV T-Routes for transitioning through or around the Class B airspace, but is concerned that these would not be in place and charted when the airspace changes become effective. This commenter also suggested that the FAA develop specific VFR arrival and departure routes for PDK.

The FAA will publish the above-mentioned VFR points concurrent with the publication of the new Class B charts. The RNAV T-routes will be published once they have been developed and implemented through a separate rulemaking action. Regarding PDK VFR routes, the FAA is developing suggested VFR flyways to be published on the Atlanta Terminal Area Chart.

Several commenters argued that the 12,500-foot MSL ceiling of ATL Class B area is unnecessarily high and prevents unpressurized VFR aircraft from transitioning the area at higher altitudes. They cited examples where most other Class B locations have ceilings at or below 10,000 feet MSL.

Although other locations have Class B ceilings lower than ATL, all Class B airspace dimensions are individually tailored to meet site-specific requirements. The 12,500 foot Class B ceiling encompasses ATL's transition altitudes. Within this airspace, jet aircraft departing ATL are initially climbed to 10,000 feet; while jet aircraft arriving ATL are initially descended to 12,000 feet. Within 30 miles of the ATL airport is where all of these aircraft transition between 10,000 and 12,000 feet. The arrivals begin their descent to land and, once the departures are clear of the arrivals, the departures begin climbing to cruise altitude. Having VFR aircraft that are not in communication with ATC operating in this airspace reduces the margin of safety in the high volume airspace surrounding the world's busiest airport. The current 12,500 foot ceiling has been in existence since 1975 and has provided an excellent safety record. This ceiling provides adequate protection to arrivals and departures as they transition to and from the en route structure. For those reasons, the FAA did not propose a change to the existing Class B airspace ceiling.

Lastly, a commenter submitted an alternative Class B diagram for the FAA to consider that proposed a different altitude structure than was contained in the NPRM. The suggested Class B floors were the same as the FAA's proposal in areas A through E, but were significantly higher in the other areas to the north and south of ATL. In addition, a 10,000 foot MSL ceiling was suggested to replace the existing 12,500-foot ceiling.

The FAA reviewed the proposal but did not adopt it because it does not meet the requirements to contain all of ATL's existing arrival and departure flows within Class B airspace as required by FAA directives. Many aircraft do not have a sufficient climb capability to remain within the Class B floors suggested in the commenter's proposal.

Differences From the NPRM

The descriptions of subareas F, I and J have been modified from that proposed in the NPRM. In light of public and Ad Hoc Committee inputs, the FAA reevaluated the Class B design in the vicinity of PDK and determined that the proposed 5,000-foot Class B floor airspace over PDK could be raised to 7,000 feet. This is accomplished by moving the northern boundary of Area F, and the southern boundary of Area I, to the south of PDK; and by moving the west boundary of the section of Area J (that lies northeast of PDK) to the east by two miles. The revised subarea descriptions are listed in the ''Adoption of the Amendment'' section, below. Additionally, a correction of one second of longitude is made to the Hartsfield-Jackson Atlanta International Airport reference point to reflect the latest FAA database values.

The Rule

The FAA is amending Title 14 of the Code of Federal Regulations (14 CFR) part 71 to modify the Atlanta, GA, Class B airspace area. This action (depicted on the attached chart) reduces the overall lateral boundaries of the airspace and expands the vertical boundaries by lowering the floors of some subareas. These modifications are necessary to provide the additional Class B airspace needed to contain large turbine-powered aircraft operating to and from ATL. The modifications to the ATL Class B airspace area are summarized below. The following areas extend upward from the specified altitudes to 12,500 feet MSL:

Area A. Area A is the surface area that extends from the ground up to 12,500 feet MSL. The FAA is not making any changes to Area A.

Area B. The revised area consists of that airspace extending upward from 2,500 feet MSL east and west of the Atlanta airport. It combines two existing subareas, B and C. The existing area B consists of a small segment of airspace, east of the ATL airport that extends upward from 2,100 feet MSL between the 7- and 9-NM radii of the Atlanta VORTAC. The existing Area C includes that airspace extending upward from 2,500 feet MSL, east and west of Atlanta airport between the 7- and 12-NM radii of the Atlanta VORTAC. With this change, the existing 2,100-foot floor of Class B airspace is eliminated.

Area C. The area is redefined to include that airspace that extends upward from 3,000 feet MSL (as described above, the existing Area C extends upward from 2,500 feet MSL). The new Area C lowers the existing floor of Class B airspace from 3,500 feet MSL to 3,000 feet MSL. Currently, Area D includes the airspace extending upward from 3,500 feet MSL. With this change, most of the airspace now in Area D is incorporated into the new Area C (with the lower 3,000-foot floor).

Area D. This area consists of that airspace extending upward from 3,500 feet MSL. However, it is significantly reduced in size due to the modification of Area C, described above. The revised Area D includes only that airspace bounded on the south by a line 4 miles north of and parallel to the Runway 08L/26R localizer course, and on the north by a line 8 miles north of and parallel to the above mentioned localizer courses. The revised Area D is bounded on the west by long. 84°51′38″ W., and on the east by long. 84°00′32″ W.

Area E. This area continues to include the airspace extending upward from 4,000 feet MSL, but it is modified by incorporating a small segment of Class B airspace south of ATL that currently extends upward from 6,000 feet MSL. In addition, Area E incorporates the two segments, currently extending upward from 5,000 feet MSL that were added by the October 2006 rule as discussed in the NPRM.

Area F. Area F consists of that airspace extending upward from 5,000 feet MSL. The area currently is composed of four small segments, one southwest of ATL, one southeast of ATL, and the two segments east and west of ATL that were designated in the October 2006 rule. These four areas would be removed from Area F and incorporated into other subareas with lower floors. The modified Area F is located north of ATL within the area bounded on the south by a line 8 miles north of and parallel to the Runway 08L/26R localizer courses, and on the north by a line 12 miles north of and parallel to the above mentioned

localizer courses. On the east and west, Area F is bounded by long. 83°54′04″ W.; and long. 84°57′41″ W., respectively. The effect of this change is to lower the floor of Class B airspace from 6,000 feet MSL to 5,000 feet MSL in the described area.

Area G. Area G contains that airspace extending upward from 6,000 feet MSL. Currently, Area G consists of airspace north of ATL, which is largely incorporated into the revised Area F. The revised Area G consists of the airspace bounded approximately between the Atlanta VORTAC 30 NM radius on the south, and a line 12 miles south of and parallel to the Runway 10/28 localizer courses.

Area H. This area consists of two airspace segments that extend upward from 5,000 feet MSL, one located southwest and one located southeast of ATL. The Area H segments are bounded on the north by a line 12 miles south of and parallel to the Runway 10/28 localizer courses and on the south by the 30 NM radius of the Atlanta VORTAC, excluding the airspace within Area G as described above.

Area I. Area I is redefined to consist of the airspace extending upward from 7,000 feet MSL north of ATL. The revised Area I is bounded on the north side by the 30 NM radius of the Atlanta VORTAC; on the south by a line 12 NM north of and parallel to the Runway 08L/26R localizer courses; on the east by a line drawn from lat. 33°50′59″ N., long. 84°16′38″ W., direct to lat. 34°04′20″ N., long. 84°09′24″ W.; and on the west by a line from lat. 33°50′59″ N., long. 84°34′14″ W. direct to lat. 34°01′40″ N., long. 84°47′55″ W. This change would lower the floor of Class B airspace from 8,000 feet MSL to 7,000 feet MSL in the defined area.

Area J. Area J is a new subarea to describe that airspace extending upward from 6,000 feet MSL in two segments, one northwest and one northeast, of ATL. One segment abuts the west side of Area I and the other segment abuts the east side of Area I. The two segments also abut the northern boundary of Area F, with the 30 NM radius of the Atlanta VORTAC defining their northern edges. Area J lowers part of the Class B airspace floor from 8,000 feet MSL to 6,000 feet MSL in the northwest and northeast sections of the area.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' paragraph 311a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. We have determined that there is no new information collection requirement associated with this rule.

Regulatory Evaluation Summary

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this final rule. The reasoning for this determination follows:

This action modifies the Atlanta, GA, Class B airspace area to ensure the containment of aircraft within Class B airspace, reduce controller workload and enhance safety in the Atlanta, GA, terminal area. It lowers the Class B airspace in some sections to encompass existing IFR traffic. Lowering the floor of the Class B airspace will increase safety by segregating large turbine-powered aircraft from aircraft that may not be in contact with ATC. It also increases safety and reduces air traffic controller workload by reducing the number of radio communications that air traffic controllers must use to inform IFR aircraft when they are leaving and re-entering Class B airspace. This reduces the amount of distraction that air traffic controllers face in issuing these communications and frees radio time for more important control instructions. IFR traffic will not be rerouted as a result of this proposal.

The change may cause some VFR pilots to have to choose between flying lower, circumnavigating the area, or requesting Class B service from A80 to transition the area. This has the potential of increasing costs to VFR pilots if the alternative routes are longer, take more time and burn more fuel. The FAA believes, however, that there will be minimal impact to VFR aircraft operating where the Class B floor will be lowered. Commenters did not offer specific comments on increased fuel consumption for VFR flights if the pilot of these flights chose alternative routes. An FAA sampling of VFR traffic found that 98 percent of 7123 VFR flights were already operating below the 5,000-foot floor proposed in the NPRM. Since the final rule raises a portion of this floor, we can still conclude that an estimated 98% of VFR flights based on this sample will operate below the redesigned Class B floor. Where the floor will be lowered to 3,000 feet, we believe there is sufficient airspace to allow safe flight below the Class B airspace. The minimum vectoring altitude (based in part on obstruction clearance) under most of the 3,000 foot floor is 2,500 feet. VFR aircraft can and do fly safely at 2,000 feet under the existing Class B floor. Recognizing that some VFR aircraft may elect to circumnavigate instead of flying lower, only a short deviation in distance and time will be needed to place the aircraft beneath a higher Class B floor.

The FAA intends to take actions that will increase the alternatives available to VFR pilots. For instance, the FAA intends to establish VFR Waypoints and Reporting Points to assist VFR pilot navigation, and to establish VFR routes that can be used to circumnavigate the Class B airspace or used as a predetermined route through the Class B

airspace when operations permit. In addition to these new VFR waypoints, the FAA will establish RNAV T-Routes within Class B airspace for transitioning over the top of ATL airports. These various alternatives should provide pilots with options that will assist them in navigating around or beneath the Class B and/or to request ATC clearance to cut through the Class B. The FAA believes that no more than a small percent of VFR traffic will choose to travel longer, less efficient or more costly routes because safe flight will still be possible beneath most of the Class B airspace, A80 would continue to provide VFR services to assist pilots in transiting the area, and only short course deviations would be needed if pilots decide to avoid the areas with lower Class B floors.

The FAA has made changes relative to the NPRM by raising the floor of the proposed Class B in the vicinity of PDK from 5,000 feet to 7,000 feet. This may be relieving in that additional airspace will be available for GA operations relative to the proposal.

The FAA will have to update maps and charts to indicate the airspace modifications, but these documents are updated regularly. These modifications will be made within the normal updating process and therefore will not contribute to the cost of the rule since the updates would be as scheduled.

The rule redefines Class B airspace boundaries to improve safety, will not require updating of materials outside the normal update cycle, will not require rerouting of IFR traffic, and is expected to possibly cause some VFR traffic to travel alternative routes which are not expected to be appreciably longer than with the current airspace design. The expected outcome will be a minimal impact with positive net benefits, and a regulatory evaluation was not prepared.

FAA has, therefore, determined that this final rule is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The rule is expected to improve safety by redefining Class B airspace boundaries and will impose only minimal costs because it will not require rerouting of IFR traffic, could possibly cause some VFR traffic to travel alternative routes that are not expected to be appreciably longer than with the current airspace design, and will not require updating of materials outside the normal update cycle. The FAA reviewed the comments and did not find any comments that would lead us to conclude that there would be an impact on small businesses. Therefore, the expected outcome will be a minimal economic impact on small entities affected by this rulemaking action.

Therefore as the acting FAA Administrator, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this final rule and determined that it will have only a domestic impact and therefore no effect on international trade

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $143.1 million in lieu of $100 million. This final rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012, is amended as follows:

Paragraph 3000 Subpart B—Class B Airspace.

* * * * *

ASO GA B Atlanta, GA [Amended]

Hartsfield-Jackson Atlanta International Airport (Primary Airport)
(Lat. 33°38′12″ N., long. 84°25′40″ W.)
Atlanta VORTAC
(Lat. 33°37′45″ N., long. 84°26′06″ W.)

Boundaries

Area A. That airspace extending upward from the surface to and including 12,500 feet

MSL, bounded on the east and west by a 7-mile radius of the Atlanta VORTAC, on the south by a line 4 miles south of and parallel to the Runway 10/28 localizer courses, and on the north by a line 4 miles north of and parallel to the Runway 08L/26R localizer courses; excluding the Atlanta Fulton County Airport-Brown Field, GA, Class D airspace area.

Area B. That airspace extending upward from 2,500 feet MSL to and including 12,500 feet MSL, bounded on the east and west by a 12-mile radius of the Atlanta VORTAC, on the south by a line 4 miles south of and parallel to the Runway 10/28 localizer courses, and on the north by a line 4 miles north of and parallel to the Runway 08L/26R localizer courses; excluding the Atlanta Fulton County Airport-Brown Field, GA, Class D airspace area and that airspace contained in Area A.

Area C. That airspace extending upward from 3,000 feet MSL to and including 12,500 feet MSL, bounded on the east by long. 84°00′32″ W., on the west by long. 84°51′38″ W., on the south by a line 8 miles south of and parallel to the Runway 10/28 localizer courses, and on the north by a line 4 miles north of and parallel to the Runway 08L/26R localizer courses; excluding that airspace contained in Areas A and B.

Area D. That airspace extending upward from 3,500 feet MSL to and including 12,500 feet MSL, bounded on the east by long. 84°00′32″ W., on the west by long. 84°51′38″ W., on the south by a line 4 miles north of and parallel to the Runway 08L/26R localizer courses, and on the north by a line 8 miles north of and parallel to the Runway 08L/26R localizer courses.

Area E. That airspace extending upward from 4,000 feet MSL to and including 12,500 feet MSL, bounded on the east by long. 83°54′04″ W., on the west by long. 84°57′41″ W., on the south by a line 12 miles south of and parallel to the Runway 10/28 localizer courses and on the north by a line 8 miles north of and parallel to the Runway 08L/26R localizer courses; excluding that airspace contained in Areas A, B, C, and D.

Area F. That airspace extending upward from 5,000 feet MSL to and including 12,500 feet MSL, within a 30-mile radius of the Atlanta VORTAC and bounded on the east by long. 83°54′04″ W., on the south by a line 8 miles north of and parallel to the Runway 08L/26R localizer courses, on the west by long. 84°57′41″ W., and on the north by a line 12 miles north of and parallel to the Runway 08L/26R localizer courses.

Area G. That airspace extending upward from 6,000 feet MSL to and including 12,500 feet MSL bounded on the north by a line 12 miles south of and parallel to the Runway 10/28 localizer courses, on the east by a line from lat. 33°25′21″ N., long. 84°16′49″ W. direct to lat. 33°15′33″ N., long. 84°01′55″ W., on the south by a 30-mile radius of the Atlanta VORTAC, and on the west by a line from lat. 33°25′25″ N., long. 84°33′32″ W. direct to lat. 33°18′26″ N., long. 84°42′56″ W. and thence south via long. 84°42′56″ W.

Area H. That airspace extending upward from 5,000 feet MSL to and including 12,500 feet MSL, within a 30-mile radius of the Atlanta VORTAC south of a line 12 miles south of and parallel to the Runway 10/28 localizer courses, bounded on the west by long. 84°57′41″ W. and on the east by long. 83°54′04″ W. excluding that airspace within the lateral limits of area G.

Area I. That airspace extending upward from 7,000 feet MSL to and including 12,500 feet MSL bounded on the north by the 30-mile radius of the Atlanta VORTAC, on the east by a line from lat. 33°50′59″ N., long. 84°16′38″ W. direct to lat. 34°04′20″ N., long. 84°09′24″ W., on the south by a line 12 miles north of and parallel to the Runway 08L/26R localizer courses, and on the west by a line from lat. 33°50′59″ N., long. 84°34′14″ W. direct to lat. 34°01′40″ N., long. 84°47′55″ W.

Area J. That airspace extending upward from 6,000 feet MSL to and including 12,500 feet MSL bounded on the north by a 30-mile radius of the Atlanta VORTAC, on the east by long. 83°54′04″ W., on the south by a line 12 miles north of and parallel to the Runway 08L/26R localizer courses, and on the west by long. 84°57′41″ W., excluding that airspace within the lateral limits of area I.

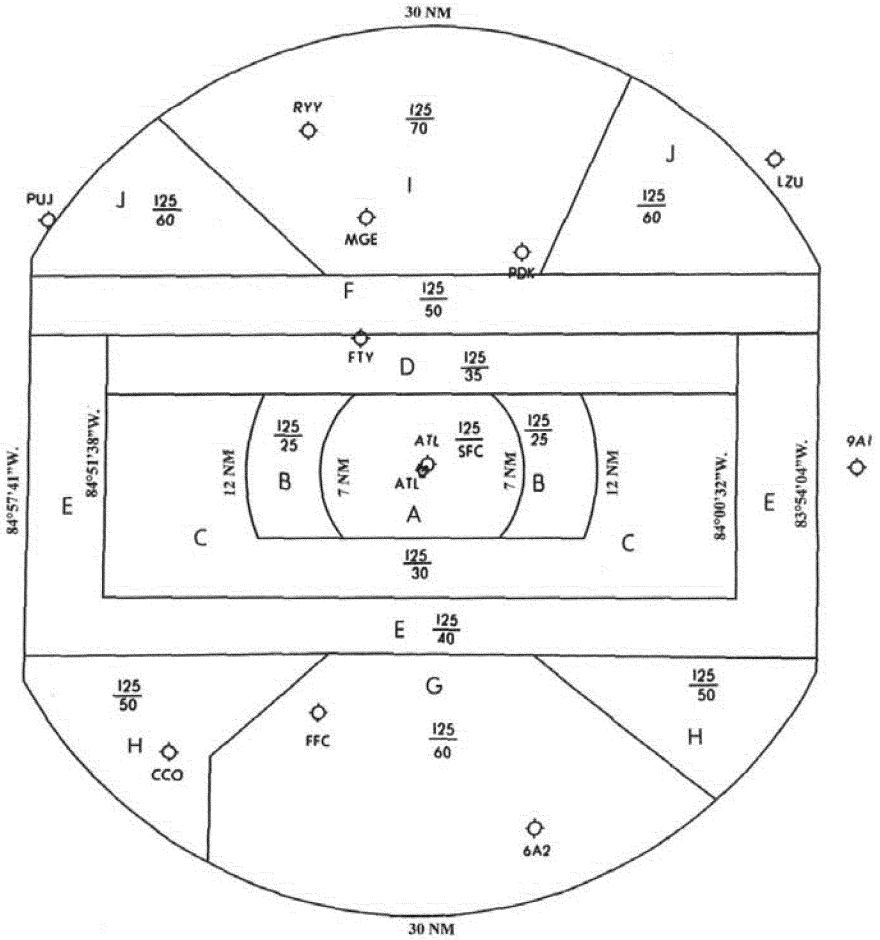
Issued in Washington, DC, on December 6, 2012.

Gary A. Norek,

Manager, Airspace Policy and ATC Procedures Group.

BILLING CODE 4910–13–P

Modification of the
Atlanta, GA Class B Airspace Area
(Docket No. 08-AWA-5)



For Information Only
Not For Navigation

[FR Doc. 2013–00287 Filed 1–7–13; 4:15 pm]

BILLING CODE 4910–13–C

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–1444; Airspace Docket No. 11–ASO–46]

Establishment of Class E Airspace; Princeton, KY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E Airspace at Princeton, KY, to accommodate the new Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures serving Princeton-Caldwell County Airport. This action enhances the safety and airspace management of Instrument Flight Rules (IFR) operations within the National Airspace System. This action also makes a minor adjustment to the geographic coordinates of the airport.

DATES: Effective 0901 UTC, March 7, 2013. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

History

On October 24, 2012, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish Class E airspace at Princeton, KY (77 FR 64919) Docket No. FAA–2011–1444. Subsequent to publication,

the FAA found a typographical error in the longitude coordinates. This action makes the correction. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9W dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order. With the exception of editorial changes, and the changes described above, this rule is the same as that proposed in the NPRM.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 establishes the Class E airspace extending upward from 700 feet above the surface at Princeton, KY, to provide the controlled airspace required to accommodate the new RNAV GPS Standard Instrument Approach Procedures developed for Princeton-Caldwell County Airport. This action is necessary for the safety and management of IFR operations at the airport. Also, the longitude coordinates of the airport are corrected from 'long. 87° 51′10″25″ W to 'long. 87°51′25″ W.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes controlled airspace at Princeton-Caldwell County Airport, Princeton, KY.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' paragraph 311a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for Part 71 continues to read as follows:

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, effective September 15, 2012, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth.

* * * * *

ASO KY E5 Princeton, KY [New]

Princeton-Caldwell County Airport
(Lat. 37°6′54″ N., long. 87°51′25″ W.)

That airspace extending upward from 700 feet above the surface within a 6.7-mile radius of the Princeton-Caldwell County Airport.

Issued in College Park, Georgia, on December 12, 2012.

Barry A. Knight,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2013–00286 Filed 1–7–13; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–0867; Airspace Docket No. 12–AGL–4]

RIN 2120–AA66

Modification of VOR Federal Airway V–170 in the Vicinity of Devils Lake, ND

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies VHF Omnidirectional Range (VOR) Federal airway V–170 between Devils Lake, ND (DVL), and Jamestown, ND (JMS). The FAA is taking this action to ensure the airway between DVL and JMS has the necessary clearance from the western boundary of the newly established restricted area R–5402, Devils Lake, ND, to support non-radar separation requirements when the restricted area is active.

DATES: Effective date 0901 UTC, March 7, 2013. The Director of the **Federal Register** approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace Policy & ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

On Thursday, September 6, 2012, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend VOR Federal airway V–170 by inserting a slight ''dogleg,'' to the west, between DVL and JMS to provide the required non-radar separation and airway clearance from the newly established R–5402, Devils Lake, ND (77 FR 54860). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. One comment was received, which raised

two concerns and offered two alternative recommendations for consideration.

The first concern was that the FAA was pursuing the proposed airway modification to address a conflict with a newly established restricted area (R–5402), which is activated by NOTAM only with no charted or designated times of use.

The FAA does not agree. The rule establishing R–5402 listed the time of designation as ''0700–2000 daily, by NOTAM 6-hours in advance; other times by NOTAM.'' The time of designation for the restricted area provides specified hours that reflect the core hours of when training operations are expected to occur, supplemented with the requirement of a NOTAM 6-hours prior to activation of the restricted area to provide additional awareness to non-participating pilots. Additionally, the R–5402 time of designation information is contained in the following products: the IFR en route charts (L–13 and L–14); the FAA Notices to Airmen Publication (NTAP), Part 4, Graphical Notices, Section 2, Special Military Operation; the North Central U.S. Airport/Facility Directory (AFD) as an Aeronautical Chart Bulletin (Twin Cities Sectional section); and on the FAA's Special Use Airspace web page (*http://sua.faa.gov/sua/siteFrame.app*). Lastly, the FAA placed a Safety Alert notice of the new restricted area on the Aeronautical Navigation Products' Web site and distributed the notice to customers that subscribe to the Twin Cities Sectional Chart.

The second concern was that a modified V–170 airway segment would result in greater track miles, regardless of the activation status of R–5402. Furthermore, the commenter stated that if R–5402 is not activated, non-participating pilots would be forced to request direct routing between DVL and JMS in lieu of flying the dogleg and the additional miles.

The FAA acknowledges that inserting a dogleg to V–170 between DVL–JMS would increase the track miles flown, but it only adds three nautical miles to the track distance. When the Minneapolis Air Route Traffic Control Center performed the traffic analysis of R–5402 impacts to V–170, it found that an average of four aircraft per day filed Instrument Flight Rules (IFR) flight plans for the airway. The FAA concluded that the restricted area's impact to V–170 to be minimal when balanced against reducing system complexity, enhancing safety, and maximizing airspace access to all users of the NAS. When R–5402 is not scheduled for activation, pilots have the option to file direct DVL–JMS, incurring no extra mileage. Additionally, pilots may also receive in-flight updates as to the restricted area status, and proceed direct DVL to JMS, if approved by air traffic control.

The commenter recommended that the FAA consider establishing a global positioning system (GPS) waypoint that air traffic controllers could use to clear IFR aircraft to in lieu of amending V–170. Alternatively, the commenter offered that the FAA could establish a T-route, in addition to V–170, that would maintain appropriate separation from R–5402.

The FAA notes that amending V–170, as proposed, offers a standard navigation capability today, independent of aircraft equipage, and provides the greatest airspace access between DVL and JMS to the largest number of users. While eventually there may be airspace and navigational service upgrades to this part of the country, such changes should occur as part of comprehensive, structured process and plan. For now, the greatest level of safety and efficiency in the vicinity of this area that has poor low altitude radar coverage and known winter weather hazards, is to modify the existing airway.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by modifying V–170 between Devils Lake, ND, and Jamestown, ND, due to the airway overlapping the western boundary of R–5402 when it is active.

To retain the availability of the navigation route structure between DVL and JMS, V–170 is modified by replacing the existing airway segment with a new segment containing a slight dogleg extending westward of the current location. The DVL VOR 187° and JMS VOR 337° radials redefine the new airway segment and establish the FARRM fix at the intersection of the radials. The FARRM fix is described as the intersection of those navigation aid radials in the legal description.

Specifically, the V–170 description is amended by replacing the ''Jamestown, ND;'' reference with ''INT Devils Lake 187° and Jamestown, ND, 337° radials; Jamestown.'' This modification to V–170 adds less than three nautical miles to the existing airway segment, ensures availability of V–170 between DVL and JMS regardless of the status of R–5402, reduces airspace complexity in the area, and enhances flight safety.

VOR Federal airways are published in paragraph 6010(a) of FAA Order 7400.9W dated August 8, 2012 and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The VOR Federal Airway listed in this document would be subsequently published in the Order.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies a VOR Federal airway in the vicinity of Devils Lake, ND.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, Environmental Impacts: Policies and Procedures, paragraph 311a. This airspace action consist of a modification of an existing airway and is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the FAA Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012, is amended as follows:

Paragraph 6010(a)—Domestic VOR Federal Airways

* * * * *

V–170 [Amended]

From Devils Lake, ND; INT Devils Lake 187° and Jamestown, ND, 337° radials; Jamestown; Aberdeen, SD; Sioux Falls, SD; Worthington, MN; Fairmont, MN; Rochester, MN; Nodine, MN; Dells, WI; INT Dells 097° and Badger, WI, 304° radials; Badger; INT Badger 121° and Pullman, MI, 282° radials; Pullman; Salem, MI. From Erie, PA; Bradford, PA; Slate Run, PA; Selinsgrove, PA; Ravine, PA; INT Ravine 125° and Modena, PA, 318° radials; Modena; Dupont, DE; INT Dupont 223° and Andrews, MD, 060° radials; to INT Andrews 060° and Baltimore, MD, 165° radials. The airspace within R–5802 is excluded.

Issued in Washington, DC, on December 6, 2012.

Gary A. Norek,

Manager, Airspace Policy & ATC Procedures Group.

[FR Doc. 2013–00288 Filed 1–7–13; 11:15 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–1067]

RIN 1625–AA87

Security Zone, Potomac and Anacostia Rivers; Washington, DC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary security zone encompassing certain waters of the Potomac River and Anacostia River. This action is necessary to safeguard persons and property, and prevent terrorist acts or incidents. This rule prohibits vessels and people from entering the security zone and requires vessels and persons in the security zone to depart the security zone, unless specifically exempt under the provisions in this rule or granted specific permission from the Coast Guard Captain of the Port Baltimore.

DATES: This rule is effective from January 29, 2013 until January 30, 2013.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG–2012–1067. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number 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 Mr. Ronald L. Houck, at Sector Baltimore Waterways Management Division, Coast Guard; telephone 410–576–2674, email *Ronald.L.Houck@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impractical and contrary to public interest to delay the effective date of this rule. The Coast Guard was unable to publish a NPRM and hold a comment period for this rulemaking due to the short time period between event planners notifying the Coast Guard of the event and publication of this security zone. As such, it is impracticable to provide a full comment period due to lack of time. Furthermore, delaying the effective date of this security zone would be contrary to the public interest given the high risk of injury and damage to the President, U.S. Capitol Building, high-ranking United States officials, and the public.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register.** Due to the need for immediate action, the restriction of vessel traffic is necessary to protect life, property and the environment, therefore, a 30-day notice period is impractical. Delaying the effective date would be contrary to the security zone's intended objectives of protecting the President, U.S. Capitol Building, high-ranking United States officials and the public, as it would introduce vulnerability to the maritime safety and security of the President, U.S. Capitol Building and high-ranking United States officials, as well as that of the general public.

B. Basis and Purpose

The President will address the nation on January 29, 2013. During this event, a gathering of high-ranking United States officials is expected to take place at the U. S. Capitol Building in Washington, DC, in close proximity to navigable waterways within the Captain of the Port's Area of Responsibility.

The Coast Guard has given each Coast Guard Captain of the Port the ability to implement comprehensive port security regimes designed to safeguard human life, vessels, and waterfront facilities while still sustaining the flow of commerce. The Captain of the Port Baltimore is establishing this security zone to protect the President, U.S. Capitol Building, high-ranking United States officials and the public, mitigate potential terrorist acts, and enhance public and maritime safety and security in order to safeguard life, property, and the environment on or near the navigable waters.

C. Discussion of the Final Rule

Through this regulation, the Coast Guard will establish a security zone. The security zone will be in effect from 4 p.m. on January 29, 2013 until 2 a.m. on January 30, 2013. The security zone will include all navigable waters of the

Potomac River, from shoreline to shoreline, bounded on the north by the Francis Scott Key (U.S. Route 29) Bridge at mile 113.0, downstream to and bounded on the south between the Virginia shoreline and the District of Columbia shoreline along latitude 38°50′00″ N, including the waters of the Georgetown Channel Tidal Basin; and all waters of the Anacostia River, from shoreline to shoreline, bounded on the north by the 11th Street (I–295) Bridge at mile 2.1, downstream to and bounded on the south by its confluence with the Potomac River (datum NAD 1983). This location is entirely within the Area of Responsibility of the Captain of the Port Baltimore, as set forth at 33 CFR 3.25–15.

This rule requires any unauthorized persons in the regulated area at the time this security zone is implemented to immediately proceed out of the zone. Except for vessels at berth, mooring, or at anchor, this rule temporarily requires all vessels in the designated security zone as defined by this rule to immediately depart the security zone. Entry into this security zone is prohibited, unless specifically authorized by the Captain of the Port Baltimore. U.S. Coast Guard personnel will be provided to prevent the movement of unauthorized persons into the zone. Federal, state, and local agencies may assist the Coast Guard in the enforcement of this rule. The Coast Guard will issue Notices to Mariners to further publicize the security zone and notify the public of changes in the status of the zone. Such notices will continue until the event is complete.

D. Regulatory Analyses

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

1. 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 Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. Although this security zone restricts vessel traffic through the affected area, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect. Given the time of year this event is scheduled, vessel traffic is expected to be minimal. In addition, notifications will be made to the maritime community so mariners may adjust their plans accordingly.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. 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 may affect the following entities, some of which might be small entities: The owners or operators of vessels intending to operate or transit through or within the security zone during the enforcement period. The security zone will not have a significant economic impact on a substantial number of small entities for the following reasons. The security zone is of limited duration. Although the security zone will apply to the entire width of the Potomac and Anacostia Rivers, traffic may be allowed to pass through the zone with the permission of the Captain of the Port Baltimore. Additionally, given the time of year this event is scheduled, vessel traffic is expected to be minimal. Before the effective period, maritime advisories will be widely available to the maritime community.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INTFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. 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.

8. 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.

9. 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.

10. 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 does not create an environmental risk to health or risk to safety that may disproportionately affect children.

11. 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.

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves establishing a temporary security zone. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. This rule involves establishing a temporary security zone.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. 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.

■ 2. Add § 165.T05–1067 to read as follows:

§ 165.T05–1067 Security Zone, Potomac and Anacostia Rivers; Washington, DC.

(a) *Location.* The following area is a security zone:

(1) All waters of the Potomac River, from shoreline to shoreline, bounded on the north by the Francis Scott Key (U.S. Route 29) Bridge at mile 113.0, downstream to and bounded on the south between the Virginia shoreline and the District of Columbia shoreline along latitude 38°50′00″;N, including the waters of the Georgetown Channel Tidal Basin; and

(2) All waters of the Anacostia River, from shoreline to shoreline, bounded on the north by the 11th Street (I–295) Bridge at mile 2.1, downstream to and bounded on the south by its confluence with the Potomac River. All coordinates refer to datum NAD 1983.

(b) *Regulations.* The general security zone regulations found in 33 CFR 165.33 apply to the security zone created by this temporary section, § 165.T05–1067.

(1) All persons are required to comply with the general regulations governing security zones found in 33 CFR 165.33.

(2) Entry into or remaining in this zone is prohibited unless authorized by the Coast Guard Captain of the Port Baltimore. Vessels already at berth, mooring, or anchor at the time the security zone is implemented do not have to depart the security zone. All vessels underway within this security zone at the time it is implemented are to depart the zone.

(3) Persons desiring to transit the area of the security zone must first obtain authorization from the Captain of the Port Baltimore or his designated representative. To seek permission to transit the area, the Captain of the Port Baltimore and his designated representatives can be contacted at telephone number 410–576–2693 or on Marine Band Radio, VHF–FM channel 16 (156.8 MHz). The Coast Guard vessels enforcing this section can be contacted on Marine Band Radio, VHF–FM channel 16 (156.8 MHz). Upon being hailed by a U.S. Coast Guard vessel, or other Federal, State, or local agency vessel, by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port Baltimore or his designated representative and proceed at the minimum speed necessary to maintain a safe course while within the zone.

(4) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the zone by Federal, State, and local agencies.

(c) *Definitions.* As used in this section:

Captain of the Port Baltimore means the Commander, U.S. Coast Guard Sector Baltimore, Maryland or any Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port to act on his behalf.

Designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Baltimore to assist in enforcing the security zone described in paragraph (a) of this section.

(d) *Effective Period.* This rule is effective from 4 p.m. on January 29, 2013 until 2 a.m. on January 30, 2013.

(e) *Enforcement period.* This section will be enforced from 4 p.m. on January 29, 2013 until 2 a.m. on January 30, 2013.

Dated: December 16, 2012.

Kevin C. Kiefer,

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

[FR Doc. 2013–00217 Filed 1–8–13; 8:45 am]

BILLING CODE 9110–04–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 2010–3]

Refunds Under the Cable Statutory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Office is amending its regulations to clarify its practices for providing refunds of cable royalties under the provisions of the Satellite Television Extension and

Localism Act of 2010 (''STELA''). A cable operator must pay royalties to and file Statements of Account with the Office every six months in order to use the statutory license that allows for the retransmission of over-the-air broadcast signals under 17 U.S.C. 111. STELA allows a cable operator to calculate its royalty obligation for the carriage of distant signals on a community-by-community basis for accounting periods beginning on or after January 1, 2010, instead of calculating its royalty obligation based on the system as a whole. STELA also states that a cable operator shall not be subject to an infringement action if it used the subscriber group methodology to calculate its royalty obligation in a Statement filed prior to the effective date of STELA. Although a cable operator cannot be held liable for using the subscriber group methodology, the regulation clarifies that a cable operator's obligation to pay for the carriage of distant signals prior to the effective date of STELA was determined on a system-wide basis. Therefore, refunds for an overpayment of royalty fees on a Statement filed prior to the effective date of STELA will be made only when a cable operator has satisfied its outstanding royalty obligations (if any), including the obligation to pay for the carriage of each distant signal on a system-wide basis.

DATES: *Effective Date:* February 8, 2013.

FOR FURTHER INFORMATION CONTACT: Tanya Sandros, Deputy General Counsel, or Erik Bertin, Attorney Advisor, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. *Telephone:* (202) 707–8380. *Telefax:* (202) 707–8366. All prior **Federal Register** notices and comments in this docket are available at *http://www.copyright.gov/docs/stela/comments/index.html.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 111 of the Copyright Act (''Act''), Title 17 of the United States Code (''Section 111''), allows cable operators to retransmit the performance or display of a work embodied in a primary transmission made by a television or radio station licensed by the Federal Communications Commission (''FCC''). In order to use this statutory license, cable operators are required to pay royalty fees to the Copyright Office on a semi-annual basis. The Office invests these royalties in United States Treasury securities pending distribution of the funds to those copyright owners who are entitled to receive a share of the fees. In 2010, Congress enacted the Satellite Television Extension and Localism Act of 2010 (''STELA''), Public Law 111–175, which *inter alia* changed the methodology for calculating royalty obligations under Section 111.

Generally speaking, the royalty fee for retransmitting a distant broadcast signal is based on a percentage of the gross receipts generated by a cable system. Under the licensing framework established by Congress in 1976, cable operators were required to pay for every distant broadcast signal that they carried on their system without regard to whether a particular signal was received by or made available to all of the subscribers within a particular community. Cable operators often referred to the signals that subscribers could not receive as ''phantom signals,'' because the operator's royalty obligation was calculated based solely on the number and type of signals (*e.g.,* local vs. distant or permitted vs. non-permitted) carried by a cable system, even if the operator did not provide a particular signal to all of its subscribers. The Office and the cable industry have been aware of this issue for more than 25 years, but it did not receive legislative attention until 2010.

Section 104 of STELA changed the methodology for calculating the royalty fees that a cable operator must pay in order to use the statutory license. The royalty fee is based on the communities where a cable system actually offers distant broadcast signals, instead of calculating royalties based on carriage of the signals throughout the system as a whole. As a result, the controversy surrounding phantom signals has been eliminated. Specifically, STELA amended Section 111(d)(1) of the Copyright Act to state that if a cable system provides distant broadcast signals to some, but not all, of the subscribers served by that system, the gross receipts and distant signal equivalent values for each signal may be based on the subscribers in those communities where the signal is actually provided. *See* 17 U.S.C. 111(d)(1)(C)(iii).

STELA also amended Section 111(d)(1)(D) to state that:

> A cable system that, on a statement submitted before the date of the enactment of the Satellite Television Extension and Localism Act of 2010, computed its royalty fee consistent with the methodology under subparagraph (C)(iii), or that amends a statement filed before such date of enactment to compute the royalty fee due using such methodology, shall not be subject to an action for infringement, or eligible for any royalty refund or offset, arising out of its use of such methodology on such statement.

In other words, a cable operator cannot be held liable for using the subscriber group methodology to calculate its royalty obligation on any Statement of Account filed prior to the enactment of STELA (including any amended Statement).[1] However, the legislation makes clear that a cable operator shall not be entitled to any refund or offset based on the fact that it used the subscriber group methodology on a Statement or amended Statement filed prior to the date of enactment.

On October 4, 2010, the Office published a notice of proposed rulemaking and request for comment on a regulation that would implement Section 111(d)(1)(D) of the Copyright Act. *See* 75 FR 61116. The Office explained that the proposed regulation would confirm that a cable operator's obligation to pay for the carriage of distant signals prior to the effective date of STELA was determined on a system-wide basis. It would also confirm that the Office will not issue refunds for a Statement filed before the 2010/1 accounting period, unless the cable operator has satisfied its outstanding royalty obligations (if any), including the obligation to pay for the carriage of distant signals on a system-wide basis.[2]

The Office explained that a number of cable operators have requested refunds for overpayments that they allegedly made on Statements filed prior to the enactment of STELA. In most cases, the refund request was made in response to an inquiry from the Licensing Division concerning a questionable or missing entry in the operator's filing, such as identifying a local signal as a distant signal for the 2009/2 accounting period or an earlier accounting period.[3] In

[1] Although the President signed STELA into law on May 27, 2010, the statute states that the date of enactment shall be deemed to be February 27, 2010. *See* Public Law 111–175, § 307(a), 124 Stat. 1257 (May 27, 2010).

[2] The Office is aware of at least two situations where a cable operator initially calculated its royalty obligation using the subscriber group method, and then in response to an inquiry from the Licensing Division, changed its Statement of Account to calculate its royalties using the system-wide method. The operator then requested a refund for an overpayment that was unrelated to the issue of phantom signals. The Office issued a refund in both cases, because the amount paid on the initial Statement of Account exceeded the amount due for the phantom signals.

[3] Refund requests may also originate with the cable system. The Office is aware of at least one situation where a cable operator initiated and submitted a timely formal amendment to its initial 2009/2 Statement of Account requesting a refund before the Statement was examined by the Licensing Division. However, in this case, the Licensing Division is unable to ascertain whether a refund is due because the operator used the subscriber group methodology in its initial and its amended filing and, as a result, the extent of the royalty fees that the cable operator owed for the system-wide carriage of all signals is unclear.

those cases where the operators used the subscriber group methodology to calculate their royalty obligations, instead of calculating royalties on a system-wide basis, the Licensing Division has declined to issue a refund because there appears to be a balance due—rather than an overpayment—on their Statements.

II. The Timeliness of the Refund Requests

A. Comments

The Office received comments and reply comments from the National Cable & Telecommunications Association (''NCTA'') and the Motion Picture Association of America, Inc., on behalf of its member companies, and other producers and/or syndicators of movies, programs, and specials broadcast by television stations (collectively, the ''Program Suppliers''). The Office also received reply comments from a group of Copyright Owners who, like Program Suppliers, are the beneficiaries of the royalties collected under the statutory license.[4]

In their initial comments, the Program Suppliers asserted that most of the refund requests should be denied because they appear to be untimely. The Copyright Owners expressed the same view. *See* Program Suppliers Comment at 3–4; Copyright Owners Reply at 1–2.

The Office's current regulations state that a cable operator may request a refund ''before the expiration of 60 days from the last day of the applicable Statement of Account filing period, or before the expiration of 60 days from the date of receipt at the Copyright Office of the royalty payment that is the subject of the request, whichever time period is longer.'' 37 CFR 201.17(m)(3)(i). The Program Suppliers stated that this regulation bars many of the refund requests at issue in this proceeding, because the cable operators made their requests more than 60 days after they filed their Statements and their royalty payments with the Office. Program Suppliers Comment at 3–4. However, the Program Suppliers took a different position in their reply comments. Although they urged the Office ''to continue to enforce [the 60 day] rule,'' the Program Suppliers stated that refund requests should be permitted where—as here—a cable operator requests a refund in response to a communication from the Licensing Division, even if that request is made more than 60 days after the deadline. Program Suppliers Reply at 1, 2.

The NCTA expressed the same view. Both the Program Suppliers and the NCTA contended that the current regulations do not allow cable operators to request a refund when they discover an overpayment in response to a communication from the Licensing Division, and they asked the Office to adopt a new regulation which would allow the Office to issue a refund in this situation. Program Suppliers Reply at 2–4; NCTA Reply at 4.

B. Discussion

The Program Suppliers are correct that a cable operator may request a refund under § 201.17(m)(3)(i) of the regulations, provided that the request is made within 60 days after the operator filed its Statement of Account and/or royalty payments with the Office. However, most of the refunds at issue in this proceeding are not governed by this section.[5] Instead, they are governed by § 201.17(m)(3)(vi) of the regulations, which states that ''[a] request for a refund is not necessary where the Licensing Division, during its examination of a Statement of Account or related document, discovers an error that has resulted in a royalty overpayment.''

When the Office discovers a legitimate overpayment in its examination of a Statement or amended Statement it is required to issue a refund, regardless of whether the Office discovers the error on its own or in the course of its communication with the cable operator. When the Office issues an inquiry concerning a particular Statement of Account, the NCTA noted that the operator typically reviews that Statement for errors and, if the operator determines that the royalties paid on that Statement exceeded the amount due, the operator may request a refund by filing a corrected Statement of Account. The NCTA correctly noted that ''the Office's longstanding practice has been to issue the appropriate refund'' in this situation, ''even though the request for such refund falls outside the 60-day window that governs operator-initiated refund requests.'' NCTA Reply at 4.

The NCTA contended that this practice ''is not expressly codified in the Office's rules,'' NCTA Reply at 4, but in fact, the regulations specifically state that ''the Licensing Division will forward the royalty refund to the cable system owner named in the Statement of Account without regard to the time limitations provided for [in § 201.17(m)(3)(i) of the regulations].'' 37 CFR 201.17(m)(3)(vi). Simply put, the Program Suppliers and the NCTA have asked the Office to adopt a rule that is already reflected in the regulations.

To be clear, there must be a direct relationship between the issues identified in the Office's inquiry and the basis for the operator's refund request. An inquiry from the Office is not an open invitation to revisit every entry in every Statement of Account that has been filed with the Office, and refunds will not be made if the operator discovers errors that are unrelated to the issues that prompted the Office's inquiry. For example, if the Office notified a cable operator that it apparently reported three local signals as distant signals on its 2010/1 Statement of Account, the operator may be entitled to a refund for those three signals under § 201.17(m)(3)(vi) of the regulations. However, if the operator determined that it failed to identify another distant station as a significantly viewed station on its 2010/1 Statement of Account (hence, considered to be a local station), or mistakenly paid royalties for another signal that was not carried anywhere on the system, the operator would not be entitled to a refund for those overpayments unless it filed an amended Statement of Account within the time allowed under § 201.17(m)(3)(i) of the regulations.

III. Final Rule

A. Comments

The Program Suppliers and the Copyright Owners did not take a position on the proposed regulation in their initial comments. They simply noted that the refund requests appear to be untimely and should be denied on that basis. However, the Program Suppliers took an entirely different position in their reply comments, stating that the ''proposed Amendment to Section 201.17(m) is unnecessary,'' and that there is ''no reason for [a] new regulation regarding phantom signals.'' Program Suppliers Reply at 2.

While the Program Suppliers did not explain the reason for the change in their views, the NCTA consistently maintained the same position in its initial comments and reply comments. The NCTA contended that the proposed rule ignores the ''letter and spirit'' of the statutory language set forth in Section 111(d)(1)(D), as well as the legislative

[4] This group includes the Joint Sports Claimants (professional and college sports programming); Commercial Television Claimants (local commercial television programming); Devotional Claimants (religious television programming); Canadian Claimants (Canadian television programming); and Music Claimants (musical works included in television programming).

[5] As discussed above, the Office is aware of at least one situation where a cable operator requested a refund on its 2009/2 Statement of Account before the Statement was examined by the Licensing Division. This request was timely under § 201.17(m)(3)(i), because it was received within 60 days after the last day of the accounting period.

history for that provision. The NCTA also contended that the regulation would undermine the negotiated settlement between copyright owners and cable operators that resolved the longstanding dispute over phantom signals. NCTA Comment at 2; NCTA Reply at 1, 2.

Specifically, the NCTA asserted that the proposed regulation ''runs counter to Congress' clear intent to hold cable operators harmless for their past use of the subscriber group methodology,'' and that adopting this rule ''would effectively penalize a cable operator for something Congress has expressly approved.'' NCTA Comment at 2; NCTA Reply at 3. The NCTA commented that the regulation would prevent cable operators from obtaining a refund for an overpayment on a Statement of Account or an amended Statement of Account filed prior to the effective date of STELA, even if the overpayment ''does not arise from the operator's use of subscriber group or system-wide reporting.'' NCTA Reply at 3. For example, the NCTA contended that the regulation would prevent a cable operator who used the subscriber group methodology from claiming a refund where the operator incorrectly reported a local signal as distant or mistakenly paid royalties for a signal that was not carried anywhere on the system. NCTA Reply at 3.

Finally, the NCTA predicted that the proposed rule will cause ''confusion'' regarding the treatment of phantom signals and it will ''reignite the uncertainty and controversy'' that the legislation was intended to resolve. NCTA Comment at 2; NCTA Reply at 2. The NCTA explained that the amendments to Section 111 were intended ''to provide a *permanent* resolution of the phantom signal controversy'' and that the proposed rule ''is antithetical to the goals of closure and certainty that are at the heart of the phantom signal settlement.'' NCTA Comment at 4 (emphasis in original).

B. Discussion

As a general rule, the Office will issue a refund to a cable operator when the royalty fees paid on a particular Statement of Account exceed the amount due. The NCTA contended that ''Section 111(d)(1)(D), as amended by STELA, speaks for itself and provides all of the guidance needed for copyright owners, copyright users, and the Office to determine a cable operator's royalty fees and to make refunds where appropriate.'' NCTA Reply at 2. The Office agrees with that assessment.

STELA amended Section 111(d)(1)(D) to state that:

> A cable system that, on a statement submitted before the date of the enactment of the Satellite Television Extension and Localism Act of 2010, computed its royalty fee consistent with the methodology under subparagraph (C)(iii), or that amends a statement filed before such date of enactment to compute the royalty fee due using such methodology, shall not be subject to an action for infringement, or eligible for any royalty refund or offset, arising out of its use of such methodology on such statement.

As the NCTA observed, cable operators cannot be held liable in an infringement action for using the subscriber group methodology to calculate their royalty obligations on a Statement of Account or amended Statement of Account filed prior to the enactment of STELA. Nor are they required to recalculate their royalty obligations using the system-wide methodology in order to avoid liability for infringement. *See* NCTA Reply at 2. However, Section 111(d)(1)(D) makes it clear that cable operators are not entitled to any refunds or offsets arising out of their use of the subscriber group methodology before the enactment of STELA. The NCTA correctly noted that cable operators who paid for phantom signals on a pre-STELA Statement of Account are ''expressly precluded from obtaining any benefit (through refunds or offsets to other payment obligations) by going back and revising their calculations to use the subscriber group methodology after-the-fact.'' NCTA Comment at 3–4. Likewise, cable operators cannot deduct the amount that they paid for a phantom signal prior to the 2010/1 accounting period in order to reduce the amount that they owe on a future Statement of Account. *See id.*

The question presented in this proceeding is whether the Office should allow use of the subscriber group methodology in place of the system-wide methodology to determine whether there is an overpayment or a balance due on Statements filed prior to the effective date of STELA. The NCTA contended that Section 111(d)(1)(D) prevents copyright owners from bringing an infringement action against a cable operator that computed its royalty obligations using the subscriber group methodology, and that this same provision extinguishes ''all direct or indirect claims that operators have outstanding 'balances' of underpaid royalties as a result of their using that methodology.'' NCTA Comment at 5.

While this is one interpretation of Section 111(d)(1)(D), it is not the only one. As the Office explained in the notice of proposed rulemaking, a literal reading indicates that this provision shields cable operators from liability for an infringement action, but it does not eliminate the obligation to pay for the carriage of phantom signals prior to the enactment of STELA. Under the licensing framework that predated STELA, cable operators were expected to calculate their royalty obligations on a system-wide basis. If an operator failed to pay for a distant signal on a system-wide basis, the Office would notify the operator and record the balance due as an outstanding obligation. Until the operator satisfied this royalty obligation, the Office would not issue a refund for overpayments caused by misreporting a local signal as a distant signal or other reporting errors. The Office has followed this practice for more than 30 years.

The NCTA contended that the proposed regulation ''would effectively penalize cable operators who used the subscriber group methodology on statements of account for accounting periods occurring prior to 2010'' and that this is contrary to ''Congress' clear intent to hold cable operator's [sic] harmless for their past use of the subscriber group methodology.'' NCTA Comment at 2; NCTA Reply at 3. However, the NCTA has not cited any language in the statute or the legislative history that expressly overruled the Office's longstanding practice concerning refunds or offsets involving payments for phantom signals in the pre-STELA period. Section 111(d)(1)(D) simply states that a cable operator cannot be sued for infringement for failing to calculate its royalty obligation using the system-wide methodology on a Statement filed prior to the enactment of STELA. The fact that Congress eliminated a cause of action that could have been asserted before STELA does not mean that the obligation to use the system-wide methodology did not exist or that Congress retroactively eliminated that obligation prior to the 2010/1 accounting period. Nor does it mean that a cable operator should be able to pocket the difference if using the subscriber group method, rather than the system-wide method, resulted in an overpayment for accounting periods prior to 2010/1. Indeed, the statute specifically states that refunds or offsets arising out of the cable operators' use of the subscriber group methodology prior to the effective date of STELA are not permitted.

The NCTA contended that the proposed rule would prevent a cable operator from obtaining a refund or offset, even if the overpayment ''does not arise from the operator's use of subscriber group or system-wide reporting.'' NCTA Reply at 3. In other words, if the cable operator would

otherwise be entitled to a refund or offset[6]—but for the fact that it calculated its royalty obligation using the subscriber group method rather than the system-wide method, and as a result, underpaid the royalties due under the system-wide method—then the operator is not entitled to a refund or offset under Section 111(d)(1)(D). That is indeed the effect of the regulation.

Cable operators presumably use the subscriber group method, because it lowers the amount of royalties owed under the statutory license. Indeed, in most of the refund requests at issue in this proceeding, the amount owed on the Statement of Account would be higher if the cable operator used the system-wide method instead of the subscriber group method to calculate its royalty obligation. In such cases, the operators are not entitled to a refund or offset, because the overpayments purportedly shown on their Statements of Account would not have occurred but for the fact that they calculated their royalty obligation using the subscriber group method rather than the system-wide method, which was the methodology in effect when the Statements were filed.

The NCTA contended that the proposed rule is inconsistent with the legislative history for the amendment to Section 111(d)(1)(D), but the quotes that the NCTA cited from the congressional debate do not support this view. At best, these quotes merely indicate that stakeholders disagreed over whether a cable operator should be required to pay for phantom signals and that the legislation was intended to resolve that longstanding dispute. The NCTA offered no language from the congressional debate indicating that Congress intended to change the method that should be used to calculate royalty obligations on Statements filed before the date of enactment. Nor is there any indication that Congress intended to overrule the Office's longstanding practice of declining to issue refunds or offsets to cable operators who failed to pay for phantom signals.

Finally, the NCTA contended that the proposed rule will cause ''confusion and uncertainty'' regarding the treatment of phantom signals. NCTA Reply at 2. However, the NCTA acknowledged that the instances where a cable operator used the subscriber group methodology and subsequently requested a refund ''are relatively rare,'' NCTA Comment at 1 n.3, and in fact, it provided only one example of alleged ''confusion and delay'' in its comments. Specifically, the NCTA predicted that the proposed rule would create uncertainty for Statements of Account filed for the second accounting period of 2010, because ''those statements were not due until after the effective date of STELA, but in some cases were filed before that date.'' NCTA Reply at 2, n.1. In fact, the Office did not receive any Statements of Account for the 2010/2 accounting period before the effective date of STELA, so the regulation will not cause any delay in connection with those Statements.[7] Moreover, the proposed rule draws a bright line that eliminates any confusion. Refunds on Statements of Account filed prior to the 2010/1 accounting period are based upon calculations of royalty obligations under the methodology that attributed carriage of a signal throughout the cable system rather than on the revised methodology adopted under STELA that requires calculations to be made based on carriage of signals within discrete communities.

List of Subjects in 37 CFR Part 201

Copyright, General provisions.

Final Regulations

In consideration of the foregoing, the Copyright Office amends part 201 of 37 CFR as follows:

PART 201—GENERAL PROVISIONS

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

■ 2. Amend § 201.17 by redesignating paragraphs (m)(1) through (4) as paragraphs (m)(2) through (5) and adding a new paragraph (m)(1) to read as follows:

§ 201.17 Statements of Account covering compulsory licenses for secondary transmissions by cable systems.

* * * * *

(m) * * *

(1) Royalty fee obligations under 17 U.S.C. 111 prior to the effective date of the Satellite Television Extension and Localism Act of 2010, Public Law 111–175, are determined based on carriage of each distant signal on a system-wide basis. Refunds for an overpayment of royalty fees for an accounting period prior to January 1, 2010, shall be made only when all outstanding royalty fee obligations have been met, including those for carriage of each distant signal on a system-wide basis.

* * * * *

Dated: September 21, 2012.

Maria A. Pallante,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 2013–00171 Filed 1–8–13; 8:45 am]

BILLING CODE 1410–30–P

[6] As the NCTA observed, an operator might be entitled to a refund if it incorrectly reported a local signal as distant or mistakenly paid royalties for a signal that was not carried anywhere on the system. *See* NCTA Reply at 3.

[7] As discussed above, STELA is effective as of February 27, 2010. The 2010/2 accounting period ended on December 31, 2010, and Statements of Account for that period were due on March 1, 2011.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR PART 52

[FRL–9767–5]

Notice of Approval of Clean Air Act Outer Continental Shelf Minor Source/Title V Minor Permit Modification Issued to Shell Offshore, Inc. for the Kulluk Conical Drilling Unit

AGENCY: United States Environmental Protection Agency (EPA).

ACTION: Notice of final action.

SUMMARY: This notice announces that EPA Region 10 has issued a final decision granting Shell Offshore Inc.'s (''Shell'') request for minor modifications of Clean Air Act Outer Continental Shelf (''OCS'') Minor Source/Title V Permit No. R10OCS03000 (''permits''). The permits authorize air emissions associated with Shell's operation of the Kulluk Conical Drilling Unit (''Kulluk'') in the Beaufort Sea to conduct exploratory oil and gas drilling.

DATES: January 9, 2013.

ADDRESSES: The documents relevant to the above-referenced permits are available for public inspection during normal business hours at the following address: U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Suite 900, AWT–107, Seattle, WA 98101. To arrange for viewing of these documents, call Natasha Greaves at (206) 553–7079.

FOR FURTHER INFORMATION CONTACT: Natasha Greaves, Office of Air Waste and Toxics, U.S. Environmental Protection Agency, Region 10, 1200 6th Avenue, Suite 900, AWT–107, Seattle, WA 98101.

SUPPLEMENTARY INFORMATION: EPA Region 10 issued a final decision on the minor modifications of the permits on September 28, 2012. The modified permits also became effective on that date, and the 30-day period provided by 40 CFR 71.11(l) to file with the Environmental Appeals Board (''EAB'')

a petition to review the minor modifications of the permits ended on October 29, 2012. Pursuant to section 307(b)(1) of the Clean Air Act, 42 U.S.C. 7607(b)(1), judicial review of these final permit decisions, to the extent it is available, may be sought by filing a petition for review in the United States Court of Appeals for the Ninth Circuit within 60 days of January 9, 2013.

On April 12, 2012, EPA issued a final decision on the permits which authorize air emissions from Shell's operation of the Kulluk in the Beaufort Sea to conduct exploratory drilling. Shell submitted an application to EPA Region 10 requesting minor modifications of the permits on July 5, 2012. EPA Region 10 reviewed and issued the requested minor modifications of the permits on September 28, 2012.

All conditions of the Kulluk permit, issued by EPA on September 28, 2012, are final and effective.

Dated: November 6, 2012.

Kate Kelly,

Director, Office of Air, Waste & Toxics, Region 10.

[FR Doc. 2012–31649 Filed 1–8–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2012–0782; FRL–9766–7]

Determination of Attainment for the San Francisco Bay Area Nonattainment Area for the 2006 Fine Particle Standard; California; Determination Regarding Applicability of Clean Air Act Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to determine that the San Francisco Bay Area nonattainment area in California has attained the 2006 24-hour fine particle ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS). This determination is based upon complete, quality-assured, and certified ambient air monitoring data showing that this area has monitored attainment of the 2006 24-hour $PM_{2.5}$ NAAQS based on the 2009–2011 monitoring period. Based on the above determination, the requirements for this area to submit an attainment demonstration, together with reasonably available control measures (RACM), a reasonable further progress (RFP) plan, and contingency measures for failure to meet RFP and attainment deadlines are suspended for so long as the area continues to attain the 2006 24-hour $PM_{2.5}$ NAAQS.

DATES: This rule is effective on February 8, 2013.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2012–0782 for this action. Generally, documents in the docket for this action are available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *www.regulations.gov,* some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps, multi-volume reports), and some may not be publicly available in either location (e.g., Confidential Business Information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: John Ungvarsky, (415) 972–3963, or by email at *ungvarsky.john@epa.gov.*

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

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I. Summary of Proposed Action
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I. Summary of Proposed Action

On October 29, 2012 (77 FR 65521), EPA proposed to determine that the San Francisco Bay Area nonattainment area[1] has attained the 2006 24-hour NAAQS[2] for fine particles (generally referring to particles less than or equal to 2.5 micrometers in diameter, $PM_{2.5}$).

In our proposed rule, we explained how EPA makes an attainment determination for the 2006 24-hour $PM_{2.5}$ NAAQS by reference to complete, quality-assured data gathered at State and Local Air Monitoring Stations (SLAMS) and entered into EPA's Air Quality System (AQS) database and by reference to 40 CFR 50.13 (''National primary and secondary ambient air quality standards for $PM_{2.5}$'') and appendix N to [40 CFR] part 50 (''Interpretation of the National Ambient Air Quality Standards for $PM_{2.5}$''). EPA proposed the determination of attainment for the San Francisco Bay Area based upon a review of the monitoring network operated by the Bay Area Air Quality Management District (BAAQMD) and the data collected at the 10 monitoring sites operating during the most recent complete three-year period (i.e., 2009 to 2011). Based on this review, EPA found that complete, quality-assured and certified data for the San Francisco Bay Area showed that the 24-hour design value for the 2009–2011 period was equal to or less than 35 μ/m^3 at all of the monitor sites. See the data summary table on page 65523 of the October 29, 2012 proposed rule. We also noted that preliminary data available in AQS for 2012 indicates that the San Francisco Bay Area continues to attain the NAAQS.

In our proposed rule, based on the proposed determination of attainment, we also proposed to apply EPA's Clean Data Policy to the 2006 $PM_{2.5}$ NAAQS and thereby suspend the requirements for this area to submit an attainment demonstration, associated reasonably available control measures (RACM), a reasonable further progress (RFP) plan, and contingency measures for so long as the area continues to attain the 2006 24-hour $PM_{2.5}$ NAAQS. See pages 65524–65525 of our October 29, 2012 proposed rule. In proposing to apply the Clean Data Policy to the 2006 $PM_{2.5}$ NAAQS, we explained how we are applying the same statutory interpretation with respect to the implications of clean data determinations that the Agency has long applied in regulations for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS and in individual rulemakings for the 1-hour ozone, PM_{10} and lead NAAQS.

Please see the October 29, 2012 proposed rule for more detailed information concerning the $PM_{2.5}$ NAAQS, designations of $PM_{2.5}$ nonattainment areas, the regulatory basis for determining attainment of the NAAQS, BAAQMD's $PM_{2.5}$ monitoring network, EPA's review and evaluation of the data, and the rationale and implications for application of the Clean Data Policy to the 2006 $PM_{2.5}$ NAAQS.

II. Public Comments and EPA Responses

EPA's proposed rule provided a 30-day public comment period. During this period, we received no comments.

III. EPA's Final Action

For the reasons provided in the proposed rule and summarized herein, EPA is taking final action to determine that the San Francisco Bay Area

[1] The San Francisco Bay Area $PM_{2.5}$ nonattainment area includes southern Sonoma, Napa, Marin, Contra Costa, San Francisco, Alameda, San Mateo, Santa Clara and the western part of Solano counties.

[2] The 2006 24-hour $PM_{2.5}$ NAAQS is 35 micrograms per cubic meter ($\mu g/m^3$), based on a 3-year average of the 98th percentile of 24-hour concentrations.

nonattainment area in California has attained the 2006 24-hour $PM_{2.5}$ NAAQS based on the most recent three years of complete, quality-assured, and certified data in AQS for 2009–2011. Preliminary data available in AQS for 2012 show that this area continues to attain the standard.

EPA is also taking final action, based on the above determination of attainment, to suspend the requirements for the San Francisco Bay Area nonattainment area to submit an attainment demonstration and associated RACM, a RFP plan, contingency measures, and any other planning SIPs related to attainment of the 2006 $PM_{2.5}$ NAAQS for so long as the area continues to attain the 2006 $PM_{2.5}$ NAAQS. EPA's final action is consistent and in keeping with its long-held interpretation of CAA requirements, as well as with EPA's regulations for similar determinations for ozone (*see* 40 CFR 51.918) and the 1997 fine particulate matter standards (*see* 40 CFR 51.1004(c)).

Today's final action does not constitute a redesignation of the San Francisco Bay Area nonattainment area to attainment for the 2006 24-hour $PM_{2.5}$ NAAQS under CAA section 107(d)(3) because we have not yet approved a maintenance plan for the San Francisco Bay Area nonattainment area as meeting the requirements of section 175A of the CAA or determined that the area has met the other CAA requirements for redesignation. The classification and designation status in 40 CFR part 81 remain nonattainment for this area until such time as EPA determines that California has met the CAA requirements for redesignating the San Francisco Bay Area nonattainment area to attainment.

If the San Francisco Bay Area nonattainment area continues to monitor attainment of the 2006 $PM_{2.5}$ NAAQS, the requirements for the area to submit an attainment demonstration and associated RACM, a RFP plan, contingency measures, and any other planning requirements related to attainment of the 2006 $PM_{2.5}$ NAAQS will remain suspended. If after today's action EPA subsequently determines, after notice-and-comment rulemaking in the **Federal Register**, that the area has violated the 2006 $PM_{2.5}$ NAAQS, the basis for the suspension of the attainment planning requirements for the area would no longer exist, and the area would thereafter have to address such requirements.

IV. Statutory and Executive Order Reviews

This final action makes a determination of attainment based on air quality and suspends certain federal requirements, and thus, this action would not impose additional requirements beyond those imposed by state law. For this reason, the final 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 disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this final action does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP obligations discussed herein do not apply to Indian Tribes, and thus this action will not impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 11, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Particulate matter, Nitrogen oxides, Sulfur oxides, Reporting and recordkeeping requirements.

Dated: December 18, 2012.

Jared Blumenfeld,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—California

■ 2. Section 52.247 is added to read as follows:

§ 52.247 Control Strategy and regulations: Fine Particle Matter.

(a) *Determination of Attainment:* Effective February 8, 2013, EPA has determined that, based on 2009 to 2011 ambient air quality data, the San Francisco Bay Area $PM_{2.5}$ nonattainment area has attained the 2006 24-hour $PM_{2.5}$ NAAQS. This determination 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 for as long as this area continues to attain the 2006 24-hour $PM_{2.5}$ NAAQS. If EPA determines, after notice-and-comment rulemaking, that this area no longer meets the 2006 $PM_{2.5}$ NAAQS, the corresponding determination of attainment for that area shall be withdrawn.

(b) [Reserved]

[FR Doc. 2013–00170 Filed 1–8–13; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 78, No. 6
Wednesday, January 9, 2013

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 906

[Doc. No. AMS–FV–12–0038; FV12–906–1 PR]

Oranges and Grapefruit Grown in Lower Rio Grande Valley in Texas; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would increase the assessment rate established for the Texas Valley Citrus Committee (Committee) for the 2012–13 and subsequent fiscal periods from $0.14 to $0.16 per 7/10-bushel carton or equivalent of oranges and grapefruit handled. The Committee locally administers the marketing order which regulates the handling of oranges and grapefruit grown in the Lower Rio Grande Valley in Texas (order). Assessments upon orange and grapefruit handlers are used by the Committee to fund reasonable and necessary expenses of the program. The fiscal period begins August 1 and ends July 31. The assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by January 22, 2013.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or Internet: *http://www.regulations.gov.* Comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.* All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Doris Jamieson, Marketing Specialist or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 325–8793, or Email: *Doris.Jamieson@ams.usda.gov* or *Christian.Nissen@ams.usda.gov.*

Small businesses may request information on complying with this regulation by contacting Laurel May, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Laurel.May@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This proposed rule is issued under Marketing Agreement and Order No. 906, as amended (7 CFR part 906), regulating the handling of oranges and grapefruit grown in the Lower Rio Grande Valley in Texas, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Order 12866.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, orange and grapefruit handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as proposed herein would be applicable to all assessable oranges and grapefruit beginning on August 1, 2012, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule would increase the assessment rate established for the Committee for the 2012–13 and subsequent fiscal periods from $0.14 to $0.16 per 7/10-bushel carton or equivalent of oranges and grapefruit handled.

The Texas orange and grapefruit marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of Texas oranges and grapefruit. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2011–12 and subsequent fiscal periods, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on June 5, 2012, and unanimously recommended 2012–13 expenditures of $1,340,800 and an assessment rate of $0.16 per 7/10-bushel carton or equivalent of oranges and grapefruit handled. In comparison, last year's budgeted expenditures were $1,273,537. The assessment rate of $0.16 is $0.02 higher than the rate currently in effect. The increased assessment rate

should generate sufficient income to cover anticipated expenses, including an increase in advertising and promotion, as well as allow the Committee to replenish funds in its reserves.

The major expenditures recommended by the Committee for the 2012–13 fiscal period include $575,000 for promotion; $489,500 for the Mexican fruit fly control program; and $243,000 for management, administration, and compliance. Budgeted expenses for these items in 2011–12 were $425,000, $564,500, and $250,737, respectively.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses by expected shipments of Texas oranges and grapefruit. Orange and grapefruit shipments for the 2012–13 fiscal period are estimated at 8.5 million 7/10-bushel cartons or equivalent, which should provide $1,360,000 in assessment income. Income derived from handler assessments would be adequate to cover budgeted expenses. Funds in the reserve (currently $78,090) would be kept within the maximum permitted by the order (approximately one fiscal period's expenses as stated in § 906.35).

The proposed assessment rate would continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate would be in effect for an indefinite period, the Committee would continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA would evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2012–13 budget and those for subsequent fiscal periods would be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 170 producers of oranges and grapefruit in the production area and 15 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $7,000,000 (13 CFR 121.201).

According to Committee data and information from the National Agricultural Statistical Service, the weighted average grower price for Texas citrus during the 2010–11 season was around $11.30 per box and total shipments were near 4.7 million boxes. Using the weighted average price and shipment information, and assuming a normal distribution, the majority of growers would have annual receipts of less than $750,000. In addition, based on available information, approximately 60 percent of Texas citrus handlers could be considered small businesses under SBA's definition. Thus, the majority of producers and handlers of Texas citrus may be classified as small entities.

This proposed rule would increase the assessment rate established for the Committee and collected from handlers for the 2012–13 and subsequent fiscal periods from $0.14 to $0.16 per 7/10-bushel carton or equivalent of Texas oranges and grapefruit. The Committee unanimously recommended 2012–13 expenditures of $1,340,800 and an assessment rate of $0.16 per 7/10-bushel carton or equivalent handled. The proposed assessment rate of $0.16 is $0.02 higher than the 2011–12 rate. The quantity of assessable oranges and grapefruit for the 2012–13 fiscal period is estimated at 8.5 million 7/10-bushel cartons or equivalent. Thus, the $0.16 rate should provide $1,360,000 in assessment income and be adequate to meet this year's expenses.

The major expenditures recommended by the Committee for the 2012–13 fiscal period include $575,000 for promotion; $489,500 for the Mexican fruit fly control program; and $243,000 for management, administration, and compliance. Budgeted expenses for these items in 2011–12 were $425,000, $564,500, and $250,737, respectively.

The Committee reviewed and unanimously recommended 2012–13 expenditures of $1,340,800, which included increases in promotional activities. The Committee considered proposed expenses and recommended increasing the assessment rate to cover the increase in the advertising and promotion program, as well as to allow the Committee to replenish funds in its reserve.

Prior to arriving at this budget, the Committee considered information from various sources, such as the Committee's Budget and Personnel Committee, and the Market Development Committee. Alternative expenditure levels were discussed by these groups, based upon the relative value of various research and promotion projects to the Texas citrus industry. The assessment rate of $0.16 per 7/10-bushel carton or equivalent of assessable oranges and grapefruit was then determined by dividing the total recommended budget by the quantity of assessable oranges and grapefruit, estimated at 8.5 million 7/10-bushel cartons or equivalent for the 2012–13 fiscal period. This is approximately $20,700 above the anticipated expenses, which the Committee determined to be acceptable.

A review of historical information and preliminary information pertaining to the upcoming fiscal period indicates that the grower price for the 2012–13 season could range between $8.98 and $16.35 per 7/10-bushel carton or equivalent of oranges and grapefruit. Therefore, the estimated assessment revenue for the 2012–13 fiscal period as a percentage of total grower revenue could range between 1 and 2 percent.

This proposed action would increase the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be offset by the benefits derived by the operation of the marketing order.

In addition, the Committee's meeting was widely publicized throughout the Texas citrus industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the June 5, 2012, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit

comments on this proposed rule, including the regulatory and informational impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0189 Generic Fruit Crops. No changes in those requirements as a result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would impose no additional reporting or recordkeeping requirements on either small or large Texas orange and grapefruit handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *www.ams.usda.gov/MarketingOrdersSmallBusinessGuide*. Any questions about the compliance guide should be sent to Laurel May at the previously-mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 10-day comment period is provided to allow interested persons to respond to this proposed rule. Ten days is deemed appropriate because: (1) The 2012–13 fiscal period began on August 1, 2012, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable oranges and grapefruit handled during such fiscal period; (2) the Committee needs to have sufficient funds to pay its expenses, which are incurred on a continuous basis; and (3) handlers are aware of this action, which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years.

List of Subjects in 7 CFR Part 906

Grapefruit, Marketing agreements, Oranges, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 906 is proposed to be amended as follows:

PART 906—ORANGES AND GRAPEFRUIT GROWN IN LOWER RIO GRANDE VALLEY IN TEXAS

■ 1. The authority citation for 7 CFR part 906 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 906.235 is revised to read as follows:

§ 906.235 Assessment rate.

On and after August 1, 2012, an assessment rate of $0.16 per 7/10-bushel carton or equivalent is established for oranges and grapefruit grown in the Lower Rio Grande Valley in Texas.

Dated: January 3, 2013.

David R. Shipman,

Administrator, Agricultural Marketing Service.

[FR Doc. 2013–00189 Filed 1–8–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2012–0812; Notice No. 13–01]

RIN 2120–AK14

Requirements for Chemical Oxygen Generators Installed on Transport Category Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This rulemaking would amend the type certification requirements for chemical oxygen generators installed on transport category airplanes so the generators are secure and not subject to misuse. The intended effect of this action would be to increase the level of security for future transport category airplane designs. This proposal does not directly affect the existing fleet.

DATES: Send comments on or before March 11, 2013.

ADDRESSES: Send comments identified by docket number FAA–2012–0812 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov,* including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jeff Gardlin, Airframe and Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, Northwest Mountain Region, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone: (425) 227–2136; email: *jeff.gardlin@faa.gov.*

For legal questions concerning this action, contact Douglas Anderson, Federal Aviation Administration, Office of the Regional Counsel, ANM–7, Northwest Mountain Region, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone: (425) 227–2166; email: *douglas.anderson@faa.gov.*

SUPPLEMENTARY INFORMATION: See the ''Additional Information'' section for information on how to comment on this proposal and how the FAA will handle comments received. The ''Additional Information'' section also contains related information about the docket, privacy, the handling of proprietary or confidential business information. In addition, there is information on obtaining copies of related rulemaking documents.

Authority for This Rulemaking

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

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, the FAA is charged with prescribing regulations required in the interest of safety for the design and performance of aircraft; regulations and minimum standards in the interest of safety for inspecting, servicing, and overhauling aircraft; and regulations for other practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it would prescribe new safety standards for the design of transport category airplanes.

List of Abbreviations and Acronyms Frequently Used in This Document

AC—Advisory Circular
AD—Airworthiness Directive
ARAC—Aviation Rulemaking Advisory Committee
ARC—Aviation Rulemaking Committee
COG—Chemical Oxygen Generator
LOARC—Lavatory Oxygen Aviation Rulemaking Committee
SaO_2—Blood Oxygen Saturation Level
SFAR—Special Federal Aviation Regulation

I. Overview of the Proposed Rule

This proposed rule would adopt new standards for COGs installed in transport category airplanes. These proposed new standards, based on the LOARC's recommendations, would apply to future applications for type certificates, address potential security vulnerabilities with those devices, and provide performance-based options for acceptable COG installations.

II. Background

The incorporation of security measures into an airplane design is a significant development in aviation safety that was initiated over 20 years ago. The International Civil Aviation Organization (ICAO) adopted standards to address several key elements of airplane design to reduce its vulnerability to terrorist acts following the bombing of a Pan American 747 airplane near Lockerbie, Scotland in 1988. These standards were adopted as Amendment 97 to Annex 8 of the 1944 Convention on Civil Aviation.

In January 2002, the FAA adopted the first regulations that address security vulnerabilities in airplanes. The FAA later incorporated all of the ICAO standards into regulations by Amendment 25–127 to Title 14, Code of Federal Regulations (14 CFR) part 25. That amendment complemented other rulemaking initiatives that address security measures for flightdeck doors and added a new § 25.795, Security considerations. ICAO does not have recommended practices related to COGs. Nevertheless, the FAA has determined that COGs present an unacceptable vulnerability and has exercised its authority to take remedial action to correct this vulnerability in airplane design.[1]

The FAA became aware of a security vulnerability with certain types of oxygen systems installed inside the lavatories of most transport category airplanes operating under 14 CFR part 121, as well as certain airplanes operating under part 129. As a result, in April 2011, the FAA issued AD 2011–04–09, mandating that these oxygen systems be rendered inoperative until the vulnerability could be eliminated.[2] However, by rendering the oxygen systems inoperative to comply with the AD, the airplanes do not comply with the requirements of §§ 25.1447, 121.329, and 121.333. The AD contained a provisional allowance to permit noncompliance in the lavatories from those specific requirements.

To further address that situation, the FAA also issued SFAR 111[3] to allow continued operation, delivery, and modification of affected airplanes, despite their non-compliance with the above-noted regulations. The AD and the SFAR (while still in effect) are interim measures to minimize the disruption to air commerce while the development of permanent solutions, including this proposed rule, are underway.

In addition, the FAA chartered the LOARC shortly after issuing SFAR 111. The LOARC was tasked to make recommendations for new standards that would ensure the installation of a safe and secure COG system, including the best approach to implement those standards. The LOARC's recommendations also included the key issues involved in making a COG secure, and a summary of how those issues may affect implementation of new standards. The LOARC's recommendations are discussed in the ''Lavatory Oxygen Aviation Rulemaking Committee'' section of this NPRM. Those LOARC recommendations also form the basis for this proposal.

A. Lavatory Oxygen Systems

The minimum performance requirements for oxygen supply and oxygen mask presentation are contained in §§ 25.1443 and 25.1447. The supplemental oxygen systems are necessary safety equipment in the event of loss of cabin pressure. Each occupant is required to have a supplemental oxygen supply immediately available if cabin pressure drops to a certain level. The regulations specifically require lavatories to be equipped with two oxygen masks connected to oxygen supply terminals and, for airplanes flying above 30,000 feet, automatic presentation of the masks to the occupants. Two masks are required inside a lavatory to address the situation where one person may be assisting another, such as an adult assisting a small child. The quantity of oxygen available to each occupant is based on the route flown and how quickly the airplane can descend to an altitude that does not require supplemental oxygen.

Lavatory oxygen systems are generally similar to the systems provided for passenger and flight attendant use in the cabin. The intent of the supplemental oxygen requirements in 14 CFR part 25 is reinforced in the operational requirements of §§ 121.329 and 121.333, although neither section specifically references lavatories.

The regulations do not specify the use of COGs as an oxygen supply. However, COGs are common because they tend to provide a sufficient oxygen supply while retaining the optimum size, weight, and maintainability for most operations. Because COGs produce oxygen through a chemical reaction that generates heat, there are requirements in § 25.1450 to ensure that adjacent materials and systems are protected from damage and persons are protected from injury. Surface temperatures can reach temperatures up to 500 degrees Fahrenheit, so the COG often has a protective shroud installed.

B. Safety Ramifications

In issuing AD 2011–04–09 and SFAR 111, the FAA carefully considered the safety ramifications of removing supplemental oxygen from the lavatories of a significant portion of the

[1] For example, the FAA has issued ADs to address issues with reinforced flightdeck doors that would not otherwise affect safety.

[2] FAA originally notified carriers in February 2011 and required immediate compliance. The AD was issued in March 2, 2011 with a compliance date of March 14, 2011. *See* AD 2011–04–09, Airworthiness Directives: Various Transport Category Airplanes Equipped with Chemical Oxygen Generators Installed in a Lavatory, Docket No. FAA–2011–0157.

[3] SFAR 111, Security Considerations for Lavatory Oxygen Systems (76 FR 12550, March 8, 2011), Docket No. FAA–2011–0186.

commercial fleet. The FAA conducted a risk analysis to assess the safety implications of temporarily[4] not having supplemental oxygen available inside lavatories. To support the risk assessment, earlier studies involving passengers' use of supplemental oxygen were reviewed.

Several years ago in an unrelated initiative, the FAA tasked the ARAC to make recommendations for safety standards when airplanes operate in high altitudes. As part of its efforts, the ARAC did a comprehensive assessment of the frequency and nature of the need for supplemental oxygen systems in service.[5] The ARAC identified 2,800 instances over a 40-year period and categorized them by cause, severity, and consequence. The majority of these instances were caused by malfunctions of the cabin pressurization system. However, in none of those 2,800 instances was there a loss of life due to lack of oxygen. The ARAC used these data to make recommendations to the FAA for future rulemaking not related to this action.

The FAA reviewed the service history since those ARAC recommendations were made and found that the types and frequencies of incidents, as well as their causes, are consistent with the historical record. The relative risks and service history have not changed in any significant way since the ARAC recommendations were issued. With respect to SFAR 111, the assessment was limited to the lavatories, as opposed to the earlier ARAC task that applied to the entire airplane. The lavatories are sporadically occupied during flight and by a small number of passengers at any given time. This limits the potential impact on safety.

The ARAC found the frequency of the types of severe occurrences necessitating the use of supplemental oxygen was around 10^{-8}/flight-hour for causes other than a malfunction of the pressurization system. These malfunctions tend to be slower losses of pressure, or are identified at lower altitudes, and therefore, they are not as critical for this situation. For the purposes of the assessment leading to SFAR 111, the FAA assumed the probability of an occupied lavatory is 50%. The probability of an event when supplemental oxygen is physiologically required is around 5×10^{-9}/flight-hour. Since SFAR 111 was issued, there has been one decompression event due to a mechanical failure involving oxygen mask deployment and emergency descent. In that instance, no occupants were in a lavatory and no persons suffered any injury.

C. Lavatory Oxygen Aviation Rulemaking Committee

As discussed above, the FAA chartered the LOARC to obtain recommendations from the affected public on what the new certification standards for COGs should be, as well as the best way to implement them. Specifically, the LOARC was tasked to:

(1) Establish criteria for in-service, new production and new type design airplanes, preferably in the form of performance standards, for safe and secure installation of lavatory oxygen systems;

(2) Determine whether the same criteria should apply to the existing fleet and to new production and type designs;

(3) Establish what type of safety assessment approach should be used (e.g., in accordance with SAE International Document ARP5577[6] or § 25.1309), and define the content and procedures of the safety assessment;

(4) Determine whether tamper resistance, active tamper evidence, or different system design characteristics are equivalent options;

(5) Develop guidance as necessary to satisfy the recommended criteria for each system design characteristic as appropriate; and

(6) Consider the pros and cons of different implementation options and recommend a schedule(s) for implementation with the advantages and disadvantages identified.

The LOARC identified five key subjects to focus on to develop its recommendations and fulfill its charter. Those subjects were:

- Design Considerations—identifying and characterizing the design constraints and key factors affecting an installation.
- Security Standards—identifying the necessary components of a secure installation, in terms of both new designs and for retrofit.
- System Performance—identifying the factors that affect system performance in general and how modifications to enhance security might affect system performance.
- Implementation Considerations—identifying the major factors in being able to implement the new requirements into the fleet as expeditiously as practicable, as well as making assessments of how long certain actions will take.
- Other Affected Areas—characterizing the parameters that resulted in the determination of a security vulnerability for lavatory COG installations and establishing criteria for evaluating other installations against those characteristics.

A sub-group was formed for each of the focus areas. Each subject was explored in detail with respect to how it would affect the content of new standards and the ability to implement those new standards into the existing fleet. Using the inputs from the sub-groups, the LOARC made recommendations in a final report, which is available in the docket for this rulemaking.

Some of the significant findings of the LOARC are summarized below. The LOARC concluded that security could be achieved through tamper-resistance alone, through a combination of tamper-resistance and active tamper-evidence (e.g., an alarm), or by switching to a different means of supplying oxygen in lieu of a COG. For new type designs, any of these approaches would be feasible, and some could be adopted with minimal impact on cost or weight.

As discussed below, the FAA is addressing the existing U.S. fleet via an AD. Although this proposal would not affect the existing U.S. fleet, the proposed standards would likely be used by international aviation authorities in approving installations for the retrofit of those fleets covered by their regulations. The discussion of the LOARC's conclusions regarding the implications for retrofit is included here, because it may aid the international community in reintroducing supplemental oxygen systems into affected airplane lavatories. From the standpoint of the existing U.S. fleet, the LOARC concluded that if a COG were to continue to be used, the majority of installations would likely require using a combination of the tamper-resistance and tamper-evidence approaches.

Incorporation of an active system to provide tamper-evidence would significantly increase complexity, cost, and time in implementing new designs into the existing U.S. fleet compared to other approaches for addressing the security concerns with COGs. This is because such a system must demonstrate a suitable level of reliability and not be susceptible to tampering. It would also require intervention on the part of the crew, which would result in new crew

[4] *See* AD 2012–11–09, Various Transport Category Airplanes (77 FR 38000, June 26, 2012).

[5] FAA–Regulations and Policies, Aviation Rulemaking Advisory Committee: Transport Airplane and Engine Issue Area Mechanical System Harmonization Working Group, Task 3—Airplane Ventilation Systems (66 FR 39074, July 26, 2001).

[6] Aerospace Recommended Practice (ARP) 5577, *Aircraft Lightning Direct Effects Certification,* dated September 30, 2002.

procedures and training. In addition, most of the modification work must be done on the airplane, which can lead to unscheduled time out of service. All of these factors contribute to the complexity of the design, the time it takes to install and certificate the design, and the costs associated with incorporating the design.

The LOARC concluded that switching to a different means of supplying oxygen might be the most efficient solution in a significant number of cases. However, because the COG is an optimized design for this application, there are currently no other types of systems available for the existing fleet. Nonetheless, some design approval holders may take this approach to avoid the issues associated with the active tamper-evidence approach.

The LOARC further concluded that there is limited space available to modify existing designs or to add features. There is some correlation between the size of the airplane and the space available, but in almost all cases, there are very small tolerances on the size and shape of an oxygen source (COG or other) that will fit. Similarly, although moving the supplemental oxygen supply to a different location may be feasible for new designs, relocating the supplemental oxygen supply in existing fleets is limited by the space available in existing designs. Relocating the supplemental oxygen supply can also complicate activating the oxygen flow, since that is generally accomplished by pulling on the oxygen mask. Nevertheless, the LOARC concluded that there are practical design solutions, and, as discussed below under ''Related Actions,'' the FAA has accepted the LOARC's recommendations.

D. New Technology

Irrespective of the method chosen to provide supplemental oxygen, there may be means to indirectly mitigate the space constraints by changing the way in which the supplemental oxygen dosage is measured. Historically, oxygen systems have provided a constant tracheal partial pressure of oxygen in accordance with § 25.1443. In order to maintain the requisite partial pressure, the system supplies oxygen at a given rate for a time period as determined by the routes being flown.

Recent developments in system technology have made a more direct approach feasible for meeting the physiological oxygen requirement. This approach measures the oxygen saturation level in the blood, known as SaO_2, instead of tracheal partial pressure. Because SaO_2 is more directly indicative of whether adequate oxygen is being supplied, this approach has merit. Further, for a system that can maintain adequate SaO_2, the total quantity of oxygen may be reduced, making the storage vessel smaller than one based on tracheal partial pressure. Using a smaller storage vessel makes such installations more practical by utilizing the existing locations. While there is no regulatory change proposed to incorporate SaO_2, the FAA will consider this approach as a basis for a finding of an equivalent level of safety to the oxygen quantity requirements of § 25.1443, Minimum mass flow of supplemental oxygen.

E. Related Actions

As previously discussed, the FAA began incorporating security measures into the airplane design in 2002. This proposal is keeping with that effort and reflects additional knowledge the FAA has acquired since then. The FAA recently superseded AD 2011–04–09 with AD 2012–11–09, Various Transport Category Airplanes (77 FR 38000, June 26, 2012) to include terminating action for installations meeting requirements of this proposal. To enable affected operators and modifiers to obtain approval of COG installations in advance of finalizing this proposed rulemaking, the FAA has also issued Policy Statement PS–ANM–25–04 regarding COGs using these proposed standards (based on the LOARC recommendations) as guidance for methods of compliance.[7] The policy statement enables operators to satisfy the requirements in AD 2012–11–09 while at the same time restoring a supplemental oxygen supply to lavatories.

III. Discussion of the Proposal

A. New Requirements for Chemical Oxygen Generator Installations (§ 25.795)

The current requirements for COGs relate primarily to protecting the airplane and passengers from the heat produced by the generators. These standards are in § 25.1450 and will continue to apply. The requirements of § 25.1450 address safety requirements for COGs when correctly installed and operating, as well as predictable failures. These existing requirements do not consider the deliberate misuse of a COG, or the potential effects of that misuse.

As previously discussed, § 25.795 addresses the incorporation of security measures into an airplane design, following similar standards adopted by ICAO. Currently, § 25.795 does not address COGs, as they were not considered at the time that regulation was adopted. Nevertheless, since the issues of concern stem from security considerations, the FAA has determined that the most logical location for these new COG standards is in § 25.795, Security considerations.

Again, the FAA is proposing standards based on recommendations from the LOARC. This proposal would amend § 25.795 by requiring that each COG or its installation must be designed to be secure by meeting at least one of the following four conditions: (1) Provide effective resistance to tampering; (2) provide an effective combination of resistance to tampering and active tamper-evident features; (3) installing in a location or manner where any attempt to access the COG would be immediately obvious; and (4) by a combination of these approaches, provided the Administrator finds it to be a secure installation. These conditions are discussed in further detail below.

There are two basic approaches to providing a secure lavatory COG installation: make a fully tamper-resistant installation, or incorporate a combined tamper-resistance and active tamper-evidence approach. Either of these approaches would be acceptable, but they involve different considerations.

A COG that is inaccessible would be considered a tamper-resistant COG for the purposes of § 25.795(d). This could be accomplished by locating the COG in an inaccessible area, or installing it in a more conventional location in such a way that access to it is not possible. The ARC considered whether to characterize such an installation as ''tamper proof'' rather than ''tamper resistant.'' However, a literal interpretation of ''tamper proof'' was considered to be too stringent, since there would always be some conceivable, albeit unreasonable, method to overcome tamper-proof features. Nonetheless, where tamper resistance is the sole method of providing security, it is intended that the features be very robust.

If the installation cannot rely solely on a tamper-resistance approach, it is acceptable to incorporate a combined tamper-resistance and active tamper-evidence approach, as previously stated. Using this combined approach would also necessitate changes to crew procedures and concurrent training to provide the same level of security. In this case, it is intervention that ultimately prevents misuse of the generator, so crew involvement is

[7] PS–ANM–25–04, Chemical Oxygen Generator Installations, dated December 21, 2011.

essential. The use of a tamper-evidence approach alone is unacceptable, since this relies entirely on intervention and does not improve the security of the COG itself. Neither the LOARC nor the FAA considers a tamper-evidence approach alone to adequately provide the needed security.

Another method of providing a secure installation is by locating the COG where any attempt to access it would be immediately obvious. In other words, the COG might be in a location where it is accessible, but anyone attempting to gain access to it would be immediately noticed before actually gaining access. This method would not be feasible inside lavatories since they are inherently isolated from view. This method is not the same as a sole tamper-evidence approach, which is only effective after access has begun and relies entirely on subsequent intervention.

There may be any number of combinations used of tamper-resistance and tamper-evidence approaches that would be effective. Applicants would need to make specific proposals and obtain FAA approval for a given approach. In addition, there may be methods of providing a secure installation that involve other elements that would also be acceptable but are not yet defined. The intent of these proposed requirements would allow for those possibilities, while at the same time set a clear performance goal.

In addition, acceptable methods of employing tamper-resistance and tamper-evidence approaches are discussed in proposed AC 25.795, Chemical Oxygen Generator Security Requirements. A copy of AC 25.795 will be placed in the docket for this action.

B. Alternative Approaches

The FAA and the LOARC recognize that the unique nature of COGs drives the identified security vulnerability. Although not proposed in this action, there are other means of delivering supplemental oxygen, such as a stored gas system (either centrally or locally installed), that could eliminate the security vulnerability. These systems are currently used in certain airplane types and could be easily incorporated for new airplane type designs.

C. General Provisions

Although the installation of COGs in lavatories prompted the various rulemaking activities discussed in this proposal, the LOARC recommended applying the new standards to COG installations anywhere on the airplane, and the FAA agrees with this recommendation. The LOARC concluded that if the characteristic that makes the COG a risk exists in locations other than in lavatories, then those locations should also be subject to the same approval criteria. The LOARC did not attempt to identify any specific locations, but it developed assessment criteria to identify such locations. However, since lavatories are currently without supplemental oxygen, those are the locations with the greatest interest. The LOARC also concluded that the solution for other areas might be different than for lavatories. This information is also included in the above-noted proposed AC 25.795.

D. Operational Requirements

The FAA has superseded AD 2011–04–09, with AD 2012–11–09 which includes requirements to retrofit the fleet of airplanes affected by AD 2011–04–09. Superseding AD 2012–11–09 also applies to airplanes in production for which compliance relief was provided by SFAR 111. The expiration of SFAR 111 will correspond to the compliance date of AD 2012–11–09, since the relief provided by the SFAR will no longer be necessary once operators have complied with that AD. As noted earlier, the FAA has issued Policy Statement PS–ANM–25–04 to facilitate the incorporation of designs meeting these proposed requirements. AD 2012–11–09 references that policy as a potential means of compliance.

The FAA does not intend any further mandate to retrofit oxygen generator systems because only lavatory COG installations that meet the criteria in Policy Statement PS–ANM–25–04 or in this NPRM would be approved. This means that even if there are some changes between this NPRM and the final rule, designs approved prior to the effective date of the final rule, in accordance with the policy, would not be affected. This applies to the design approval, not just to the airplanes on which the design is installed prior to the effective date of the final rule. Therefore, a design approved as an alternative means of compliance to AD 2011–04–09, or as a means of compliance to AD 2012–11–09, will still be approved for installation on airplanes after the effective date of this rule.

All affected airplanes need to be modified either in accordance with the standards in this proposed rule, or via a prior approval as discussed in Policy Statement PS–ANM–25–04 before the expiration date of SFAR 111. For new design approvals on airplanes subject to AD 2012–11–09, or applications for type design changes after the effective date of the final rule, the FAA will use the requirements of the newly adopted § 25.795(d) as the approval basis. For example, if a design is approved per Policy Statement PS–ANM–25–04, and an applicant applies to amend the design after the effective date of the final rule, the amended design must comply with the requirements of § 25.795(d). For transport airplanes that are not subject to proposed AD 2012–NM–004–AD (e.g., all-cargo airplanes), §§ 21.17 and 21.101, as applicable, will be used to determine whether the requirements of § 25.795(d) must be met.

E. Miscellaneous Amendments (§ 25.1450)

Section 25.1450, which contains the general standards for COGs, would be revised to refer to the new § 25.795(d), in addition to the existing standards for COGs.

IV. Regulatory Notices and Analyses

A. Regulatory Evaluation

Changes to Federal regulations must undergo several economic analyses. First, Executive Orders 12866 and 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States (U.S.). In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by state, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this proposed rule.

In conducting these analyses, FAA has determined that this proposed rule: (1) Would have benefits that justify its costs; (2) would not be an economically ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866; (3) would not be ''significant'' as defined in DOT's

Regulatory Policies and Procedures; (4) would not have a significant economic impact on a substantial number of small entities; (5) would not create unnecessary obstacles to the foreign commerce of the U.S.; and (6) would not impose an unfunded mandate on state, local, or tribal governments, or on the private sector by exceeding the threshold identified above.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order allows that a statement to that effect and the basis for it to be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this proposed rule. The reasoning for this determination follows:

This proposed rule would apply only to future type-certificated, large transport airplane models. It would not affect any current airplanes or future airplanes built under an existing type certificate. The proposed requirements are technologically feasible, as evidenced by two new type certificate programs (the Boeing 787 and the Airbus 350) that include designs that would be in compliance with this proposed rule. The FAA does not believe that compliance with the proposed rule for future type certificates would require extensive airplane redesign.

The FAA also believes that there would be little, if any, production airplane cost increases from complying with these proposed requirements. The FAA has learned that the emergency oxygen systems technology used in the Boeing 787 and the Airbus 350 could be transferrable to future type-certificate designs. Further, these technologies provide greater airline operational flexibility because they would allow the airplane to carry variable amounts of oxygen, which is not currently the case with COGs. Finally, future type-certificate designs could still use the COG for emergency oxygen in other parts of the airplane with an alternative oxygen source within the lavatories. The FAA requests comments on its conclusions and these issues.

Total Estimated Benefits and Costs of This Proposed Rule

The primary benefit from this proposed rule is that it would allow the airplane to continue to provide supplemental oxygen to individuals in lavatories during emergencies while ensuring that individuals in lavatories could not tamper with the supplemental oxygen system.

The FAA believes that the proposed rule would impose minimal costs because it would only apply to new type-certificated airplane models so that the manufacturer would be able to design the most cost-effective emergency oxygen system for the model before construction would start on the first airplane. Again, the Boeing 787 and the Airbus 350 are two new type-certificate projects which include designs for supplemental oxygen systems that would be in compliance with this proposed rule. The FAA believes that similar emergency oxygen systems could be designed for future type-certificated airplanes at a minimal cost.

The FAA requests comments on this initial conclusion of minimal expected costs for future type-certificated airplane models.

Who is affected by this rule?

This rule affects all manufacturers of large transport category, certificated airplanes under part 25.

Source(s) of Information

The primary source of information is the LOARC, which included part 25 airplane manufacturers, other aviation safety regulatory agencies, manufacturers of oxygen generating systems, airlines, a pilot union, and a flight attendant union.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed rule would have a significant economic impact on a substantial number of small entities. If the agency determines that it would, the agency must prepare an initial regulatory flexibility analysis as described in the RFA. However, if an agency determines that a proposed rule would not have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify, and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Small Business Administration defines a small airplane manufacturer as one that employs fewer than 1,500 people. As all the affected airplane manufacturers employ more than 1,500 people, this proposed rule would not affect small entities. Therefore, the FAA certifies that this proposed rule, if promulgated, would not have a significant impact on a substantial number of small entities. Specifically, the FAA requests comments on whether the proposed rule would create any specific compliance costs unique to small entities. Please provide detailed economic analysis to support any cost claims. The FAA also invites comments regarding other small-entity concerns with respect to this proposed rule.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States (U.S.). Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the U.S., so long as the standards have a legitimate domestic objective, such as protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this proposed rule and determined that it would improve safety and, therefore, is not an unnecessary obstacle to international trade.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector; such

a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $143.1 million in lieu of $100 million. This proposed rule does not contain such a mandate; therefore, the requirements of Title II do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there would be no new requirement for information collection associated with this proposed rule.

F. International Compatibility and Cooperation

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these proposed regulations.

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609, and has determined that this action would have no effect on international regulatory cooperation.

G. Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312f and involves no extraordinary circumstances.

V. Executive Order Determinations

A. Executive Order 12866

See the ''Regulatory Evaluation'' discussion in the ''Regulatory Notices and Analyses'' section elsewhere in this preamble.

B. Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. The agency has determined that this action would not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, would not have Federalism implications.

C. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it would not be a ''significant energy action'' under the executive order and would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

VI. Additional Information

A. Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The agency also invites comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The agency may change this proposal in light of the comments it receives.

Proprietary or Confidential Business Information: Commenters should not file proprietary or confidential business information in the docket. Such information must be sent or delivered directly to the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document, and marked as proprietary or confidential. If submitting information on a disk or CD ROM, mark the outside of the disk or CD ROM, and identify electronically within the disk or CD ROM the specific information that is proprietary or confidential.

Under 14 CFR 11.35(b), when the FAA is aware of proprietary information filed with a comment, the agency does not place it in the docket. It is held in a separate file to which the public does not have access, and the FAA places a note in the docket that it has received it. If the FAA receives a request to examine or copy this information, it treats it as any other request under the Freedom of Information Act (5 U.S.C. 552). The FAA processes such a request under Department of Transportation procedures found in 49 CFR part 7.

B. Availability of Rulemaking Documents

An electronic copy of rulemaking documents may be obtained from the Internet by—

1. Searching the Federal eRulemaking Portal (*http://www.regulations.gov*);
2. Visiting the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies* or
3. Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html.*

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Commenters must identify the docket or notice number of this rulemaking.

All documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, may be accessed from the Internet through the Federal eRulemaking Portal referenced in item (1) above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The Proposed Amendments

In consideration of the foregoing, the Federal Aviation Administration proposes to amend chapter I of Title 14, Code of Federal Regulations as follows:

PART 25—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES

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

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

■ 2. Amend § 25.795 by redesignating paragraphs (d) and (e) as (e) and (f) respectively, and by adding a new paragraph (d) to read as follows:

§ 25.795 Security considerations.

* * * * *

(d) Each chemical oxygen generator or its installation must be designed to be secure from deliberate manipulation by one of the following:

(1) By providing effective resistance to tampering,

(2) By providing an effective combination of resistance to tampering and active tamper-evident features,

(3) By installation in a location or manner whereby any attempt to access the generator would be immediately obvious, or

(4) By a combination of approaches specified in paragraphs (d)(1), (d)(2) and (d)(3) of this section that the Administrator finds provides a secure installation.

* * * * *

■ 3. Amend § 25.1450 by adding a new paragraph (b)(3) to read as follows:

§ 25.1450 Chemical oxygen generators.

* * * * *

(b) * * *

(3) Except as provided in SFAR 109, each chemical oxygen generator installation must meet the requirements of § 25.795(d).

* * * * *

Issued in Washington, DC, on January 3, 2013.

Dorenda D. Baker,

Director, Aircraft Certification Service.

[FR Doc. 2013–00238 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1316; Directorate Identifier 2012–NM–186–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to revise an existing airworthiness directive (AD) that applies to all The Boeing Company Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. The existing AD requires repetitive inspections to detect cracking in the web of the aft pressure bulkhead at body station 1016 at the aft fastener row attachment to the ''Y'' chord, various inspections for discrepancies at the aft pressure bulkhead, and related investigative and corrective actions if necessary. Since we issued that AD, we have determined that certain inspection and repair conditions must be clarified, as well as certain paragraph references related to the terminating action. This proposed AD would clarify certain actions specified in the existing AD. We are proposing this AD to detect and correct fatigue cracking, which could result in rapid decompression of the fuselage.

DATES: We must receive comments on this proposed AD by February 25, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

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

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Alan Pohl, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6450; fax: (425) 917–6590; email: *alan.pohl@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–1316; Directorate Identifier 2012–NM–186–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On August 31, 2012, we issued AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012), for all The Boeing Company Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. (AD 2012–18–13 superseded AD 99–08–23, Amendment 39–11132 (64 FR 19879, April 23, 1999).) That AD requires repetitive inspections to detect cracking in the web of the aft pressure bulkhead at body station 1016 at the aft fastener row attachment to the ''Y'' chord, various inspections for discrepancies at the aft pressure bulkhead, and related investigative and corrective actions if necessary. That AD resulted from several reports of fatigue cracking at that location. We issued that AD to detect and correct such fatigue cracking, which could result in rapid decompression of the fuselage.

Actions Since Existing AD (77 FR 57990, September 19, 2012) Was Issued

Since we issued AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012), we have determined that a certain inspection and repair required by paragraph (l) of AD 2012–18–13 must be clarified.

Paragraph (l) of the existing AD specifies to inspect for ''incorrectly drilled fasteners and elongated fasteners'' (as well as for cracking and corrosion), and also that ''if any crack, incorrectly drilled fastener, elongated fastener, or corrosion is found, before further flight, repair the web * * * .'' However, the intent of paragraph (l) of AD 2012–18–13 with regard to this inspection is to inspect the fastener holes, not the fasteners. This also reflects the corresponding instructions specified in Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011 (which is the appropriate source of service information for accomplishing the actions required by paragraph (l) of AD 2012–18–13). It is not possible to inspect ''fasteners'' using the procedures specified in Part III of the Accomplishment Instructions of that service bulletin. That is, the inspection procedures in that service bulletin apply to ''fastener holes'' and cannot be used to inspect ''fasteners.'' Therefore, we have revised paragraph (l) of this proposed AD to specify to inspect, in part, for ''incorrectly drilled fastener holes'' and ''elongated fastener holes,'' as well as to specify that ''if any crack, incorrectly drilled fastener hole, elongated fastener hole, or corrosion is found, before further flight, repair * * *.''

In addition, we also find it necessary to revise certain paragraph references related to the terminating action, as specified in paragraph (s) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012). Paragraph (s) of AD 2012–18–13 states that accomplishing the requirements of paragraphs (k) through (q) of that AD terminates the requirements of paragraphs (g) through (j) of that AD. However, we have determined that it is only necessary to accomplish the requirements of paragraph (k) of that AD in order to terminate the requirements of paragraphs (g) through (j) of that AD. We have revised paragraph (s) of this AD accordingly.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would retain all requirements of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012). This proposed AD would clarify certain actions in paragraph (l) of this proposed AD, would revise certain paragraph references related to the terminating action in paragraph (s) of this proposed AD, and would add new paragraph (u)(5) to this proposed AD as a new provision of the alternative method of compliance (AMOC) paragraph to allow the continued use of AMOCs approved previously in accordance with AD 2012–18–13.

Costs of Compliance

We estimate that this proposed AD affects 566 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Low frequency eddy current (LFEC) inspection [retained action from AD 99–08–23, Amendment 39–11132 (64 FR 19879, April 23, 1999)].	8 work-hours × $85 per hour = $680.	$0	$680	$384,880
Detailed visual inspection [retained action from AD 99-08-23, Amendment 39–11132 (64 FR 19879, April 23, 1999)].	2 work-hours × $85 per hour = $170.	$0	$170	$96,220
Detailed, high frequency eddy current inspection (HFEC), and LFEC inspections of the web at the ''Y'' chord of the bulkhead, the web located under the outer circumferential tear strap, the ''Z'' stiffeners at the dome cap, and existing repairs [retained actions from AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012)].	Up to 60 work-hours × $85 per hour = $5,100 per inspection cycle.	$0	Up to $5,100 per inspection cycle.	Up to $2,886,600 per inspection cycle.

We estimate the following costs to do any necessary on-condition inspections that would be required based on the results of the initial inspection. We have no way of determining the number of aircraft that might need these inspections:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Detailed and HFEC inspections for oil-canning	1 work-hour × $85 per hour = $85	$0	$85
LFEC or HFEC inspection for cracking	2 work-hours × $85 per hour = $170.	$0	$170

We have received no definitive data that would enable us to provide cost estimates for the crack repairs specified in this proposed AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

The Boeing Company: Docket No. FAA–2012–1316; Directorate Identifier 2012–NM–186–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by February 25, 2013.

(b) Affected ADs

This AD revises AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012).

(c) Applicability

This AD applies to all The Boeing Company Model 737–100, –200, –200C, –300, –400, and –500 series airplanes, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by several reports of fatigue cracks in the aft pressure bulkhead. We are issuing this AD to detect and correct such fatigue cracking, which could result in rapid decompression of the fuselage.

(f) Compliance

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

(g) Retained Initial Inspection

This paragraph restates the initial inspection required by paragraph (g) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012). Perform either inspection specified by paragraph (g)(1) or (g)(2) of this AD at the time specified in paragraph (h) of this AD.

(1) Perform a low frequency eddy current (LFEC) inspection from the aft side of the aft pressure bulkhead to detect discrepancies (including cracking, misdrilled fastener holes, and corrosion) of the web of the upper section of the aft pressure bulkhead at body station 1016 at the aft fastener row attachment to the ''Y'' chord, from stringer 15 left (S–15L) to stringer 15 right (S–15R), in accordance with Boeing 737 Nondestructive Test Manual D6–37239, Part 6, Section 53–10–54, dated December 5, 1998.

(2) Perform a detailed visual inspection of the aft fastener row attachment to the ''Y'' chord from the forward side of the aft pressure bulkhead to detect discrepancies (including cracking, misdrilled fastener holes, and corrosion) of the entire web of the aft pressure bulkhead at body station 1016.

(h) Retained Compliance Times

This paragraph restates the compliance times specified in paragraph (h) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012). Perform the inspection required by paragraph (g) of this AD at the time specified in paragraph (h)(1), (h)(2), or (h)(3) of this AD, as applicable.

(1) For airplanes that have accumulated 40,000 or more total flight cycles as of May 10, 1999 (the effective date of AD 99–08–23, Amendment 39–11132 (64 FR 19879, April 23, 1999)): Inspect within 375 flight cycles or 60 days after May 10, 1999 (the effective date of AD 99–08–23), whichever occurs later.

(2) For airplanes that have accumulated 25,000 or more total flight cycles and fewer than 40,000 total flight cycles as of May 10, 1999 (the effective date of AD 99–08–23, Amendment 39–11132 (64 FR 19879, April 23, 1999)): Inspect within 750 flight cycles or 90 days after May 10, 1999 (the effective date of AD 99–08–23), whichever occurs later.

(3) For airplanes that have accumulated fewer than 25,000 total flight cycles as of May 10, 1999 (the effective date of AD 99–08–23, Amendment 39–11132 (64 FR 19879, April 23, 1999)): Inspect prior to the accumulation of 25,750 total flight cycles.

(i) Retained Repetitive Inspections

This paragraph restates the repetitive inspections required by paragraph (i) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012). Within 1,200 flight cycles after performing the initial inspection required by paragraph (g) of this AD, and thereafter at intervals not to exceed 1,200 flight cycles: Perform either inspection specified by paragraph (g)(1) or (g)(2) of this AD.

(j) Retained Corrective Actions

This paragraph restates the corrective actions required by paragraph (j) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012). If any discrepancy is detected during any inspection required by paragraph (g), (h), or (i) of this AD: Prior to further flight, accomplish the actions specified by paragraphs (j)(1) and (j)(3) of this AD, and paragraph (j)(2) of this AD, if applicable.

(1) Perform a high frequency eddy current inspection from the forward side of the bulkhead to detect cracking of the web at the ''Y'' chord attachment, around the entire periphery of the ''Y'' chord, in accordance with Boeing 737 Nondestructive Test Manual D6–37239, Part 6, Section 51–00–00, Figure 23, dated November 5, 1995.

(2) If the most recent inspection performed in accordance with paragraph (g) of this AD was not a detailed visual inspection: Accomplish the actions specified by paragraph (g)(2) of this AD. If the inspection was a detailed visual inspection, it is not necessary to repeat that inspection prior to further flight.

(3) Repair any discrepancy such as cracking or corrosion or misdrilled fastener holes using a method approved in accordance with the procedures specified in paragraph (u) of this AD.

(k) Retained Inspections of the Web at the ''Y'' Chord Upper Bulkhead From S–15L to S–15R

This paragraph restates the inspections of the web at the ''Y'' chord upper bulkhead from S–15L to S–15R required by paragraph (k) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012). At the later of the times specified in paragraphs (k)(1) and (k)(2) of this AD: Do detailed and LFEC inspections of the aft side of the bulkhead web, or do detailed and high frequency eddy current (HFEC) inspections from the forward side of the bulkhead, and do all applicable related investigative and corrective actions; in accordance with Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, except

as required by paragraphs (r)(1) and (r)(3) of this AD. Inspect for cracks, incorrectly drilled fastener holes, and elongated fastener holes. Do all applicable related investigative and corrective actions before further flight. Repeat the inspections at the applicable times specified in table 1 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011.

(1) Prior to the accumulation of 25,000 total flight cycles.

(2) Except as required by paragraphs (r)(2) and (r)(4) of this AD, at the later of the times specified in the ''Compliance Time'' column in table 1 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011.

(l) Retained Inspections of the Web at the ''Y'' Chord in the Lower Bulkhead From S–15L to S–15R With Revised Inspection and Repair Conditions

This paragraph restates the inspections of the web at the ''Y'' chord in the lower bulkhead from S–15L to S–15R required by paragraph (l) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012), with revised inspection and repair conditions. Except as required by paragraphs (r)(2) and (r)(5) of this AD, at the applicable time specified in table 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011: Do detailed and eddy current inspections of the web from the forward or aft side of the bulkhead for cracks, incorrectly drilled fastener holes, and elongated fastener holes, in accordance with Part III of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, except as required by paragraphs (r)(1) and (r)(3) of this AD. If any crack, incorrectly drilled fastener hole, elongated fastener hole, or corrosion is found, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (u) of this AD. Repeat the inspections at the applicable times specified in table 2 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011.

(m) Retained One-Time Inspection Under the Tear Strap

This paragraph restates the one-time inspection under the tear strap required by paragraph (m) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012). Except as required by paragraphs (r)(2) and (r)(5) of this AD, at the applicable time specified in table 3 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011: Do a one-time LFEC inspection for cracks on the aft side of the bulkhead of the web located under the outer circumferential tear strap, or do a one-time HFEC inspection for cracks from the forward side of the bulkhead of the web located under the outer circumferential tear strap, in accordance with Part II of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, except as required by paragraph (r)(1) of this AD. If any cracking is found, before further flight, repair the bulkhead using a method approved in accordance with the procedures specified in paragraph (u) of this AD.

(n) Retained Inspection for Oil-Canning

This paragraph restates the inspection for oil-canning required by paragraph (n) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012). Except as required by paragraph (r)(2) of this AD, at the applicable time specified in table 4 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011: Do a detailed inspection from the aft side of the bulkhead for oil-canning and do all applicable related investigative and corrective actions, in accordance with Part II of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, except as required by paragraph (r)(1) of this AD. Do all related investigative and corrective actions before further flight. Thereafter, repeat the inspection at the applicable times specified in table 4 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011. For oil-cans found within the limits specified in Part II of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011: In lieu of installing the repair before further flight, at the applicable times specified in table 4 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, do initial and repetitive detailed and HFEC inspections for cracks of the oil-canning and install the repair, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011. If any crack is found, before further flight, repair the cracking using a method approved in accordance with the procedures specified in paragraph (u) of this AD. Installing the repair terminates the repetitive inspections for cracks.

(o) Retained Inspection of the Dome Cap at the Center of the Bulkhead

This paragraph restates the inspection of the dome cap at the center of the bulkhead required by paragraph (o) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012). Except as required by paragraphs (r)(2) and (r)(5) of this AD, at the applicable time specified in table 5 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011: Do an eddy current inspection to detect any cracking of the dome cap at the center of the bulkhead, and do all applicable corrective actions, in accordance with Part IV of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011. Do all corrective actions before further flight. Repeat the inspection at the times specified in table 5 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011.

(p) Retained Inspection of the Forward Flange of the ''Z'' Stiffeners at the Dome Cap

This paragraph restates the inspection of the forward flange of the ''Z'' stiffeners at the dome cap required by paragraph (p) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012). Except as required by paragraphs (r)(2) and (r)(5) of this AD, at the applicable time specified in table 6 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011: Do an HFEC inspection to detect any cracking of the ''Z'' stiffener flanges at the dome cap in the center of the bulkhead, in accordance with Part V of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, except as required by paragraph (r)(1) of this AD. If any crack is found, before further flight, repair the flanges using a method approved in accordance with the procedures specified in paragraph (u) of this AD. Repeat the inspection at the applicable times specified in table 6 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011.

(q) Retained Inspection for Existing Repairs on the Bulkhead

This paragraph restates the inspection for existing repairs on the bulkhead required by paragraph (q) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012). Except as required by paragraph (r)(2) of this AD, at the applicable time specified in table 7 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011: Do a detailed inspection of the bulkhead web and stiffeners for existing repairs, in accordance with Part VI of the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, except as required by paragraph (r)(1) of this AD.

(1) If any repair identified in the ''Condition'' column of table 8 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, is found and the ''Reference'' column refers to Appendix A, B, C, or D of that service bulletin: At the applicable times specified in table 8 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, except as required by paragraph (r)(2) of this AD, do an HFEC inspection or an LFEC inspection of the web for cracking, in accordance with Appendix A, B, C, or D, as applicable, of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011. If any cracking is found, before further flight, repair using a method approved in accordance with the procedures specified in paragraph (u) of this AD. Repeat the inspections thereafter at the applicable intervals specified in table 8 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011.

(2) If any repair identified in the ''Condition'' column of table 8 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, is found and the ''Reference'' column refers to Appendix E of that service bulletin: At the applicable times specified in table 8 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, except as required by paragraph (r)(2) of this AD, remove the repair and replace with a new repair, in accordance with Appendix E of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011.

(3) If any non-SRM (structural repair manual) repair is found and the repair does not have FAA-approved damage tolerance inspections, except as required by paragraph (r)(2) of this AD, at the applicable time specified in table 7 of Paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011: Contact the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle Aircraft Certification Office, for damage tolerance inspections. Do those damage tolerance inspections at the times given using a method approved in accordance with the procedures specified in paragraph (u) of this AD.

(r) Retained Exceptions to the Service Information

This paragraph restates the exceptions to the service information required by paragraph (r) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012).

(1) Where Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, specifies to contact Boeing for repair instructions: Before further flight, repair using a method approved in accordance with the procedures specified in paragraph (u) of this AD.

(2) Where Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, specifies a compliance time ''after the date of Revision 1 to this service bulletin,'' ''from the date of Revision 3 of this service bulletin,'' ''after the date of Revision 3 to this service bulletin,'' or ''of the effective date of AD 99–08–23,'' this AD requires compliance within the specified compliance time after October 24, 2012 (the effective date of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012)).

(3) Access and restoration procedures specified in the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, are not required by this AD. Operators may do those procedures following their maintenance practices.

(4) Where table 1 of paragraph 1.E., ''Compliance'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, specifies a compliance time relative to actions done ''in accordance with paragraph (a)(2) of AD 99–08–23,'' this AD requires compliance within the specified compliance time relative to actions specified in paragraph (g)(2) of this AD.

(5) Where the Condition columns in tables 2, 3, 5, and 6 of paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1214, Revision 4, dated December 16, 2011, refer to total flight cycles, this AD applies to the airplanes with the specified total flight cycles as of October 24, 2012 (the effective date of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012)).

(s) Retained Terminating Action With Revised Paragraph Reference

This paragraph restates the terminating action specified in paragraph (s) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012), with a revised paragraph reference. Accomplishment of the requirements in paragraph (k) of this AD terminates the requirements of paragraphs (g) through (j) of this AD.

(t) Credit for Previous Actions

This paragraph restates the credit for previous actions specified by paragraph (t) of AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012). This paragraph provides credit for the actions required by paragraphs (k) through (s) of this AD, if the actions were performed before the effective date of this AD using the service bulletins specified in paragraphs (t)(1) through (t)(4) of this AD.

(1) Boeing Alert Service Bulletin 737–53A1214, dated June 17, 1999.

(2) Boeing Alert Service Bulletin 737–53A1214, Revision 1, dated June 22, 2000.

(3) Boeing Alert Service Bulletin 737–53A1214, Revision 2, dated May 24, 2001.

(4) Boeing Alert Service Bulletin 737–53A1214, Revision 3, dated January 19, 2011.

(u) Alternative Methods of Compliance (AMOCs)

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

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

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

(4) AMOCs approved previously in accordance with AD 99–08–23, Amendment 39–11132 (64 FR 19879, April 23, 1999), are approved as AMOCs for the corresponding provisions of this AD.

(5) AMOCs approved previously in accordance with AD 2012–18–13, Amendment 39–17190 (77 FR 57990, September 19, 2012), are approved as AMOCs for the corresponding provisions of this AD.

(v) Related Information

(1) For more information about this AD, contact Alan Pohl, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6440; fax: (425) 917–6590; email: *alan.pohl@faa.gov*.

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

Issued in Renton, Washington, on January 2, 2013.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–00186 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1217; Directorate Identifier 2012–NE–39–AD]

RIN 2120–AA64

Airworthiness Directives; International Aero Engines AG Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain International Aero Engines AG (IAE), V2525–D5 and V2528–D5 turbofan engines, with a certain number (No.) 4 bearing internal scavenge tube and a certain No. 4 bearing external scavenge tube installed. This proposed AD was prompted by a report of an engine under-cowl fire and commanded in-flight shutdown. This proposed AD would require replacement of certain part number (P/N) No. 4 bearing internal scavenge tubes, and alignment checks of certain P/N No. 4 bearing external scavenge tubes. We are proposing this AD to prevent engine fire and damage to the airplane.

DATES: We must receive comments on this proposed AD by March 11, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this proposed AD, contact International Aero Engines, 628 Hebron Avenue, Suite 400, Glastonbury, CT 06033; phone: 860–368–3823; fax: 860–755–6876. You may view the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Martin Adler, Aerospace Engineer, Engine & Propeller Directorate, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7157; fax: 781–238–7199; email: *martin.adler@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–1217; Directorate Identifier 2012–NE–39–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We received a report of a fire warning on an IAE V2525 turbofan engine shortly after takeoff. The engine experienced an under-cowl fire and a commanded in flight shutdown. Investigation revealed that this event was caused by failure of the No. 4 bearing internal scavenge tube due to high stress. A misalignment of the No. 4 bearing external scavenge tube was noted to be a contributing factor. This proposed AD would direct the replacement of all No. 4 bearing internal scavenge tubes, P/N 2A2074–01. This proposed AD would also require checking the alignment of the No. 4 bearing external scavenge tube, P/N 6A5254, and if it fails the check, replacement of the external scavenge tube. These conditions, if not corrected, could result in engine fire and damage to the airplane.

Relevant Service Information

We reviewed IAE Service Bulletin (SB) No. V2500–ENG–72–0630, Revision 1, dated September 20, 2012. The SB describes procedures for replacement of the No. 4 bearing internal scavenge tube and for verification of proper alignment of the No. 4 bearing external scavenge tube.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require the replacement of the No. 4 bearing internal scavenge tube, P/N 2A2074–01, at the next combustor module-level exposure. This AD would also require verification of the alignment and installation of the No. 4 bearing external scavenge tube, P/N 6A5254, relative to the tube-to-boss elbow, P/N 2A2514 or P/N 2A3951–01, on the No. 4 bearing internal scavenge tube, P/N 2A2074–01.

Differences Between the Proposed AD and the Service Information

The SB requires replacement of the No. 4 bearing internal scavenge tube, P/N 2A2074–01, at each combustor module-level exposure. This AD would require replacement at each combustor module-level exposure after 10,000 cycles.

Interim Action

We consider this proposed AD interim action. The design approval holder is currently developing a modification that will address the unsafe condition identified in this AD. Once this modification is developed, approved, and available, we might consider additional rulemaking.

Costs of Compliance

We estimate that this proposed AD would affect 123 engines installed on airplanes of U.S. registry. We estimate that it would take 1.5 hours per engine to replace the No. 4 bearing internal scavenge tube, and 3 hours per engine to replace the No. 4 bearing external scavenge tube. Required parts would cost $25,251 per engine. The average labor rate is $85 per hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $3,152,921.

Authority for This Rulemaking

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

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

Regulatory Findings

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

responsibilities among the various levels of government.

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

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

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

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

International Aero Engines AG: Docket No. FAA–2012–1217; Directorate Identifier 2012–NE–39–AD.

(a) Comments Due Date

We must receive comments by March 11, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to International Aero Engines AG (IAE), V2525–D5 and V2528–D5 turbofan engines, serial numbers V20001 through V20285, with number (No.) 4 bearing internal scavenge tube, part number (P/N) 2A2074–01 and No. 4 bearing external scavenge tube, P/N 6A5254 installed.

(d) Unsafe Condition

This AD was prompted by a report of an engine under-cowl fire, commanded in-flight shutdown, and damage to the airplane. We are issuing this AD to prevent engine fire and damage to the airplane

(e) Compliance

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

(f) No. 4 Bearing Internal Scavenge Tube, P/N 2A2074–01, Replacement

Replace the No. 4 bearing internal scavenge tube, P/N 2A2074–01, at each combustor module-level exposure after the No. 4 bearing internal scavenge tube has accumulated 10,000 flight cycles (FCs) since new. If the FCs on the tube cannot be confirmed, replace the tube at each combustor module-level exposure.

(g) No. 4 Bearing External Scavenge Tube, P/N 6A5254, Installation

At each installation, check the alignment of the No. 4 bearing external scavenge tube, P/N 6A5254, in accordance with paragraphs 3.A. PART 2, of IAE NMSB No. V2500–ENG–72–0630, Revision 1, dated September 20, 2012. If the tube is misaligned, replace with a new tube.

(h) Definitions

Combustor module level exposure is defined as separation of the combustor case and the compressor case flanges.

(i) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs to this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(j) Related Information

(1) For more information about this AD, contact Martin Adler, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; email: *martin.adler@faa.gov,* phone: 781–238–7779; fax: 781–238–7199.

(2) For service information identified in this AD, contact International Aero Engines AG, 628 Hebron Avenue, Suite 400, Glastonbury, CT 06033; phone: 860–368–3823; fax: 860–755–6876. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington, Massachusetts, on December 28, 2012.

Colleen M. D'Alessandro,

Assistant Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2013–00212 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

Boundary Expansion of Cordell Bank and Gulf of the Farallones National Marine Sanctuaries; Intent To Prepare Draft Environmental Impact Statement; Scoping Meetings

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

ACTION: Correction.

SUMMARY: On December 21, 2012, NOAA published a notice of intent in the **Federal Register** to revise the boundaries of Cordell Bank and Gulf of the Farallones national marine sanctuaries. This document makes a correction to the dates of the scoping meetings. The end of the scoping period remains March 1, 2013.

DATES: NOAA will accept public comments on the notice of intent published at 77 FR 75601 (December 21, 2012) through March 1, 2013.

Dates for scoping meetings are:

(1) January 24, 2013 at the Bodega Bay Grange Hall.

(2) February 12, 2013 at the Point Arena High School.

(3) February 13, 2013 at the Gualala Community Center.

ADDRESSES: You may submit comments on this document, identified by NOAA–NOS–2012–0228, by any of the following methods:

• *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NOS-2012-0228,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.

• *Mail:* Maria Brown, Sanctuary Superintendent, Gulf of the Farallones National Marine Sanctuary, 991 Marine Drive, The Presidio, San Francisco, CA 94129.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NOAA. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information

submitted voluntarily by the sender will be publicly accessible. NOAA will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Maria Brown at *Maria.Brown@noaa.gov* or 415–561–6622; or Dan Howard at *Dan.Howard@noaa.gov* or 415–663–0314.

SUPPLEMENTARY INFORMATION:

Public Scoping Meetings: NOAA intends to conduct a series of public scoping meetings to collect public comments. These meetings will be held on the following dates and at the following locations and times:

1. Bodega Bay, CA

Date: January 24, 2013.
Location: Bodega Bay Grange Hall.
Address: 1370 Bodega Avenue, Bodega Bay, CA 94923.
Time: 6 p.m.

2. Pt. Arena, CA

Date: February 12, 2013.
Location: Point Arena High School.
Address: 185 Lake Street, Point Arena, CA 95468.
Time: 6 p.m.

3. Gualala, CA

Date: February 13, 2013.
Location: Gualala Community Center.
Address: 47950 Center Street, Gualala, CA 95445.
Time: 6 p.m.

Authority: 16 U.S.C. 1431 *et seq.;* 16 U.S.C. 470.

Dated: December 27, 2012.

Daniel J. Basta,

Director for the Office of National Marine Sanctuaries.

[FR Doc. 2012–31655 Filed 1–8–13; 8:45 am]

BILLING CODE 3510–NK–P

FEDERAL TRADE COMMISSION

16 CFR Part 305

[3084–AB15]

Disclosures Regarding Energy Consumption and Water Use of Certain Home Appliances and Other Products Required Under the Energy Policy and Conservation Act (''Appliance Labeling Rule'')

AGENCY: Federal Trade Commission (''FTC'' or ''Commission'').

ACTION: Proposed Rule and Proposed Conditional Exemption.

SUMMARY: The Commission proposes to amend the Appliance Labeling Rule (''Rule'') by updating ranges of comparability and unit energy cost figures for many EnergyGuide labels. The Commission also seeks comment on a proposed exemption request by the Association of Home Appliance Manufacturers (AHAM) to help consumers compare the labels on refrigerators and clothes washers after the implementation of upcoming changes to the Department of Energy test procedures for those products.

DATES: Comments must be received by March 1, 2013.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Energy Label Ranges, Matter No. R611004'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/energylabelranges* by following the instructions on the Web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex U), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Hampton Newsome, (202) 326–2889, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Room M–8102B, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission issued the Appliance Labeling Rule (''Rule'') in 1979,[1] in response to a directive in the Energy Policy and Conservation Act of 1975 (EPCA).[2] The Rule requires energy labeling for major home appliances and other consumer products, to help consumers compare competing models. When first published, the Rule applied to eight categories: refrigerators, refrigerator-freezers, freezers, dishwashers, water heaters, clothes washers, room air conditioners, and furnaces. The Commission subsequently expanded the Rule's coverage to include central air conditioners, heat pumps, plumbing products, lighting products, ceiling fans, and televisions. The Commission is currently conducting a regulatory review of the Rule.[3]

The Rule requires manufacturers to attach yellow EnergyGuide labels on many of these products, and prohibits retailers from removing the labels or rendering them illegible. In addition, the Rule directs sellers, including retailers, to post label information on Web sites and in paper catalogs from which consumers can order products. EnergyGuide labels for covered appliances must contain three key disclosures: estimated annual energy cost (for most products); a product's energy consumption or energy efficiency rating as determined from Department of Energy (DOE) test procedures; and a comparability range displaying the highest and lowest energy costs or efficiency ratings for all similar models. For energy cost calculations, the Rule specifies national average costs for applicable energy sources (*e.g.,* electricity, natural gas, oil) as calculated by DOE. The Rule sets a five-year schedule for updating range of comparability and annual energy cost information.[4] The Commission updates the range information based on manufacturer data submitted pursuant to the Rule's reporting requirements.

II. Proposed Amendments

As discussed below, the Commission proposes to update the comparability ranges (Appendices A–J to Part 305) and national average energy cost figures (Appendix K to Part 305) for many EnergyGuide labels consistent with its five-year schedule. This Notice also contains several minor, proposed revisions and updates to the label's content, some of which were suggested by commenters as part of the Commission's ongoing regulatory review. To avoid requiring multiple label revisions within a short time period, the Commission proposes to require these label content changes concurrently with the range updates. Finally, the Commission proposes to grant a request from the Association of Home Appliance Manufacturers (AHAM) seeking an exemption related to labeling requirements for refrigerators, refrigerator-freezers, and freezers (hereinafter referred to as ''refrigerators''), and clothes washers to

[1] 44 FR 66466 (Nov. 19, 1979) (Rule's initial promulgation).

[2] 42 U.S.C. 6294. EPCA also requires the Department of Energy (''DOE'') to develop test procedures that measure how much energy appliances use, and to determine the representative average cost a consumer pays for different types of energy.

[3] 77 FR 15298 (Mar. 15, 2012) (regulatory review). The Commission currently has two other open proceedings related to other proposed amendments for the Rule. *See* 77 FR 33337 (June 6, 2012) (proposed changes to furnace and central air conditioner labels); 76 FR 45715 (Aug. 1, 2011) (proposed expanded light bulb coverage).

[4] 16 CFR 305.10.

address recent DOE test procedure changes.

A. Comparability Range and Energy Cost Revisions

In accordance with the Rule's five-year schedule for label updates, the Commission publishes proposed revisions to the comparability range and energy cost information for many products bearing EnergyGuide labels.[5] The comparability ranges (*i.e.,* scales) show the highest and lowest energy costs or energy efficiency ratings of models similar to the labeled product. The Commission derives these ranges from annual data submitted by manufacturers.[6] In addition, the Commission is updating the average energy cost figures (*e.g.,* 12 cents per kWh) manufacturers must use to calculate a model's estimated energy cost for the label based on national average cost figures published by DOE.[7] To effect these changes, the Commission proposes amendments to the applicable tables in the Rule's appendices. Manufacturers must begin using this new information within 90 days after publication of a final notice in this proceeding. To aid manufacturers in transitioning to the new ranges, FTC staff will provide sample label template files on its Web site.[8]

At this time, the Commission does not propose to alter range and cost information for EnergyGuide labels on four product categories (refrigerators, clothes washers, furnaces and central air conditioners, and televisions) given upcoming DOE regulatory changes applicable to those products.[9] Instead, the Commission proposes waiting to synchronize the changes with the impending DOE regulations. By doing so, the Commission would avoid several label changes in a short time period, a practice that could confuse consumers and burden manufacturers.

B. Proposed Revisions and Updates to Label Content

In addition to the proposed range and cost updates, the proposed amendments contain five minor label changes to simplify and improve the disclosures. The Commission also seeks comment on the possible elimination of range information on television labels. Finally, the Commission seeks comment on the potential increase in the frequency of changes to range and cost information on all EnergyGuide labels.

First, consistent with recently implemented FTC labeling requirements for light bulb and television labels,[10] the proposed rule rounds to the nearest cent the national average electricity (12 cents per kWh) and natural gas ($1.06 per therm) cost figures (in Appendix K) used to calculate the label's estimated annual operating (energy) cost. In the past, the Rule has expressed these figures as a fraction of a cent (*e.g.,* 11.85 cents per kWh). A cost figure rounded to cents should be more familiar to consumers and should not have any negative impact on the label's utility because any differences in cost from such rounding will be very small and apply to all models.[11]

Second, also consistent with the recent television and light bulb labeling requirements, the proposed amendments further simplify the label's cost disclosure by eliminating reference to the cost rate's year in § 305.11(f). Currently, the label identifies the year of the underlying energy cost rate (*e.g.,* ''based on a 2007 national average electricity cost of 10 cents per kWh''). This date remains on the label for five years. For example, labels for a product introduced in 2011 state that the cost figure derives from a 2007 national average. However, because energy rates can increase and decrease from year to year, the benefit of disclosing this detail on the label does not appear significant. More importantly, this disclosure could cause confusion. For instance, the ''2007'' reference in the example above may incorrectly suggest to some consumers that the product itself was produced in 2007. To avoid these problems, the Commission proposes to eliminate the reference to the year. The label would simply read ''based on a national average electricity cost of * * *.''

Third, based on comments in the ongoing regulatory review for the Rule, the Commission proposes to include a new disclosure on room air conditioners (§ 305.11(f)) explaining that the cost estimate is based on an assumed 750 hours of operation a year.[12] Similar estimates already appear on other labels (*e.g.,* four loads per week for dishwashers and five hours per day for televisions). This change should help consumers gauge the product's estimated energy cost in the context of their own use. Fourth, the amendments replace the term ''operating cost'' with ''energy cost'' on EnergyGuide labels for appliances (§ 305.11(f)). The term ''energy'' ties the disclosure directly to the label's purpose (*i.e.,* disclosing the product's energy use) and is consistent with new labels for televisions and light bulbs. Finally, the amendments make a conforming change to the Web site address on the label, from *www.ftc.gov/appliances* to *www.ftc.gov/energy*.

In addition to these minor changes, the Commission seeks comment on whether to retain range information on television labels.[13] In comments related to the regulatory review of the overall Rule, the Consumer Electronics Association (CEA) argued that the comparability ranges on the EnergyGuide labels become obsolete soon after they are issued because the television market changes so frequently.[14] As a result, the estimated energy costs for many models fall

[5] 16 CFR 305.10.

[6] In addition to revising existing comparability ranges, the Commission proposes to include a new range for instantaneous electric water heaters (Appendix D6).

[7] 77 FR 29940 (Apr. 26, 2012) (DOE notice for ''Representative Average Unit Costs of Energy'').

[8] The Commission will also update the prototype and sample labels in the Rule's appendices to reflect the new range and cost information as well as the minor label content changes proposed in this Notice when it publishes a final rule regarding the ranges.

[9] For refrigerators and clothes washers, as discussed in Section II.B. below, the Commission proposes to update range and cost information after the upcoming implementation of revised DOE standards and test procedures, which will significantly change energy use data for those products. *See infra* note 19. Similarly, for furnace and central air conditioner labels, the Commission recently announced plans to issue range data to coincide with new DOE efficiency standards scheduled to become effective next year. 77 FR 33337 (June 6, 2012) (proposed FTC rule). Finally, for televisions, the Commission will issue revisions to the television ranges in 16 CFR 305.17 after DOE adopts a recently proposed test procedure. 77 FR 2830 (Jan. 19, 2012) (proposed DOE test procedure). The Commission will also establish an annual reporting schedule for television manufacturers at that time. EPCA requires annual reporting based on DOE test procedures. Because no DOE television test procedure currently exists, the Rule currently contains no reporting requirements. 42 U.S.C. 6296(b)(4) (FTC annual reporting requirements tied to DOE test procedure); 16 CFR 305.8 (FTC reporting requirements). In addition, these amendments do not affect recently revised labeling requirements for lighting products. 75 FR 41696 (July 19, 2010). The Rule has separate provisions in § 305.15 for energy cost disclosures on lighting products.

[10] 75 FR 41696 (July 19, 2010) (light bulbs); 76 FR 1038 (Jan. 6, 2011) (televisions).

[11] DOE's 2012 national average energy cost data lists electricity at 11.84 cents/kWh. 77 FR 24940 (Apr. 26, 2012) (DOE fuel cost update). Accordingly, the FTC's proposed amendments require manufacturers to use 12 cents/kWh in calculating energy cost for affected labels.

[12] Joint Comments from Energy-Efficiency and Consumer Organizations (May 16, 2012) (#560957–00015) available at *http://www.ftc.gov/os/comments/energylabelamend/00015-83010.pdf*.

[13] 16 CFR 305.17(f).

[14] CEA comments (May 16, 2012) (#560957–00012) available at *http://www.ftc.gov/os/comments/energylabelamend/560957-00012-83006.pdf*. EPCA grants the Commission discretion to include (or exclude) range information for television labels. 42 U.S.C. 6296(c)(9). However, once DOE issues a final test procedure, manufacturers will have to submit energy data whether or not the label displays a range. 42. U.S.C. 6296(b)(4).

outside the range depicted on the label, limiting the label's utility. CEA also noted that, in lieu of the ranges on labels, consumers can rely on other sources, including consumer and trade publications and product reviews, to obtain comparative energy information for televisions. In response, the Commission seeks comment on whether to eliminate range information from future updates of the television label. Comments should address whether range information is useful, whether the model's energy cost information provides an adequate comparative tool for consumers shopping in stores and online, and whether there are sufficient alternatives to provide comparability information to consumers.

Finally, the Commission seeks comment on whether to update range and cost information more frequently than every five years.[15] In comments on the regulatory review, several energy-efficiency organizations suggested that the FTC follow a three-year schedule to update national average energy cost figures and the comparison ranges for most products. They also recommended a two-year schedule for products with rapidly changing efficiencies and quicker sell-through periods, such as televisions.[16] The commenters argued that the current schedule fails to keep pace with efficiency improvements of new models. Similarly, in their view, the five-year schedule does not update the label's average cost figures frequently enough. In support of these observations, the commenters noted recent dishwasher market changes brought on by new DOE standards as well as an approximately 10% increase in national average electricity costs over the last few years.

In establishing the five-year schedule, the Commission recognized the potential benefits of more frequent changes to cost and range information.[17] However, the Commission concluded that the need for consistent label information is paramount and, on balance, deserves greater weight than the need for more frequent updates. In doing so, the Commission focused on the need to minimize frequent label changes, noting that inconsistent cost and range information for competing models in showrooms and catalogs can lead to consumer confusion and a lack of confidence in the label. In the Commission's view, the five-year schedule strikes a reasonable balance between maintaining consistent disclosures and providing frequent updates. Accordingly, the Commission is not proposing to change the current schedule. However, the Commission seeks further comment on whether it should adopt the commenters' suggestions to implement a three-year schedule.

C. Proposed Conditional Exemption for Refrigerators and Clothes Washers

In response to a request from the Association of Home Appliance Manufacturers (AHAM),[18] the Commission proposes a conditional exemption and rule amendments for refrigerators and clothes washers. New DOE testing procedures for these products, issued in conjunction with new efficiency standards, change the methods for calculating a model's energy use and, as a result, will trigger substantial changes to the energy information disclosed on EnergyGuide labels.[19] To aid consumers in their comparison shopping during this transition, the Commission proposes a distinct label for models tested under the new DOE procedure to be used both during this transition and afterward. In addition, the Commission proposes to allow manufacturers to begin labeling new models using the new DOE test procedures several months before the DOE compliance dates to ease the burden associated with transition to the new test procedures.[20]

AHAM submitted its request in anticipation of upcoming DOE energy conservation standards and test procedures for refrigerators (effective on September 15, 2014) and clothes washers (effective on March 7, 2015). The new, more stringent conservation standards will render a substantial portion of existing refrigerator and clothes washer models obsolete. In addition, the updated test procedures will yield substantially different results than the current ones. According to AHAM, the new refrigerator test procedure will increase the measured energy use of refrigerators by approximately 14%, though the increase will vary between product classes, manufacturers, and even individual models.[21] In addition, the new clothes washer test procedure bases annual energy use estimates on 295 cycles per year (approximately six per week), instead of the current 392 cycles (approximately eight per week), thus reducing stated energy costs on the EnergyGuide labels by about 25%.[22]

AHAM notes that after manufacturers start to test their products using the new procedures, showrooms and Web sites will contain some models tested under the old procedure and others tested under the new one. In AHAM's view, the resulting mix of EnergyGuide labels could severely hamper consumers in making fair product comparisons.

To help facilitate the transition to the new efficiency standards and to aid shoppers who compare products during this period, AHAM proposed two measures. First, it seeks permission to use the new DOE tests for labeling models introduced prior to DOE's compliance dates. Second, it recommends different, transitional EnergyGuide labels for these models, to help consumers distinguish products tested under the new procedure from those tested under the old one. Specifically, AHAM proposes that new labels contain blue (cyan) text and include the statement: ''Blue EnergyGuide Compares Only to Other Models with Blue EnergyGuides (due to new U.S. Government requirements).'' [23] AHAM's members want to begin using the new test procedures and transitional labels for models introduced after January 1, 2014 for refrigerators, and June 1, 2014 for clothes washers. AHAM also requested that the Commission continue to require this modified label for products tested under the new procedure until DOE makes another substantial change to the test procedure in the future.

AHAM contends that these proposals will reduce burdens associated with upcoming regulatory changes, avoid

[15] 16 CFR 305.10(a).

[16] Joint Comments from Energy-Efficiency and Consumer Organizations (May 16, 2012) (#560957–00015) available at *http://www.ftc.gov/os/comments/energylabelamend/00015-83010.pdf.*

[17] 72 FR 49948, 49959 (Aug. 29, 2007) (rulemaking on effectiveness of the EnergyGuide label).

[18] AHAM comments (July 17, 2012) (#560957–00023) at *http://www.ftc.gov/os/comments/energylabelamend/00023-83190.pdf* and (Sept. 11, 2012) (#560957–00025) at *http://www.ftc.gov/os/comments/energylabelamend/560957-00025-84112.pdf.*

[19] 76 FR 57516 (Sept. 15, 2011) (refrigerator standards); 77 FR 3559 (Jan. 25, 2012) (refrigerator test procedure); 77 FR 32308 (May 31, 2012) (clothes washer standards); 77 FR 13888 (Mar. 7, 2012) (clothes washer test procedure). DOE rules require compliance with the new test procedures for all refrigerators by September 15, 2014 and for all clothes washers by March 7, 2015.

[20] The Commission issued similar modifications in 2003 for clothes washer labels in response to changes in the DOE test procedure. 68 FR 23584 (May 5, 2003).

[21] AHAM comments (May 16, 2012) (#560957–0013) at *http://www.ftc.gov/os/comments/energylabelamend/00013-83038.pdf.*

[22] *See* 77 FR 13888, 13933 (Mar. 7, 2012) (DOE clothes washer test procedure). The new DOE test procedure also includes the cost of energy consumed in non-active wash modes.

[23] AHAM comments (Sept. 11, 2012) (#560957–00025) at *http://www.ftc.gov/os/comments/energylabelamend/560957-00025-84112.pdf.* In those comments, AHAM also recommended that the Commission omit a comparability range scale from the label until data from the new test procedures becomes available.

consumer confusion, and encourage early introduction of high-efficiency models. The Commission generally agrees. The proposal should reduce burdens by allowing refrigerator and clothes washer manufacturers to roll out new high-efficiency models well before the DOE compliance date and thus avoid the logistical complications associated with designing, producing, and testing many models at the same time.[24] In addition, using transitional labels will avoid the display of a misleading mix of test results on EnergyGuide labels. Lastly, early compliance will provide an incentive for manufacturers to introduce models that meet the more stringent energy standards sooner, thus providing consumers with more high-efficiency choices.[25]

Therefore, the Commission proposes to exempt manufacturers from certain EnergyGuide testing and labeling requirements for new refrigerator and clothes washer models introduced before DOE's compliance dates. Specifically, the Commission proposes to grant a conditional exemption from the Rule's requirement that, for purposes of the EnergyGuide label, manufacturers use the estimated annual energy consumption derived from the test procedures presently required by DOE.[26] By granting the requested exemption, the Commission would allow manufacturers to begin using the results of DOE's new procedures and provide those results on EnergyGuide labels several months before the DOE compliance date.

The Commission proposes to grant this exception, but only to the extent required to allow manufacturers [27] to use the new test procedures on refrigerator (including refrigerators, refrigerator-freezers, and freezers) and clothes washer models manufactured after January 1, 2014 (for refrigerators) and June 1, 2014 (for clothes washers). If a manufacturer continues to use the current test results for a particular model until the new procedures take effect, September 15, 2014 (for refrigerators) and March 7, 2015 (for clothes washers), it must continue to use the current label for that model up until those dates. Manufacturers would remain obligated to comply with all other Rule requirements. The Commission proposes to grant this exemption on the following additional conditions:

(1) For models manufacturers choose to test and label under the exemption, manufacturers must follow the new DOE test procedures in 10 CFR Part 430, Subpart B, Appendix A (refrigerators) and Appendix J2 (clothes washers) to determine the energy use figures printed on EnergyGuide labels; [28]

(2) For all such models, manufacturers must use EnergyGuide labels, as illustrated in Figures 1 and 2 of this Notice, with the energy cost and electricity use figures in yellow text framed by block boxes and containing the statement ''Compare to other labels with yellow numbers. Appliances that have labels with black numbers were tested differently to estimate cost and electricity used.'' [29]

(3) For all such models, manufacturers must print the estimated energy cost on the label above the center of the comparability range, and the following statement must appear directly below the range: ''Cost Range Not Available,'' as illustrated in Figures 1 and 2 of this Notice; [30]

(4) For all such models, the label must state that the estimated energy cost is based on a national average electricity cost of 12 cents per kWh; and

(5) For all such clothes washer models, the label must state that the estimated energy cost is based on six wash loads per week and, as discussed below, must provide capacity in cubic feet.[31]

Second, to ensure consistency in labeling following the exemption period, the Commission proposes to amend the Rule at §§ 305.5(a) and 305.11 to require these new labels, as described in the five conditions above, after the test procedure transition. Thus, the new labels would apply to all refrigerators and clothes washers distributed on, or after, the DOE new test procedure compliance dates (September 15, 2014 for refrigerators and March 7, 2015 for clothes washers). This change should reduce consumer confusion in viewing labels that look alike but contain differently-calculated information.[32] The Commission proposes to maintain this new label until DOE further amends the test procedures in the future beyond 2015. At that time, the Commission will consider changes to the label. In addition, once the Commission receives product data reflecting new and existing models tested under the new DOE procedures, it would issue new comparability ranges for those products.

The Commission seeks comment on the proposed exemption and associated amendments. In particular, the Commission requests input on whether the different results from the new and old DOE test procedures are significant enough to warrant the proposed label modifications. In addition, the Commission seeks comment on whether the proposed label changes are appropriate and will help consumers in their purchasing decisions. In particular, commenters should address whether the proposed labels will effectively communicate to consumers that they should not compare the old and new labels. In addition, commenters should identify any alternative disclosures or label design

[24] To facilitate the early introduction of these higher-efficiency models, DOE has announced that manufacturers may certify these models with DOE using the new test procedures, thus relieving them from having to test new models under both the old and new test procedures during the transition period. On June 29, 2012, DOE issued guidance permitting early compliance with new or amended test procedures and standards. *See http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/tp_faq_2012-06-29.pdf.* Thus, in DOE's view, manufacturers may begin using the new test procedures before the dates specified for compliance.

[25] AHAM also requested guidance on whether manufacturers must change model numbers for products during the DOE transition period. Unless the manufacturer modifies the model in a way that affects its energy performance, the Commission does not recommend changing model numbers during the transition.

[26] 16 CFR 305.5(a) and 305.11(a) (FTC testing and labeling); *see also* 10 CFR Part 430 (DOE test procedures).

[27] Consistent with the Rule's requirements, the proposed exemption applies to both manufacturers and private labelers.

[28] Manufacturers also may use the new test procedures for labeling existing products during this period, but must follow all conditions of this exemption in doing so.

[29] The Commission does not propose a cyan (blue) label as suggested by AHAM because cyan text on yellow background would be difficult to read, especially for smaller text. In addition, the cyan ink could cause confusion with regard to ENERGY STAR certification given that cyan is the color commonly used for ENERGY STAR logos. By retaining the yellow and black format, the proposed label will not change the printing cost associated with the labels.

[30] The Commission will publish range information for the new labels once energy data becomes available for refrigerators and clothes washers tested under the new procedure, most likely in 2015.

[31] The new DOE test procedure changes the estimated weekly clothes washer cycles from 8 to 6. 77 FR 13888 (DOE clothes washer test procedure).

[32] To avoid confusion associated with the multiple rule amendments and effective dates covered by this Notice, the Commission has not included formal proposed rule language for the transitional labels. However, this Notice contains a full description of the proposal, including sample labels. In addition, the minor label changes proposed in section II.B. (*i.e.,* fuel rates to the nearest cent and the use of ''energy cost'' instead of ''operating cost'') would not be required for refrigerator and clothes washer labels until the new DOE test procedure compliance dates. (September 15, 2014 for refrigerators and March 7, 2015 for clothes washers).

features that would be more effective than the proposed labels.

BILLING CODE 6750–01–P

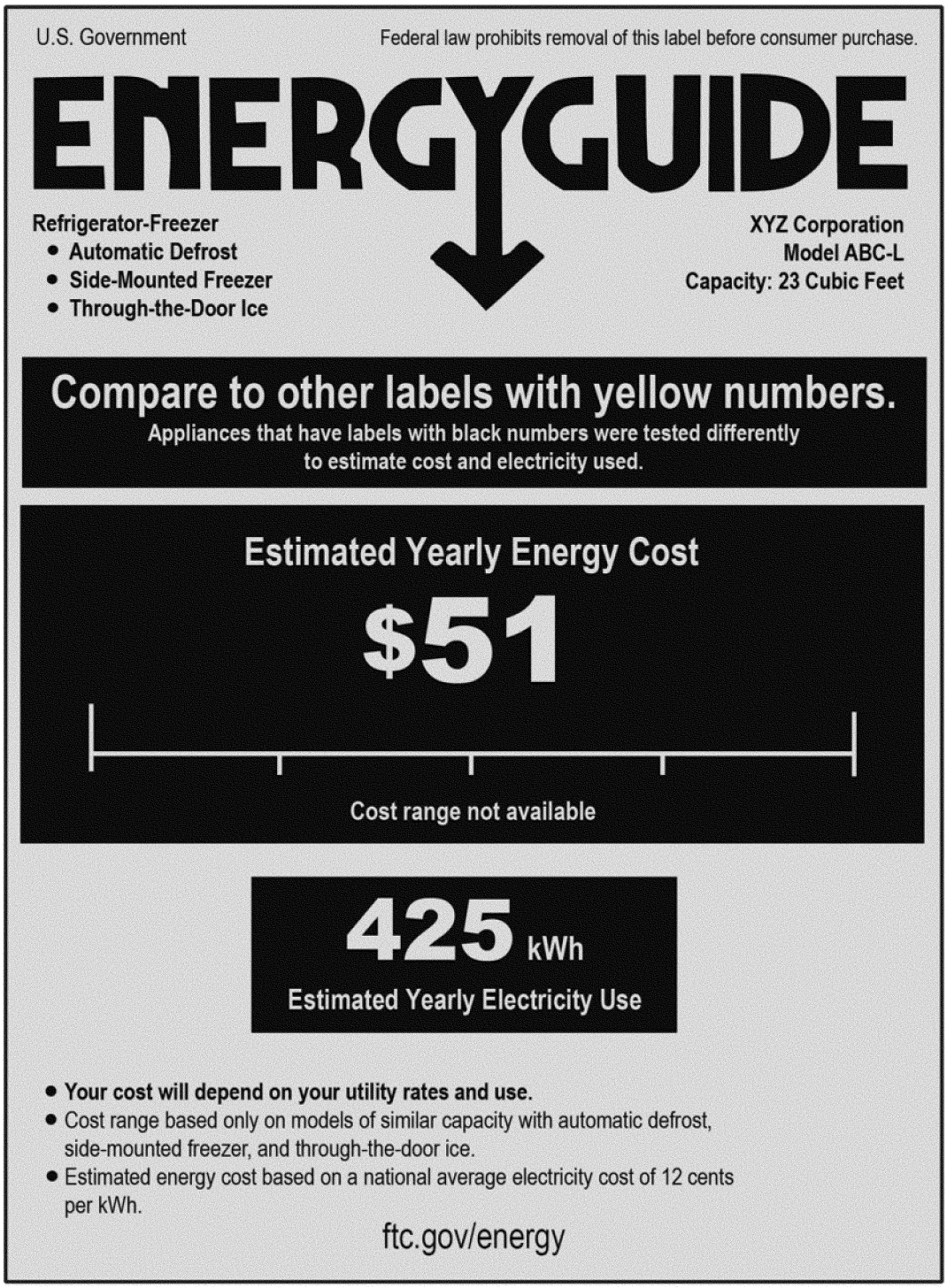

FIGURE 1 – PROPOSED TRANSITIONAL REFRIGERATOR-FREEZER LABEL

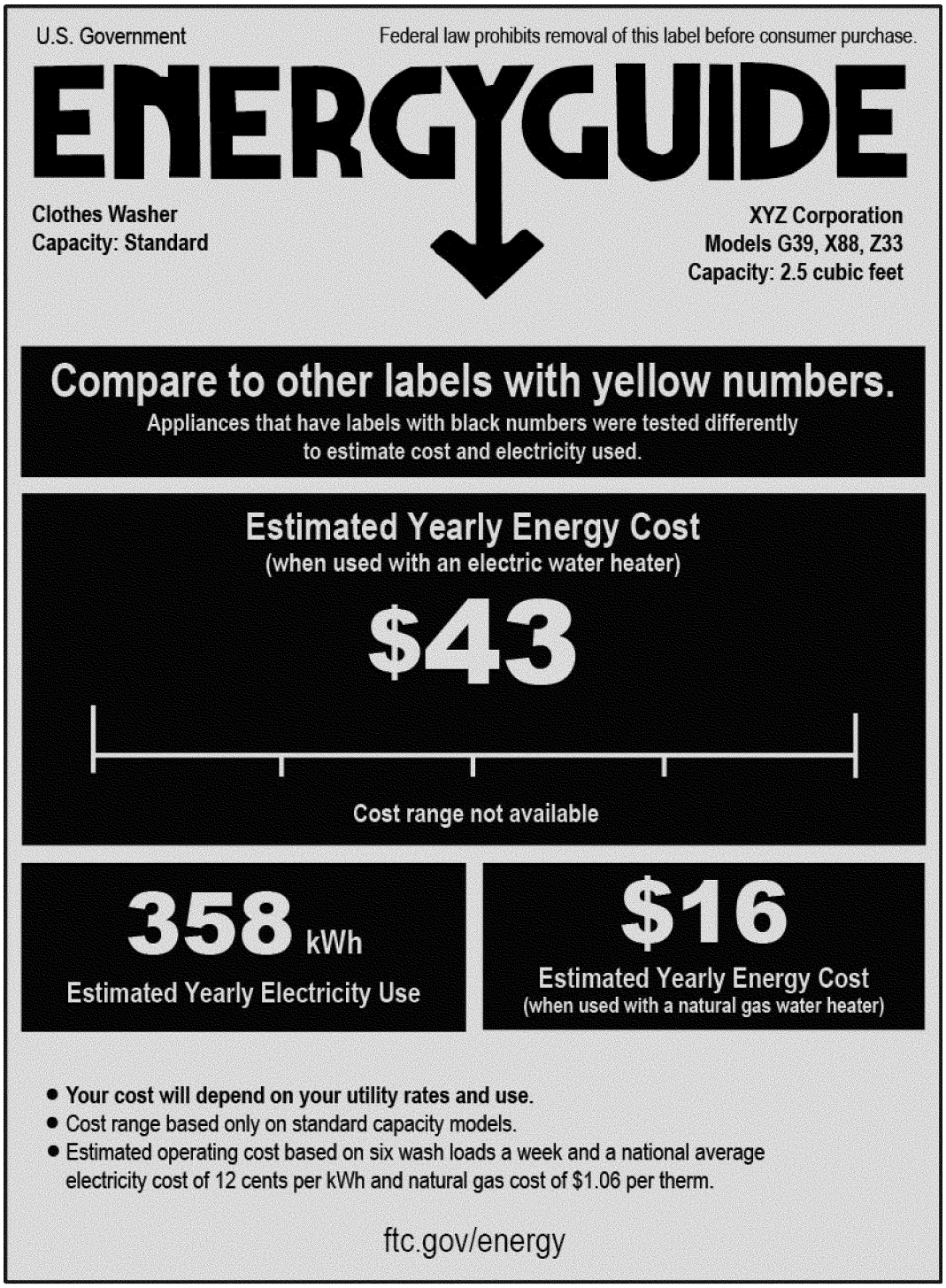

FIGURE 2 – PROPOSED TRANSITIONAL CLOTHES WASHER LABEL

BILLING CODE 6750–01–C

D. Additional Refrigerator and Clothes Washer Issues

In addition to the exemption request for a transitional label, the Commission has considered the following three issues related to refrigerators and clothes washers raised in response to the regulatory review notice: Changes to refrigerator range categories; disclosures for refrigerator models with optional icemakers; and capacity information for clothes washers.[33]

Refrigerator Comparability Range Categories: The current rule organizes refrigerator comparability ranges by product configuration (*e.g.,* models with top-mounted freezers) in Appendices A1–A8. The current requirements designate eight separate range categories for refrigerator models and three for

[33] The Commission plans to consider other outstanding issues from the regulatory review at a later date.

freezer models.[34] These ranges disclose the energy costs associated with the most and least efficient models in a particular category. Specifically, for automatic-defrost refrigerator freezers, which typically populate the bulk of showroom floors, the Rule contains five categories (or styles): Side-by-side door models with and without through-the-door ice service; top-mounted freezer models with and without through-the-door ice service; and bottom-mounted freezer models. The Rule also has ranges for less common models including those with manual and partial defrost models, and refrigerator-only models.[35] These categories allow consumers to compare the energy use of similarly configured refrigerators.

Several energy-efficiency and consumer groups urged the Commission to consolidate the comparability ranges into a single range covering all configurations.[36] They reasoned one range would allow consumers to compare a product's energy performance against all other models. AHAM opposed this approach, arguing that consolidation of the ranges for different configurations would cast fully-featured products that use more energy in an unfavorable light. AHAM also pointed to data suggesting that consumers usually replace their existing refrigerators with similarly configured models. AHAM acknowledged, however, that it had no detailed information directly addressing whether consumers shop with a specific configuration in mind. It concluded that, without clear data on consumer shopping habits, the Commission should refrain from changing the current ranges.[37]

The Commission does not propose any changes at this time. Without further opportunity for comment on a proposal and more information about consumer buying habits, the Commission is reluctant to alter existing requirements.[38] Once DOE's new standards become effective, the Commission will examine new range data from models on the market and consider whether to propose changes to the range categories.

Refrigerator Models with Optional Icemakers: Currently, refrigerator labels do not reflect icemaker energy consumption because the current DOE test procedure does not measure a model's icemaker operation. However, because the new DOE procedures will account for icemakers, the new labels will now include icemaker energy consumption for those products.[39]

In light of this change, AHAM has raised concerns about labeling for so-called ''kitable'' refrigerator models (*i.e.,* models that can be fitted with an icemaker before or after purchase).[40] The new DOE rules divide these products into categories (*i.e.,* units with pre-installed icemakers and units without). Thus, each category will have its own EnergyGuide labels reflecting different levels of energy use. In comments to the Commission, AHAM has suggested that all ''kitable'' refrigerator labels disclose the energy use of the model shipped without the optional icemaker to avoid overstating energy costs for models that may never have an icemaker. In addition, AHAM suggests additional label language to inform retailers and consumers that the addition of an icemaker will increase the model's energy costs.

The Commission agrees that this proposal merits consideration. However, DOE plans to examine its designation of these models and thus may provide guidance that addresses AHAM's concerns.[41] Accordingly, the Commission does not plan to impose any additional testing-related disclosures for these products until DOE has completed its deliberations.

Clothes Washer Capacity: In initiating the Rule's regulatory review, the Commission proposed to require specific capacity information in cubic feet on EnergyGuide labels for clothes washers.[42] The Commission seeks additional comments on this issue. Current EnergyGuide labels indicate whether the model is ''standard'' or ''compact,'' but do not specify volume (*e.g.,* 3.5 cubic feet). In the current market, most models fall into the broad ''standard'' size class (*i.e.,* models with tub capacities greater than 1.6 cubic feet), but actual capacity among models varies significantly. Thus, the general capacity disclosure provides little assistance to consumers in distinguishing washer size. A specific capacity disclosure on the label should help consumers make important product comparisons. It would also complement recent DOE and industry efforts to ensure uniformity in capacity disclosures, which would provide consumers with usable information whether they are looking at EnergyGuide labels, manufacturer advertising, or DOE certification data.[43]

AHAM objected to the Commission's proposal, arguing that it will greatly increase the number of labels manufacturers have to produce. According to AHAM, many washer models with different capacities have the same energy cost. Manufacturers currently print one label for such appliances. AHAM contended that the Commission's proposal would prevent this cost-savings. AHAM also argued consumers can access capacity information through other sources. In addition, it observed that industry members have already taken steps to ensure consistency in washer capacity claims. Thus, in AHAM's view, the Commission's proposal addresses a problem that no longer exists. In contrast, PG&E supported the specific capacity disclosure proposed in the regulatory review notice, suggesting it might ''prompt consumers to think more critically about the utility of different sized washers, and also [their] associated energy and water requirements.'' [44]

The Commission continues to believe that detailed capacity information will help consumers in their purchasing decisions. The presence of capacity information allows consumers easily to consider the size and energy cost of models as they compare products in showrooms and Web sites, without repeatedly crosschecking washer capacity disclosed elsewhere in specifications and other marketing material. In addition, this approach is consistent with the EnergyGuide labels

[34] The Rule further divides each model category into several size classes (*e.g.,* 19.5 to 21.4 cubic feet), each with its own comparability range.

[35] *See* 16 CFR part 305, Appendices A and B.

[36] Joint Comments from Energy-Efficiency and Consumer Organizations (May 16, 2012) (#560957–00015) available at *http://www.ftc.gov/os/comments/energylabelamend/00015–83010.pdf.*

[37] AHAM comments (Sept. 11, 2012) (#560957–00025) available at *http://www.ftc.gov/os/comments/energylabelamend/560957–00025–84112.pdf.*

[38] The consolidation of ranges also could cause conflicts and confusion with regard to the ENERGY STAR system, which sets efficiency levels based on different refrigerator configurations. For example, ENERGY STAR-qualified side-by-side door models are highly efficient compared to other side-by-side models but not necessarily compared to all other refrigerator-freezers. Therefore, if the comparison range on the EnergyGuide label included all configurations, some ENERGY STAR designated models will be higher on the cost range than some non-ENERGY STAR models. Before making any changes, the Commission needs to explore the overall costs and benefits of such a change.

[39] 16 CFR 305.5 (FTC testing rules); 10 CFR Part 430, Subpart B, Appendix A (DOE refrigerator tests).

[40] AHAM comments (May 16, 2012, and October 31, 2012) at *http://www.ftc.gov/os/comments/energylabelamend/00013-83038.pdf.*

[41] 77 FR at 3569 (DOE notice on refrigerator testing).

[42] 77 FR at 15302 (proposing to amend 16 CFR 305.7(g) to include clothes washer capacity on the label).

[43] *See* 75 FR 57556, 57575 (Sept. 21, 2010) (DOE clothes washer notice) and *http://www.aham.org/ht/a/GetDocumentAction/i/51727.*

[44] Pacific Gas and Electric Company (PG&E) comments (May 15, 2012) (#00009) at *http://www.ftc.gov/os/comments/energylabelamend/00009-82974.pdf.*

for most other covered products, which, among other things, allow consumers to gauge a model's energy cost against its size. Moreover, data for clothes washers certified to DOE suggests that the proposed change would require new labels for a small fraction of models.[45] Accordingly, it seems unlikely that the proposal would impose a substantial burden on manufacturers. The Commission seeks further comment on its proposal to require clothes washer capacity disclosures on the label.

III. Request for Comment

The Commission invites interested persons to submit written comments on any issue of fact, law, or policy that may bear upon the FTC's proposed labeling requirements. Please provide explanations for your answers and supporting evidence where appropriate. In addition, the Commission notes that it has accepted several late comments in its ongoing regulatory review proceeding.[46] To ensure that parties have an opportunity to address issues raised in those submissions, the Commission invites comments on any open issue in the regulatory review proceeding in addition to those issues raised in the present notice. Interested persons should follow the instructions below for filing any such comments on the regulatory review. After examining the comments, the Commission will determine whether to issue final amendments.

All comments should be filed as prescribed below, and must be received by March 1, 2013. Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Energy Label Ranges, Matter No. R611004'' to facilitate the organization of comments. Please note that your comment, including your name and your state, will be placed on the public record of this proceeding, including on the publicly accessible FTC Web site, at *http://www.ftc.gov/os/publiccomments.shtm*.

Because comments will be made public, they should not include any sensitive personal information, such as any individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential as provided in Section 6(f) of the Federal Trade Commission Act (FTC Act, 15 U.S.C. 46(f)), and FTC Rule 4.10(a)(2) (16 CFR 4.10(a)(2)). Comments containing matter for which confidential treatment is requested must be filed in paper form, must be clearly labeled Confidential, and must comply with FTC Rule 4.9(c). Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted using the following weblink: *https://ftcpublic.commentworks.com/ftc/energylabelranges* (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink *https://ftcpublic.commentworks.com/ftc/energylabelranges*. If this Notice appears at *http://www.regulations.gov/#!home,* you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC Web site at *http://www.ftc.gov* to read the Notice and the news release describing it.

A comment filed in paper form should include the Energy Label Ranges, Matter No. R611004 reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex U), 600 Pennsylvania Avenue NW., Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov/os/publiccomments.shtm*. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

Because written comments appear adequate to present the views of all interested parties, the Commission has not scheduled an oral hearing regarding these proposed amendments. Interested parties may request an opportunity to present views orally. If such a request is made, the Commission will publish a document in the **Federal Register** stating the time and place for such oral presentation(s) and describing the procedures that will be followed. Interested parties who wish to present oral views must submit a hearing request, on or before February 1, 2013, in the form of a written comment that describes the issues on which the party wishes to speak. If there is no oral hearing, the Commission will base its decision on the written rulemaking record.

IV. Paperwork Reduction Act

The current Rule contains recordkeeping, disclosure, testing, and reporting requirements that constitute information collection requirements as defined by 5 CFR 1320.3(c), the definitional provision within the Office of Management and Budget (OMB) regulations that implement the Paperwork Reduction Act (PRA). OMB has approved the Rule's existing information collection requirements through Jan. 31, 2014 (OMB Control No. 3084 0069). The proposed amendments do not change the substance or frequency of the recordkeeping, disclosure, or reporting requirements and, therefore, do not require further OMB clearance.

V. Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to a Regulatory Flexibility Act analysis (5 U.S.C. 603–604) are not applicable to this proceeding because the amendments do not impose any new obligations on entities regulated by the Appliance Labeling Rule. As explained in detail elsewhere in this document, the proposed exemption and amendments do not significantly change the substance or frequency of the recordkeeping, disclosure, or reporting requirements. Thus, the amendments will not have a ''significant economic

[45] *See* DOE clothes washer data at *https://www.regulations.doe.gov/ccms/*.

[46] 44 FR 66466 (Nov. 19, 1979) (regulatory review notice). The late comments are available at *http://www.ftc.gov/os/comments/energylabelamend/index.shtm* and include: AHAM (July 17, 2012, Sept. 12, 2012, and Oct. 31, 2012), Earthjustice (Dec. 3, 2012), Fanimation (July 17, 2012), Miele Inc. (Sept. 20, 2012), and Progress Lighting (June 25, 2012).

impact on a substantial number of small entities.'' 5 U.S.C. 605. The Commission has concluded, therefore, that a regulatory flexibility analysis is not necessary, and certifies, under Section 605 of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that the amendments announced today will not have a significant economic impact on a substantial number of small entities.

Proposed Rule Language

List of Subjects in 16 CFR Part 305

Advertising, Energy conservation, Household appliances, Labeling, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Commission proposes to amend 16 CFR part 305 as follows:

PART 305—RULE CONCERNING DISCLOSURES REGARDING ENERGY CONSUMPTION AND WATER USE OF CERTAIN HOME APPLIANCES AND OTHER PRODUCTS REQUIRED UNDER THE ENERGY POLICY AND CONSERVATION ACT (''APPLIANCE LABELING RULE'')

■ 1. The authority citation for part 305 continues to read as follows:

Authority: 42 U.S.C. 6294.

■ 2. In § 305.7, revise paragraph (g) to read as follows:

§ 305.7 Determinations of capacity.

* * * * *

(g) *Clothes washers.* The capacity shall be the tub capacity as determined according to Department of Energy test procedures in 10 CFR part 430, subpart B, expressed in the terms of volume in cubic feet and the designations of ''standard'' or ''compact'' as determined pursuant to those regulations.

* * * * *

■ 3. In § 305.10, revise paragraphs (a) and (b) to read as follows:

§ 305.10 Ranges of comparability on the required labels.

(a) *Range of estimated annual energy costs or energy efficiency ratings.* The range of estimated annual operating costs or energy efficiency ratings for each covered product (except televisions, fluorescent lamp ballasts, lamps, showerheads, faucets, water closets and urinals) shall be taken from the appropriate appendix to this part in effect at the time the labels are affixed to the product. The Commission shall publish revised ranges in the **Federal Register** in 2017. When the ranges are revised, all information disseminated after 90 days following the publication of the revision shall conform to the revised ranges. Products that have been labeled prior to the effective date of a modification under this section need not be relabeled.

(b) *Representative average unit energy cost.* The Representative Average Unit Energy Cost to be used on labels as required by § 305.11 and disclosures as required by § 305.20 are listed in appendix K to this part, except the electricity and gas cost to be used on labels for refrigerators, refrigerator-freezers, and freezers distributed before September 15, 2014 and labels for clothes washers distributed before March 7, 2015 shall be 10.65 cents per kWh and 1.218 dollars per therm. The Commission shall publish revised Representative Average Unit Energy Cost figures in the **Federal Register** in 2017. When the cost figures are revised, all information disseminated after 90 days following the publication of the revision shall conform to the new cost figure.

* * * * *

■ 4. In § 305.11, revise paragraphs (f)(5) and (9) and redesignate paragraphs (f)(11) and (12) as paragraphs (f)(10) and (11), respectively.

The revisions read as follows:

§ 305.11 Labeling for refrigerators, refrigerator-freezers, freezers, dishwashers, clothes washers, water heaters, room air conditioners, and pool heaters.

* * * * *

(f) * * *

(5) Estimated annual operating costs for refrigerators, refrigerator-freezers, freezers, clothes washers, dishwashers, room air conditioners, and water heaters are as determined in accordance with §§ 305.5 and 305.10 of this part. Thermal efficiencies for pool heaters are as determined in accordance with § 305.5. Labels for clothes washers and dishwashers must disclose estimated annual operating cost for both electricity and natural gas as illustrated in the sample labels in appendix L.

* * * * *

(9) Labels must contain a statement explaining information on the label as illustrated in the prototype labels in appendix L and specified as follows by product type:

(i) For refrigerators, refrigerator-freezers, and freezers, the statement will read as follows (fill in the blanks with the appropriate year and energy cost figures):

Your costs will depend on your utility rates and use.

[Insert statement required by § 305.11(f)(9)(ii)].

Estimated energy cost is based on a national average electricity cost of ____ cents per kWh.

For more information, visit *www.ftc.gov/energy.*

(ii) For refrigerators, refrigerator-freezers, and freezers, the following sentence shall be included as part of the statement required by § 305.11(f)(9)(i):

(A) For models covered under appendix A1, the sentence shall read:

Cost range based only on models of similar capacity with automatic defrost.

(B) For models covered under appendix A2, the sentence shall read:

Cost range based only on models of similar capacity with manual defrost.

(C) For models covered under appendix A3, the sentence shall read:

Cost range based only on models of similar capacity with partial automatic defrost.

(D) For models covered under appendix A4, the sentence shall read:

Cost range based only on models of similar capacity with automatic defrost, top-mounted freezer, and without through-the-door ice.

(E) For models covered under appendix A5, the sentence shall read:

Cost range based only on models of similar capacity with automatic defrost, side-mounted freezer, and without through-the-door ice.

(F) For models covered under appendix A6, the sentence shall read:

Cost range based only on models of similar capacity with automatic defrost, bottom-mounted freezer, and without through-the-door ice.

(G) For models covered under appendix A7, the sentence shall read:

Cost range based only on models of similar capacity with automatic defrost, top-mounted freezer, and through-the-door ice.

(H) For models covered under appendix A8, the sentence shall read:

Cost range based only on models of similar capacity with automatic defrost, side-mounted freezer, and through-the-door ice.

(I) For models covered under appendix B1, the sentence shall read:

Cost range based only on upright freezer models of similar capacity with manual defrost.

(J) For models covered under appendix B2, the sentence shall read:

Cost range based only on upright freezer models of similar capacity with automatic defrost.

(K) For models covered under appendix B3, the sentence shall read:

Cost range based only on chest and other freezer models of similar capacity.

(iii) For room air conditioners covered under appendix E, the statement will read as follows (fill in the blanks with the appropriate model type, year, energy type, and energy cost figure):

Your costs will depend on your utility rates and use.

Cost range based only on models [of similar capacity without reverse cycle and with louvered sides; of similar capacity without reverse cycle and without louvered sides; with reverse cycle and with louvered sides; or with reverse cycle and without louvered sides].

Estimated energy cost is based on a national average electricity cost of ____ cents per kWh and 750 hours of operation per year.

For more information, visit *www.ftc.gov/energy.*

(iv) For water heaters covered by Appendices D1, D2, and D3, the statement will read as follows (fill in the blanks with the appropriate fuel type, year, and energy cost figures):

Your costs will depend on your utility rates and use.

Cost range based only on models of similar capacity fueled by [natural gas, oil, propane, or electricity]. Estimated energy cost is based on a national average [electricity, natural gas, propane, or oil] cost of [___ cents per kWh or $____ per therm or gallon].

For more information, visit *www.ftc.gov/energy.*

(v) For instantaneous water heaters (appendix D4 and D6) and heat pump water heaters (appendix D5), the statement will read as follows (fill in the blanks with the appropriate model type, the operating cost, the year, and the energy cost figures):

Your costs will depend on your utility rates and use.

Cost range based only on [instantaneous gas water heater or heat pump water heater] models of similar capacity. Estimated energy cost is based on a national average [electricity, natural gas, or propane] cost of [____ cents per kWh or $____ per therm or gallon].

For more information, visit *www.ftc.gov/energy.*

(vi) For clothes washers and dishwashers covered by appendices C1, C2, F1, and F2, the statement will read as follows (fill in the blanks with the appropriate appliance type, the energy cost, the number of loads per week, the year, and the energy cost figures):

Your costs will depend on your utility rates and use.

Cost range based only on [compact/standard] capacity models.

Estimated energy cost is based on [4 washloads a week for dishwashers, or 6 washloads a week for clothes washers] and a national average electricity cost of ____ cents per kWh and natural gas cost of $____ per therm.

For more information, visit *www.ftc.gov/energy.*

(vii) For pool heaters covered under appendices J1 and J2, the statement will read as follows:

Efficiency range based only on models fueled by [natural gas or oil].

For more information, visit *www.ftc.gov/energy.*

* * * * *

■ 5. Appendix C1 to Part 305 is revised to read as follows:

Appendix C1 to Part 305—Compact Dishwashers

Range Information

''Compact'' includes countertop dishwasher models with a capacity of fewer than eight (8) place settings. Place settings shall be in accordance with appendix C to 10 CFR part 430, subpart B. Load patterns shall conform to the operating normal for the model being tested.

Capacity	Range of estimated annual energy costs (dollars/year)	
	Low	High
Compact	$18	$27

■ 6. Appendix C2 to Part 305 is revised to read as follows:

Appendix C2 to Part 305—Standard Dishwashers

Range Information

''Standard'' includes dishwasher models with a capacity of eight (8) or more place settings. Place settings shall be in accordance with appendix C to 10 CFR part 430, subpart B. Load patterns shall conform to the operating normal for the model being tested.

Capacity	Range of estimated annual energy costs (dollars/year)	
	Low	High
Standard	$21	$41

■ 7. Appendices D1 through D5 to Part 305 are revised and Appendix D6 is added to read as follows:

Appendix D1 to Part 305—Water Heaters—Gas

Range Information

Capacity	Range of estimated annual energy costs (dollars/year)			
First hour rating	Natural gas ($/year)		Propane ($/year)	
	Low	High	Low	High
Less than 21	*	*	*	*
21 to 24	*	*	*	*
25 to 29	*	*	*	*
30 to 34	*	*	*	*
35 to 40	*	*	*	*
41 to 47	*	*	*	*

Capacity	Range of estimated annual energy costs (dollars/year)			
First hour rating	Natural gas ($/year)		Propane ($/year)	
	Low	High	Low	High
48 to 55	$248	$269	$655	$712
56 to 64	$257	$269	$678	$712
65 to 74	$237	$273	$627	$724
75 to 86	$237	$288	$627	$724
87 to 99	$248	$288	$645	$763
100 to 114	$241	$300	$637	$763
115 to 131	$241	$331	$637	$791
Over 131	$269	$331	$712	$876

* No data submitted.

Appendix D2 to Part 305—Water Heaters—Electric

Range Information

Capacity	Range of estimated annual energy costs (dollars/year)	
First hour rating	Low	High
Less than 21	$567	$567
21 to 24	*	*
25 to 29	$567	$567
30 to 34	$567	$573
35 to 40	$561	$573
41 to 47	$555	$599
48 to 55	$555	$599
56 to 64	$555	$585
65 to 74	$555	$599
75 to 86	$555	$613
87 to 99	$567	$620
100 to 114	$579	$651
115 to 131	$613	$635
Over 131	*	*

* No data submitted.

Appendix D3 to Part 305—Water Heaters—Oil

Range Information

Capacity	Range of estimated annual energy costs (dollars/year)	
First hour rating	Low	High
Less than 65	*	*
65 to 74	*	*
75 to 86	*	*
87 to 99	*	*
100 to 114	$703	$808
115 to 131	$663	$856
Over 131	$642	$856

* No data submitted.

Appendix D4 to Part 305—Water Heaters—Instantaneous—Gas

Range Information

Capacity	Range of estimated annual energy costs (dollars/year)			
Capacity (maximum flow rate); gallons per minute (gpm)	Natural gas ($/year)		Propane ($/year)	
	Low	High	Low	High
Under 1.00	$248	$248	$655	$655
1.00 to 2.00	$248	$248	$627	$627
2.01 to 3.00	$171	$231	$499	$609
Over 3.00	$167	$204	$435	$532

* No data submitted.

Appendix D5 to Part 305—Water Heaters—Heat Pump

Range Information

Capacity	Range of estimated annual energy costs (dollars/year)	
First hour rating	Low	High
Less than 21	*	*
21 to 24	*	*
25 to 29	*	*
30 to 34	*	*
35 to 40	*	*
41 to 47	*	*
48 to 55	*	*
56 to 64	*	*
65 to 74	*	*
75 to 86	*	*
87 to 99	*	*
100 to 114	*	*
115 to 131	*	*
Over 131	*	*

* No data submitted.

Appendix D6 to Part 305—Water Heaters—Instantaneous—Electric

Range Information

Capacity	Range of estimated annual energy costs (dollars/year)	
Capacity (maximum flow rate); gallons per minute (gpm)	Low	High
Under 1.00	$532	$532
1.00 to 2.00	$532	$532
2.01 to 3.00	*	*
Over 3.00	*	*

* No data submitted.

■ 8. Appendix E to Part 305 is revised to read as follows:

Appendix E to Part 305—Room Air Conditioners

Range Information

Manufacturer's rated cooling capacity in Btu's/yr	Range of estimated annual energy costs (dollars/year)	
	Low	High
Without Reverse Cycle and with Louvered Sides:		
Less than 6,000 Btu	$42	$48
6,000 to 7,999 Btu	$50	$72
8,000 to 13,999 Btu	$66	$115
14,000 to 19,999 Btu	$117	$195

Manufacturer's rated cooling capacity in Btu's/yr	Range of estimated annual energy costs (dollars/year)	
	Low	High
20,000 and more Btu	$169	$382
Without Reverse Cycle and without Louvered Sides:		
Less than 6,000 Btu	*	*
6,000 to 7,999 Btu	$56	$72
8,000 to 13,999 Btu	$73	$138
14,000 to 19,999 Btu	$140	$166
20,000 and more Btu	*	*
With Reverse Cycle and with Louvered Sides	$71	$225
With Reverse Cycle, without Louvered Sides	$89	$126

* No data submitted.

■ 9. Appendices J1 and J2 to part 305 are revised to read as follows:

Appendix J1 to Part 305—Pool Heaters—Gas

Range Information

Manufacturer's rated heating capacities	Range of thermal efficiencies (percent)			
	Natural gas		Propane	
	Low	High	Low	High
All capacities	78.2	95.0	78.2	95.0

Appendix J2 to Part 305—Pool Heaters—Oil

Range Information

Manufacturer's rated heating capacities	Range of thermal efficiencies (percent)	
	Low	High
All capacities	*	*

* No data submitted.

■ 10. Appendix K to part 305 is revised to read as follows:

Appendix K to Part 305—Representative Average Unit Energy Costs

This Table contains the representative unit energy costs that must be utilized to calculate estimated annual energy cost disclosures required under §§ 305.11 and 305.20. This Table is based on information published by the U.S. Department of Energy in 2012. Unless otherwise indicated by the Commission, this table will be revised in 2017.

UNIT COSTS OF ENERGY FOR USE ON ENERGYGUIDE LABELS REQUIRED BY § 305.11

Type of energy	In commonly used terms	As required by DOE test procedure	Dollars per million Btu [1]
Electricity	12.00¢/kWh [2,3]	$.1200/kWh	$34.70
Natural Gas	$1.06/therm [4] $10.59/MCF [5,6]	$0.00001035/Btu	$10.35
No. 2 heating oil	$4.04/gallon [7]	$0.00002912/Btu	$29.12
Propane	$2.56/gallon [8]	$0.00002803/Btu	$28.03
Kerosene	$4.35/gallon [9]	$0.00003222/Btu	$32.22

[1] Btu stands for British thermal unit.
[2] kWh stands for kiloWatt hour.
[3] 1 kWh = 3,412 Btu.
[4] 1 therm = 100,000 Btu. Natural gas prices include taxes.
[5] MCF stands for 1,000 cubic feet.
[6] For the purposes of this table, 1 cubic foot of natural gas has an energy equivalence of 1,023 Btu.

[7] For the purposes of this table, 1 gallon of No. 2 heating oil has an energy equivalence of 138,690 Btu.
[8] For the purposes of this table, 1 gallon of liquid propane has an energy equivalence of 91,333 Btu.
[9] For the purposes of this table, 1 gallon of kerosene has an energy equivalence of 135,000 Btu.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2013–00113 Filed 1–8–13; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2012–0150]

RIN 1625–AA08

Special Local Regulations, Stuart Sailfish Regatta, Indian River; Stuart, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Coast Guard is proposing to establish special local regulations on the Indian River located northeast of Ernest F. Lyons Bridge and south of Joes Cove, in Stuart, Florida during the Stuart Sailfish Regatta, a series of high-speed boat races. The Stuart Sailfish Regatta will take place from Friday, April 19, 2013 through Sunday, April 21, 2013. Approximately 150 high-speed power boats will be participating in the event. It is anticipated that at least 100 spectator vessels will be present during the race. These special local regulations are necessary for the safety of race participants, participant vessels, spectators and the general public during the event. The special local regulations establish the following three areas: a race area, where all persons and vessels, except those persons and vessels participating in the high-speed boat races, are prohibited from entering, transiting through, anchoring in, or remaining within; a buffer zone around the race area, where all persons and vessels, except those persons and vessels enforcing the buffer zone, or authorized participants or vessels transiting to the race area, are prohibited from entering, transiting through, anchoring in, or remaining within; and a spectator area.

DATES: Comments and related material must be received by the Coast Guard on or before February 8, 2013.

Requests for public meetings must be received by the Coast Guard on or before February 8, 2013.

ADDRESSES: You may submit comments identified by docket number using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Junior Grade Mike H. Wu, Sector Miami Prevention Department, Coast Guard; telephone (305) 535–7576, email *Mike.H.Wu@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:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Public Participation and Request for Comments

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

1. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov,* or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* type the docket number USCG–2012–0150 in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number USCG–2012–0150 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.

3. Privacy Act

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

4. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one on or before February 8, 2013, using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

B. Regulatory History and Information

Previously, temporary special local regulations regarding this maritime event have been published in the Code of Federal Regulations at 33 CFR 100.701. No final rule has been published in regards to this event. The proposed special local regulations are not new in their entirety, but merely reflect updates to certain details of the event.

C. Basis and Purpose

The legal basis for the rule is the Coast Guard's authority to establish special local regulations: 33 U.S.C. 1233. The purpose of the rule is to insure safety of life on navigable waters of the United States during the Stuart Sailfish Regatta.

D. Discussion of Proposed Rule

From Friday, April 19, 2013 through Sunday, April 21, 2013, Stuart Sailfish Regatta, Inc. will be hosting the Stuart Sailfish Regatta, a series of high-speed boat races. The races will be held on the Indian River located northeast of Ernest F. Lyons Bridge and south of Joes Cove, in Stuart, Florida. Approximately 150 high-speed power boats will be participating in the event. It is anticipated that at least 100 spectator vessels will be present during the race.

The proposed rule would establish special local regulations that will encompass certain waters of the Indian River located northeast of Ernest F. Lyons Bridge and south of Joes Cove, in Stuart, Florida. The special local regulations will be enforced daily from 9 a.m. until 5 p.m. from April 19, 2013 through April 21, 2013. The special local regulations consist of the following three areas: (1) A race area, where all persons and vessels, except those persons and vessels participating in the high-speed boat races, are prohibited from entering, transiting through, anchoring in, or remaining within; (2) a buffer zone around the race area, where all persons and vessels, except those persons and vessels enforcing the buffer zone, or authorized participants or vessels transiting to the race area, are prohibited from entering, transiting through, anchoring in, or remaining within; and (3) a spectator area.

Persons and vessels may request authorization by contacting the Captain of the Port Miami by telephone at (305) 535–4472, or a designated representative via VHF radio on channel 16, to enter, transit through, anchor in, or remain within the race area or the buffer zone. If authorization is granted by the Captain of the Port Miami or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Miami or a designated representative. The Coast Guard will provide notice of the regulated areas by Local Notice to Mariners, Broadcast Notice to Mariners and on-scene designated representatives.

E. Regulatory Analyses

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

1. Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 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 Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. The economic impact of this proposed rule is not significant for the following reasons: (1) The special local regulations will be enforced for a maximum of 8 hours a day for only three days; (2) non-participant persons and vessels may enter, transit through, anchor in, or remain within the regulated areas during their respective enforcement periods if authorized by the Captain of the Port Miami or a designated representative; (3) non-participant persons and vessels not able to enter, transit through, anchor in, or remain within the regulated areas without authorization from the Captain of the Port Miami or a designated representative may operate in the surrounding areas during the respective enforcement periods; and (4) the Coast Guard will provide advance notification of the special local regulations to the local maritime community by Local Notice to Mariners and Broadcast Notice to Mariners.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this proposed rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities, some of which may be small entities: the owners or operators of vessels intending to enter, transit through, anchor in, or remain within any of the regulated areas during the respective enforcement period. For the reasons discussed in the Regulatory Planning and Review section above, this rule will not have a significant economic impact on a substantial number of small entities.

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

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

4. Collection of Information

This proposed rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this proposed rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the ''For Further Information Contact'' section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children From Environmental Health Risks

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

11. Indian Tribal Governments

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

12. Energy Effects

This proposed rule is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f). Due to potential environmental issues, we conducted an environmental assessment last year for both the issuance of the marine event permit and the establishment of this special local regulation. The same environmental assessment is being used for this year's event as it is substantially similar in all aspects and therefore the potential effects and alternatives would remain unchanged. After completing the environmental assessment for the issuance of the marine event permit, and the establishment of these special local regulations, we have determined these actions will not significantly affect the human environment. The environmental assessment and finding of no significant impact (FONSI) are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 100

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

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

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

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

Authority: 33 U.S.C. 1233.

■ 2. Add a temporary § 100.35T07–0150 to read as follows:

§ 100.35T07–0150 Special Local Regulations; Stuart Sailfish Regatta, Indian River, Stuart, FL.

(a) Regulated Areas. The following regulated areas are established as special local regulations. All coordinates are North American Datum 1983.

(1) Race Area. All waters of Indian River located northeast of Ernest Lyons Bridge and south of Joes Cove that are encompassed within an imaginary line connecting the following points: starting at Point 1 in position 27°12′46″ N, 80°11′09″ W; thence southeast to Point 2 in position 27°12′41″ N, 80°11′08″ W; thence southwest to Point 3 in position 27°12′37″ N, 80°11′11″ W; thence southwest to Point 4 in position 27°12′33″ N, 80°11′18″ W; thence southwest to Point 5 in position 27°12′31″ N, 80°11′23″ W; thence west to Point 6 in position 27°12′31″ N, 80°11′27″ W; thence northwest to Point 7 in position 27°12′33″ N, 80°11′31″ W; thence northwest to Point 8 in position 27°12′38″ N, 80°11′32″ W; thence northeast to Point 9 in position 27°12′42″ N, 80°11′30″ W; thence northeast to Point 10 in position 27°12′46″ N, 80°11′26″ W; thence northeast to Point 11 in position 27°12′48″ N, 80°11′20″ W; thence east to Point 12 in position 27°12′48″ N, 80°11′15″ W; thence southeast back to origin. All persons and vessels, except those persons and vessels participating in the high-speed boat races, are prohibited from entering, transiting through, anchoring in, or remaining within the race area.

(2) Buffer Zone. All waters of Indian River located northeast of Ernest Lyons Bridge and south of Joes Cove that are encompassed within an imaginary line connecting the following points, with the exception of the spectator area: starting at Point 1 in position 27°12′47″ N, 80°11′43″ W; thence southeast to Point 2 in position 27°12′22″ N, 80°11′28″ W; thence northeast to Point 3 in position 27°12′35″ N, 80°11′00″ W; thence northwest to Point 4 in position 27°12′47″ N, 80°11′04″ W; thence northeast to Point 5 in position 27°13′05″ N, 80°11′01″ W; thence southeast back to origin. All persons and vessels, except those persons and vessels enforcing the buffer zone, or authorized participants or vessels transiting to the race area, are prohibited from entering, transiting through, anchoring in, or remaining within the buffer zone.

(3) Spectator Area. All waters of Indian River located northeast of the Ernest Lyons Bridge and south of Joes Cove that are encompassed within an imaginary line connecting the following

points: starting at Point 1 in position 27°12′47″ N, 80°11′43″ W; thence southeast to Point 2 in position 27°12′40″ N, 80°11′38″ W; thence northeast to Point 3 in position 27°11′52″ N, 80°11′25″ W; thence northwest to Point 4 in position 27°12′54″ N, 80°11′26″ W; thence southwest back to origin. On-scene designated representatives will direct spectator vessels to the spectator area.

(b) *Definition.* The term ''designated representative'' means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, state, and local officers designated by or assisting the Captain of the Port Miami in the enforcement of the regulated area.

(c) *Regulations.*

(1) All persons and vessels, are prohibited from:

(A) Entering, transiting through, anchoring in, or remaining within the race area, unless participating in the race.

(B)Transiting through, anchoring in, or remaining within the buffer zone, unless enforcing the buffer zone or a race participant transiting to the race area.

(C) Traveling in excess of no-wake speed in the spectator area.

(2) Persons and vessels may request authorization to enter, transit through, anchor in, or remain within the regulated area by contacting the Captain of the Port Miami by telephone at 305–535–4472, or a designated representative via VHF radio on channel 16. If authorization is granted by the Captain of the Port Miami or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Miami or a designated representative.

(3) The Coast Guard will provide notice of the regulated areas by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

(d) *Enforcement Date.* This rule will be enforced from 9:00 a.m. until 5:00 p.m. daily from April 19, 2013 through April 21, 2013.

Dated: December 26, 2012.

J.B. Pruett,

Captain, U.S. Coast Guard, Acting Captain of the Port Miami.

[FR Doc. 2013–00276 Filed 1–8–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–1075]

RIN 1625–AA00

Safety Zone, Change to Enforcement Period, Patapsco River, Northwest and Inner Harbors; Baltimore, MD

AGENCY: Coast Guard, DHS.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Coast Guard is proposing a change to the enforcement period of a safety zone regulation for the annual movement of the historic sloop-of-war USS CONSTELLATION. This regulation applies to a recurring event that takes place in Baltimore, MD. The safety zone regulation is necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic in portions of the Patapsco River, Northwest Harbor and Inner Harbor during the event.

DATES: Comments and related material must be received by the Coast Guard on or before February 8, 2013.

ADDRESSES: You may submit comments identified by docket number using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329.

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Ronald L. Houck, Sector Baltimore, Waterways Management Division, U.S. Coast Guard; telephone (410) 576–2674, email *Ronald.L.Houck@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Public Participation and Request for Comments

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

1. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov*, or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov*, type the docket number [USCG–2012–1075] in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number (USCG–2012–1075) 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.

3. Privacy Act

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

4. Public Meeting

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

B. Basis and Purpose

This rule involves the USS CONSTELLATION ''turn-around'' cruise, an event that takes place in Baltimore, Maryland. A permanent safety zone for this proposed rule, with an enforcement period from 2 p.m. through 7 p.m. local time annually on the Friday following Labor Day, has been published and is detailed at Title 33 Code of Federal Regulations, Section 165.512. Due however to a change in scheduling, future such events are planned for the Thursday before Memorial Day (observed), and, if necessary due to inclement weather, on the Thursday following Memorial Day (observed). The event time and location remain unchanged.

Historic Ships in Baltimore is planning to conduct its turn-around ceremony involving the sloop-of-war USS CONSTELLATION in Baltimore, Maryland on the Thursday before Memorial Day (observed). Planned events include a three-hour, round-trip tow of the USS CONSTELLATION in the Port of Baltimore, consisting of an onboard salute with navy pattern cannon while the historic vessel is positioned off the Fort McHenry National Monument and Historic Site. Beginning at 3 p.m., the historic Sloop-of-War USS CONSTELLATION will be towed ''dead ship,'' which means that the vessel will be underway without the benefit of mechanical or sail propulsion. The return dead ship tow of the USS CONSTELLATION to its berth in the Inner Harbor is expected to occur immediately upon execution of a tug-assisted ''turn-around'' of the USS CONSTELLATION on the Patapsco River near Fort McHenry. The Coast Guard anticipates a large recreational boating fleet during this event, scheduled on a late Thursday afternoon before the Memorial Day Holiday weekend in Baltimore, Maryland. Operators should expect significant vessel congestion along the planned route. In the event of inclement weather, the ''turn-around'' will be rescheduled for the Thursday following Memorial Day (observed).

To address safety concerns during the event, the Captain of the Port Baltimore proposes to change to the enforcement period of a safety zone regulation for the annual movement of the historic sloop-of-war USS CONSTELLATION, conducted upon certain waters of the Patapsco River, Northwest Harbor and Inner Harbor. The proposed change to the enforcement period of the safety zone will help the Coast Guard provide a clear transit route for the participating vessels, and provide a safety buffer around the participating vessels while they are in transit. Due to the need to promote maritime safety and protect participants and the boating public in the Port of Baltimore immediately prior to, during, and after the scheduled event, the safety zone is prudent.

C. Discussion of Proposed Rule

The Coast Guard proposes to change the enforcement period of the safety zone for a recurring event conducted in portions of the Patapsco River, Northwest Harbor and Inner Harbor. This regulation applies to the annual movement of the historic sloop-of-war USS CONSTELLATION detailed at Title 33 Code of Federal Regulations, Section 165.512.

Title 33 Code of Federal Regulations, Section 165.512, paragraph (e), establishes the enforcement date for the USS CONSTELLATION ''turn-around'' cruise event held in Baltimore, MD. This regulation does not change the enforcement times for the event. The safety zone will be enforced from 2 p.m. through 7 p.m. on the Thursday before Memorial Day (observed), and, if necessary due to inclement weather, from 2 p.m. through 7 p.m. on the Thursday following Memorial Day (observed), and will restrict general navigation in the regulated area during the event. Historic Ships in Baltimore, which is the sponsor for this event, holds this event annually. Except for participants and vessels authorized by the Coast Guard Captain of the Port Baltimore or the designated on-scene patrol personnel, no person or vessel will be allowed to enter or remain in the regulated area. This regulation is needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 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 Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. Although this safety zone restricts vessel traffic through the affected area, the effect of this regulation will not be significant due to the limited size and duration that the regulated area will be in effect. In addition, notifications will be made to the maritime community via marine information broadcasts so mariners may adjust their plans accordingly.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this proposed rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: the owners or operators of vessels intending to operate or transit through or within the safety zone during the enforcement period. Before the effective period, maritime advisories will be widely available to the maritime community.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see

ADDRESSES) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

4. Collection of Information

This proposed rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this proposed rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children From Environmental Health Risks

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

11. Indian Tribal Governments

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

12. Energy Effects

This proposed rule is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves establishing a temporary safety zone. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. A preliminary environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. 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.

■ 2. Revise paragraph (e) of § 165.512 to read as follows:

§ 165.512 Safety Zone; Patapsco River, Northwest and Inner Harbors, Baltimore, MD.

* * * * *

(e) *Enforcement period.* This section will be enforced from 2 p.m. through 7 p.m. on the Thursday before Memorial Day (observed), and, if necessary due to inclement weather, from 2 p.m. through 7 p.m. on the Thursday following Memorial Day (observed).

* * * * *

Dated: December 20, 2012.

Kevin C. Kiefer,

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

[FR Doc. 2013–00214 Filed 1–8–13; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2012–0832; FRL–9374–2]

Receipt of a Pesticide Petition Filed for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of filing of petition and request for comment.

SUMMARY: This document announces the Agency's receipt of an initial filing of a pesticide petition requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before February 8, 2013.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2012–0832, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Gina Burnett, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 605–0513; email address: *burnett.gina@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

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

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

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What action is the agency taking?

EPA is announcing receipt of a pesticide petition filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), (21 U.S.C. 346a), requesting the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. The Agency is taking public comment on the request before responding to the petitioner. EPA is not proposing any particular action at this time. EPA has determined that the pesticide petition described in this document contains data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the pesticide petition. After considering the public comments, EPA intends to evaluate whether and what action may be warranted. Additional data may be needed before EPA can make a final determination on this pesticide petition.

Pursuant to 40 CFR 180.7(f), a summary of the petition that is the subject of this document, prepared by the petitioner, is included in a docket EPA has created for this rulemaking. The docket for this petition is available online at *http://www.regulations.gov.* As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

PP 2F8056. Fine Agrochemicals Ltd. c/o SciReg, Inc., 12733 Director's Loop, Woodbridge, VA 22192, requests to amend an exemption from the requirement of a tolerance in 40 CFR 180.1299 for residues of the plant growth regulator prohydrojasmon (PDJ), propyl-3-oxo-2-pentylcyclo-

pentylacetate, in or on red apples and grapes. The petitioner believes no analytical method is needed because this request is to establish a permanent exemption from the requirement of a tolerance and, therefore, an analytical method is not required.

List of Subjects in 40 CFR Part 180

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 12, 2012.

Sheryl K. Reilly,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 2013–00272 Filed 1–8–13; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 20

[PS Docket No. 11–153; PS Docket No. 10–255; FCC 12–149]

Next Generation 911; Text-to-911; Next Generation 911 Applications

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Federal Communications Commission proposes to amend its rules by requiring all wireless carriers and providers of ''interconnected'' text messaging applications to support the ability of consumers to send text messages to 911 in all areas throughout the nation where 911 Public Safety Answering Points (PSAPs) are also prepared to receive the texts. In addition, to inform consumers and prevent confusion, the Commission proposes to require all wireless carriers and interconnected text messaging providers to send automated ''bounce back'' error messages to consumers attempting to text 911 when the service is not available.

DATES: *Comment Date for Section III.A:* January 29, 2013.

Reply Comment Date for Section III.A: February 8, 2013.

Comment Date for Other Sections: March 11, 2013.

Reply Comment Date for Other Sections: April 9, 2013.

ADDRESSES: Submit comments to Federal Communications Commission, 445 12th Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Aaron Garza, Attorney Advisor, (202) 418–1175. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Judith Boley-Herman, (202) 418–0214, or send an email to *PRA@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking in PS Docket No. 11–153, PS Docket No. 10–255, FCC 12–149, released on December 13, 2012. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street SW., Washington, DC 20554, or online at *http://www.fcc.gov/document/text-911-further-notice-proposed-rulemaking*.

I. Introduction

1. Wireless consumers are increasingly using text messaging as a means of everyday communication on a variety of platforms. The legacy 911 system, however, does not support text messaging as a means of reaching emergency responders, leading to potential consumer confusion and even to possible danger. As consumer use of carrier-based and third party-provided texting applications expands and evolves, the 911 system must also evolve to enable wireless consumers to reach 911 in those emergency situations where a voice call is not feasible or appropriate.

2. In this Further Notice of Proposed Rulemaking, we propose rules that will enable Americans to send text messages to 911 (text-to-911) and that will educate and inform consumers regarding the future availability and appropriate use of text-to-911. Specifically, we propose to require all wireless carriers and providers of ''interconnected'' text messaging applications to support the ability of consumers to send text messages to 911 in all areas throughout the nation where 911 Public Safety Answering Points (PSAPs) are also prepared to receive the texts. In addition, to inform consumers and prevent confusion, we propose to require all wireless carriers and interconnected text messaging providers to send automated ''bounce back'' error messages to consumers attempting to text 911 when the service is not available.

3. Our proposals build on the recently filed voluntary commitment by the four largest wireless carriers—in an agreement with the National Emergency Number Association (NENA), and the Association of Public Safety Communications Officials (APCO) (Carrier-NENA–APCO Agreement)—to make text-to-911 available to their customers by May 15, 2014, and to provide automatic bounce back messages across their networks by June 30, 2013. The baseline requirements we propose in this Further Notice are modeled on the Carrier-NENA–APCO Agreement, and we seek comment on whether all carriers, including regional, small and rural carriers, and all ''interconnected text'' providers can achieve these milestones in the same or similar timeframes. To allow for the possibility of implementing our bounce back proposal by June 30, 2013, we are seeking comment on this portion of the Further Notice on an accelerated basis. Moreover, in light of the importance of these issues, we intend to resolve promptly the questions we raise in the remaining portion of the Further Notice in 2013.

4. Our proposal to add text capability to the 911 system will vastly enhance the system's accessibility for over 40 million Americans with hearing or speech disabilities. It will also provide a vital and lifesaving alternative to the public in situations where 911 voice service is unavailable or placing a voice call could endanger the caller. Indeed, as recent history has shown, text messaging is often the most reliable means of communications during disasters where voice calls cannot be completed due to capacity constraints. Finally, implementing text-to-911 represents a crucial next step in the ongoing transition of the legacy 911 system to a Next Generation 911 (NG911) system that will support not only text but will also enable consumers to send photos, videos, and data to PSAPs, enhancing the information available to first responders for assessing and responding to emergencies.

5. Our proposed approach to text-to-911 is also based on the presumption that consumers in emergency situations should be able to communicate using the text applications they are most familiar with from everyday use. Currently, the most commonly used texting technology is Short Message Service (SMS), which is available, familiar, and widely used by virtually all wireless consumers. In the Carrier-NENA–APCO Agreement, the four major carriers have indicated that they intend to use SMS-based text for their initial text-to-911 deployments, and we expect other initial deployments to be similarly SMS-based.

6. At the same time, we do not propose to limit our focus to SMS-based text. As a result of the rapid proliferation of smartphones and other

advanced mobile devices, some consumers are beginning to move away from SMS to other IP-based text applications, including downloadable software applications provided by parties other than the underlying carrier. To the extent that consumers gravitate to such applications as their primary means of communicating by text, they may reasonably come to expect these applications to also support text-to-911, as consumer familiarity is vital in emergency situations where seconds matter. Therefore, in this Further Notice, we seek to ensure that consumers ultimately have access to the same text-to-911 capabilities on the full array of texting applications that they use for ubiquitous communication—regardless of provider or platform. We also propose that service providers who offer SMS-based text-to-911 should have the flexibility to migrate their customers to other text-to-911 applications.

7. While our proposal is designed to accelerate the nationwide availability of text-to-911, we recognize that deployment will not be uniform, e.g., during the transition period, text-to-911 may be available in certain geographic areas while it is not available in others, or may be supported by certain carriers but not by others. This creates the risk of consumer confusion about the availability of text-to-911 as the transition proceeds—indeed, there is evidence that many consumers erroneously believe that they can already reach 911 by text, and that some have attempted to do so. Rapid implementation of the bounce back notification mechanism that we propose in this Further Notice is therefore critical to informing consumers and lessening potential confusion about text-to-911 availability. In addition, we intend to begin work immediately with PSAPs, carriers, service providers, disability organizations, consumer groups, and others to educate and inform consumers regarding the transition, local availability, and appropriate use of text-to-911.

8. Finally, we emphasize that even as adding text capability makes the 911 system more accessible and effective in enhancing public safety, text-to-911 is and will remain a complement to, rather than a substitute for, voice 911 service. The voice 911 system that has been maintained and improved over decades remains the preferred means of seeking help in an emergency in most instances. Moreover, voice 911 service will continue to be central and essential to the 911 system even as we add text, photo, data, and video capabilities in the course of migrating to NG911. Therefore, even as we take this first major step in the transition to NG911, we continue to encourage all consumers seeking emergency help to access 911 by voice whenever possible.

II. General Background

9. In September 2011, the Commission released a Notice of Proposed Rulemaking (Notice) (76 FR 63257, October 12, 2011), which sought comment on a number of issues related to the deployment of NG911, including potential near-term methods for delivering text-to-911; whether and how to prioritize 911 in major emergencies; how to facilitate the long-term deployment of text-to-911; the Commission's role in deploying text-to-911 and other NG911 applications; consumer education and disclosure mechanisms; and the relationship between this proceeding and the implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA).

A. Text-to-911 Deployments and Trials

10. While some commenters initially expressed concerns about implementing near-term text-to-911, both wireless carriers and public safety entities have more recently taken significant steps towards the near-term deployment of text-to-911, including SMS-based solutions. In May 2012, Verizon Wireless announced plans to deploy text-to-911 capability throughout its nationwide network in 2013. On December 10, 2012, Verizon Wireless commenced its rollout of text-to-911 service in York County, Virginia. In June 2012, AT&T also announced the goal of launching text-to-911 nationwide in 2013. In addition, the Alliance for Telecommunications Industry Solutions (ATIS), an organization consisting of a large number of wireless and wireline carriers as well as equipment vendors, has formed a committee to ''create an ATIS standard(s) for SMS-to-9–1–1 that incorporates requirements, architecture, message flows, and product details.'' ATIS has targeted completion of these standards in the first quarter of 2013. Most recently, as noted above and described in further detail below, the four major wireless carriers, Sprint Nextel, AT&T, T-Mobile, and Verizon, have entered into a voluntary agreement with NENA and APCO whereby the major carriers will provide text-to-911 service by May 15, 2014, to PSAPs who request the service.

11. Some of these same wireless carriers have already initiated text-to-911 trials in partnership with several PSAPs to assess the technical feasibility of text-to-911 and its impact on PSAP operations. Four trials are currently under way—three of which have yielded positive results. First, as just announced, AT&T is ''in the process of launching a standards-based trial service for text-to-911 in the state of Tennessee * * *.'' Additionally, in June 2009, Black Hawk County, Iowa partnered with Intrado (a provider of 911 technology solutions) and i wireless (a T-Mobile affiliate that offers regional wireless communications service), to provide text-to-911 service within the county. According to Black Hawk County, there have been no delayed or dropped text messages in the trial, nor has there been a ''significant increase in incident volume.'' Indeed, callers have benefitted from the technology in several situations. This includes women who have been at risk of domestic abuse who have been able to text for help undetected by their assailant; children reporting instances of domestic abuse; and anonymous reports of imminent sales of controlled substances. Black Hawk County has expanded the trial and now receives text messages from individuals throughout the state, which it then relays to the appropriate PSAP. According to Black Hawk County, the trial demonstrates that text-to-911 service ''is reliable and * * * saves lives.''

12. In August 2011, the City of Durham, North Carolina (Durham) initiated an SMS-to-911 trial in partnership with Verizon Wireless and Intrado. According to Durham, the technology has worked reliably. Durham's trial suggests that callers will continue to rely on voice calls to 911 and that concerns about text messages overwhelming PSAPs may be unfounded. Durham views the technology as a ''valuable asset'' and the North Carolina Director of the Division of Services for the Deaf and the Hard of Hearing stated that ''the significance of the program cannot be overstated.'' More recently, the trial was extended ''to accommodate Durham's additional outreach to individuals with disabilities.''

13. In April 2012, the State of Vermont (Vermont) initiated a text-to-911 trial allowing any Verizon Wireless subscriber to send emergency text messages to the Williston, Vermont PSAP, provided that the text message is transmitted via a cell tower located within the physical boundaries of Vermont. The Executive Director of the Vermont E911 Board stated that implementing the trial ''wasn't * * * difficult at all'' and that so far, the trial has proceeded ''very smoothly.'' Vermont believes that fears over the volume of emergency text messages are

''overblown'' and ''remain[s] convinced that those who can make a voice call will make a voice call as that is the most efficient way to communicate in an emergency.''

14. Vermont further reports that as of August 2012, it had received only two legitimate emergency text messages, but in both cases emergency services were able to intervene successfully. In one case, a life was saved when emergency personnel were able to thwart an attempted suicide. In the other case, a domestic abuse victim was able to contact police, who then arrived on the scene and made an arrest. While Vermont recognizes that some parties would prefer to wait for a more advanced text-to-911 solution, Vermont maintains that the ''individual whose life we saved and the domestic assault victim would likely disagree that it is too soon to have this technology available.'' Vermont also indicates it has experienced some text ''spoofing,'' but notes that ''there is nothing about this new technology that is any more likely to result in 'spoof' contacts than what we already deal with on the voice side of the system.'' Additionally, Vermont did not experience any problems with text slang.

15. On October 30, 2012, Vermont submitted an ex parte filing indicating that it is maintaining the text-to-911 system past the end of its trial and is ''currently working on enabling a second Public Safety Answering Point (PSAP) for redundancy purposes.'' Vermont states that it ''can report no negative operational impacts on our system as the result of the Verizon trial,'' but that it needs the Commission's assistance in ''encouraging all of the carriers to do the right thing and enable text-to-9–1–1 now.'' Vermont concludes by stating that ''[w]e understand that there are some concerns both in the PSAP and industry communities about the timing of SMS text-to-9–1–1, but so long as the most common method of texting on today's devices remains SMS, we feel it is important to move ahead and not wait for the promises that other texting solutions might provide.'' On December 3, 2012, Vermont announced that it would further expand its text-to-911 trial to include Sprint Nextel customers, in collaboration with the Vermont Enhanced 911 Board, Sprint Wireless, and Intrado.

B. Carriers' Voluntary Commitments

16. On December 6, 2012, APCO, NENA, Sprint Nextel, AT&T, T-Mobile, and Verizon, entered into a voluntary agreement whereby each of the four major carriers will provide text-to-911 service by May 15, 2014, to PSAPs who request such a service. Under the terms of the Carrier-NENA–APCO Agreement, once a signatory carrier begins to offer text-to-911 service, ''valid PSAP requests for Text-to-911 service will be implemented within a reasonable amount of time of receiving such a request, not to exceed six months.'' A request will be considered ''valid'' if the ''requesting PSAP represents that it is technically ready to receive 911 text messages in the format requested,'' and ''the appropriate local or State 911 service governing authority has specifically authorized the PSAP to accept and, by extension, the signatory service provider to provide, text-to-911 service (and such authorization is not subject to dispute).'' Additionally, no later than July 1, 2013, the four major providers will ''voluntarily provide quarterly progress reports to the FCC, NENA, and APCO summarizing the status of the deployment of a national Text-to-911 service capability.''

17. Under the terms of the Carrier-NENA–APCO Agreement, the major carriers have also agreed to implement a bounce-back message capability by June 30, 2013. The bounce back message will ''alert subscribers attempting to text an emergency message to instead dial 911 when text-to-911 is unavailable in that area.''

18. The signatories also agreed on additional measures to implement text-to-911 voluntarily. Specifically, the signatories agree that ''PSAPs will select the format for how messages are to be delivered,'' and that ''incremental costs for delivery of text messages * * * will be the responsibility of the PSAP, as determined by individual analysis.'' Additionally, the signatory service providers agree to implement a 911 short code and agreed to implement text-to-911 ''independent of their ability to recover * * * associated costs from state or local governments.'' The signatory providers also agree to ''work with APCO, NENA, and the FCC to establish an outreach effort to set and manage consumer expectations regarding the availability/limitations of the Text-to-911 service (including when roaming) and the benefits of using voice calls to 911 whenever possible, and support APCO and NENA's effort to educate PSAPs on text-to-911 generally.''

19. Finally, the Carrier-NENA–APCO Agreement limits the proposed voluntary text-to-911 solution ''to the capabilities of the existing SMS service offered by a participating wireless service provider on the home wireless network to which a wireless subscriber originates an SMS message.'' Thus, the carriers state that under the terms of their voluntary commitment to deploy text-to-911 capability by May 15, 2014, ''SMS-to-911 will not be available to wireless subscribers roaming outside of their home wireless network,'' and ''[e]ach implementation of SMS-to-911 will be unique to the capabilities of each signatory service provider or its Gateway Service Provider.''

III. Further Notice of Proposed Rulemaking

20. In this Further Notice, we seek comment on issues related to text-to-911 in light of the evolved record, and bifurcate the comment cycles in order to deal most promptly with the consumer notification issue that has the potential to alleviate near-term consumer confusion as to the availability of text-to-911 both during the course of the voluntary roll outs that several carriers have proposed and during the pendency of the Commission's proceeding. Accordingly, comments with respect to Section III.A will be due 20 days from publication in the **Federal Register**, and reply comments on Section III.A will be due 10 days thereafter. Comments and reply comments should address only the issues posed in this section in order to provide the Commission with a focused record on this question. Comments and reply comment on the remaining portion of the Further Notice will be due 60 days and 90 days from publication in the **Federal Register**, respectively. We also seek comment on Section III.C (Legal Authority) as relevant to each section in accordance with the comment timeframe for that section.

A. Automated Error Messages for Failed Text-to-911 Attempts and Consumer Expectations and Education

1. Automated Error Message Proposal

21. Background. In the Notice, the Commission noted the likelihood that as text-to-911 is implemented, there will be instances where despite efforts to educate consumers, some individuals will attempt to send text messages to 911 in locations where text-to-911 is not supported. The Commission observed that this ''could put consumers at risk if they were unaware that an emergency text did not go through or were uninformed about alternative means of reaching the PSAP.'' To mitigate this risk, the Commission proposed that in situations where a consumer attempts to text 911 in a location where text-to-911 is not available, the consumer should receive an automatic error message or similar disclosure that includes

information on how to contact the PSAP.

22. Public safety commenters generally support such an automatic notification requirement. APCO argues that ''[i]n situations where a consumer attempts to text 9–1–1 in an area that does not support this technology, a standardized auto message should be immediately returned indicating how to contact the PSAP and/or that a voice call is required. The Commission is urged to work with APCO, NENA and NASNA to develop best practices and model responses.'' The State of California similarly maintains that ''the Commission [should] require any service provider that provides texting capability to its customers to provide an immediate, automatic response (preferably standard nationwide message) to any text-to-911 stating that texting to 9–1–1 is not available and advising the customer to make a voice call to 9–1–1 in an emergency.''

23. In their comments in response to the Notice, commercial mobile radio service (CMRS) providers acknowledge the importance of providing notification of non-delivery to consumers, although some commenters question whether the Commission should adopt a notification requirement. Verizon notes that it already provides an automated message when a wireless customer attempts to send a text message to 911 in a location where text-to-911 is not available. Verizon states that its voluntary practice obviates the need for regulation, but notes that ''[s]hould the Commission nevertheless find a requirement is necessary, language like Verizon's would be sufficient and appropriate.'' Sprint argues that before making any decision on this issue, the Commission should first refer the matter to standards organizations ''to review the technical aspects associated with delivering an error message and to develop a consistent error response message.'' Finally, textPlus, a software-based text application provider, notes that it already ''sends a bounce back message to users alerting the user that the 911 address is not recognized.''

24. Most recently, however, the Carrier-NENA-APCO Agreement states that ''[b]efore the deployment of Text-to-911, the signatory service providers will implement a bounce-back (auto-reply) message to alert subscribers attempting to text an emergency message to instead dial 9–1–1 when Text-to-9–1–1 is unavailable * * *'' The Agreement further states that these providers, the four major wireless carriers which include Verizon and Sprint, ''will implement the bounce-back * * * message by June 30, 2013.''

25. Discussion. We propose that CMRS providers and other providers of text messaging services should be required to automatically notify consumers attempting to text-to-911 in areas where text-to-911 is not supported or in other instances where the text cannot be transmitted to the PSAP. In this respect, there appears to be a clear benefit to persons in emergency situations being able to know immediately if a text message has been delivered to the proper authorities. This automatic feedback may be life-saving, allowing a person in need of assistance to immediately seek out an alternative. Providing this type of error message may also be particularly critical during the transition to NG911, as the record to date suggests there are likely to be numerous instances where consumers attempt to send text messages to PSAPs in areas where text-to-911 is not yet available.

26. We disagree with the assertion that there is no need for a bounce-back requirement because certain wireless carriers already voluntarily provide automatic error messages when customers attempt to text-to-911 in areas where it is not supported. Rather, we believe that all CMRS providers and other prospective text-to-911 service providers should implement this safeguard so that consumers have the assurance that they will receive automatic notification regardless of which provider they choose. While consumer education (as discussed below) may help to mitigate this risk, the possibility remains that without such a requirement, a consumer without knowledge of where text-to-911 is supported could attempt to send a text message to 911 and mistakenly believe that the text has been successfully transmitted to the PSAP.

27. Moreover, in view of the four carriers' commitment in the Carrier-NENA-APCO Agreement to implement a bounce-back message by the end of June 2013, a proactive approach for requiring automatic error messages appears to be feasible at a reasonable cost, especially in comparison to the public safety benefits that an automatic error message can provide consumers. The Carrier-NENA-APCO Agreement states that the four major wireless carriers ''will meet [the] commitments [in the Agreement] independent of the [carriers] ability to recover these associated costs from state or local governments.'' We believe that this representation indicates that the costs for implementing a bounce-back message are manageable, regardless of whether such costs are recoverable under current state or local cost recovery programs. However, we seek comment on this view, particularly in regard to the impact that the costs to meet the bounce-back requirement might have on small and rural CMRS providers compared to the public safety benefits for their subscribers.

28. We seek comment on the appropriate timeframe for CMRS providers to implement a bounce back messaging capability. Whether or not CMRS providers have developed text-to-911 capability, the record to date appears to demonstrate that it is technically feasible for them to provide an automated ''bounce-back'' text message in such circumstances instructing the sender to make a voice 911 call, and that many carriers already provide this message voluntarily. We recognize that CMRS providers other than the four major carriers may need to address certain technical and operational issues in order to meet our proposed notification requirement. Nevertheless, we believe that a solution should be implemented as quickly as possible to avoid the risk of consumer confusion. Accordingly, we seek comment on whether it is feasible for all CMRS providers to provide their customers with an automatic notification by the June 30, 2013 date specified in the Carrier-NENA-APCO Agreement. We seek comment on this timeframe, and any significant technical issues that would bear on the achievability of an automatic error message within that time frame by small, regional, or rural CMRS providers.

29. We also propose to require prospective providers of interconnected text service to develop an automated error message capability. In order to reduce potential consumer confusion and enhance the ability of consumers to communicate by text in emergencies using the applications they are most familiar with from everyday use, we believe that the ''bounce-back'' requirement proposed for CMRS providers above should also apply, to the extent feasible, to all providers of software applications that enable a consumer to send text messages to text-capable U.S. mobile telephone numbers and receive text messages from the same when a user of the application attempts to send an emergency text in an area where text-to-911 is not supported or the provider is otherwise unable to transmit the text to the PSAP.

30. We clarify that we do not propose to extend text-to-911 obligations to IP-based messaging applications that support communication with a defined set of users of compatible applications but do not support general communication with text-capable

telephone numbers. We believe it is less likely that consumers will expect such applications to support emergency communications. Nevertheless, we encourage providers of such messaging applications to inform their users that these applications do not support communication to 911. We seek comment on this approach. Are there other ''flavors'' of third-party text messaging applications that should not be included? Why?

31. We seek comment on the feasibility and cost of third-party providers to implement such an automatic notification and whether they must address any unique technical issues not faced by CMRS providers in executing this requirement. We also seek comment on whether it is feasible timeframe for third-party providers to implement the automatic notification requirement by June 30, 2013, or whether we should adopt a longer timetable.

32. We clarify that with respect to both CMRS providers and interconnected text providers, our proposed requirement for automatic notification to consumers would only apply to situations where the provider (or the provider's text-to-911 vendor) has direct control over the transmission of the text message and is unable to transmit the text message to the PSAP serving the texting party's location, whether due to network congestion, the inability of the PSAP to accept such messages, or otherwise. Thus, for example, a CMRS provider would not be required to provide automatic notification where the consumer uses a text application provided by a third party that the carrier does not control. Similarly, notification would not be required where the provider is able to transmit the text to the PSAP, but a failure in the PSAP network results in the text not being delivered to a 911 operator. We seek comment on our proposal. We also clarify that we do not propose to require all text-to-911 providers to use the exact same wording for their automatic error messages to consumers. Rather, we propose that providers would be deemed to have met our requirement so long as the error message includes information on how to contact the PSAP. For example, an automated message that advises the consumer to place a voice call to 911 would meet the proposed requirement. We would, however, encourage carriers to work with public safety organizations and consumer organizations, including disability organizations, on a common error message text to simplify consumer education. We seek comment on this approach.

2. Consumer Expectations and Education

33. Background. The Notice sought comment on how to ensure that consumers are informed about the availability and non-availability of text-to-911 in specific areas. Specifically, the Notice sought comment on the expected costs and benefits of various approaches to consumer education and disclosure mechanisms, whether contractual or cost considerations would deter consumers from texting or sending photos or video to 911, and if so, whether providers or the Commission should develop practices to remedy that situation. It also sought comment on what types of educational programs could be created to reduce and/or prevent consumer confusion as text-to-911 is deployed in the short term, what the appropriate role is for the Commission and for other government and private sector entities in any public education effort, and whether other resources could be developed to help individuals learn about where text-to-911 services are and are not available.

34. Public safety commenters generally agree that there is a significant need for a nationwide effort to educate the public and prevent consumer confusion while text-to-911 is being rolled out. For example, the North Central Texas Council of Governments (NCTCOG) conducted a recent survey which noted that approximately one-third of their population believe they can text 9–1–1 today. APCO argues that ''NG9–1–1 and the capabilities for data and multimedia will require a focused and funded public education plan. Consumers must be made aware of the limitations of 9–1–1 location accuracy and they must be cognizant of the role that they need to play in 'managing their emergency.' '' APCO urges the public and private sector to ''unite to provide a national campaign targeted at public education of NG 9–1–1 as it becomes available,'' and offers to help ''craft and disseminate an agreed upon curriculum.'' NASNA supports focusing educational efforts on ''discrete groups that would receive substantial and meaningful benefits'' from near-term deployment of text-to-911, ''such as the deaf and hard of hearing.'' NASNA suggests these focused educational efforts ''could provide a model when texting-to-9–1–1 is deployed on a permanent basis.'' NENA ''encourages the Commission'' to implement a campaign to ''provid[e] states, regions, and localities with template materials such as canned video, audio, and print materials'' that ''could provide enormous economies of scale * * * and help local 9–1–1 systems and centers to effectively educate the public about the roll-out of new system capabilities.'' NENA also contends that ''it is imperative that any text-to-9–1–1 solution that relies on a digit string or short code incorporate the digits '9–1–1' '' because ''[d]oing so will help to minimize consumer confusion and reduce public education costs.''

35. Industry commenters also stress the importance of consumer education and the need for both public and private sector participation in education efforts. CTIA stresses that ''consumer education requires that federal and state entities, as well as Public Safety agencies and consumer representatives, participate in the consumer education process, and that the responsibility not be left solely to the wireless industry.'' CTIA also supports the concept presented in the Notice of developing a consumer-focused map or Web site that would provide information on the text-capability of specific PSAPs, but notes that ''the cost of developing and updating such resources is an issue that should be considered in developing a map or similar consumer education campaign.''

36. Discussion. We agree with commenters that educating the public is critical to the successful roll-out of text-to-911 and preventing consumer confusion. Adding text capability to the 911 system is not likely to occur uniformly: during the transition period, the availability of text-to-911 will vary by area, and the areas of availability will change over time as the transition progresses. The Carrier-NENA-APCO Agreement recognized this and the signatory providers agreed to ''work with APCO, NENA, and the FCC to develop an outreach effort to set and manage consumer expectations regarding the availability/limitations of the Text-to-911 service (including when roaming) and the benefits of using voice calls to 911 whenever possible, and support APCO and NENA's effort to educate PSAPs on Text-to-911 generally.'' Therefore, as we initiate the transition, a concerted effort will be needed to provide the public with accurate and up-to-date information regarding where text-to-911 is—and is not—available.

37. Aside from educating the public about the availability or unavailability of text-to-911, education is also imperative to inform the public about the capabilities and limitations of text-to-911 where it is available, and the circumstances under which texting 911 is or is not preferable to making a 911 voice call. The public needs to be aware that text may not provide all of the

features and functionalities associated with voice 911 service, such as automatic location. Similarly, the public needs to be aware that, while sending an emergency text may be preferred in instances where the sender is unable to communicate by voice (e.g., due to a speech or hearing disability, or in a hostage or abuse situation where voice calling could be dangerous to the caller), in most other instances, placing a voice call to 911 will continue to be the most effective means of communicating with emergency responders, and therefore will remain the strongly preferable option even where text is available.

38. Given the clear need for consumer education, we direct the Public Safety and Homeland Security Bureau and the Consumer and Governmental Affairs Bureau to implement a comprehensive consumer education program concerning text-to-911, and to coordinate their efforts with state and local 911 authorities, other federal and state agencies, public safety organizations, industry, disability organizations, and consumer groups, consistent with those voluntary measures taken under the Carrier-NENA-APCO Agreement. To assist in the development of this program, we seek comment on what educational tools and resources exist or need to be developed to combat consumer confusion as text-to-911 is deployed. To what degree can current 911 educational programs be adapted to help consumers understand the availability, capability, and appropriate use of text-to-911? How do we ensure that education and outreach efforts on text-to-911 are fully accessible to people with disabilities? Are there lessons that we can draw from educational efforts that were conducted during the deployment of basic 911 or E911 service? Have other countries developed text-to-911 education programs?

39. We also seek comment on whether CMRS and interconnected text providers should provide educational information to their subscribers about the availability and use of text-to-911. The signatory providers in the Carrier-NENA-APCO Agreement agreed to work with APCO, NENA and the Commission to develop an outreach effort to ''set and manage consumer expectations'' regarding text-to-911. Should carriers also provide information regarding the text-to-911 capabilities of specific wireless devices that operate on their networks?

40. Would it be feasible to provide consumers with the ability to test text-to-911 functionality in their devices? Allowing customers to send simulated or test 911 messages could have benefits by enabling customers to verify the availability of text-to-911 and familiarize themselves with its use. However, any test mechanism would need to be configured to avoid burdening PSAPs with unnecessary text messages, e.g., by having the carrier or 911 text services provider reply to test messages with an automated response. We seek comment on technical and cost issues associated with developing such a test capability.

41. Who should bear the primary responsibility for educating consumers on the limits of text-to-911? The Commission? CMRS and interconnected text providers? Public safety organizations? Should the Commission establish a joint effort in conjunction with CMRS and interconnected text providers and public safety to implement an education effort? To what extent should consumer groups, including organizations representing the interests of people with disabilities, be included in such efforts? Should the educational effort be federal, regional, state, or local-level? What safeguards and measures should be taken to ensure that education and outreach efforts on text-to-911 and its limitations are fully accessible to people with disabilities? Can the ability to send test text messages to a PSAP facilitate consumer education? Could the database described in Bandwidth.com's comments be used to automatically generate up-to-date consumer-facing maps of where text-to-911 is available?

B. Comprehensive Text-to-911 Proposals

1. Further Background

42. The Commission has previously highlighted the popularity and ubiquity of text messaging, the increasing public expectation that consumers should be able to text to 911 during an emergency, and the importance of text to 911 for people with disabilities. American consumers send billions of SMS text messages per day and more than two-thirds of mobile phone users have used text messaging. Moreover, many of these consumers are acquiring advanced mobile devices (e.g., 3G and 4G devices) that enable them to send text messages using ''over-the-top'' software applications that they install on their phones and other mobile devices. Additionally, text messaging will likely play an integral role in providing future 911 services for persons with communications disabilities. Hence, any discussion about the near-term deployment of text-to-911 must consider both SMS and currently available, as well as anticipated, software applications as potential platforms.

43. The record in response to the Notice indicates that NG911 will eventually be capable of supporting the full range of possible multimedia-to-911 communications, including transmission of text, photos, video, and data. However, due to the complexity and cost of deploying NG911 infrastructure on a national scale, full deployment of NG911 will not be uniform and will likely take years. At the same time, the record indicates that it is technically feasible for CMRS providers to implement text-to-911 using existing technologies prior to full deployment of NG911, as evidenced by the successful trials and demonstrations noted above, the University of Colorado and Intrado technical studies, and the fact that the four largest nationwide wireless carriers committed to deploy text-to-911 capability throughout their networks by May 15, 2014. Thus, text-to-911 could be made available to virtually all wireless customers in the near term and delivered to both ''NG-capable'' and ''pre-NG'' PSAPs at a reasonable cost to wireless carriers.

44. As discussed below, we believe that enabling consumers to send a text message to 911 in the near term will substantially improve accessibility to emergency services, particularly for people with hearing and speech disabilities. While we recognize that text-to-911 based on pre-NG technologies does not provide the full functionality of NG911-based text, and that it has certain limitations in comparison to voice-based 911, we believe that these limitations are outweighed by the substantial public safety benefits that near-term implementation of text-to-911 would yield. In addition, implementing text-to-911 in the near term will provide valuable real-world operational experience that will help consumers, PSAPs and service providers plan for full NG911 deployment. Moreover, the availability of text-to-911 will provide incentives for PSAPs to acquire Internet Protocol (IP) connectivity and NG911-capable customer premise equipment (CPE), which are both critical steps towards the full deployment of NG–911. We seek comment on these observations.

45. We also believe that adopting a mandatory regulatory framework and timetable for implementation of text-to-911 is necessary. We recognize that substantial progress has been achieved through the voluntary initiatives of the four major CMRS providers, 911 service providers, and PSAPs described above. However, we are concerned that continuing to rely solely on voluntary measures could result in the four major

CMRS providers implementing text-to-911 while other service providers—including regional, small, and rural CMRS providers and third party interconnected text providers—do not, or could lead to non-uniform and uncoordinated implementation, inconsistent technological approaches, and widely varying implementation timelines to the detriment of consumers. This in turn could lead to a longer transition period, increased transition costs, and increased consumer confusion regarding when and where text-to-911 will be supported, what functionality it will provide, and when and how consumers should use it where it is available. We seek comment on this analysis.

46. Public safety commenters made a number of ex parte submissions in the record highlighting the importance of deploying text-to-911 services. NENA conducted a comprehensive study and reported that the majority of its chapters would support a requirement for wireless carriers to provide text-to-911 services to their customers. APCO argued that ''deferring action on the basic [text-to-911] requirement would only lead to uncertainty and delay serious consideration of implementation issues and requirements.'' NCTCOG submitted an ex parte noting that the public expects to be able text-to-911 and highlighted that ''a recent market study * * * showed that approximately ⅓ of our population believe they can text 9–1–1 today.'' The Maine Public Utilities Commission noted that ''increasingly [persons with disabilities are] abandoning the use of TTYs for new technologies such as text messaging that allow them more flexibility to communicate with most others except 9–1–1.''

47. We believe that a mandatory regulatory framework that builds on existing voluntary initiatives will mitigate these risks by providing a common deadline for the implementation of text-to-911. Moreover, while under our proposal PSAPs will still have the option to choose whether to accept text messages, greater uniformity in availability will enhance PSAP options and make it easier to justify investments in upgrades. Uniformity will also promote coordinated and consistent deployment by establishing a set of baseline requirements for all CMRS providers and third-party interconnected text providers to meet. Finally, it will provide greater certainty to consumers regarding text-to-911 availability, functions, and usage. Given the these substantial benefits, we believe that the public interest is served by requiring CMRS providers and third-party interconnected text providers to supply text-to-911 capabilities to their customers on all text-capable devices. We seek comment on this analysis and on possible timelines and technical options for implementation of these proposed requirements.

2. Public Safety Benefits of Text-to-911

48. The record indicates that text-to-911 can offer significant public safety benefits, most notably: (1) Widespread consumer availability and ease of use, (2) enhanced accessibility to 911 for people with hearing and speech disabilities, and (3) an alternative means of emergency communication for the general public when 911 voice service is unavailable or when voice calling could endanger the caller. We note that text-to-911 service may also permit ''text-takers'' to open multiple texts and prioritize the most life-threatening situations first, rather than waiting to address calls based simply on the order in which they arrived.

a. Availability and Ease of Use

49. The effectiveness of the legacy voice 911 system derives in large part from its ease of use by consumers, and their familiarity and comfort with voice calling on everyday devices. It is much easier for people faced with the stress of emergency situations to communicate quickly and effectively when they are able to use the same technologies that they use for everyday communications. This principle, which has long applied to voice calling, is increasingly true for communication by text as well. More than 2 trillion text messages are sent annually and according to the Pew Center, more than 7 out of 10 cell phone users send or receive text messages. Another report suggests that 91 percent of smartphone owners actively use SMS. Thus, expanding existing text technology to support 911 will provide the public with a familiar mode of communication for emergency use.

b. Enhanced Accessibility for People With Disabilities

50. Currently, approximately 15 percent of the United States population, or 34.5 million people, have hearing disabilities and approximately 7.5 million people have difficulty using their voices. Moreover, there is a strong relationship between age and reported hearing loss. For example, 18 percent of American adults 45–64 years old have a hearing loss, 30 percent of adults 65–74 years old have a hearing loss, and 47 percent of adults 75 years old or older have a hearing loss. By 2030, 20 percent of the population will be over 65 years old, substantially increasing the number of Americans who may need alternatives to voice communications when accessing 911. Further, an increasing number of soldiers are returning from overseas and are experiencing traumatic brain injury, which can result in hearing or speech disabilities.

51. Title II of the Americans with Disabilities Act (ADA), enacted in 1990 requires PSAPs to provide persons with hearing or speech disabilities with direct access to 911 emergency services. Since 1991, the U.S. Department of Justice (DOJ) has implemented this provision by requiring all public safety agencies to make their telephone emergency services directly accessible to TTYs. In the Notice, however, the Commission explained that people with hearing and speech disabilities have increasingly migrated away from specialized legacy devices, such as TTYs, and towards more widely available forms of text communications because of the ease of access, availability, and practicability of modern text-capable communications devices. While the migration to widely available texting technologies has had the unique benefit of bringing prior TTY users into the mainstream of our nation's communications systems, this transition has also led some commenters to suggest that it leaves people with hearing and speech disabilities without an effective, reliable and direct means of accessing 911 services in the event of an emergency.

52. The EAAC noted that individuals who cannot hear or speak well enough to communicate with 911 currently have no direct means of accessing 911 when mobile other than TTYs. However, with the vast majority of people with hearing and speech disabilities having discarded their TTYs, these devices are no longer considered a viable means of directly accessing 911 for this population. Nevertheless, the EAAC found that many individuals who are deaf have service plans that include SMS. One ''key finding'' of the EAAC is that ''individuals with disabilities should be able to call 9–1–1 using the same means they use for everyday telecommunication.''

53. At present, individuals with disabilities who have stopped using TTYs often have no other option but to rely on telecommunications relay services (TRS) to access 911 emergency services. Text-based relay services generally require an emergency call to first go to a communications assistant (CA), who places the call to the PSAP. The CA then relays the conversation back and forth between the caller and

the PSAP, by voicing all text that is typed by the person with a disability to the PSAP call taker and typing back responses to the caller. As such, many have criticized TRS as providing only an indirect means of conveying information that may result in delays and translation errors during an emergency. For example, Consumer Groups note that IP-Relay, one text form of TRS, has not been widely embraced by the deaf and hard of hearing community for requesting emergency services because of the relatively long length of time it takes to reach a relay operator and then get to the correct PSAP, the fact that the call will generally arrive on a non-emergency line, and the possibility of mistakes by the CA in the relaying of the call.

54. The record in this proceeding and the EAAC Report make clear that a significant number of people with hearing and speech disabilities will benefit from the ability to directly send a text message to 911 from any device that is text-capable. Advocates for and individuals who are deaf and hard of hearing strongly support implementation of a near-term text-to-911 solution and disfavor text relay approaches due to the risk of delay and translation errors. Moreover, enabling direct text messaging to 911 by people with hearing and speech disabilities will allow this population to use mass market communication devices that have increasingly evolving capabilities. While disability advocates have previously been skeptical of SMS-to-911 because it does not support real-time text, they have given more recent support to SMS as a viable near-term solution because of its familiarity and ease of use for people with disabilities. Respondents to the EAAC survey expressed a clear preference for calling a PSAP using the same technology that they use on a daily basis. Moreover, 87.7 percent of respondents reported having used SMS text messaging and 46.1 percent reported having used SMS text messaging ''almost every day.''

55. Consumer Groups similarly urge the Commission to require the deployment of SMS-to-911 technologies in the near term as a rapid and practical means of significantly enhancing accessibility to the 911 system for people who are deaf and hard of hearing. Consumer Groups point out that because consumers have already embraced SMS technology, and the vast majority of wireless providers and manufacturers support SMS, this capability may be deployed rather quickly. Likewise, the Wireless Rehabilitation Engineering Research Center (RERC) ''strongly supports'' the incorporation of SMS for the initial deployment of an NG 911 system. Similarly, the RERC on Telecommunications Access notes that it is imperative for the Commission to ensure that mobile text communication is available in the near term to people who are deaf.

c. Alternative Means of Emergency Communication for the General Public

56. The ability to send text messages to 911 will also provide an important alternative means of emergency communication to the benefit of the general public. While the general public will not need to use text-to-911 services as frequently as people with hearing and speech disabilities, experience has shown that there are situations where being able to send a text message to 911 as opposed to placing a voice call could be vital to the caller's safety. For example, in the 2007 shooting incident at Virginia Tech, a number of students attempted unsuccessfully to send SMS text messages to 911 so as not to be heard and located by the shooter. Similarly, in the Black Hawk County, Iowa text-to-911 trial, text has been used in domestic and child abuse situations in which the victim feared that the suspect would overhear the call to 911. Additionally, the Vermont trial further demonstrated text-to-911's efficacy in cases involving suicide and domestic violence.

57. Text-to-911 can also provide a lifeline when voice networks are impaired or congested. In large-scale disasters, for example, circuit-switched landline and mobile networks may become overloaded, making it difficult to place a 911 voice call. Conversely, SMS and IP-based text messages to 911 can still be transmitted because text consumes far less bandwidth than voice and may use different spectrum resources and traffic channels. As TCS notes, ''[i]n situations in which a high 9–1–1 call volume results in blocked calls to the PSAP or situations in which the wireless infrastructure capacity is impacted such that placing voice calls is difficult or impossible, SMS communications to a PSAP may provide the only reasonable communications method to emergency services.'' TCS further notes that according to data it had drawn from its CMRS provider customers, attempts to text-to-911 are made regularly and the number of attempts to text-to-911 during the recent Hurricane Sandy spiked sharply. TCS also highlights that unlike phone calls that are be handled on a ''first-in, first-addressed'' basis without any ability to know which queued up calls are priorities, a single ''text-taker'' could open more than one text and ''attempt to address the more urgent and life-threatening emergencies with greater priority.'' In addition, the University of Colorado finds that ''text users and call takers compose and read messages offline and only use communication for the moment that the message needs to be sent [which] saves valuable network resources during network congestion.'' Thus, people in disaster areas may still be able to send text messages to 911 even if they cannot place a voice call.

3. Technical Feasibility, Timing and Cost of Text to 911

58. Balanced against the above-described benefits of text-to-911, we believe that the record indicates that text-to-911 is technically feasible and can be achieved in the near term at a reasonable cost to PSAPs, CMRS providers, and providers of interconnected text. We disagree with commenters who argue that the Commission should not act until NG911 is fully deployed. As we note above, it will likely take a number of years to deploy NG911 on a national scale. The record also indicates that it is technically feasible for CMRS providers to implement a text-to-911 solution using existing technologies prior to the full deployment of NG911, and we believe the same should be true for interconnected text providers. Thus, text-to-911 could be made available to virtually all wireless customers in the near-term and delivered to both ''NG-capable'' and ''pre-NG'' PSAPs at a reasonable cost to wireless carriers. In this respect, we also believe that investments made now by PSAPs and carriers to support text-to-911 can be leveraged to support NG911 deployments, and accordingly constitute building blocks towards an IP-based emergency network. For example, while some PSAPs may choose to implement text-to-911 through existing equipment, such as TTY terminals, other PSAPs may choose to upgrade their equipment to receive text messages in a manner that will also support additional data in an NG911 environment.

59. We disagree with MetroPCS's argument that any text-to-911 obligations should ''only be imposed on the largest nationwide carriers because the costs of increased regulations are more easily borne by the largest carriers.'' There is no evidence that the cost of implementing a text-to-911 solution will be substantial enough to warrant limiting the obligation to the largest carriers. In fact, the first text-to-911 trial in the nation was conducted in Black Hawk County, Iowa by a small

wireless carrier. Further, we believe that exempting certain wireless carriers from a text-to-911 obligation solely on the basis of size would create additional consumer confusion, because consumers would still be unsure of whether their wireless carrier provides text-to-911 service or not. We seek comment on these views.

60. Based on these findings and consistent with the Carrier-NENA-APCO Agreement, we propose that all CMRS providers and interconnected text providers should be required to implement the capability to support text-to-911 in their networks. Because SMS is the most common texting technology in use today, and virtually all wireless consumers already have access to it and are familiar with its use, we expect that most CMRS providers will initially support SMS-based text-to-911. At the same time, we recognize that CMRS providers may eventually seek to migrate customers away from SMS to other text applications, such as IP-based real-time text or Rich Communication Services (RCS). Therefore, we do not propose to require CMRS providers to support SMS-based text-to-911 so long as they provide their customers with at least one pre-installed text-to-911 option per device model that works across the provider's entire network coverage area. We propose to allow CMRS providers to select any reliable method or methods (e.g., mobile-switched, IP-based) for text routing and delivery. We seek comment on this proposal.

a. Impact on PSAPs

61. As noted above, public safety commenters generally support the implementation of text-to-911 in the near term as a first step in the transition to NG911. NENA notes that SMS is ''the prevailing consumer text mode in the United States,'' and that in addition to being the most widely available platform, SMS ''is also the most interoperable, working between nearly every device on every network in the United States.'' NENA also notes that Verizon's text-to-911 announcement indicates that ''SMS-to-911 capabilities can be technically feasible.'' NATOA, NACo, and NLC state that they support the use of SMS as ''an interim solution for text-based communication to 911,'' since it is ''particularly beneficial to people with disabilities, including people who are deaf, hard of hearing, or have speech impediments.''

62. Black Hawk County highlights that it has not encountered any text-related problems during its trial and notes that ''SMS text-to-911 is reliable and available, as clearly demonstrated in our project.'' BRETSA and the Colorado 9–1–1 Task Force state that ''the key advantage of text messaging to 9–1–1 will be in facilitating communications with the PSAP by speech and/or hearing impaired individuals. Text messaging is generally preferred by the speech and hearing impaired community over TTY communications because it is more portable, ubiquitous, and convenient.'' Vermont argues that fears over the volume of emergency text messages are ''overblown'' and ''remain[s] convinced that those who can make a voice call will make a voice call as that is the most efficient way to communicate in an emergency.''

63. While public safety entities generally regard near-term text-to-911 as feasible, some express concern about the potential cost of implementation and the impact on PSAP resources if text-to-911 results in a heavy influx of text messages. The State of California states that ''[s]hort-term implementation of text-to-911 will likely increase the time and resources required for PSAPs to process information as compared to handling voice calls.'' APCO states that ''[w]hile SMS may be appropriate as a near-term solution for limited circumstances, it is not a long-term solution for the general public.'' NASNA opposes encouraging wide-spread deployment of short-term SMS-based solutions ''[u]ntil such time as text-delivery standards are developed, adopted and compliance is assured.'' Finally, BRETSA and the Colorado 911 Task Force argue that ''devoting funds to an interim solution for text messaging may mean that less funds will be available in the future for a more effective solution, once NG9–1–1 has been deployed and PSAP systems updated to take advantage of NG9–1–1.''

64. Based on the record in this proceeding, the Carrier-NENA-APCO Agreement, and the success of the various technology trials noted above, we believe that the implementation of text-to-911 will not impose an undue burden on PSAP operations. First, under our proposed framework, PSAPs will retain the discretion to decide whether to accept text messages. Thus, if a PSAP chooses not to accept text messages, there would be no requirement for it to do so and therefore no cost to the PSAP. We believe that PSAPs are able to best understand their local technological and financial situation, and determine whether it is technically and financially feasible or desirable to implement text-to-911 in their service area. While we share BRETSA and the Colorado 911 Task Force's funding concerns, we believe that PSAPs will be in the best position to understand their ongoing NG911 funding needs. Additionally, as much of the architecture for text-to-911 service can be leveraged for NG911, we do not expect that funding text-to-911 will divert resources from funding future NG911 services. Second, as discussed in greater below, for PSAPs that elect to accept text messages, we propose several options for the receipt of text messages, including options that will impose minimal costs on the PSAP. Third, while we recognize that the technology trials noted above are limited in scope, the trial results suggest that PSAPs are not likely to become overwhelmed with text messages.

b. Impact on CMRS Providers and Interconnected Text Providers

65. In response to the Notice, CMRS commenters initially opposed a near-term text-to-911 mandate and argued that the Commission should instead focus its efforts on long-term NG911 solutions. These commenters cited a variety of concerns with implementing text-to-911 prior to the full development of next-generation solutions, including technical limitations, limited monetary resources, reliability and security, issues with consumer education, and liability protection. Notwithstanding some of these concerns, however, the four major wireless carriers voluntarily committed to deploy text-to-911 capability throughout their nationwide networks by May 15, 2014.

66. Further, the record indicates that the cost for CMRS providers to implement a text-to-911 solution will be minimal. Indeed, according to cost estimates that were submitted into the record by Intrado and Bandwidth.com, the total cost for all CMRS providers to implement this solution will be approximately $4 million annually. Based on our review of the record, the Carrier-NENA-APCO Agreement, the cost estimates provided by vendors, and the success of the text-to-911 trials and demonstrations, we believe that it is feasible for all CMRS providers to cost-effectively implement a text-to-911 solution in the near term. We seek comment on this view. We also seek comment below on the appropriate timetable for implementing our proposal in order to address the concerns raised by CMRS commenters. We also seek comment on the cost for interconnected text providers to implement a text-to-911 solution. More specifically, what are the likely initial and ongoing costs for interconnected text providers? For routing purposes, can interconnected text providers use the same service providers as CMRS providers? If so, would the cost be similar? Would a per-incident service model be feasible for

smaller interconnected text providers? Are there any other potential costs that the Commission should consider? To that end, we seek quantitative information for our cost-benefit analysis.

4. Cost-Benefit Case Study

67. States and localities collect approximately $2 billion in 911 fees and taxes annually for the operation and support of the legacy voice-based 911 system. Most states have reported to the Commission that ''they used the fees or surcharges that they collected for 911/E911 service solely to fund the provision of 911/E911 service.'' Dependent on the regulatory mechanism set forth in each statute, states distribute funding either to the carriers directly, or to a designated state or local entity which then reimburses carriers. As we have noted previously, the highest vendor estimate submitted in this record regarding the cost to carriers to implement nationwide text-to-911 capability is $4 million annually, a mere fraction of the cost of the current voice 911 system.

68. Balanced against this low cost, the implementation of text-to-911 will provide substantial benefits both for people with disabilities and the general public in a variety of scenarios. While not all of the benefits associated with these scenarios are quantifiable, we have conducted a cost-benefit analysis of the potential impact of text-to-911 in the area of cardiac emergencies—a category that represents less than 10 percent of 911 calls but for which detailed statistical information is available. Even when we limit our analysis of benefits to this subset of total emergencies, we find that the potential benefits of text-to-911 for just this one category of 911 calls outweighs the costs of implementing text-to-911 for all carriers and PSAPs. We seek comment on our case study analysis below.

69. Our analysis is based on a 2002 study of cardiac emergencies in Pennsylvania that found adoption of E911 to be associated with improvements in the health status of patients, particularly those with cardiac conditions. That Cardiac Study shows that, when precise location information is provided contemporaneously with a 911 call, response time is notably shortened and correlated with an over 34 percent reduction in mortality rates from cardiac arrest within the first 48 hours following the incident.

70. The life-saving benefits demonstrated in the Cardiac Study provide a useful reference point for assessing the importance of timely and effective 911 communication to response time and positive outcomes for medical emergencies. We therefore have extrapolated from the Cardiac Study to determine the likely number of cases in which text-to-911 might extend similar benefits to people with hearing and speech disabilities who cannot use voice to contact 911, but who would be able to communicate location information if text were available.

71. Based on the Cardiac Study, we calculate that for the voice-based 911 system as a whole, improved response time resulting from delivery of precise location information saves approximately 4,142 lives annually nationwide. To determine the proportionate benefit for people with disabilities that would result from availability of text-to-911, we consider only the 0.7 percent of the population with the most severe hearing and speech impairments (0.5 percent for extreme hearing difficulty and 0.2 percent for extreme speech difficulty). Assuming a proportional number of 911 calls in cardiac emergencies from this population, and limiting our calculation to intentional wireless calls in which the hearing- or speech-disabled person cannot rely on a speaking person to make the 911 call, we calculate that text-to-911 would save approximately 7 lives annually in cardiac emergencies. Using an accepted statistical value-of-life model developed by the U.S. Department of Transportation, we estimate the value of each life saved to be $6.2 million. This yields a total benefit of $43.4 million annually for cardiac victims alone, or more than ten times the highest estimated cost of the rules proposed herein.

72. We emphasize that the benefits calculated above for cardiac emergencies represent only a subset of the benefits that will be generated by text-to-911. The record reflects numerous other benefits that are less quantifiable but that may be similarly or even more substantial. Black Hawk County and Vermont have cited concrete examples where text-to-911 enabled callers to reach 911, but could not make a voice call for safety reasons. Similarly, the record includes additional compelling evidence that text-to-9–1–1 may provide significant benefits in disaster scenarios due to the relatively high reliability of SMS messages and the relatively low amount of network capacity required to deliver an SMS message. These benefits, though not specifically quantifiable, provide compelling evidence that the aggregate benefits of text-to-911 will significantly exceed the specific benefits quantified here—and will be generated at no additional cost.

5. Reliability of Text-to-911

73. In response to the Notice, several commenters raise concerns about the reliability of text-to-911, and particularly SMS-based text. 4G Americas notes that ''it found no short-term solution that did not exhibit limitations with respect to capability, performance, and impacts to users, network operators and/or PSAPs.'' CTIA states that ''SMS was not designed to be used as an emergency service'' and urges the Commission to focus on the deployment of ''advanced 9–1–1 emergency communications services in emerging wireless technologies.'' Other commenters similarly assert that certain technical aspects of SMS limit its reliability for emergency communications. Among the factors cited are that SMS (1) is one-way rather than session-based; (2) lacks delivery or performance guarantees, and may not inform the sender when a text is not timely delivered; (3) does not prioritize emergency messages; (4) does not assure that multiple messages will arrive in the sequence they were sent; (5) does not support 911 location technologies that are used for 911 voice calls; and (6) lacks protections against transmission of spurious or fraudulent 911 messages.

74. Technical Studies. In response to the Notice, two commenters conducted technical studies which present evidence that SMS-to-911 is as reliable as voice, and in some instances, may be even more reliable than voice. In the first study, researchers at the University of Colorado tracked several hundred SMS text messages and found that ''the reliability of text messages and mobile phone voice calls, in terms of data loss, are very similar.'' The University of Colorado study ''found that all of the text messages sent were received by the cellular network, resulting in a 'data loss rate' of 0% and a reliability level of 100%.'' In addition, the University of Colorado study noted that ''[o]ther researchers have tested the reliability of * * * SMS * * * and found that the 'data loss rate' over several thousand messages was less than 1%, resulting in a reliability level of 99%. The statistical implication is that large samples might experience a small percentage of data loss, but overall the reliability for text messages is similar to that of voice calls.'' 4G Americas criticizes the University of Colorado's findings and notes that the ''study was executed in an academic environment with a pre-determined technology and setting. The study did not involve a large number of subscribers, and hence, no real-world traffic conditions.''

75. The University of Colorado study also found that text messaging is actually more reliable than voice communications when a weak signal exists, ''such as when the caller is in the mountains, in the midst of high rise buildings, inside a building, under a collapsed building following an earthquake or explosion, or in a trunk of a car [or] closet.'' The University of Colorado notes that ''[c]ommunication at the edge of coverage can be sporadic, allowing only momentary windows of communications coverage that are not long enough to support a voice call but a short burst of a text message can get through. In addition, some implementations of SMS automatically keep trying to send a text message until a transmission window opens.''

76. Intrado conducted the second technical study, in which it sent ''tens of thousands of actual SMS messages [from] a simulated PSAP to a mobile device and from a mobile device to the simulated PSAP.'' The study found that ''by using techniques such as the 9–1–1 SMSC [short message service center], SMS can be used to create a very reliable and timely 9–1–1 communication infrastructure.'' According to Intrado, ''90% [of the text messages] were delivered within 3–4 seconds.''

77. Discussion. While 4G Americas, CTIA, Motorola, and several other commenters provide anecdotes about the limited reliability of SMS-to-911, the University of Colorado and Intrado conducted the only two technical studies on this issue. Notably, both of these studies found that the reliability of SMS-to-911 is comparable to voice, and in some instances, even more reliable than voice. Further, we believe that the success of the existing trials, the Carrier-NENA-APCO Agreement, and the continued rollout of text-to-911 services throughout the nation demonstrate that industry has already overcome many of the reliability deficiencies that were originally cited in the comments. While SMS was certainly not designed for emergency communications, we disagree with T-Mobile's claim that ''SMS is fundamentally unsuited for emergency communications.'' Indeed, a life was saved in Vermont as a direct result of Verizon's SMS-to-911 trial. Additionally, we note that, for callers who are deaf or hard-of-hearing, reaching 911 by voice may not be possible at all, so that even a mechanism that is not perfectly reliable can provide significant benefit. For callers who are not deaf, text-to-911 provides an additional way to reach PSAPs, thus increasing the overall probability of obtaining help. Finally, we believe that our proposal for wireless carriers to provide a ''bounce-back'' capability will further mitigate reliability concerns. Accordingly, given the significant benefits of text-to-911 service, we do not believe that reliability concerns should delay the deployment of text-to-911. We seek comment on this analysis.

6. Carrier and Third Party Non-SMS-Based Text-to-911 Applications

78. As technology and consumer habits evolve, consumer expectations also change and the need to meet those expectations in times of emergency must also evolve. As more consumers use SMS-substitutes, whether provided by the underlying carrier or by a third party, it is important that we evaluate ways to alleviate consumer confusion and promote regulatory parity. We note, however, that despite this proliferation of SMS-substitutes, the Carrier-NENA-APCO Agreement is limited to SMS services provided by the signatory providers.

79. Accordingly, as discussed below, we are seeking comment on a variety of issues associated with non-SMS messaging applications, including ''over-the-top'' texting applications provided by third-parties. In this regard, our focus is on those applications that are most like SMS and therefore most likely to be the subject of a consumer expectation that they may reach 911, namely those two-way texting applications that allow text messages to be sent to any U.S. phone number, irrespective of the hardware utilized to send that message.

80. Background. In the Notice, the Commission sought comment on non-SMS text-to-911 alternatives, including IP-based messaging, real-time text, and downloadable software applications. While noting the potential advantages of SMS as an interim solution, the Commission also sought comment on how to encourage the development of non-SMS options that could provide more flexibility and functionality to consumers.

81. Commenters generally support allowing carriers and service providers to develop alternatives to SMS-based text. NENA notes that smartphone-based text-to-911 applications could lower costs for both consumers and PSAPs and that ''because 9–1–1 text applications would run on smartphones or advanced devices, their call streams could, in some instances, operate outside the normal 911 voice call path.'' The University of Colorado observes that ''there are an increasing number of smartphone applications and other SMS short cuts that provide for pre-stored and automatically composed messages, such as contact information for an epileptic having a seizure, or to include location [GPS] coordinates.'' Bandwidth.com notes that applications can be ''specifically geared toward enhancing the ability of the deaf and hard of hearing to access public safety via texting.'' LR Kimball states that ''[s]oftware applications that can integrate into the legacy 911 system should be the first choice in the short term to allow for more complete access. * * * [and] should be developed in a way that makes use of services currently in use at PSAPs.'' AT&T urges the Commission to avoid imposing text-to-911 regime that would force carriers to continue supporting SMS-based text-to-911 after SMS has become technologically obsolete or economically uncompetitive.

82. In the Notice, the Commission also observed that consumers are acquiring more advanced mobile devices (e.g., 3G and 4G handsets) that enable them to install ''over-the-top'' software applications. In the Notice, we sought comment on whether text-to-911 requirements should apply to both CMRS and non-CMRS providers alike. The Commission sought comment on the feasibility of using general texting or 911-specific software applications to send text messages to PSAPs. The Commission noted that both providers and third parties, including vendors that provide services and equipment to PSAPs, could develop such applications.

83. In response to the Notice, CTIA and AT&T noted the proliferation of ''over-the-top'' software applications and highlighted the need for the Commission to implement technology neutral regulations that apply equally to both carrier-provided and non-carrier-provided texting solutions. CTIA stated that ''it is * * * unclear how a national SMS-based interim solution would work in the context of over-the-top applications or other non-carrier-provided SMS solutions'' and emphasizes that ''the [FCC] must * * * consider the severed link between the licensed CMRS service provider and the emergency calling capabilities, such as location accuracy, of end-user devices and over-the-top applications.'' AT&T notes that: (1) ''limiting the mandate of [t]ext-to-911 services to SMS services provided by telecommunications carriers would be short-sighted, and thus a great disservice to the general public[;]'' (2) a ''mandate that is exclusive to the SMS platform fails to account for the fact that such services are experiencing both declining revenues and usage due to the

proliferation of free ['over-the-top'] texting applications[;]'' and (3) ''[t]he FCC must adopt a technologically-neutral solution that applies equally to carrier-provided SMS services and competitive alternatives to avoid distorting the marketplace to the detriment of one service provider.'' AT&T further explains that ''failing to include ['over-the-top'] substitutes in the mandate may cause significant customer confusion regarding the accessibility of emergency services via text message'' and that ''applying this mandate on a technology neutral basis ensures that the effectiveness of the mandate does not depend on the dominance of any platform or on the market position of any group of service providers.'' Additionally, AT&T notes that ''including ['over-the-top'] providers in the scope of a text-to-911 mandate would assist ongoing industry standards work by encouraging [those] providers to participate in * * * developing a text-to-911 solution.''

84. On the other hand, several entities express concerns about the Commission extending text-to-911 obligations to ''over-the-top'' software applications. Sprint notes that ''[m]any * * * over-the-top messaging providers are relatively small and likely may not have the financial resources to achieve PSAP integration.'' Sprint also asserts that ''it would not be able to control * * * third-party commercial offerings nor influence how wireless consumers utilize such applications.'' Further, Sprint highlights the limitations associated with ''over-the-top'' software solutions, including the ability to ''obtain location information associated with a particular call.'' Similarly, U.S. Cellular states that it prefers text-to-911 to ''be considered in the context of native SMS,'' and that it does not favor covering over-the-top text applications. U.S. Cellular also notes that ''on some devices, SMS messages up-convert to MMS, and delivery of those converted messages to PSAP[s] would need to be further explored.'' Motorola Mobility maintains that ''any regulatory responsibility for over-the-top text-to-911 applications, including collection of precise location information, must rest only on the application developer.''

85. The VON Coalition argues that ''there is no public policy justification for extending SMS-to-911 obligations to over-the-top IP text applications'' and maintains that ''[t]here is no evidence that customers using over-the-top applications expect that they can use these applications to contact emergency services.'' The VON Coalition contends that ''[i]t seems highly unlikely that a wireless user with both an SMS functionality and an over-the-top messaging application would in some instances choose to open an application, sign in and then send an 'SMS' to a PSAP rather than simply using the wireless phone's SMS capability that (a) the customer likely uses on a near-daily basis, and (b) is readily available to the user without opening any application or providing sign-in information.'' The VON Coalition highlights that ''over-the-top messaging applications, which are dependent on the availability of broadband Internet access, are less reliable than a wireless carrier's SMS text services that require no broadband availability and, moreover, very little bandwidth vis-à-vis voice or other data communications on a wireless carrier's network.'' The VON Coalition also notes that ''there currently are no location solutions for over-the-top applications—neither for routing a message to the appropriate PSAP nor to provide sufficient location information associated with the caller.'' The VON Coalition adds that ''[b]ecause an over-the-top message is provided over another provider's network—whether a wireless carrier, wireline carrier or a Wi-Fi hotspot—there is no real-time location information associated with the over-the-top message.'' Accordingly, the VON Coalition ''recommend[s] that over-the-top IP-based messaging and text services that rely on the mobile operator's data network should be excluded from an interim [text-to-911 requirement] as they are precisely the type of communications capability for which NG911 is intended.''

86. More recently, the VON Coalition reiterates these points and further argues that the lack of user location information is an impediment to enabling routing of an emergency text to the appropriate PSAP. Moreover, they argue that implementing an interim solution directed at text-to-911 may impact the transition to NG911, or may stifle innovation and alter business models. Should the Commission pursue a 911 obligation for IP-based SMS providers, the VON Coalition urges that any obligation be limited to ''two-way'' over-the-top SMS, so that a texting customer is able to receive a bounce-back message where a PSAP is unable to receive text-to-911 messages.

87. Similarly, Apple urges the Commission, in addition to considering the jurisdictional and technical issues associated with implementing a text-to-911 obligation for over-the-top text messaging application providers, to limit its proposals to those applications that (1) are installed on a device that determines the user's location using a technology that meets the enhanced 911 requirements set forth in Section 20.18(h) of the Commission's rules; and (2) independently enables the user to send text-based messages to and receive text-based messages from any valid North American Numbering Plan telephone number via the short message service protocol.

88. Discussion. As smartphone technology and applications proliferate, wireless consumers increasingly have the ability to send and receive text messages using downloadable software applications. These applications may be provided to the consumer by the underlying wireless service provider or by third party software providers, and may use one of a variety of text delivery methods. For example, some text applications deliver text to mobile telephone numbers over the carrier's existing mobile-switched SMS network, while other applications deliver text over IP data networks, and some applications support both delivery methods and can also deliver MMS content. Several over-the-top applications hold themselves out as competitive alternatives to CMRS-provided SMS services. In addition, some software providers have developed 911-specific software applications for smartphone users that are designed specifically to support communication by text and other media with PSAPs that install and operate the application. As the Wall Street Journal recently noted, the volume of SMS text messages per month sent by consumers has recently dropped 3 percent, with the most likely explanation of this ''major shift in mobile communications'' attributable to migration of these messages to over-the-top messaging platforms. Another study suggests that over 45 percent of smartphone owners use an SMS alternative such as over-the-top messaging apps in addition to or in lieu of traditional SMS. And while other analysts predict that SMS will continue to grow globally through 2016, they further predict a large scale drop-off in SMS in favor of over-the-top applications thereafter.

89. This trend towards development and use of new third-party text applications has significant implications for the implementation of text-to-911. While SMS is currently the most widely available and heavily used texting method in the U.S., and is likely to remain so for some time, consumer access to and use of third-party text applications is likely to increase over time. As this occurs, some consumers may choose to use such applications as their primary means of communicating by text, relying less on SMS or possibly bypassing SMS entirely. In that

eventuality, consumers that become familiar with software applications by using them for everyday non-emergency communications will be increasingly likely to prefer them for emergency communications. Moreover, consumers faced with the pressure of an emergency may attempt to use the most familiar application available to contact 911 even if they are not certain that it will work.

90. Given this emerging trend for technology and consumer behavior patterns, we believe it is important to consider whether certain third party-provided text applications and carrier-provided applications should be subject to text-to-911 obligations, particularly those that hold themselves out as substitutes for carrier-provided SMS services. In choosing to use a particular text application from a variety of available options, consumers may not even be aware of the identity of the party providing the application or the nature of network technology that the application uses to deliver the text. Thus, imposing text-to-911 requirements based on the identity of the provider or the delivery technology could lead to some applications supporting text-to-911 while other applications that are functionally similar from the consumer perspective do not support text-to-911. In this respect, it may be important to consider consumer expectations both now and in the future as a matter of public safety, as well as to consider means to promote competitive neutrality to ensure that like services are treated comparably, thereby avoiding arbitrage created by artificial regulatory distinctions.

91. As discussed above, consumers now have access to a wide variety of tools that allow the sending of text messages on almost any computing and communication device. However, as the VON Coalition notes, consumers may not have the expectation to send text messages to 911 from all possible text applications, and some of these may face significant technical difficulties in delivering text messages to the correct PSAP, possibly depending on the platform the application is running on. Thus, we divide text applications into two broad categories, namely (1) interconnected text applications that use IP-based protocols to deliver text messages to a service provider, which the service provider then delivers the text messages to destinations identified by a telephone number, using either IP-based or SMS protocols, and (2) non-interconnected applications that only support communication with a defined set of users of compatible applications but do not support general communication with text-capable telephone numbers. We seek comment on applying text-to-911 obligations on the former category, but not the latter.

92. In this respect, we seek comment on the characteristics of interconnected text applications to which text-to-911 obligation should apply, if adopted. As described above, Apple suggests a two-prong approach to determine whether an interconnected text application would fall within the Commission's proposed text-to-911 obligations. The VON Coalition similarly suggests that over-the-top applications should be ''two way'' in order for a text-to-911 obligation to attach. Are either of these definitions appropriate? Are they too limited? Do these characteristics conform to consumer expectations? For example, if a text messaging application only provides for ''outbound-only'' messaging to a U.S. telephone number, would a consumer still expect to be able to reach 911? Are there other characteristics that we should take into account?

93. We also propose to treat providers of such non-SMS text applications similarly to CMRS providers with respect to the obligation to provide text-to-911 capability to their users within a defined timeframe. By enabling text communication with any text-capable mobile number, these ''interconnected text'' applications provide effectively the same functionality that SMS provides currently. Therefore, we believe the same text-to-911 obligations should apply on a technology-neutral and provider-neutral basis. We seek comment on this proposal generally and on the issues discussed below.

94. We also seek comment on whether third-party interconnected text software providers face technical issues or obstacles in the implementation of text-to-911 that could affect the extent to which a text-to-911 requirement may be implemented, or the timeframe for such implementation. Commenters agree that flexibility in implementation is important to reduce the burden of deploying text-to-911. This is likely to be particularly important for interconnected text applications, since they are often designed by smaller enterprises. Do third-party software providers face difficulties assuring that their application works reliably on all hardware platforms, operating systems, and operation system versions supported by the application? Do these applications have access, possibly after asking for user permission, to cell tower and/or geo location information via platform application programming interfaces? Can applications warn users that disabling location functionality for an application may interfere with the ability to send text-to-911 messages? Could operating system providers facilitate the access to location information for emergency calling and texting purposes? If the text application cannot obtain location information, under what circumstances can the application deliver the text message to a gateway and have the gateway service determine the approximate location of the message sender? Can texting applications determine the cellular telephone number of handsets to help locate the mobile device?

95. To facilitate discussion, we posit three possible implementation choices and invite comment on their respective advantages and disadvantages, as well as descriptions of additional options. The descriptions are meant to be illustrative, and are not meant to limit how implementers achieve the goal of providing text-to-911 to users of their applications.

96. The first implementation option leverages the SMS application programming interface (API) offered by common smartphone operating systems. The interconnected text application would use the API to deliver any text message addressed to 911, while using the application-specific mechanism for all other, non-emergency messages. It appears that many applications already separate messages by destination, as they often only deliver messages using Internet protocols for certain countries or regions.

97. In the second option, text-to-911 messages are handled the same as any other text message and delivered to the SMS gateway provider chosen by the application vendor. The gateway provider then delivers those messages to text-capable destinations. This gateway provider handles text messages addressed to 911 and delivers them to the location-appropriate PSAP, possibly with the assistance of a third party 911 message routing service.

98. Finally, in the third option, text-to-911 messages are delivered via Internet application layer protocols to PSAPs, without being converted to SMS along the way, using NG911 protocol mechanisms. The messages can be delivered to PSAPs either by the provider of the text messaging application or a third-party service provider.

99. Are there alternative mechanisms that might be used? Which of these methods provides advantages or disadvantages for the application developer? For the PSAP? For the consumer? Which options are more likely to transition seamlessly to NG911, or provide a foundation that can be

leveraged by one or more of the parties in the NG911 delivery chain? How do these options differ in terms of implementation complexity, reliance on technologies not readily available, cost to the text messaging provider or reliability?

100. Commenters have previously expressed concerns about the lack of access by the third party provider to consumer location information associated with a text-to-911 message, impacting both the ability to deliver the text message to the appropriate PSAP and the ability to locate the consumer seeking assistance. Which of the options described above facilitate delivery of location information? Are there other technical mechanisms or commercial arrangements that would facilitate the ability of a third party text application to ascertain the location from which the text originated? Can a requirement to provide text-to-911 precede such an ability? Can privacy controls utilized by some applications to limit access to location information interfere with the ability to identify the origination of a text-to-911 message? Are there other privacy concerns that need to be considered, or is it reasonable to assume that a person sending a text to 911 implicitly waives such privacy concerns? Can third party text messaging applications bypass any privacy safeguards when 911 is the destination short code?

7. Timetable for Text-to-911 Implementation

101. We seek comment on whether all CMRS providers and interconnected text providers should be required to implement the capability to support text-to-911 throughout their networks by May 15, 2014. In light of the public safety benefits of making text-to-911 available to consumers regardless of carrier or service provider, and the benefits to both PSAPs and consumers from coordinated implementation, we believe it may be desirable for all CMRS providers, including small and rural carriers, and all interconnected text providers to implement text-to-911 capability in their networks on a timetable comparable to the four largest wireless carriers. Setting a single, uniform deadline for all providers would arguably facilitate coordination among text-to-911 providers, vendors, and PSAPs, reduce the likelihood of non-uniform deployment, and provide consumers with a clear expectation of when text-to-911 will be supported regardless of which carrier or service provider they use.

102. We seek comment on this approach. Would a uniform timetable help minimize consumer confusion? Is such a uniform timeframe feasible, or are there factors that could prevent small, rural, and regional CMRS providers and third-party interconnected text providers from implementing text-to-911 in the same timeframe as the four major CMRS providers? For example, some parties have posited that the relatively small size and lack of resources for certain applications developers would limit their ability to comply with a text-to-911 requirement. Is this accurate? Are there other factors we should consider?

103. The Carrier-NENA-APCO Agreement also states that once a ''valid'' PSAP request is made for delivery of text messages, ''service will be implemented within a reasonable amount of time of receiving such request, not to exceed six months.'' Further, a request for service will be ''considered valid if, at the time the request is made: (a) the requesting PSAP represents that it is technically ready to receive 9–1–1 text messages in the format requested; and (b) the appropriate local or State 9–1–1 service governing authority has specifically authorized the PSAP to accept and, by extension, the signatory service provider to provide, text-to-911 service (and such authorization is not subject to dispute).'' Are these reasonable conditions? Is six months an appropriate timeframe? What steps does a CMRS or interconnected text provider have to take to add a PSAP to its list of text recipients and how much time are such steps likely to take? Should the same timeframe apply for both CMRS providers and interconnected text providers? Should this timeframe become shorter over time as the process for responding to PSAP requests becomes more established and routine?

8. 911 Short Code

104. Background. Short codes for mobile-switched text messaging are administered by the Common Short Code Administration (CSCA) and are typically five-digit or six-digit numbers. In the Notice, the Commission sought comment on whether a national short code for text-to-911 should be designated by the Commission, a standards-setting body, or some other entity. The Commission also asked how the short code should be designated or implemented.

105. Commenters in general agree that the Commission should establish and reserve the digits '9–1–1' as a national short code for text-to-911. Most notably, under the Carrier-NENA-APCO Agreement, the four largest wireless carriers committed to ''implement a '9–1–1' short code that can be used by customers to send text messages to 9–1–1.'' APCO notes that ''text-to-9–1–1 should involve the digits '9–1–1' and not a different short code'' and that ''[a]ny short code other than 9–1–1 will eventually need to be phased out as regions are able to accept text solutions direct to the PSAPs via NG911.'' NENA urges that ''any short code implemented must be uniform across carriers and geographic or political boundaries.'' King County states that ''a national short code, ideally using the digits 9–1–1, should be designated by Congress or the [FCC], similar to the designation of 911 as the national emergency number by Congress.'' AT&T argues that the Commission should ''establish and reserve a standardized SMS short code'' and that it ''makes sense to use some variation of the present abbreviated dialing pattern 9–1–1 for this purpose.'' Intrado believes that ''an appropriate text solution should use the digits 911.'' Motorola, however, cautions that there may be technical issues associated with using 911 as an SMS short code in some devices, and that ''end users experiences in trying to use 911 as an SMS short code may be seriously lacking.'' Nevertheless, Motorola notes that it ''has released well in excess of 100 mobile devices and software combinations in the U.S. market within the past three years, none of which has been tested for support of 911 as a SMS short code.''

106. Discussion. The evolution of 911 as the national emergency telephone number has resulted in the digits ''9–1–1'' being widely and uniformly associated with emergency communication in the United States. American consumers are familiar with dialing 911 to place an emergency voice call, and children are routinely taught to dial 911 as the way to summon help from police, fire, and ambulance service. This widespread use and consumer recognition of 911 makes it logical and highly desirable to implement 911 as a standard three-digit short code for sending emergency text messages to PSAPs wherever and whenever feasible.

107. Moreover, the general technical feasibility of using 911 as a text short code appears to be established. In each of the text-to-911 trials that have occurred to date, subscribers of the participating CMRS providers have been able to use 911 as the short code for text messages to participating PSAPs. Moreover, under the Carrier-NENA-APCO Agreement, the four largest wireless carriers committed to ''implement a '9–1–1' short code that

can be used by customers to send text messages to 9–1–1.''

108. Given the apparent technical feasibility of a 911 short code and the widespread consumer recognition of 911 as the standard emergency number in the U.S., we do not believe that other CMRS providers should encounter any substantial issues with using a 911 short code. We therefore propose that whenever technically feasible, all CMRS providers should configure their networks and text-capable cell phones to support 911 as the three-digit short code for emergency text messages sent to PSAPs. We seek comment on this proposal. We also seek comment on whether there are any text-capable cell phones being sold in the United States that are incapable of using the digits 911 as a short code. If so, what are those devices and how many of them are in use? To what extent, if any, could such devices be modified or updated by a consumer or wireless retail store to support a three-digit code? In the event that certain devices cannot be so modified or updated, should we designate an alternate short code (e.g., a five-digit code) that such devices could use?

109. With respect to interconnected text applications, we recognize that ''short codes'' per se may not be appropriate conceptually for non-SMS texting. We therefore seek comment about whether there are any technical obstacles or other issues associated with such applications using the three-digit identifier 911. How can these issues, if any, be addressed? Are they specific to particular applications, or to IP-text messaging generally? Should interconnected text applications provide an icon indicating the ability to reach text-to-911?

9. TTY Compatibility Requirement for Wireless Services and Handsets

110. The Commission first adopted a requirement for wireless carriers to be capable of transmitting TTY calls to 911 services in July 1996. Although the initial deadline set for implementation of this requirement was October 1, 1997, efforts to find a technical solution to support TTY (Baudot) technology over digital wireless systems ended up taking years of research and testing. As a result, the Commission granted multiple extensions of time for entities to comply with this mandate, ultimately requiring compliance by June 30, 2002. At that time, per the 1996 Order, wireless service providers were required to upgrade their digital networks to be compatible with TTYs and handset manufacturers were required to provide a means by which users could select a TTY mode on their phone's menus. However, by the time these changes were implemented, new digital technologies, more mobile and less expensive, had caused most TTY users to migrate away from use of these devices as their primary communication mode.

111. It is for this reason that the CVAA included a provision for the EAAC to consider deadlines ''for the possible phase out of the use of current-generation TTY technology to the extent that this technology is replaced with more effective and efficient technologies and methods to enable access to emergency services by individuals with disabilities.'' ATIS points to this provision in recommending that the Commission waive the TTY compatibility requirement for new wireless handsets where such handsets support the ATIS INES Incubator recommended solution. Specifically, ATIS argues that ''[w]hile PSAPs and wireless networks should support TTY services for the foreseeable future, the TTY requirement for wireless handsets may be a redundant communication modality for future wireless handsets that support the recommended ATIS INES Incubator solution.

112. As we noted earlier, the EAAC survey confirmed the declining use of TTYs by people with disabilities as well as the need for new forms of accessible communications to reach 911 services—including text and video—by persons who have hearing or speech disabilities. The decline in TTY usage is also reflected in the steep reduction in the number of minutes of TTY-based TRS over the last several years. At the same time, an estimated 100,000 users make approximately 20,000 emergency calls annually using TTY. In other words, while it is true that TTY use is declining, TTY still provides an invaluable, real-time 911 service for its users. Additionally, no similar robust products exist for mobile and IP-networks, where the expected lifetime of a product is about two years as opposed to TTY's ten year expected lifetime. Finally, users of TTY may not wish to switch to a new communication mechanism with which they are not familiar.

113. Therefore, we seek further comment on whether the Commission should sunset the TTY requirement for new handsets, and if so, what criteria should be adopted before such action is taken. If the Commission does sunset the TTY requirement for new wireless handsets, should it do so only contingent upon a wireless texting capability? The EAAC recommended that the Commission lift the TTY requirement only for those handsets that have ''at a minimum real time text or, in an LTE environment, IMS Multimedia Telephony that includes real-time text.'' In addition, the EAAC's 2012 Subcommittee on TTY Transition concluded that ''[c]onsistent implementation of a well-defined 'TTY replacement' with higher functionality real-time text, simultaneous voice and better mobility can fill an important need in accessible communication for user to user calls, relayed calls and 9–1–1 calls.'' We seek comment on these EAAC recommendations concerning the removal of the TTY requirement. Should the ubiquitous use of SMS, alone or with other forms of text capability, be a factor in determining whether to lift the TTY requirement? Or, does the real-time nature of TTY communication make it fundamentally different from SMS, such that SMS is not a valid replacement for TTY-capable handsets?

10. Routing and Location Accuracy

114. In the Notice, the Commission sought comment on how to ensure that text messages to 911 include accurate location information for routing to the appropriate PSAP and for determination of the sender's location by the PSAP. The record developed in response to the Notice indicates that it is technically feasible to route text messages originated on CMRS mobile switched networks to the appropriate PSAP based on the cell sector from which the text originated. Therefore, we propose to require CMRS providers (and their associated text-to-911 vendors) to use cell sector location to route 911 text messages originated on their networks to the appropriate PSAP. We also seek comment on any technical or informational challenges for third party interconnected text providers with respect to determining caller location and providing the appropriate routing. We do not propose at this time to require provision of E911 Phase II location information in conjunction with 911 text messages, although we encourage its provision where technically feasible. We discuss these proposals in greater detail below.

a. Routing of Text Messages to the Appropriate PSAP

115. Background. While the Carrier-NENA-APCO Agreement does not speak specifically to routing issues, the signatory providers agreed to provide text-to-911 on an interim ''best-efforts'' service subject to a valid PSAP request. However, the provision of text-to-911 under the Carrier-NENA-APCO Agreement is limited to ''the capabilities

of the existing SMS service offered by a participating wireless service provider on the home wireless network to which a wireless subscriber originates an SMS message.'' Many commenters, including public safety entities, argue that any text-to-911 solution must be capable of routing text messages to the appropriate PSAP based on the sender's location. APCO states that ''any solution must provide PSAP call routing capability that is as good as or better than what is being deployed today.'' BRETSA and the Colorado 9–1–1 Task Force agree that ''[t]he location of the caller must be available for the purposes of routing the call to the correct PSAP.''

116. Focusing on SMS-to-911, some CMRS commenters contend that there are technical difficulties in routing SMS messages to the correct PSAP. The Blooston Rural Carriers claim that ''current SMS standards do not support automated routing to the PSAP or automated location information.'' Sprint Nextel states that ''location information is not included with SMS text messages and would not be available for PSAP routing.'' 4G Americas argues that ''SMS * * * provides no location information—not even a cell tower—so the originating network may not accurately route the message to the correct PSAP. Because the lack of location and session information, false messages can be easily spoofed * * * without the PSAP detecting the spoof.''

117. However, commenting vendors counter that even if SMS was not initially designed to support automatic routing to PSAPs, it is technologically feasible to add the capability to route SMS text messages to a specific PSAP based on the sender's location. According to Intrado, SMS messages can be routed to the appropriate PSAP by adding a Text Positioning Center (TPC) to the existing wireless network. Intrado states that the TPC will ''function like a [Mobile Position Center] associated with wireless voice calls'' and that ''[u]pon a mobile device's initial text-to-911, the TPC will determine the appropriate PSAP to which to route the text request for assistance.'' Intrado also notes that the ''routing determination will be based upon the location of the cell sector to which the mobile device is connected.'' TCS similarly states that SMS messages can be routed to the appropriate PSAP ''[b]y combining existing location technologies with existing SMS protocol capabilities.'' The VON Coalition also notes routing challenges for third-party over-the-top application providers, which may not have direct access to caller location.

118. Discussion. Verizon and TCS have indicated that they will use coarse location as the basis for PSAP routing determination in their deployment of text-to-911. Moreover, according to the Tennessee Emergency Communications Board (TECB), ''[t]he TECB would not have agreed to host the pilot [with AT&T] had it not included the capability for location information to travel with the text. The Tennessee pilot will include a texting solution that includes rough location information.'' The coarse or rough location information as referred to by Verizon and TECB is the equivalent to the location of the cell sector from which the wireless 911 call is made—or generally E911 Phase I information under the Commission's E911 rules. Given the apparent technical feasibility of cell sector location and its actual use in text-to-911 trials to date, we propose that CMRS providers be required to route text messages automatically to the appropriate PSAP based on the cell sector to which the mobile device is connected. We also propose to define the ''appropriate'' PSAP presumptively for text-to-911 routing purposes to be the same PSAP that would receive 911 voice calls from the same cell sector. However, we recognize that in some instances, state or local 911 authorities may wish to have text messages routed to a different PSAP from the one that receives 911 voice calls from the same location (e.g., to have all 911 texts within a state or region routed to a single central PSAP rather than to individual local PSAPs). Therefore, we propose to allow designation of an alternative PSAP for routing purposes based on notification by the responsible state or local 911 authority. We seek comment on these proposals. We also seek comment on whether there are any technical obstacles or cost factors that could make it more difficult for some CMRS providers, such as small or rural carriers, to support automated routing of text messages to the appropriate PSAP.

119. We also seek comment on specific technical or informational challenges that third-party over-the-top messaging applications providers may face with respect to assessing caller location and the associated PSAP. Apple, for example, suggests that text-to-911 obligations should only attach for third-party text messaging applications where the applications is installed on a phone that meets the Commission's location accuracy requirements. Will this be sufficient to enable such applications to accurately route a 911 call to the appropriate PSAP? Are there other agreements or protocols that would be necessary between the third-party application provider and the underlying carrier to ensure appropriate routing? What would these entail?

120. Several commenters noted that spoofing could compromise the accuracy of location-based routing of SMS text messages to PSAPs. We note, however, that the proposed systems use systems not under the control of the caller to query for cell tower location. SMS messaging uses the same mechanism as calls to provide the originating number to the network, and thus, there is no unique attribute of text messaging that leaves it open to spoofing. We also note that the potential for spoofing already exists for VoIP calls to 911. As Vermont indicates with regard to its text-to-911 trial, ''there is nothing about this new technology that is any more likely to result in 'spoof' contacts than what we already deal with on the voice side of the system.'' Accordingly, we seek comment on whether the potential for spoofing text messages is any greater than the potential for spoofing VoIP calls. Are there any actions that the Commission could take to minimize the risk of text-based spoofing?

b. 911 Location Accuracy Requirements

121. Background. In the Notice, the Commission noted that some parties had expressed concerns about the inability of SMS to provide the sender's precise location. The Commission sought comment on ways to overcome this limitation. Specifically, the Notice asked whether it is technologically feasible for the recipient of an emergency SMS text message to query for the texting party's location using the phone number provided The Carrier-NENA-APCO Agreement does not specifically address location accuracy issues. However, the Carrier-NENA-APCO Agreement does limit the provision of text-to-911 to ''the capabilities of the existing SMS service offered by a participating wireless service provider on the home wireless network to which a wireless subscriber originates an SMS message.''

122. Commenters indicate that, while it is feasible to use cell sector location to route emergency texts to the appropriate PSAP, it may be more difficult for CMRS providers to provide more precise location information in connection with text messages. Neustar notes that ''some wireless operators use network based location determination mechanisms that depend on the handset being in a voice call to receive enough measurement data to determine the location of the caller accurately. Such networks could not be expected to respond with high resolution location information for texters. This will be true

for any SMS to 911 solution.'' On the other hand, TCS indicates that its system would use ''the same location technologies and strategies used today for 9–1–1 voice calls to both route the text message to the appropriate PSAP, and for delivering a more precise location of the sender to PSAP personnel.'' TCS notes, however, that ''the carrier's 9–1–1 location platform may not be able to provide location outside of a 9–1–1 voice call'' and that ''coarse [location] may be the only available location for initial service launch.'' The VON Coalition expresses similar concerns with respect to providers of ''over-the-top'' text messaging applications in terms of their inability to access user location information.

123. Discussion. The record in this proceeding indicates that providing precise location information in connection with text messages is technically feasible but could involve significant changes and upgrades to existing SMS-based text networks. We are therefore concerned that it could initially be overly burdensome to require CMRS providers to comply with the Commission's Phase II E911 location accuracy rules when transmitting text messages to 911. While we recognize the importance of providing precise location information to PSAPs, we believe that the benefits of enabling consumers, particularly consumers with hearing and speech disabilities, to send SMS-based or non-SMS-based text messages to 911 outweigh the disadvantages of being unable to provide precise location information. Accordingly, we propose that the Commission's Phase II E911 location accuracy requirements not apply to the initial implementation of text-to-911. Nevertheless, we encourage the voluntary development of automatic location solutions for text-to-911 that provide at least the same capability as Phase II location information for voice calls to 911, even if the location solution does not use the same underlying location infrastructure. For example, messaging applications could transmit location information that is available on handsets using the data channel. Further, applications that use IP-based message delivery may also be able to include location information obtained via a mobile device API along with the text message. We also seek comment on whether operating system vendors or CMRS providers can facilitate the delivery of more precise location for interconnected text providers. Are there any other factors that the Commission should consider in regard to location delivery for interconnected text providers?

c. Roaming

124. Background. Roaming enables wireless consumers to use mobile devices outside the geographical coverage area provided by their home network operator. In the Notice, the Commission asked whether it is technically feasible to determine the originating location of an emergency text message in all situations or whether it is feasible only in situations where the customer is not roaming. As noted above, the Carrier-NENA-APCO Agreement does not provide text-to-911 capability to wireless subscribers roaming outside of a subscriber's home wireless network. Because sending and receiving texts while roaming involves two networks, the consumer's home network and the visited roaming network, roaming may create issues for text-to-911 because of the greater technical complexity of routing the message to the correct PSAP based on the consumer's location. In the non-emergency context, when a wireless consumer sends an SMS message while roaming on a visited network, the visited network passes the text message via designated signaling links to the user's home network, which in turn sends the text message to its final destination.

125. Several commenters address text-to-911 in the context of roaming customers. In considering vendor proposals for text-to-911 solutions, NENA contends that applicable location requirements must be met regardless of whether a consumer initiates or continues a text-to-911 string through the consumer's home network or a roaming partner. Similarly, APCO argues that when a device roams to a visited network, 911 text messages must be capable of remaining connected with not only the PSAP, but also the specific call taker. T-Mobile voices a number of concerns about roaming, stating that ''SMS-to-911 does not work when roaming.'' T-Mobile further notes that ''SMS for a T-Mobile customer roaming on another carrier's network remains supported by T-Mobile's network and messaging infrastructure, rather than by the carrier providing roaming. However, T-Mobile will not have location information when its subscriber is roaming, and thus can neither determine whether a roaming subscriber is in an area that supports text-to-911 nor route the 911 text to the appropriate PSAP.'' U.S. Cellular stresses ''the need for the FNPRM to include a discussion regarding the need for requirements to address customers sending texts to 911 while roaming outside of their carrier's network and for the resulting need to address interoperability across carrier networks.'' Finally, Sprint Nextel urges the Commission to refer technical considerations like roaming to technical working groups and standards-setting bodies for further discussion.

126. Discussion. We agree with NENA and APCO that it is critical for consumers who are roaming to have the ability to text-to-911 during an emergency, and we further note that current voluntary measures do not provide for text-to-911 service while a subscriber is roaming. Accordingly, we seek comment on whether both the home and visited network operators must cooperate to support the delivery of the text to the appropriate PSAP serving the sender's location when a consumer sends a text message to 911 while roaming. We also seek comment on T-Mobile's assertion that its network is unable to collect location information on a roaming subscriber and is thus, technically limited from providing text-to-911 for roaming subscribers. Could the visited network intercept text-to-911 messages and determine the mobile device location? What technical and economic obstacles need to be addressed in order to provide text-to-911 service to consumers? How can these obstacles be overcome? We also seek comment on whether the same approach should apply to international roamers while they are located in the United States.

11. PSAP Options for Receiving Text-to-911

127. There appears to be general agreement that the NG911 architecture offers an IP standards-based interface protocol that supports the delivery of text messages, regardless of the technology used by the mobile device. While some PSAPs are currently NG911-capable, or soon will be, many other PSAPs will not be NG911-capable for an extended period of time, limiting their options for handling text messages in the interim. Thus, in order to implement text-to-911, particularly on a nationwide basis, the Commission must take the disparate capabilities of PSAPs into account. Accordingly, we propose a set of near-term options that would enable all PSAPs to accept text messages transmitted by CMRS or interconnected text providers, regardless of whether the PSAPs are NG911-capable. This proposed approach provides non-NG911-capable PSAPs with the flexibility to handle text messages in the near term without requiring PSAPs to fund significant upfront investments or

upgrades. We seek comment on each option and the proposal as a whole.

a. NG911-Capable PSAPs

128. We propose that text-to-911 service providers deliver text messages to NG911-capable PSAPs using a standardized NG911 protocol, such as the NENA i3 protocol. This will ensure a consistent format for delivery of text messages to all NG911-capable PSAPs. We seek comment on this proposal. Should the current NENA i3 protocol be the single protocol used for delivery of all text messages to NG911-capable PSAPs? How should we account for future releases of NENA i3 that may support additional protocol interfaces?

b. Non-NG911-Capable PSAPs

129. For non-NG911-capable PSAPs, several technical options are available that could be used for receipt of text messages. For its part, the Carrier-NENA-APCO Agreement allows PSAPs to ''select the format for how messages are to be delivered.'' We propose that non-NG911-capable PSAPs be allowed to choose among several options, and to designate a preferred option and one or more fallback options.

(i) Web Browser

130. Under this option, a PSAP would receive text messages via a web browser installed in the PSAP (typically at one or more terminals used by PSAP call-takers) and connected to a third-party service provider. Verizon Wireless and TCS have stated that with respect to Verizon's roll-out of text-to-911, they will offer PSAPs the ability to receive text messages using the web browser approach. TCS states that it has ''demonstrated a D–IP SMS client application that runs in a web browser and gives a PSAP call-taker who has connectivity to the IP-messaging network the ability to receive, view, and respond to the SMS 9–1–1 call.'' This approach will require the PSAP to have Internet connectivity, but not full NG911 capability.

131. We seek comment on the web browser approach. Because many PSAPs already have Internet connectivity even if they are not NG911-capable, we believe that this approach would offer PSAPs a cost-effective alternative for receiving text messages without having to upgrade to NG911. We seek comment on what costs, other than Internet access, a PSAP would have to incur when implementing a web browser solution. For example, T-Mobile contends that TCS' web browser application would require PSAPs to upgrade their CPE. Is this accurate, and if so, what would the nature and cost of the required upgrade?

132. We also seek comment on how the web browser option should be implemented in a multi-party environment where multiple web browser options and applications may be available to both PSAPs and text-to-911 service providers. For example, it is possible that individual text-to-911 service providers could offer different web browser applications to the same PSAP, requiring the PSAP to either support all of the offered applications or to request that the providers use a common application. Alternatively, neighboring PSAPs could select different web browser applications from one another, requiring a text-to-911 service provider serving both PSAPs to support multiple applications or to request that the PSAPs choose a common application.

133. As a practical matter, we expect that many of these issues can be resolved through development by vendors of standards-based interoperable web applications that enable CMRS providers, interconnected text providers, and PSAPs to choose single-source solutions rather than having to support multiple solutions. Nevertheless, we seek comment on how such issues should be resolved where CMRS providers, interconnected text providers, and PSAPs cannot agree on a common web browser solution. Specifically, if the PSAP chooses to receive text messages via web-based delivery, under what circumstances should CMRS or interconnected text providers be obligated to accommodate the PSAP's choice of web browser application? If the PSAP uses a service provider (''text service provider'') to render text messages to a web browser, as appears likely based on the service trials, a problem would arise only if two CMRS or third-party text providers use different service providers on their end to route text-to-911 messages. In that scenario, we proposed to allow the PSAP to designate its text service provider as the recipient of text messages under two conditions. First, the PSAP text service provider must accept text messages using industry-standard protocols, such as the NENA i3 standard. Second, the PSAP text service provider must not charge the CMRS or interconnected text provider a fee for delivering such messages. We seek comment on this proposal.

(ii) Text-to-Voice Gateway Centers

134. Under this option, a PSAP would receive text messages via a gateway center where emergency-trained telecommunicators would translate between text and voice. The gateway center would operate in a manner similar to a telematics call center of the kind that telematics providers such as OnStar use to handle emergency calls from their subscribers and transmit such calls to 911. Telematics providers use cell-site location to determine the caller's location, match the location to the associated PSAP, and then use VoIP-based routing to connect with the PSAP over its 911 trunks. Intrado has proposed a similar solution for delivery of text messages through a gateway.

135. Some commenters express concerns about implementing a gateway approach. T-Mobile notes that ''a national SMS relay center does not exist today, and would have to be created and funded, which also cannot be accomplished rapidly.'' Sprint submits that Intrado's proposal ''would require the installation of extensive infrastructure to adapt wireless networks to the solution. Whether this proposal could ultimately be successful nationwide as an interim text-to-911 solution cannot be gauged, since testing has been very limited to date.''

136. We seek comment on the feasibility of establishing one or more gateway centers for translation and transmission of text messages to PSAPs. What are the potential costs of implementing this approach, and how would such costs be allocated? Are CMRS providers or vendors offering text-to-911 services likely to develop and offer a gateway option to non-NG911-capable PSAPs? Are non-NG911-capable PSAPs likely to choose this option over the web browser or TTY-based delivery options if it is available?

137. We also seek comment on how best to ensure that text-to-voice translation offered as part of the gateway option does not lead to harmful delays in communication between the sender and the PSAP. We anticipate that with proper certification and training, telecommunicators will be able to handle these responsibilities efficiently and professionally with a minimum of delay. We also anticipate that as an increasing number of PSAPs become capable of accepting IP-based text, the number of 911 text messages that will require text-to-voice translation will decrease, though text-to-voice or text-to-TTY (see below) may continue to be necessary until all PSAPs have been upgraded.

(iii) Text-to-TTY Translation

138. Under this option, text messages would be converted into TTY calls that the PSAP would receive over its existing TTY facilities. Since all PSAPs already have TTY capability, this is potentially

a very low-cost solution that can be deployed relatively quickly. Moreover, this solution supports direct communication between the sender and the PSAP.

139. A number of commenters express support for this option. Neustar contends that using TTY to transmit SMS-originated text messages is a viable interim solution that could ''bridge the gap'' before and during the transition to NG911. Neustar notes that ''almost all mobile phones are SMS capable but cannot do TTY and almost all PSAPs [are] TTY capable but cannot handle SMS.'' Neustar further asserts that this option could be implemented at minimal cost because ''carriers would only need to make small investments in providing cell ID query mechanisms where they are not already deployed for itinerate use, and PSAPs should be able to handle text-to-911 using their existing TTY equipment.'' Verizon Wireless and TCS have stated that they intend to permit PSAPs that lack Internet connectivity to receive text messages using this approach.

140. On the other hand, some commenters state that TTY is an outdated technology that could be susceptible to errors in an automated text-to-TTY translation process. T-Mobile states that TTYs ''are not sized for general public use'' and ''present their own technical problems.'' T-Mobile also contends that investment in TTYs would be a dead end investment, that TTYs are asynchronous and use Baudot tones, and that the half-duplex nature of TTYs can lead to messages being garbled if the texting party and PSAP call taker send messages over the top of one another. INdigital submits that ''using the TTY protocol with a 1% total character error rate * * * imposes a technical requirement that is nearly impossible to meet.'' T-Mobile asserts that ''many PSAPs have a limited number of TTY-equipped answering stations [and that] the capital investment required to handle the much larger volume of messages that would result from a general public SMS-to-911 system could be substantial for cash-strapped PSAPs.'' APCO adds that PSAPs ''us[ing] standalone TTY devices * * * will face additional challenges if the volume of calls to these legacy devices increase[s] dramatically.''

141. We seek comment on the feasibility and potential costs and benefits of making the text-to-TTY approach available as a text delivery option for CMRS providers, interconnected text providers, and PSAPs. Given the age and technical limitations of the PSAPs' existing TTY equipment, are PSAPs capable of handling a volume of text messages transmitted over TTY from the general public that could be much larger than the low current volume of TTY 911 traffic? Could the technical problems associated with TTYs result in translation errors? Are there measures that could be taken to improve the capacity and reliability of TTY equipment to handle text-to-911? Are larger PSAPs likely to make use of TTYs to receive text-to-911 messages, compared to the other options discussed earlier? Do most PSAPs have stand-alone TTY devices or are these more likely to be built into the call taker equipment and would thus be able to handle a larger text volume?

(iv) State/Regional Approach

142. Under this option, a state or regional 911 authority could designate a NG911-capable PSAP to receive and aggregate 911 text messages over a large region served by multiple non-NG911-capable PSAPs, such as a county, a multi-county region, or an entire state. The NG911-capable PSAP would exchange text messages with the caller and then communicate by voice with the non-text-capable PSAP that serves the caller's location. This approach is being applied in the Black Hawk County, Iowa text-to-911 trial, where the Black Hawk County PSAP accepts text messages from any i-Wireless user located in the state, thus acting as a gateway for other PSAPs in the state.

143. We seek comment on this approach. In general, allowing 911 authorities to aggregate handling of text messages through a single PSAP on a statewide or regional basis could accelerate the availability of text-to-911 and lead to cost savings in its implementation. This approach would also minimize the operational and technological impact of text-to-911 for non-text-capable PSAPs. However, relaying text messages from the designated PSAP to other PSAPs in the state or region could lead to delay in responding to emergency text as compared to emergency voice calls. We seek comment on what measures, if any, could reduce the risk of such delay.

c. Notification of PSAP Acceptance and Delivery Method

144. In order for CMRS and interconnected text providers to deliver and PSAPs to receive emergency texts under the framework proposed in this Further Notice, a mechanism will be needed for each PSAP to notify providers (or their text-to-911 vendors) that it is prepared to accept text messages and indicating the delivery option it has chosen. In the Notice, the Commission sought comment on the possibility of developing a centralized routing database or databases that would identify which PSAPs are accepting text-to-911 messages and the routing a delivery method selected by each PSAP. The Carrier-NENA-APCO Agreement does not specify a specific notification procedure; however, it defines a ''valid request'' for text-to-911 service as one in which ''the requesting PSAP represents that it is technically ready to receive 911 text messages in the format requested,'' and ''the appropriate local or State 911 service governing authority has specifically authorized the PSAP to accept and, by extension, the signatory service provider to provide, text-to-911 service (and such authorization is not subject to dispute).''

145. In its comments, Bandwidth.com proposes a gateway architecture that includes a database of all PSAPs with their preferences for handling text messages. This approach would arguably have efficiency advantages because it would enable PSAPs to provide notification regarding text delivery only once to all parties, rather than having to inform every wireless carrier or systems service provider individually. It would also enable providers of text-to-911 routing services to coordinate their databases for the routing of text messages. We seek comment on the feasibility and cost of implementing a gateway architecture or database mechanism. If such coordination is desirable, how can it be encouraged or facilitated? What entity should operate the database? How should PSAPs declare their preferences? Can the registry of preferences be implemented as an extension of the Commission's PSAP database? Should there be a default preference to ensure that PSAPs that do not declare their text delivery option by a certain date are then assumed to prefer text-to-TTY delivery, since that option should be available without further PSAP action? What constitutes a valid notification? The Carrier-NENA-APCO Agreement requires an appropriate local or State 911 service governing authority to specifically authorize a PSAP to accept text-to-911. Should this be a requirement for a valid notification?

146. We seek comment on the feasibility and cost of implementing Bandwidth.com's proposal or a similar gateway architecture or database mechanism. This approach would arguably have efficiency advantages because it would enable PSAPs to provide notification regarding text delivery only once to all parties, rather than having to inform every CMRS provider or systems service provider

individually. It would also enable providers of text-to-911 routing services to coordinate their databases for routing text messages, via the ECRF. If such coordination is desirable, how can it be encouraged or facilitated? How should PSAPs declare their preferences? Should there be a default preference to ensure that PSAPs that do not declare their text delivery option by a certain date are assumed to prefer text-to-TTY delivery, since that option should be available without further PSAP action? Who should operate such a database? Can this registry of preferences be implemented as an extension of the Commission PSAP database?

12. Cost Recovery and Funding

147. While we seek to structure our proposals to keep text-to-911 costs as low as possible for both text-to-911 service providers and PSAPs, we seek comment on whether there are additional actions that the Commission could take to enable text-to-911 service providers and PSAPs to recover their costs. We note that under the Carrier-NENA-APCO Agreement, signatory providers agreed to provide text-to-911 ''independent of their ability to recover these associated costs from state or local governments.'' At the same time, the Carrier-NENA-APCO Agreement requires that ''incremental costs for delivery of text messages (e.g. additional trunk groups to the PSAP's premises required to support TTY delivery) will be the responsibility of the PSAP, as determined by individual analysis.''

a. Text Messaging Providers

148. Background. In response to the Notice, a number of CMRS commenters express concerns over funding text-to-911. CTIA states that ''[a]ppropriate funding is a significant uncertainty given the considerable resources that would be needed to deploy text-to-911 capabilities on a nationwide basis.'' RCA notes that ''[c]oncern for adequate funding of future 911 systems is widespread and the increasing burden on wireless and IP-based providers to maintain the 911 system moving forward is troubling.''

149. Vendors contend that existing 911 cost allocation mechanisms can be used to recover the cost to implement near-term text-to-911 for both CMRS providers and PSAPs. Intrado asserts that the cost of every ''functional element'' of a text-to-911 solution ''can be allocated to wireless carrier networks and PSAPs consistent with how they are assigned today under the Commission's King County demarcation ruling.'' Intrado submits that, depending on which ''functional elements'' PSAPs choose to implement at each stage of text-to-911, ''the cost allocations can be changed if funding considerations dictate.''

150. Some commenters suggest that existing funding mechanisms, such as TRS and the Universal Service Fund (USF) could be applied to recover costs of text-to-911 implementation. Intrado contends that ''the FCC can and should determine that SMS is eligible for TRS funding to the same extent that IP-Relay is eligible for TRS funding.'' Bandwidth.com submits that ''a default destination for text messages that do not have location info must be determined'' and contends that ''[t]he TRS/VRS and IP Relay service providers provide an excellent option for this function given their existing role in facilitating communications between deaf or hard-of-hearing callers and PSAP personnel.'' NASNA also urges the Commission to consider ''[u]se of the Universal Service Fund to assist States and regions with the costs of NG911.''

151. Discussion. We believe that existing cost recovery mechanisms are sufficient to support implementation of text-to-911 under the framework presented in this Further Notice. Generally, CMRS providers recover their 911 implementation costs from their subscriber base. Since CMRS providers already support SMS and other texting applications in their networks, and have the ability to recover costs of those applications from their customers, it appears that the primary additional cost for CMRS providers to implement text-to-911 will be to establish and support the specific routing and relay functions needed to transmit emergency text messages to PSAPs. Additionally, under the Carrier-NENA-APCO Agreement, the major carriers have agreed to provide this service independent of cost recovery from state or local governments. The record indicates that the incremental cost would be in the range of $4 million annually.

152. We also note that an additional source of funding to reimburse wireless carriers for their 911 service implementation costs can be found in certain cost recovery programs that have been established through state legislation. Most states have reported to the Commission that ''they used the fees or surcharges that they collected for 911/E911 service solely to fund the provision of 911/E911 service.'' Dependent on the regulatory mechanism set forth in each statute, states distribute funding either to the carriers directly, or to a designated state or local entity which then reimburses carriers. For example, Alabama provides that ''20% of the service charges collected are retained by the [States' Wireless 9–1–1] board * * * to reimburse wireless service providers for Phase I and II expenses.'' In comparison, Nebraska provides that from its 911 fund ''payments are also made directly to wireless carriers for costs incurred for the provision of enhanced wireless 911 services.'' Though the means and extent to which carriers receive state-prescribed reimbursement for 911 implementation costs vary from state to state, we find that such cost recovery programs are an available and significant source of funding that can facilitate the roll-out of text-to-911 capability. Moreover, some states have started to apply their 911 funding to initiate deployment of full NG911 capabilities.

153. Additionally, many states allow qualifications for cost to include NG911-capable components for which CMRS providers might recover their outlays. For example, Verizon and Verizon Wireless note that ''[m]any state and local governments have * * * begun reconfiguring their funding mechanisms to facilitate NG911 deployment. We find that such actions could provide CMRS providers with additional funding flexibility to develop routing and gateway functions. We seek comment on this view and request that commenters update the Commission on any such efforts that are underway.

154. We also seek comment on whether USF funding could play a role in cost recovery, particularly for low-cost text to-911 options such as the TTY-based approach. Could using these funding mechanisms expedite text-to-911 implementation? What modifications, if any, would the Commission have to make to these funding programs to achieve those objectives? In commenting on these approaches, commenters should consider the Commission's recent amendment of its universal service rules to specify that the functionalities of eligible voice telephony services include, among other things, access to 911 and E911 emergency services to the extent the local government in an eligible carrier's service area has implemented 911 or E911 systems. The Commission noted that Eligible Telecommunications Carriers (ETCs) ''will be required to comply with NG911 rules upon implementation by state and local governments.''

155. Finally, we seek comment on current or potential approaches that would enable third party interconnected text providers to receive cost recovery for obligations they may have to provide services and offerings to implement text-to-911 capabilities. In view of the

funding mechanisms in several states for CMRS providers to receive cost recovery, we seek comment on whether such state level mechanisms might currently apply to enable interconnected text providers to receive cost recovery in complying with text-to-911 obligations proposed in this Further Notice. We also seek comment on whether states or other jurisdictions provide or plan to provide cost recovery mechanisms that could apply to interconnected text providers. We note that under our proposed framework, the infrastructure used by interconnected text providers would be similar to the infrastructure used by CMRS providers for the delivery of text messages to a PSAP. We seek comment on whether this would facilitate extending existing cost recovery mechanisms on CMRS providers to interconnected text providers.

b. PSAPs

156. Background. A number of public safety commenters express concerns about funding, noting that many PSAPs are subject to state and local regulatory mandates that may affect their ability to fund the implementation of text-to-911 service. APCO asserts that ''[m]any PSAPs are mandated to answer 90% of their incoming 9–1–1 calls in 10 seconds or less to qualify for receipt of wireless surcharge and other 9–1–1 funds.'' APCO further contends that ''[i]t is unlikely that these * * * mandates will be modified to accommodate the additional time that interim solution based text calls may have on the PSAP's ability to meet these standards.'' APCO argues that, consequently, ''implementing SMS text-to-9–1–1 may jeopardize some PSAPs eligibility for surcharge funds.'' NATOA concurs, stating that ''localities could lose vital 911 fees and other funding in the event they fail to meet performance mandates due to the increased time necessary to handle text-based calls.'' Other commenters, however, assert that recent trials have not substantiated the alleged increase in call-taking time due to the characteristics of SMS text.

157. Wireless carrier commenters also question whether PSAPs have the necessary funding to support the transition to text-to-911. The Blooston Rural Carriers argue that ''at this point in time and for the foreseeable future, PSAPs are simply not equipped (and will not be equipped) to process SMS text-to-911 transmissions, and the costs associated with the PSAP upgrades needed to achieve this capability are apt to be great.'' Verizon and Verizon Wireless assert that ''many PSAPs will need to secure funding sources, all will need time to upgrade their own networks and facilities and train personnel, and all will need to educate consumers on where NG911 is available. * * *.'' Verizon and Verizon Wireless further submit that ''the Commission should avoid mandates for short-term solutions that would force NG911 to compete with SMS-based solutions for PSAP and service provider resources.'' 4G Americas cites the ''[s]carce funding for PSAP NG911 upgrades [a]s a major concern'' and argues that ''[it] would do little good to mandate carrier near-term deployment of technologies that would require massive investments by PSAPs or require a complete overhaul of existing emergency communications systems.''

158. In view of perceived funding difficulties, both public safety commenters and CMRS providers advocate a regional or state-level approach to lower costs and generate economies of scale in implementing near-term text-to-911 as well as facilitating a transition to NG911. CTIA contends that ''[a] statewide approach to NG911 deployment will encourage wireless service providers and PSAPs to coordinate their efforts to deploy requested services in a reasonable and efficient manner and mitigate public confusion regarding the capabilities available to a local PSAP.'' Verizon and Verizon Wireless submit that ''[a] statewide approach provides a bright-line mechanism that is consistent with funding mechanisms, which are generally governed at the state level * * *.'' Verizon and Verizon Wireless refer to a ''current trend in state governments toward greater PSAP consolidation and statewide coordination of NG911 efforts.'' King County notes that ''it may not be feasible to fund the upgrades necessary for NG911 at the state's 64 PSAPs'' and that ''[t]he State E911 Office and the NG911 Subcommittee have developed a plan for the centralization of equipment at various hubs throughout the state that will serve multiple PSAPs in order to reduce equipment upgrade costs.'' Verizon and Verizon Wireless remark that ''[i]t is not necessary that every jurisdiction within a state be NG911 capable prior to a service provider's initiation of service within the state.'' RCA adds that ''the current economic climate and need for financial restraint make consolidation of PSAPs an essential part of the transition to NG911'' and that ''[c]onsolidation is one of the most important preliminary steps on the path to widespread NG911 deployment.''

159. Further, NENA contends that ''[i]t will prove most efficient if requests for text service originate from these larger units, reducing costs for both the public and the providers called upon to provide service.'' NENA cautions, however, ''that 9–1–1 remains * * * [a local service] that, in many states, is provided by small local agencies below the county level with little or no higher level coordination or oversight.'' ''[T]o maintain the autonomy to which 9–1–1 system operators have become accustomed,'' NENA suggests that the Commission ''refrain from mandating a regional or state-wide approach to system readiness showings, and instead make such aggregated showings optional, at the election of the states.''

160. Discussion. PSAPs generally pay for their 911 costs from state and local revenues generated by monthly 911 fees that CMRS providers collect from their subscribers. Wireless carriers argue that cost recovery regulations in many jurisdictions are inadequate to meet PSAP funding needs for text-to-911. Verizon and Verizon Wireless note that ''[s]ome jurisdictions impose significant restrictions on use of 911-related fees or taxes by limiting the use of such monies for traditional local exchange and commercial mobile radio services, or imposing explicit restrictions on the types of equipment and services that may be purchased.'' Verizon and Verizon Wireless add that ''[s]tate and local jurisdictions that face funding constraints may, if given a choice between a costly SMS-based solution versus a more robust IP-enabled NG911 technology, opt for the former.'' Although ''a particular jurisdiction [could] fund both direct SMS and NG911 solutions, such an outcome could result in even higher fees imposed on consumers with marginal additional public safety benefit.''

161. As discussed above, we propose several options that consider the disparities in PSAPs' current technical capabilities and that enable non-NG911-capable PSAPs to handle texts without significant cost or upgrades. For instance, both the Web delivery and the TTY-translation options is a low cost alternative because PSAPs already have TTY capability. While this option employs an IP-gateway to facilitate routing functions compared to the traditional relay function of TTY/TDD, we believe that, in view of the relatively low cost to PSAPs to implement TTY-translation-based text-to-911, existing funding mechanisms can serve to defray the costs. Similarly, PSAPs that choose the gateway center option can limit costs by using already-trained CAs to translate between text and voice.

162. Moreover, contrary to Verizon and Verizon Wireless' assertion that

funding for interim text-to-911 solutions would adversely affect the resources available to support a transition to full NG911 capabilities, we believe that the low cost options discussed above constitute a reasonable and cost efficient alternative to resolving possible limitations in funding at the state or local level. Additionally, we note that under the current Carrier-NENA-APCO Agreement, PSAPs would be responsible for their incremental costs for delivery of text messages. We seek comment on this view.

163. Based on our proposal to offer PSAPs an array of text-to-911 delivery options, including options that entail very limited cost, we believe that existing funding mechanisms constitute a sufficient resource to implement text-to-911 within our proposed time frame. We seek comment on this approach. We also seek comment on whether these funding mechanisms could be applied to other IP-based component upgrades. If not, what modifications need to occur? Are there actions the Commission could take to encourage or facilitate those modifications at the state or regional level? We invite comment on approaches that the Commission could pursue to encourage the states or regional entities to address such changes in funding to incentivize deploying the necessary text-to-911 upgrades within the proposed timeframe.

13. Liability Protection

164. Background. In general, liability protection for provision of 911 service is governed by state law and has traditionally been applied only to LECs. However, Congress has expanded the scope of state liability protection by requiring states to provide parity in the degree of protection provided to traditional and non-traditional 911 providers, and more recently, to providers of NG911 service. In 2008, Congress enacted the New and Emerging Technologies 911 Improvement Act (Net 911 Act), which provides that a ''wireless carrier, IP-enabled voice service provider, or other emergency communications provider * * * shall have'' the same liability protection as a local exchange carrier under federal and state law. In February 2012, Congress further extended state liability protection to providers of NG911 service in the Next Generation 9–1–1 Advancement Act of 2012. The Next Generation 911 Advancement Act provides that ''a provider or user of Next Generation 9–1–1 services * * * shall have immunity and protection from liability under Federal and State law [to the extent provided under section 4 of the Wireless Communications and Public Safety Act of 1999],'' with respect to ''the release of subscriber information related to emergency calls or emergency services,'' ''the use or provision of 9–1–1 services, E9–1–1 services, or Next Generation 9–1–1 services,'' and ''other matters related to 9–1–1 services, E9–1–1 services, or Next Generation 9–1–1 services.''

165. In the Notice, which was released prior to the Next Generation 911 Advancement Act, the Commission asked whether the liability provisions in the NET 911 Act embrace the full range of technologies and service providers that will be involved in the provisioning of NG911 services. The Notice also asked whether the Commission has the authority to extend liability protection to entities involved in the provisioning of NG911 services or whether Congressional action is necessary.

166. In response to the Notice, numerous commenters argue that liability protection is essential as part of any extension of 911 requirements to include text. Commenters also assert that the lack of express liability protection for NG911 has hampered the deployment of NG911 networks. Commenters also argue that federal law requiring parity in state law protection does not adequately protect 911 and NG911 service providers because the scope of underlying liability protection is dictated by state law and varies from state to state. AT&T, for example, argues that ''liability protection presently provided under the NET 911 Act is insufficient because it is tied to the protection afforded under various state laws and, often, a local exchange carrier's tariff.'' Motorola argues that ''[n]ational consistency in liability protection will be essential to encouraging investment and promoting a smooth NG911 transition.''

167. Discussion. We recognize that adequate liability protection is needed for PSAPs, CMRS providers, third party interconnected service providers, and vendors to proceed with implementation of text-to-911 as contemplated in this Further Notice. The recent passage of the Next Generation 911 Advancement Act has significantly expanded the scope of liability protection and potentially resolved some of the issues raised by commenters by making clear that states must provide the same level of protection for NG911 as for traditional 911 and E911. We also note that under the Carrier-NENA-APCO Agreement, the four major wireless carriers have committed to deploy text-to-911 capability throughout their nationwide networks without any precondition requiring additional liability protection other than the protection that is provided by current state and Federal law. Nevertheless, we seek comment on whether there are additional steps the Commission could take—consistent with our regulatory authority—to provide additional liability protection to text-to-911 service providers. We also seek comment on whether the combined parity protection afforded by the NET 911 Act and the Next Generation 911 Advancement Act extends to all providers of text-to-911 service, regardless of whether such service is provided using pre-NG911 or NG911 mechanisms. We seek comment on whether providers of text-to-911 service have sufficient liability protection under current law to provide text-to-911 services to their customers, or whether additional protection may still be needed or desirable.

C. Legal Authority

168. We seek comment on the Commission's authority to apply the automated error message and more comprehensive text-to-911 rules proposed herein to both CMRS providers and other entities that offer interconnected text messaging services (including third-party providers of ''over-the- top'' text messaging applications). In doing so, we incorporate herein the portions of our 2011 Notice regarding the Commission's authority to adopt text-to-911 rules. We note that, in response to our 2011 Notice, numerous parties addressed the Commission's authority to adopt text-to-911 rules under the CVAA, Title III, and our ancillary authority. Since then, we have modified our proposals and taken into account recent developments regarding the deployment of text-to-911 offerings, including the recent Carrier-NENA-APCO Agreement.

169. We now ask parties to refresh the record on the legal authority issues and to address their comments to the particular rules being proposed herein. Specifically, we ask commenters to address the Commission's authority under the CVAA to apply the proposed rules to this circumstance, and in particular to other entities that offer interconnected text messaging service. In this regard, we seek comment on how the Commission's ''authority to promulgate regulations to implement the recommendations proposed by'' EAAC applies to this circumstance. Would the Commission's decision to adopt the proposed text-to-911 rules implement EAAC recommendation P4.1, titled ''Interim Text Access,'' or recommendation T1.2, titled ''Interim Mobile Text Solution''? Are there other

EAAC recommendations relevant to our authority under Section 615c(g)? We also invite comment on how the Commission's authority to promulgate ''any other regulations, technical standards, protocols, and procedures as are necessary to achieve reliable, interoperable communication that ensures access by individuals with disabilities to an Internet protocol-enabled emergency network, where achievable and technically feasible'' applies to these proposals, and in particular to other entities that offer interconnected text messaging service.

170. In addition to the CVAA, we ask commenters to address the Commission's authority under Title III, including our authority under Sections 301, 303, 307, 309, and 316, to adopt the rules proposed herein. We note that, when analyzing our legal authority in the 2011 Notice, we stated our ''belie[f] that we have well-established legal authority under * * * Title III provisions to take the regulatory and non-regulatory measures described [t]herein that would apply to users of spectrum.'' Since then, the D.C. Circuit provided additional guidance regarding the scope of our Title III authority in Cellco Partnership v. FCC. We now seek additional comment on our Title III authority in light of this decision.

171. Among other points, we seek comment on whether Title III grants the Commission authority to apply the proposed rules to third-party interconnected text providers and, if so, which specific provisions of Title III apply to them. Does the Commission's Title III authority over those entities depend on how they offer their service? For example, does the FCC's Title III authority over them turn on whether the entity holds a Commission's license or other authorization, and, if so, whether such authorization is integral to that entity's interconnected texting service? Do any third-party interconnected text messaging providers hold any such authorizations? We also ask commenters to address the Commission's authority to impose regulations on CMRS providers that indirectly affect third-party providers. For example, does the Commission have authority to require CMRS providers to take steps to prevent the use of certain third-party applications that do not support text-to-911? If so, would such steps be consistent with the Commission's open platform requirements for the 700 MHz C Block and other agency precedent?

172. We also ask commenters to address the Commission's ability to rely on its ancillary authority to adopt the rules proposed herein. The Commission may act pursuant to its ancillary authority when ''(1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.'' We ask commenters to discuss both prongs of this test. Would the Commission's decision to adopt the proposed rules be ancillary to certain Title III provisions, the CVAA, or other statutory provisions? Is application of the proposed rules to all providers of interconnected text-messaging services necessary to avoid consumer confusion or achieve the public safety benefits associated with applying such rules to CMRS providers? We seek comment on these questions.

IV. Procedural Matters

A. Ex Parte Presentations

173. The proceedings initiated by this Further Notice of Proposed Rulemaking shall be treated as a ''permit-but-disclose'' proceedings in accordance with the Commission's ex parte rules. Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must: (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made; and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

B. Comment Filing Procedures

174. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments in response to this Further Notice of Proposed Rulemaking on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.*
- *Paper Filers:* Parties that choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.

C. Accessible Formats

175. 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).

D. Regulatory Flexibility Analysis

176. As required by the Regulatory Flexibility Act of 1980, *see* 5 U.S.C. sec. 604, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth in Appendix B. Written public comments are requested in the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to this Further Notice of Proposed Rulemaking as set forth on the first page of this document, and have a separate and distinct heading designating them as responses to the IRFA.

E. Paperwork Reduction Analysis

177. The Further Notice of Proposed Rulemaking contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collection requirements contained in this document, as required by PRA. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

V. Ordering Clauses

178. *It is further ordered,* pursuant to Sections 1, 2, 4(i), 7, 10, 201, 214, 222, 251(e), 301, 302, 303, 303(b), 303(r), 307, 307(a), 309, 309(j)(3), 316, 316(a), 332, 615a, 615a–1, 615b, 615c(a), 615c(c), 615c(g), and 615(c)(1) of the Communications Act of 1934, 47 U.S.C. sec. 151, 152(a), 154(i), 157, 160, 201, 214, 222, 251(e), 301, 302, 303, 303(b), 303(r), 307, 307(a), 309, 309(j)(3), 316, 316(a), 332, 615a, 615a-1, 615b, 615c, 615c(c), 615c(g), and 615(c)(1) that this Further Notice of Proposed Rulemaking is hereby *adopted.*

179. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 20

Communications common carriers.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 20 as follows:

PART 20—COMMERCIAL MOBILE SERVICES

■ 1. The authority citation for part 20 is revised to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 157, 160, 201, 214, 222, 251(e), 301, 302, 303, 303(b), 303(r), 307, 307(a), 309, 309(j)(3), 316, 316(a), 332, 615a, 615a–1, 615b, 615c, 615c(c), 615c(g), and 615(c)(1).

■ 2. Section 20.18 is amended by adding paragraph (n) to read as follows:

§ 20.18 911 Service.

* * * * *

(n) *Text-messaging for 911.* CMRS providers subject to this section and third party interconnected text providers as defined in paragraph (n)(6) of this section shall comply with the following requirements:

(1) CMRS providers subject to this section shall provide an automated error text message that notifies consumers attempting to send text messages to 911 in areas where text-to-911 is unavailable or in other instances where the carrier is unable to transmit the text to the PSAP serving the texting party's location for reasons including, but not limited to, network congestion, the inability of the PSAP to accept such messages, or otherwise. The requirements of this paragraph only apply when the CMRS provider (or the CMRS provider's text-to-911 vendor) has direct control over the transmission of the text message. The automatic notification must include information on how to contact the PSAP. CMRS providers shall meet the requirements of this paragraph no later than June 30, 2013.

(2) No later than May 15, 2014, CMRS providers shall offer their subscribers the capability to send 911 text messages to the appropriate PSAP from any text-capable wireless handset.

(i) CMRS providers must provide their subscribers with at least one pre-installed text-to-911 option per mobile device model under a CMRS provider's direct control. The pre-installed text-to-911 option must be capable of operating over the provider's entire network coverage area. Where a consumer has obtained the device from an unaffiliated third party and uses the device on a CMRS provider's network, CMRS providers must offer a text-to-911 application that the consumer can load on to the device.

(ii) To meet the requirement of paragraph (n)(2) of this section, CMRS providers may select any reliable method or methods for text routing and delivery. For example, CMRS providers may use Short Message Service (SMS), mobile-switched, or Internet Protocol (IP)-based methods for text routing and delivery.

(3) 911 is the designated short code for text messages sent to PSAPs.

(4) CMRS providers must route all 911 text messages to the appropriate PSAP, based on the cell sector to which the mobile device is connected. In complying with this requirement, CMRS providers must route text messages to the same PSAP to which they currently route 911 calls, unless the responsible local or state entity designates a different PSAP to receive 911 text messages and informs the carrier of that change.

(5) *Roaming.* When a consumer is roaming, both the home and visiting network operators must cooperate to support the delivery of the text to the appropriate PSAP serving the sender's location.

(6) *Third party interconnected text providers.* (i) All third-party interconnected text application providers that offer the capability for consumers to send to and receive text messages from text-capable mobile telephone numbers shall send an automated error text message when a user of the application attempts to send an emergency text in an area where text-to-911 is not supported or the provider is otherwise unable to transmit the text to the PSAP for reasons including, but not limited to, network congestion, the inability of the PSAP to accept such messages, or otherwise. The automatic error notification must include information on how to contact the PSAP. Third party interconnected text providers subject to this paragraph shall meet the above requirements no later than June 30, 2013.

(ii) No later than May 15, 2014, all third party interconnected text providers that provide the capability for consumers to send to and receive text messages from text-capable mobile telephone numbers must offer the capability described in paragraph (n)(2) of this section during time periods when the mobile device is connected to a CMRS network.

[FR Doc. 2013–00159 Filed 1–8–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[MB Docket No. 12–217; DA 12–2081]

Cable Television Technical and Operational Requirements

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of reply comment period.

SUMMARY: In this document, the Commission extends the deadline for filing reply comments on the Commission's Notice of Proposed Rulemaking (NPRM) in this proceeding, which was published in the **Federal Register** on October 9, 2012 (77 FR 61351). The extension will facilitate the development of a full record given the importance of the issues in this proceeding.

DATES: The reply comment period for the proposed rule published October 9, 2012 (77 FR 61351) is extended. Submit reply comments on or before January 25, 2013.

ADDRESSES: You may submit reply comments, identified by MB Docket No. 12–217, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Electronic Comment Filing System (ECFS) Web Site: http://www.fcc.gov/cgb/ecfs.* Follow the instructions for submitting comments.
- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone (202) 418–0530 or TTY: (202) 418–0432.

For detailed instructions on submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of the NPRM.

FOR FURTHER INFORMATION CONTACT: Jeffrey Neumann, *Jeffrey.Neumann@fcc.gov,* of the Engineering Division, Media Bureau, (202) 418–2046.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order in MB Docket No. 12–217, DA 12–2081, adopted and released on December 21, 2012, which extends the reply comment filing deadline established in the NPRM published under FCC No. 12–86 at 77 FR 61351, October 9, 2012. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street SW., Washington, DC 20554. The complete text 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: *http://www.fcc.gov.* Alternative formats are available to persons with disabilities by sending an email to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Background

1. The NPRM in this proceeding established a comment deadline of December 8, 2012, and a reply comment deadline of January 7, 2013. On December 21, 2012, the National Association of Telecommunications Officers and Advisors (''NATOA'') requested that the reply comment deadline be extended by five weeks, to allow for additional time to compile records in response to assertions made by other commenters, and to permit time for discussions with other commenters regarding differences in the positions taken in their comments. We grant NATOA's request in part.

2. As set forth in Section 1.46 of the Commission's Rules, 47 CFR 1.46(a), of the Commission's Rules, the Commission's policy is that extensions of time shall not be routinely granted. Given the importance of the issues in this proceeding, and in the interest of encouraging thoughtful consideration of these issues, however, we believe that granting in part NATOA's request is necessary to facilitate the development of a full record. However, we feel that five weeks is unnecessarily long to accomplish these goals and note that parties may avail themselves of the ex parte process after the submission of their reply comments if necessary. Therefore, we grant an extension of 18 days, until January 25, 2013 for file reply comments.

Ordering Clauses

Pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), and §§ 0.61, 0.283, and 1.46 of the Commission's rules, 47 CFR 0.61, 0.283, and 1.46, the Motion for Extension of Time to File Reply Comments filed by NATOA *is granted in part,* and the deadline to file reply comments in this proceeding is extended to January 25, 2013.

Federal Communications Commission.

William T. Lake,

Chief, Media Bureau.

[FR Doc. 2013–00248 Filed 1–8–13; 8:45 am]

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Notices

Federal Register

Vol. 78, No. 6

Wednesday, January 9, 2013

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0096]

Notice of Request for Approval of an Information Collection; National Veterinary Services Laboratories; Bovine Spongiform Encephalopathy Surveillance Program Documents

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: New information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request approval of a new information collection associated with National Veterinary Services Laboratories diagnostic support for the bovine spongiform encephalopathy surveillance program.

DATES: We will consider all comments that we receive on or before March 11, 2013.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0096-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0096, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0096* 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: For information on documents associated with the bovine spongiform encephalopathy surveillance program, contact Dr. Dean Goeldner, Senior Staff Veterinarian, Veterinary Services, APHIS, 4700 River Road Unit 43, Riverdale, MD 20737; (301) 851–3511. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: National Veterinary Services Laboratories; Bovine Spongiform Encephalopathy Surveillance Program Documents.

OMB Number: 0579–XXXX.

Type of Request: Approval of a new information collection.

Abstract: Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA) is authorized, among other things, to carry out activities to detect, control, and eradicate pests and diseases of livestock within the United States. APHIS' National Veterinary Services Laboratories (NVSL) safeguard U.S. animal health and contribute to public health by ensuring that timely and accurate laboratory support is provided by their nationwide animal health diagnostic system.

In 2006, APHIS' Veterinary Services (VS) implemented the bovine spongiform encephalopathy (BSE) Ongoing Surveillance Program. NVSL is instrumental to this program in its efforts to monitor and assess changes to the BSE status of U.S. cattle and to provide mechanisms for early detection of BSE, which is a chronic degenerative disease that affects the central nervous system of cattle.

As part of the surveillance program, NVSL tests and analyzes samples assembled from a variety of sites and from the cattle populations where BSE is most likely to be detected. These diagnostic services involve information collection activities, such as the USDA BSE Surveillance Submission Form/Continuation Sheet (VS Forms 17–146/17–146a) and the USDA BSE Surveillance Data Collection Form (VS Form 17–131).

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

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

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

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.1000068 hours per response.

Respondents: Slaughter establishments, offsite collection facilities for condemned slaughter cattle, rendering 3D/4D facilities, veterinary diagnostic laboratories, State animal health personnel, and accredited veterinarians.

Estimated annual number of respondents: 60.

Estimated annual number of responses per respondent: 732.95.

Estimated annual number of responses: 43,977.

Estimated total annual burden on respondents: 4,399 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 2nd day of January, 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–00192 Filed 1–8–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0088]

Notice of Establishment of an Animal and Plant Health Inspection Service Stakeholder Registry

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: This notice announces the availability of a new Animal and Plant Health Inspection Service stakeholder registry.

FOR FURTHER INFORMATION CONTACT: Ms. Hallie Zimmers, Advisor for State and Stakeholder Relations, Legislative and Public Affairs, APHIS, room 1147, 1400 Independence Avenue SW., Washington, DC 20250; (202) 799–7029.

SUPPLEMENTARY INFORMATION: The Animal and Plant Health Inspection Service (APHIS) has established an electronic stakeholder registry for individuals and organizations interested in receiving updates regarding APHIS announcements, activities, policies, regulations and services. Subscribers can choose from an array of topics covering all of APHIS' program areas and once registered will receive information via email or text tailored to their specific interests. In addition to choosing topics of interest, subscribers may select how often they want to receive messages.

APHIS' Plant Protection and Quarantine and Veterinary Services programs are already using this subscription service to share information with stakeholders. By expanding the registry to include APHIS' Animal Care, Biotechnology Regulatory Services, International Services, and Wildlife Services programs, we are adopting an agency-wide approach toward increasing transparency and communication with our many and diverse stakeholders.

To join the registry and receive messages, stakeholders must subscribe and provide an email address or telephone number. Stakeholders can update their profiles at any time using this same information.

Persons interested in becoming subscribers or updating their subscriptions may access the expanded registry at: *https://public.govdelivery.com/accounts/USDAAPHIS/subscriber/topics?qsp=USDAAPHIS_1.* Subscribers can also register or update their profiles by clicking on the red envelope on the APHIS home page at *www.aphis.usda.gov.* Questions concerning the APHIS stakeholder registry may be directed to the person listed under **FOR FURTHER INFORMATION CONTACT**.

Done in Washington, DC, this 2nd day of January, 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–00193 Filed 1–8–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0004]

Importation of Fresh Barhi Dates From Israel Into the United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that we have prepared a pest risk analysis that evaluates the risks associated with the importation of fresh dates of the cultivar Barhi from Israel into the United States. Based on that analysis, we have concluded that the application of one or more designated phytosanitary measures will be sufficient to mitigate the pest risk. In addition, we are advising the public that we have prepared a treatment evaluation document that describes a new treatment schedule for *Ceratitis capitata* in Barhi dates. We are making the pest risk assessment and treatment evaluation document available to the public for review and comment.

DATES: We will consider all comments that we receive on or before March 11, 2013.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS 2012-0004-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0004, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS 2012-0004* 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: Mr. Marc Phillips, Import Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road Unit 156, Riverdale, MD 20737; (301) 851–2114.

SUPPLEMENTARY INFORMATION:

Background

Under the regulations in ''Subpart—Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–57), the Animal and Plant Health Inspection Service (APHIS) prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests that are new to or not widely distributed within the United States.

Section 319.56–4 contains a performance-based process for approving the importation of commodities that, based on the findings of a pest risk analysis, can be safely imported subject to one or more of the designated phytosanitary measures listed in paragraph (b) of that section.

APHIS received a request from the Government of Israel to allow the importation of fresh dates (*Phoenix dactylifera* L.) of the cultivar Barhi to be imported into the United States. Currently, fresh Barhi dates are not authorized for entry from Israel. We completed a pest risk assessment (PRA) to identify pests of quarantine significance that could follow the pathway of importation if such imports were to be allowed. Based on the PRA, we then completed a risk management document (RMD) to identify phytosanitary measures that could be applied to mitigate the risks of introducing or disseminating the identified pests via the importation of Barhi dates from Israel. We have concluded that fresh Barhi dates can safely be imported into the United States from Israel using one or more of the five designated phytosanitary measures listed in § 319.56–4(b). These measures are that:

• The dates may be imported into the United States in commercial consignments only;

• The dates must be treated in accordance with 7 CFR part 305 for *Ceratitis capitata;* and

• The dates must be accompanied by a phytosanitary certificate issued by the national plant protection organization of Israel stating that the consignment has begun or has undergone treatment T107–i, with the additional declaration stating that the fruit in the consignment was inspected and found free of *Mauginiella scaettae.*

Therefore, in accordance with § 319.56–4(c), we are announcing the availability of our PRA for public review and comment. The PRA may be viewed on the *Regulations.gov* Web site or in our reading room (see **ADDRESSES** above for instructions for accessing Regulations.gov and information on the location and hours of the reading room). You may also request paper copies of the PRA by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT.** Please refer to the subject of the analysis that you wish to review when requesting copies.

After reviewing any comments we receive, we will announce our decision regarding the import status of fresh Barhi variety dates from Israel in a subsequent notice. If the overall conclusions of the analysis and the Administrator's determination of risk remain unchanged following our consideration of the comments, then we will authorize the importation of fresh Barhi variety dates from Israel into the United States subject to the requirements specified in the RMD.

New Treatment

The phytosanitary treatments regulations contained in part 305 of 7 CFR chapter III set out standards for treatments required in parts 301, 318, and 319 of 7 CFR chapter III for fruits, vegetables, and other articles.

In § 305.2, paragraph (b) states that approved treatment schedules are set out in the Plant Protection and Quarantine (PPQ) Treatment Manual.[1] Section 305.3 sets out a process for adding, revising, or removing treatment schedules in the PPQ Treatment Manual. In that section, paragraph (a) sets out the process for adding, revising, or removing treatment schedules when there is no immediate need to make a change.

The PPQ Treatment Manual does not currently provide a treatment schedule for *C. capitata* in Barhi variety dates. In accordance with § 305.3(a)(1), we are providing notice of a new cold treatment schedule T107–i that we have determined is effective against *C. capitata* in Barhi variety dates. The reasons for this determination are described in a treatment evaluation document (TED) we have prepared to support this action. The TED may be viewed on the *Regulations.gov* Web site or in our reading room. You may also request paper copies of the TED by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT.**

After reviewing the comments we receive, we will announce our decision regarding the changes to the Treatment Manual that are described in the TED in a subsequent notice. If our determination that it is necessary to add new treatment schedule T107–i remains unchanged following our consideration of the comments, then we will make available a new version of the PPQ Treatment Manual that reflects the addition of T107–i.

Authority: 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 2nd day of January, 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–00194 Filed 1–8–13; 8:45 am]

BILLING CODE 3410–34–P

[1] The Treatment Manual is available on the Internet at *http://www.aphis.usda.gov/import_export/plants/manuals/index.shtml* or by contacting the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Manuals Unit, 92 Thomas Johnson Drive, Suite 200, Frederick, MD 21702.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0082]

International Sanitary and Phytosanitary Standard-Setting Activities

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with legislation implementing the results of the Uruguay Round of negotiations under the General Agreement on Tariffs and Trade, we are informing the public of the international standard-setting activities of the World Organization for Animal Health, the Secretariat of the International Plant Protection Convention, and the North American Plant Protection Organization, and we are soliciting public comment on the standards to be considered.

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

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0082-0001.*

• *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0082, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0082* 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: For general information on the topics covered in this notice, contact Mrs. Jessica Mahalingappa, Acting Associate Deputy Administrator for SPS Management, International Services, APHIS, room 1132, USDA South Building, 14th Street and Independence Avenue SW., Washington, DC 20250; (202) 799–7121.

For specific information regarding standard-setting activities of the World Organization for Animal Health, contact Dr. Michael David, Director, International Animal Health Standards Team, National Center for Import and Export, VS, APHIS, 4700 River Road, Unit 33, Riverdale, MD 20737–1231; (301) 851–3302.

For specific information regarding the standard-setting activities of the International Plant Protection Convention or the North American Plant Protection Organization, contact Ms. Julie E. Aliaga, Program Director, International Phytosanitary Standards, PPQ, APHIS, 4700 River Road, Unit 140, Riverdale, MD 20737–1236; (301) 851–2032.

SUPPLEMENTARY INFORMATION:

Background

The World Trade Organization (WTO) was established as the common international institutional framework for governing trade relations among its members in matters related to the Uruguay Round Agreements. The WTO is the successor organization to the General Agreement on Tariffs and

Trade. U.S. membership in the WTO was approved by Congress when it enacted the Uruguay Round Agreements Act (Pub. L. 103–465), which was signed into law on December 8, 1994. The WTO Agreements, which established the WTO, entered into force with respect to the United States on January 1, 1995. The Uruguay Round Agreements Act amended Title IV of the Trade Agreements Act of 1979 (19 U.S.C. 2531 *et seq.*). Section 491 of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2578), requires the President to designate an agency to be responsible for informing the public of the sanitary and phytosanitary (SPS) standard-setting activities of each international standard-setting organization. The designated agency must inform the public by publishing an annual notice in the **Federal Register** that provides the following information: (1) The SPS standards under consideration or planned for consideration by the international standard-setting organization; and (2) for each SPS standard specified, a description of the consideration or planned consideration of that standard, a statement of whether the United States is participating or plans to participate in the consideration of that standard, the agenda for U.S. participation, if any, and the agency responsible for representing the United States with respect to that standard.

''International standard'' is defined in 19 U.S.C. 2578b as any standard, guideline, or recommendation: (1) Adopted by the Codex Alimentarius Commission (Codex) regarding food safety; (2) developed under the auspices of the World Organization for Animal Health (OIE, formerly known as the Office International des Epizooties) regarding animal health and welfare, and zoonoses; (3) developed under the auspices of the Secretariat of the International Plant Protection Convention (IPPC) in cooperation with the North American Plant Protection Organization (NAPPO) regarding plant health; or (4) established by or developed under any other international organization agreed to by the member countries of the North American Free Trade Agreement (NAFTA) or the member countries of the WTO.

The President, pursuant to Proclamation No. 6780 of March 23, 1995 (60 FR 15845), designated the Secretary of Agriculture as the official responsible for informing the public of the SPS standard-setting activities of Codex, OIE, IPPC, and NAPPO. The United States Department of Agriculture's (USDA's) Food Safety and Inspection Service (FSIS) informs the public of Codex standard-setting activities, and USDA's Animal and Plant Health Inspection Service (APHIS) informs the public of OIE, IPPC, and NAPPO standard-setting activities.

FSIS publishes an annual notice in the **Federal Register** to inform the public of SPS standard-setting activities for Codex. Codex was created in 1962 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization. It is the major international organization for encouraging international trade in food and protecting the health and economic interests of consumers.

APHIS is responsible for publishing an annual notice of OIE, IPPC, and NAPPO activities related to international standards for plant and animal health and representing the United States with respect to these standards. Following are descriptions of the OIE, IPPC, and NAPPO organizations and the standard-setting agenda for each of these organizations. We have described the agenda that each of these organizations will address at their annual general sessions, including standards that may be presented for adoption or consideration, as well as other initiatives that may be underway at the OIE, IPPC, and NAPPO.

The agendas for these meetings are subject to change, and the draft standards identified in this notice may not be sufficiently developed and ready for adoption as indicated. Also, while it is the intent of the United States to support adoption of international standards and to participate actively and fully in their development, it should be recognized that the U.S. position on a specific draft standard will depend on the acceptability of the final draft. Given the dynamic and interactive nature of the standard-setting process, we encourage any persons who are interested in the most current details about a specific draft standard or the U.S. position on a particular standard-setting issue, or in providing comments on a specific standard that may be under development, to contact APHIS. Contact information is provided at the beginning of this notice under **FOR FURTHER INFORMATION CONTACT**.

OIE Standard-Setting Activities

The OIE was established in Paris, France, in 1924 with the signing of an international agreement by 28 countries. It is currently composed of 178 Members, each of which is represented by a delegate who, in most cases, is the chief veterinary officer of that country or territory. The WTO has recognized the OIE as the international forum for setting animal health and welfare standards, reporting global animal disease events, and presenting guidelines and recommendations on sanitary measures relating to animal health.

The OIE facilitates intergovernmental cooperation to prevent the spread of contagious diseases in animals by sharing scientific research among its Members. The major functions of the OIE are to collect and disseminate information on the distribution and occurrence of animal diseases and to ensure that science-based standards govern international trade in animals and animal products. The OIE aims to achieve these through the development and revision of international standards for diagnostic tests, vaccines, and the safe international trade of animals and animal products.

The OIE provides annual reports on the global distribution of animal diseases, recognizes the free status of Members for certain diseases, categorizes animal diseases with respect to their international significance, publishes bulletins on global disease status, and provides animal disease control guidelines to Members. Various OIE commissions and working groups undertake the development and preparation of draft standards, which are then circulated to Members for consultation (review and comment). Draft standards are revised accordingly and are then presented to the OIE World Assembly of Delegates (all the Members) during the General Session, which meets annually every May, for review and adoption. Adoption, as a general rule, is based on consensus of the OIE membership.

The next OIE General Session is scheduled for May 26–31, 2013, in Paris, France. Currently, the Deputy Administrator for APHIS' Veterinary Services program is the official U.S. Delegate to the OIE. The Deputy Administrator for APHIS' Veterinary Services program intends to participate in the proceedings and will discuss or comment on APHIS' position on any standard up for adoption. Information about OIE draft Terrestrial and Aquatic Animal Health Code chapters may be found on the Internet at *http://www.aphis.usda.gov/import_export/animals/oie/* or by contacting Dr. Michael David (see **FOR FURTHER INFORMATION CONTACT** above).

OIE Terrestrial and Aquatic Animal Health Code Chapters and Appendices Adopted by the May 2012 General Session

Over 32 Code chapters were amended, rewritten, or newly proposed and

presented for adoption at the General Session. The following Code chapters are of particular interest to the United States:

1. *Glossary*
   The definition for the term ''infestation'' was added to the chapter.
2. *Chapter 1.1, Notification of Diseases and Epidemiological Information*
   The change in the text updates some of the terminology in this chapter.
3. *Chapter 1.2, Criteria for listing diseases*
   New criteria were adopted for listing notifiable diseases.
4. *Chapter 1.4, Animal Health Surveillance*
   Minor changes and some additional text for improved clarity were adopted.
5. *Chapter 3.2, Evaluation of Veterinary Services*
   Text in this chapter was modified for clarity and adopted.
6. *Chapter 3.4, Veterinary Legislation*
   This is a new Code chapter which was adopted with minor modifications to the text.
7. *Chapter 4.6, Collection and Processing of Bovine, Small Ruminant and Porcine Semen*
   This chapter was adopted with updated text to include new testing procedures.
8. *Chapter 6.4, Biosecurity Procedures in Poultry Production*
   Minor updates to this chapter were adopted.
9. *Chapter 6.7, Harmonization of National Antimicrobial Resistance Surveillance and Monitoring Programs*
   Text concerning specificity (prescriptiveness) was removed and made more accommodating of the local situation.
10. *Chapter 6.8, Monitoring of the Quantities and Usage Patterns of Antimicrobial Agents Used in Food Producing Animals*
    Changes were made in this chapter to improve clarity.
11. *Chapter 7.1, Introduction to the recommendations for animal welfare*
    General principles for animal welfare in livestock production systems were developed and adopted.
12. *Chapter 7.9, Animal Welfare in Beef Cattle Production Systems*
    This newly adopted code chapter is the first animal welfare chapter on production and housing of livestock.
13. *Chapter 8.6, Aujesky's disease*
    Additional clarity was made to the term ''captive wild pigs'' to clearly indicate that these are pigs which are ''under direct human supervision and control''.
14. *Chapter 10.4, Notifiable Avian Influenza*
    Text was added to the ''General Provisions'' section of this chapter to clarify a country's disease notification requirements.
15. *Chapter 12.9, Equine viral arteritis*
    An updated chapter on Equine viral arteritis was adopted.

The following Aquatic Code chapters are of particular interest to the United States:

1. *Chapter 6.4, Monitoring of the quantities and usage patterns of antimicrobial agents used in aquatic animals*
   This is a new Code chapter adopted and supported by the United States.
2. *Chapter 6.5, Development and harmonization of national antimicrobial resistance surveillance and monitoring programs for aquatic animals*
   This is a new Code chapter.
3. *Chapter 7.4, Killing of farmed fish for disease control purposes*
   This is a new chapter.

OIE Terrestrial Animal Health Code Chapters and Appendices for Future Review

Existing Terrestrial Animal Health Code chapters that may be further revised and new chapters that may be drafted in preparation for the next General Session in 2013 include the following:

- Chapter 6.9, Responsible and Prudent Use of Antimicrobial Agents in Veterinary Medicine.
- Chapter 6.10, Risk Analysis for Antimicrobial Resistance Arising from the Use of Antimicrobial Agents in Animals.
- Chapter 7.5, Use of Animals in Research and Education
- Chapter 8.3, Bluetongue.
- Chapter 8.4, Infection with *Echinococcus multilocularis.*
- Chapter 8.12, Rinderpest.
- Chapter 8.13, Infection with *Trichinella.*
- Chapter 8.15, Vesicular stomatitis.
- Chapter 9.1, Infestation of honey bees with *Acarapis woodi.*
- Chapter 9.4, Infestation with *Aethina.*
- Chapter 9.5, Infestation of honey bees with *Tropilaelaps* spp.
- Chapter 9.6, Infestation of honey bees with *Varroa* spp.
- Chapter 11.2, Infection with Lumpy skin disease virus.
- Chapter 11.3, Infection with *Brucella abortus,*
- Chapter 11.X, Infection with *Brucella melitensis.*
- Chapter 11.X, Infection with *Brucella suis.*
- Chapter 14.8, Infection with Peste Des Petits Ruminants Virus.
- Chapter 15.2, Classical swine fever.
- Chapter X.X., Infection with *Echinococcus granulosus.*
- Chapter 7.X, Animal Welfare in Broiler Production Systems.
- Chapter 7.X Animal Welfare in Dairy Production Systems.

IPPC Standard-Setting Activities

The IPPC is a multilateral convention adopted in 1952 for the purpose of securing common and effective action to prevent the spread and introduction of pests of plants and plant products and to promote appropriate measures for their control. Under the IPPC, the understanding of plant protection has been, and continues to be, broad, encompassing the protection of both cultivated and noncultivated plants from direct or indirect injury by plant pests. Activities addressed by the IPPC include the development and establishment of international plant health standards, the harmonization of phytosanitary activities through emerging standards, the facilitation of the exchange of official and scientific information among countries, and the furnishing of technical assistance to developing countries that are signatories to the IPPC.

The IPPC is under the authority of the Food and Agriculture Organization (FAO), and the members of the Secretariat of the IPPC are appointed by the FAO. The IPPC is implemented by national plant protection organizations (NPPOs) in cooperation with regional plant protection organizations (RPPOs); the Commission on Phytosanitary Measures (CPM, formerly referred to as the International Commission on Phytosanitary Measures); and the Secretariat of the IPPC. The United States plays a major role in all standard-setting activities under the IPPC and has representation on FAO's highest governing body, the FAO Conference.

The United States became a contracting party to the IPPC in 1972 and has been actively involved in furthering the work of the IPPC ever since. The IPPC was amended in 1979, and the amended version entered into force in 1991 after two-thirds of the contracting countries accepted the amendment. More recently, in 1997, contracting parties completed negotiations on further amendments that were approved by the FAO Conference and submitted to the parties for acceptance. This 1997 amendment

updated phytosanitary concepts and formalized the standard-setting structure within the IPPC. The 1997 amended version of the IPPC entered into force after two-thirds of the contracting parties notified the Director General of FAO of their acceptance of the amendment in October 2005. The U.S. Senate gave its advice and consent to acceptance of the newly revised IPPC on October 18, 2000. The President submitted the official letter of acceptance to the FAO Director General on October 4, 2001.

The IPPC has been, and continues to be, administered at the national level by plant quarantine officials whose primary objective is to safeguard plant resources from injurious pests. In the United States, the national plant protection organization is APHIS' Plant Protection and Quarantine (PPQ) program. The steps for developing a standard under the IPPC are described below.

Step 1: Proposals for a new international standard for phytosanitary measures (ISPM) or for the review or revision of an existing ISPM are submitted to the Secretariat of the IPPC in a standardized format on a 2-year cycle. Alternatively, the Secretariat can propose a new standard or amendments to existing standards.

Step 2: After review by the Standards Committee and the Strategic Planning, a summary of proposals is submitted by the Secretariat to the CPM. The CPM identifies the topics and priorities for standard setting from among the proposals submitted to the Secretariat and others that may be raised by the CPM.

Step 3: Specifications for the standards identified as priorities by the CPM are drafted by the Standards Committee. The draft specifications are subsequently made available to members and RPPOs for comment (60 days). Comments are submitted in writing to the Secretariat. Taking into account the comments, the Standards Committee finalizes the specifications.

Step 4: The standard is drafted or revised in accordance with the specifications by a working group designated by the Standards Committee. The resulting draft standard is submitted to the Standards Committee for review.

Step 5: Draft standards approved by the Standards Committee are distributed to members by the Secretariat and RPPOs for consultation (100 days). Comments are submitted in writing to the Secretariat. Where appropriate, the Standards Committee may establish open-ended discussion groups as forums for further comment. The Secretariat summarizes the comments and submits them to the Standards Committee.

Step 6: Taking into account the comments, the Secretariat, in cooperation with the Standards Committee, revises the draft standard. The Standards Committee submits the final version to the CPM for adoption.

Step 7: The ISPM is established through formal adoption by the CPM according to Rule X of the Rules of Procedure of the CPM.

Step 8: Review of the ISPM is completed by the specified date or such other date as may be agreed upon by the CPM.

Each member country is represented on the CPM by a single delegate. Although experts and advisors may accompany the delegate to meetings of the CPM, only the delegate (or an authorized alternate) may represent each member country in considering a standard up for approval. Parties involved in a vote by the CPM are to make every effort to reach agreement on all matters by consensus. Only after all efforts to reach a consensus have been exhausted may a decision on a standard be passed by a vote of two-thirds of delegates present and voting.

Technical experts from the United States have participated directly in working groups and indirectly as reviewers of all IPPC draft standards. The United States also has a representative on the Standards Committee and the CPM Bureau. In addition, documents and positions developed by APHIS and NAPPO have been sources of significant input for many of the standards adopted to date. This notice describes each of the IPPC standards currently under consideration or up for adoption. The full text of each standard will be available on the Internet at *http://ocs.ippc.int/index.html#*. Interested individuals may review the standards posted on this Web site and submit comments to *Julie.E.Aliaga@aphis.usda.gov.*

The next CPM meeting is scheduled for April 8–12, 2013, at FAO Headquarters in Rome, Italy. The Deputy Administrator for APHIS' PPQ program is the U.S. delegate to the CPM. The Deputy Administrator intends to participate in the proceedings and will discuss or comment on APHIS' position on any standards up for adoption. The agenda for the Fifth Session of the Commission of Phytosanitary Measures is as follows:

1. Opening of the session.
2. Adoption of the agenda.
3. Election of the Rapporteur.
4. Report by the CPM chairperson.
5. Report by the Secretariat.
6. Report of the technical consultation among RPPOs.
7. Report of observer organizations.
8. Goal 1: A robust international standard-setting and implementation program.
9. Goal 2: Information exchange systems appropriate to meet IPPC obligations.
10. Goal 3: Effective dispute settlement systems.
11. Goal 4: Improved phytosanitary capacity of members.
12. Goal 5: Sustainable implementation of the IPPC.
13. Goal 6: International promotion of the IPPC and cooperation with relevant regional and international organizations.
14. Goal 7: Review of the status of plant protection in the world.
15. Election of the Bureau.
16. Membership of CPM subsidiary bodies.
17. Calendar.
18. Other business.
19. Date and venue of the next meeting.
20. Adoption of the report.

It is expected that the following standards will be sufficiently developed to be considered by the CPM for adoption at its 2013 meeting. The United States, represented by the Deputy Administrator for APHIS' PPQ program, will participate in consideration of these standards. The U.S. position on each of these issues will be developed prior to the CPM session and will be based on APHIS' analysis, information from other U.S. Government agencies, and relevant scientific information from interested stakeholders.

- *Revision of ISPM 11, Pest risk analysis for quarantine pests and Annex to ISPM 11, Pest risk analysis for plants as quarantine pests.* The annex provides specific guidance for conducting pest risk analysis to determine if a plant is a pest of plants (cultivated or wild), whether it should be regulated, and to identify phytosanitary measures to reduce pest risk to an acceptable level. The international standard has been modified to harmonize concepts with its annex.
- *Annex 1 to ISPM 15: Approved treatments associated with wood packaging material.* The annex contains guidance for the use of approved treatments for wood packaging material, including heat treatments (conventional steam or dry kiln, and dielectric radiation) and methyl bromide.

New Standard-Setting Initiatives, Including Those in Development

A number of expert working group meetings or other technical

consultations will take place during 2013 on the topics listed below. These standard-setting initiatives are under development and may be considered for future adoption. APHIS intends to participate actively and fully in each of these working groups. The U.S. position on each of the topics to be addressed by these various working groups will be developed prior to these working group meetings and will be based on APHIS' technical analysis, information from other U.S. Government agencies, and relevant scientific information from interested stakeholders.

1. *Establishment and maintenance of fruit fly quarantine areas within pest free areas in the event of an outbreak detection.* This draft is proposed as an Annex to ISPM 26, Establishment of pest free areas for fruit flies (Tephritidae). It will provide guidance on the establishment and maintenance of regulated areas within pest free areas (PFA) when fruit fly outbreaks are detected. It will provide guidance on phytosanitary measures which are intended to protect other production areas and, as far as possible, will allow for the continuation of fruit and vegetable production, movement and handling, treatment, and shipping when some or all of the components of the export process are located in the regulated areas within the PFA.

2. *Determination of host status of fruits and vegetables to fruit fly (Tephritidae) infestation.* This standard will provide guidelines for the determination of the host status of fruits and vegetables to fruit fly infestation. It describes three categories of host status for fruit flies: natural host, non-natural host, and non-host. It includes methodologies for surveillance under natural field conditions and trials under semi-natural field conditions that should be used to ascertain the host status of fruits and vegetables to fruit fly infestation where the knowledge of host status is uncertain or disputed.

3. *Appendix to ISPM 12: Electronic certification, information on standard XML schemes and exchange mechanisms.* This appendix contains information and guidance to NPPOs to use the World Wide Web Consortium (WC3) Extensible Markup Language (XML) as the standardized language for exchange of electronic certificate data between NPPOs.

4. *Annex to ISPM 27: Diagnostic Protocol for Tilletia indica.* This diagnostic protocol contains pest information, taxonomy, detection, examination of seeds, extraction of teliospores, morphological identification, germination, molecular identification, and a list of references.

5. *Annex to ISPM 27: Diagnostic Protocol for Guignardia citricarpa.* This diagnostic protocol contains pest information, taxonomy, symptoms, identification procedures, isolation and culture, morphology, molecular assays, and a list of references.

For more detailed information on the above topics, which will be addressed by various working groups established by the CPM, contact Ms. Julie E. Aliaga (see **FOR FURTHER INFORMATION CONTACT** above).

APHIS posts draft standards on the Internet (*http://www.aphis.usda.gov/import_export/plants/plant_exports/phyto_international_standards.shtml*) as they become available and provides information on the due dates for comments. Additional information on IPPC standards is available on the IPPC Web site at *http://www.ippc.int/IPP/En/default.htm*. For the most current information on official U.S. participation in IPPC activities, including U.S. positions on standards being considered, contact Ms. Julie E. Aliaga (see **FOR FURTHER INFORMATION CONTACT** above). Those wishing to provide comments on any of the areas of work being undertaken by the IPPC may do so at any time by responding to this notice (see **ADDRESSES** above) or by providing comments through Ms. Aliaga.

NAPPO Standard-Setting Activities

NAPPO, a regional plant protection organization created in 1976 under the IPPC, coordinates the efforts among Canada, the United States, and Mexico to protect their plant resources from the entry, establishment, and spread of harmful plant pests, while facilitating intra- and inter-regional trade. NAPPO conducts its business through panels and annual meetings held among the three member countries. The NAPPO Executive Committee charges individual panels with the responsibility for drawing up proposals for NAPPO positions, policies, and standards. These panels are made up of representatives from each member country who have scientific expertise related to the policy or standard being considered. Proposals drawn up by the individual panels are circulated for review to Government and industry officials in Canada, the United States, and Mexico, who may suggest revisions. In the United States, draft standards are circulated to industry, States, and various government agencies for consideration and comment. The draft standards are posted on the Internet at *http://www.nappo.org/en/*. Once revisions are made, the proposal is sent to the NAPPO Working Group and the NAPPO Standards Panel for technical reviews, and then to the Executive Committee for final approval, which is granted by consensus.

The annual NAPPO meeting was held October 16 to 18, 2012, in Louisville, Kentucky, United States. The NAPPO Executive Committee meeting took place on October 15, 2012. The Deputy Administrator for PPQ is a member of the NAPPO Executive Committee. The Deputy Administrator participated in the proceedings to discuss or comment on APHIS' position on any standard up for adoption or any proposals to develop new standards.

Below is a summary of current panel assignments as they relate to the ongoing development of NAPPO standards. The United States (i.e., USDA/APHIS) intends to participate actively and fully in the work of each of these panels. The U.S. position on each topic will be guided and informed by the best scientific information available on each of these topics. For each of the following panels, the United States will consider its position on any draft standard after it reviews a prepared draft. Information regarding the following NAPPO panel topics, assignments, activities, and updates on meeting times and locations may be obtained from the NAPPO homepage at *http://www.nappo.org* or by contacting Ms. Julie E. Aliaga (see **FOR FURTHER INFORMATION CONTACT** above).

1. Accreditation Panel

The panel will perform an audit of the U.S. NPPO's adherence to Regional Standard for Phytosanitary Measures (RSPM) 9, ''Authorization of laboratories for phytosanitary testing'' and review the audit training program with a view to establishing a harmonized approach for NAPPO countries.

2. Biological Control Panel

The panel has revised RSPM 26, ''Certification of commercial arthropod biological control agents moving into NAPPO member countries,'' reviewed the Technical Advisory Group (TAG) report on the evaluation of risk of imported bee pollen and royal jelly on plant health through the use of pollinators, and will determine research needs and recommend mitigation measures.

3. Citrus Panel

The panel continues exchanging information on the situation of citrus quarantine pests among NAPPO member countries, OIRSA, and other Caribbean countries. The panel is revising and updating the appendices for RSPM 16, ''Importation of Citrus

propagative material into a NAPPO member country''. The panel will recommend measures for the establishment and maintenance of area wide management programs for Huanglongbing (HLB) and its vector.

4. Electronic Phytosanitary Certification Panel

The panel continues participating in the international development of electronic certification towards a functioning regional and global e-certification capability; reviewing the consolidated IPPC XML Schema and ISPM 12 mapping currently being developed by the IPPC; harmonizing ISPM 12 code list for botanical names, treatments, additional declarations and product descriptions; and advancing discussions of methods for the transfer, security measures, and the validation of electronic certification.

5. Forestry Panel

The panel completed the standard for regulating the movement of wooden articles intended for indoor and outdoor use (''Importation of certain wooden and bamboo commodities into a NAPPO member country''); completed the drafting of a standard on the movement of Christmas trees within the NAPPO region; is working on a discussion paper regarding the applicability of the current standards for heat treatment for wood products considering that certain pests such as the emerald ash borer (EAB) have demonstrated a tolerance to treatments; has reviewed and drafted a discussion paper reporting on the risks associated with fungi moving on wood commodities; and directed a TAG to report advances on additional research for the application of biological control of the EAB. The panel is working on a document summarizing current approaches used within North America to manage pests of firewood.

6. Fruit Panel

The panel has developed recommendations for technically justified phytosanitary measures to mitigate the risk of introduction of *Lobesia botrana* into NAPPO countries, including measures to deal with a possible outbreak; has provided oversight to a TAG to compile and analyze the available scientific information on appropriate phytosanitary measures against *Drosophila suzukii,* evaluating and determining which measures are appropriate for application by NAPPO countries; and is completing the TAG documents on *Rhagoletis* and *Tetranychus* trapping.

7. Grains Panel

The panel contributed to the organization (agenda and speakers) of the IPPC workshop on the international movement of grain, in Vancouver, Canada, in December 2011. Taking into account discussions at the IPPC workshop, the panel identified relevant phytosanitary issues and evaluated the need for a NAPPO standard on the movement of grain.

8. Invasive Species Panel

The panel finalized a pathway risk analysis standard with support from the Pest Risk Analysis (PRA) panel; collaborated with the PRA panel to review the scientific literature on climate change and completed the discussion paper on its pertinence to the PRA process; and identified the most important invasive plant species threats to North America, which were presented at the NAPPO Annual Meeting symposium in October 2012.

9. Pest Risk Analysis Panel

The panel completed the discussion paper on the potential for climate change to affect the ability of pests to spread and establish in new areas, including the implications for the current PRA process, with assistance from the Invasive Species panel; reviewed and addressed comments on the NAPPO Pest Risk Analysis standard (RSPM 31); completed a discussion paper summarizing the risk associated with the movement of wooden articles intended for indoor and outdoor use; and completed the development of the PRA format including risk-ranking guidelines.

10. Phytosanitary Alert System (PAS) Panel

The panel prepared guidelines for the development of pest alerts and a checklist of alert sources to ensure all available sources are being utilized but not duplicated; coordinated outreach with other related Web sites and linked them to the PAS Web site; conducted outreach activities for possible collaboration between NAPPO, OIRSA, and other NPPOs in Central America on pest alerts; and posted new pest reports and alerts to the NAPPO PAS Web site.

11. Plants for Planting

The panel reviewed the need to maintain RSPM 24, ''Integrated pest risk management measures for the importation of plants for planting into NAPPO member countries'' after the IPPC standard on the same subject was adopted; completed the pest list annexes for RSPM 35, ''Guidelines for the Movement of Stone and Pome Fruit Trees and Grapevines into a NAPPO Member Country;'' and organized the Plants for Planting Symposium for the 2012 Annual Meeting, focusing on regulatory strategies for the nursery industry (including greenhouses).

12. Potato Panel

The panel developed a NAPPO discussion paper on the efficacy of potato sprout inhibitors, gathered the most recent information potato virus Y and identified the strains of concern to the NAPPO region based on biological and economic factors, and completed the review of RSPM 3, ''Requirements for the importation of potatoes.'' The panel investigated the potential phytosanitary issues related to zebra chip.

13. Seeds Panel

The panel is working to complete the NAPPO regional standard on seed movement, an appendix on pathogens considered to be seedborne and seed-transmitted pests, and the annexes covering phytosanitary import requirements, recommended seed testing and diagnostic methods for most important seed pests, and recommended seed treatments for quarantine seed pests. The panel continues to support efforts in the development of an international standard for seed.

14. Standards Panel

The panel coordinated the review of new and amended NAPPO standards, diagnostic and treatment protocols, and implementation plans; provided updates on NAPPO standards and ISPMs for the NAPPO Newsletter; maintained the NAPPO Glossary; and is developing a regulatory response upon detection of new pests in NAPPO to avoid bilateral irritants.

15. Tuta absoluta Technical Advisory Group

This TAG has developed a surveillance protocol for the tomato leaf miner, *Tuta absoluta* for NAPPO countries which includes a system for early detection, trapping criteria, a system for delimiting surveys, and recommended phytosanitary measures when detections are made.

The PPQ Associate Deputy Administrator, as the official U.S. delegate to NAPPO, intends to participate in the adoption of these regional plant health standards, including the work described above, once they are completed and ready for such consideration.

The information in this notice contains all the information available to us on NAPPO standards currently under

development or consideration. For updates on meeting times and for information on the working panels that may become available following publication of this notice, go to the NAPPO Web site on the Internet at *http://www.nappo.org* or contact Ms. Julie Aliaga (see **FOR FURTHER INFORMATION CONTACT** above). Information on official U.S. participation in NAPPO activities, including U.S. positions on standards being considered, may also be obtained from Ms. Aliaga. Those wishing to provide comments on any of the topics being addressed by any of the NAPPO panels may do so at any time by responding to this notice (see **ADDRESSES** above) or by transmitting comments through Ms. Aliaga.

Done in Washington, DC, this 2nd day of January, 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–00207 Filed 1–8–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0080]

National Wildlife Services Advisory Committee; Notice of Solicitation for Membership

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of solicitation for membership.

SUMMARY: We are giving notice that the Secretary of Agriculture is soliciting nominations for the National Wildlife Services Advisory Committee.

DATES: Consideration will be given to nominations received on or before March 11, 2013.

ADDRESSES: Nomination packages may be sent by postal mail or commercial delivery to The Honorable Thomas Vilsack, Secretary, U.S. Department of Agriculture, 1400 Independence Avenue SW., Washington, DC 20250, Attn: Secretary's National Wildlife Services Advisory Committee. Nomination packages may also be faxed to (301) 734–5157.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Joyce, Designated Federal Officer, WS, APHIS, 4700 River Road, Unit 87, Riverdale, MD 20737; (301) 851–3999.

SUPPLEMENTARY INFORMATION: The National Wildlife Services Advisory Committee (the Committee) advises the Secretary of Agriculture on policies, program issues, and research needed to conduct the Wildlife Services program. The Committee also serves as a public forum enabling those affected by the Wildlife Services program to have a voice in the program's policies. The Committee Chairperson and Vice Chairperson shall be elected by the Committee from among its members.

We are soliciting nominations from interested organizations and individuals. An organization may nominate individuals from within or outside of its membership; alternatively, an individual may nominate herself or himself. Nomination packages should include a nomination form along with a cover letter or resume that documents the nominee's experience. Nomination forms are available on the Internet at *http://www.ocio.usda.gov/forms/doc/AD–755.pdf* or may be obtained from the person listed under For Further Information Contact.

The Secretary will select members to obtain the broadest possible representation on the Committee, in accordance with the Federal Advisory Committee Act (5 U.S.C. App. II) and U.S. Department of Agriculture (USDA) Regulations 1041–1. Equal opportunity practices, in line with the USDA policies, will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken into account the needs of the diverse groups served by the Department, membership should include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

Done in Washington, DC, this 2nd day of January 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–00195 Filed 1–8–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Nez Perce-Clearwater National Forests; Id; Crooked River Valley Rehabilitation Project

Correction

In notice document 2012–29836 appearing on pages 73976–73978 in the issue of Wednesday, December 12, 2012, make the following corrections:

1. On page 73977, in the first column, on the ninth and tenth lines, ''comments-northernnezperce-red-river@fsled.us'' should read ''comments-northern-nezperce-red-river@fs.fed.us''.

2. On the same page, in the same column, in the thirty-fourth through thirty-sixth lines, ''*http://www.fs.fed.usinepa/fs-usda-pop.php/?project=40648*'' should read ''*http://www.fs.fed.us/nepa/fs-usda-pop.php/?project=40648*''.

[FR Doc. C1–2012–29836 Filed 1–8–13; 8:45 am]

BILLING CODE 1505–01–D

CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

Sunshine Act Meeting

TIME AND DATE: January 17, 2013; 2:30 p.m. EST.

PLACE: Ronald Reagan Building and International Trade Center, Horizon Room, 1300 Pennsylvania Avenue NW., Washington, DC 20004.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: The Chemical Safety and Hazard Investigation Board (CSB) announces that it will convene a public meeting on Thursday, January 17, 2013, starting at 2:30 p.m. EST (8:30 a.m. Hawaii-Aleutian Standard Time) in the Horizon Room of the Ronald Reagan Building and International Trade Center at 1300 Pennsylvania Avenue NW., Washington, DC 20004.

The agenda for the meeting includes the presentation of the findings from the CSB investigation of the April 8, 2011, explosion and fire that killed five workers at a storage facility used by Donaldson Enterprises Inc. (DEI) near Honolulu, Hawaii. The explosion occurred during the disposal of professional-grade fireworks, illegally labeled for consumer use by a Chinese manufacturer, that had been seized by U.S. customs agents upon importation. DEI was performing the disposal work as a subcontractor to VSE Corporation, which held a contract with the U.S. Treasury Department for the disposal of seized property.

At the meeting, CSB staff will present to the Board the results of the investigation into this incident. Key issues identified in the investigation include the methods used to dispose of the fireworks, U.S. Government contracting standards for hazardous work, and the absence of a national standard or industry good practice for fireworks disposal. Following the staff presentation on proposed findings and safety recommendations, the Board will hear brief comments from the public.

Following the conclusion of the public comment period, the Board will

consider whether to approve the final investigation report and recommendations. All staff presentations are preliminary and are intended solely to allow the Board to consider in a public forum the issues and factors involved in this case. No factual analyses, conclusions, or findings presented by staff should be considered final. Only after the Board has considered the staff presentations, listened to public comments, and adopted a final investigation report and recommendations will there be an approved final record of the CSB investigation of this incident.

The meeting will be free and open to the public. If you require a translator or interpreter, please notify the individual listed below as the **CONTACT PERSON FOR FURTHER INFORMATION**, at least five business days prior to the meeting.

The CSB is an independent Federal agency charged with investigating industrial accidents that result in the release of extremely hazardous substances. The agency's Board Members are appointed by the President and confirmed by the Senate. CSB investigations look into all aspects of accidents, including physical causes such as equipment failure, as well as inadequacies in regulations, industry standards, and safety management systems.

CONTACT PERSON FOR FURTHER INFORMATION: Hillary J. Cohen, Communications Manager, *hillary.cohen@csb.gov* or 202–261–7600. General information about the CSB can be found on the agency Web site at: *www.csb.gov.*

Dated: January 7, 2013.

Rafael Moure-Eraso,

Chairperson.

[FR Doc. 2013–00321 Filed 1–7–13; 4:15 pm]

BILLING CODE 6350–01–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket Number 121017555–2688–01]

Annual Surveys in the Manufacturing Area

AGENCY: Bureau of the Census, Department of Commerce.

ACTION: Notice of Determination.

SUMMARY: The Bureau of the Census (Census Bureau) is conducting the 2013 Annual Surveys in the Manufacturing Area. The 2013 Annual Surveys consist of the Annual Survey of Manufactures, the Business R&D and Innovation Survey, and the Manufacturers' Unfilled Orders Survey. We have determined that annual data collected from these surveys are needed to aid the efficient performance of essential governmental functions, and have significant application to the needs of the public and industry. The data derived from these surveys, most of which have been conducted for many years, are not publicly available from nongovernmental or other governmental sources. For more information on these surveys (e.g. forms and reporting instructions, due dates, etc.), visit the Census Bureau's Business Help Site and select the survey name.

ADDRESSES: The Census Bureau will furnish report forms to organizations included in the survey. Additional copies are available upon written request to the Director, U.S. Census Bureau, Washington, DC 20233–0101.

FOR FURTHER INFORMATION CONTACT: Mendel D. Gayle, Chief, Manufacturing and Construction Division at (301) 763–4587 or by email at *mendel.d.gayle@census.gov.*

SUPPLEMENTARY INFORMATION: The Census Bureau is authorized to conduct mandatory surveys necessary to furnish current data on the subjects covered by the major censuses authorized by Title 13, United States Code, sections 61, 81, 131, 182, 193, 224, and 225. Under this authority, the Bureau of the Census (Census Bureau) is conducting the 2013 Annual Surveys in the Manufacturing Area. The 2013 Annual Surveys consist of the Annual Survey of Manufactures, the Business R&D and Innovation Survey, and the Manufacturers' Unfilled Orders Survey.

The three surveys that will be conducted in 2013 will provide continuing and timely national statistical data on manufacturing for the period between economic censuses. The data collected in the surveys will be within the general scope and nature of those inquiries covered in the economic census. The next economic census will be conducted for the year 2017.

Annual Survey of Manufactures

The Annual Survey of Manufactures collects industry statistics, such as total value of shipments, employment, payroll, workers' hours, capital expenditures, cost of materials consumed, supplemental labor costs, and other data related to manufacturing. This survey is conducted on a sample basis, and covers all manufacturing industries, including data on plants under construction, but not yet in operation.

Business R&D and Innovation Survey

The Business R&D and Innovation Survey (BRDIS) measures spending on research and development activities by United States businesses. This survey replaced the Survey of Industrial Research and Development that had been collected since the 1950's. The BRDIS collects global as well as domestic spending information, more detailed information about the R&D workforce, and information regarding innovation and intellectual property from U.S. businesses. The Census Bureau collects and compiles this information in accordance with a joint project agreement between the National Science Foundation (NSF) and the Census Bureau. The NSF publishes the results in its publication series. All data items are collected on a mandatory basis under the authority of Title 13, United States Code.

Manufacturers' Unfilled Orders Survey

The Manufacturers' Unfilled Orders Survey collects data on sales and unfilled orders in order to provide annual benchmarks for unfilled orders for the monthly Manufacturers' Shipments, Inventories, and Orders (M3) survey. The survey data will also be used to determine whether it is necessary to collect unfilled orders data for specific industries on a monthly basis; some industries are not requested to provide unfilled orders data on the M3 Survey.

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a current valid Office of Management and Budget (OMB) control number. In accordance with the PRA, 44 U.S.C., Chapter 45, OMB approved the Annual Surveys under the following OMB control numbers: Annual Survey of Manufactures, 0607–0449; Business R&D and Innovation Survey, 0607–0912; and Manufacturers' Unfilled Orders Survey, 0607–0561.

Based upon the foregoing, I have directed that the Annual Surveys in the Manufacturing Area be conducted for the purpose of collecting these data.

Dated: January 3, 2013.

Thomas L. Mesenbourg, Jr.,

Acting Director, Bureau of the Census.

[FR Doc. 2013–00235 Filed 1–8–13; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–896]

Magnesium Metal From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011–2012

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''Department'') is conducting the administrative review of the antidumping duty order on magnesium metal from the People's Republic of China (''PRC''). The period of review (''POR'') is April 1, 2011, through March 31, 2012. This review covers one PRC company, Tianjin Magnesium International, Co., Ltd. (''TMI''). The Department preliminarily finds that TMI did not have reviewable transactions during the POR.

DATES: *Effective Date:* January 9, 2013.

FOR FURTHER INFORMATION CONTACT: Laurel LaCivita or Eugene Degnan, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4243 or (202) 482–0414, respectively.

Scope of the Order

The product covered by this antidumping duty order is magnesium metal from the PRC, which includes primary and secondary alloy magnesium metal, regardless of chemistry, raw material source, form, shape, or size. The merchandise subject to this order is classifiable under items 8104.19.00, and 8104.30.00 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS number is provided for convenience and customs purposes, the written product description, available in *Notice of Antidumping Duty Order: Magnesium Metal From the People's Republic of China,* 70 FR 19928 (April 15, 2005), remains dispositive.

Background

On April 2, 2012, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on magnesium metal from the PRC for the period April 1, 2011 through March 31, 2012.[1] On April 30, 2012, U.S. Magnesium LLC (''U.S. Magnesium''), a domestic producer and Petitioner in the underlying investigation of this case, made a timely request that the Department conduct an administrative review of TMI.[2] On May 29, 2012, in accordance with section 751(a) of the Tariff Act of 1930, as amended (''the Act''), the Department published in the **Federal Register** a notice of initiation of this antidumping duty administrative review.[3] On June 1, 2012, TMI submitted a letter to the Department certifying that it did not export magnesium metal for consumption in the United States during the POR.[4]

On July 17, 2012, the Department placed on the record information obtained in response to the Department's query to U.S. Customs and Border Protection (''CBP'') concerning imports into the United States of subject merchandise during the POR.[5] This information indicates that there were no entries of subject merchandise during the POR that had been exported by TMI. In addition, on July 20, 2012, we notified CBP that we were in receipt of a no-shipment certification from TMI and requested CBP to report any contrary information within 10 days.[6] CBP did not report any contrary information.

As explained in the memorandum from the Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 29, through October 30, 2012. Thus, all deadlines in this segment of the proceeding have been extended by two days. The revised deadline for the preliminary results of review is Wednesday, January 2, 2013, and the revised deadline for the final results of review is Thursday, May 2, 2013.[7]

Preliminary Determination of No Shipments

As noted in the ''Background'' section above, TMI submitted a timely-filed certification indicating that it had no shipments of subject merchandise to the United States during the POR. In addition, CBP did not provide any evidence that contradicts TMI's claim of no shipments.[8] Further, on July 17, 2012, the Department released to interested parties the results of a CBP query that it intended to use for corroboration of TMI's no shipment claims. The Department received no comments from interested parties concerning the results of the CBP query.

Based on TMI's certification and our analysis of CBP information, we preliminarily determine that TMI did not have any reviewable transactions during the POR. In addition, the Department finds that consistent with its recently announced refinement to its assessment practice in NME cases, it is appropriate not to rescind the review in part in this circumstance but, rather, to complete the review with respect to TMI and issue appropriate instructions to CBP based on the final results of the review. *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011) and the ''Assessment Rates'' section, below.

Public Comment

Interested parties are invited to comment on the preliminary results and may submit case briefs and/or written comments within 30 days of the date of publication of this notice, pursuant to 19 CFR 351.309(c)(1)(ii). Rebuttal briefs, limited to issues raised in the case briefs, will be due five days after the due date for case briefs, pursuant to 19 CFR 351.309(d). Parties who submit case or rebuttal briefs in this proceeding are requested to submit with each argument a statement of the issue, a summary of the argument not to exceed five pages, and a table of statutes, regulations, and cases cited, in accordance with 19 CFR 351.309(c)(2).

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, filed electronically using Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). IA ACCESS is available to registered users at *http://*

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 77 FR 19621 (April 2, 2012).

[2] *See* letter from U.S. Magnesium, ''Magnesium Metal from the People's Republic of China: Request for Administrative Review,'' dated April 30, 2012.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Review,* 77 FR 31568 (May 29, 2012).

[4] *See* letter from TMI, ''Magnesium Metal from the People's Republic of China; A–570–896; Certification of No Sales by Tianjin Magnesium International, Co., Ltd.,'' dated June 1, 2012, at 1.

[5] *See* Memorandum to the File, ''Magnesium Metal from the People's Republic of China: Transmittal of U.S. Customs and Border Protection Information to the File,'' dated July 17, 2012 (''CBP Query'').

[6] *See* Customs Message # 2202305, ''No Shipments Inquiry,'' dated July 20, 2012.

[7] *See* Memorandum to the File, ''Magnesium Metal From the People's Republic of China: Tolling of Deadlines,'' dated November 1, 2012.

[8] *See* CBP Query.

iaaccess.trade.gov and in the Central Records Unit, room 7046 of the main Department of Commerce building. An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5:00 p.m. Eastern Standard Time, within 30 days after the date of publication of this notice.[9] Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. The Department intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. Additionally, pursuant to a recently announced refinement to its assessment practice in NME cases, if the Department continues to determine that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.,* at that exporter's rate) will be liquidated at the PRC-wide rate. For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For TMI, which claimed no shipments, the cash deposit rate will remain unchanged from the rate assigned to TMI in the most recently completed review of the company; (2) for previously investigated or reviewed PRC and non-PRC exporters who are not under review in this segment of the proceeding but who have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 141.49 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter(s) that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.213.

Dated: December 14, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2013–00270 Filed 1–8–13; 8:45 am]

BILLING CODE 3510–DS–P

[9] *See* 19 CFR 351.310(c).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–891]

Hand Trucks and Certain Parts Thereof From the People's Republic of China: Preliminary Results of the 2010–2011 Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* January 9, 2013.

SUMMARY: The Department of Commerce (the Department) is currently conducting an administrative review of the antidumping duty order on hand trucks and certain parts thereof (hand trucks) from the People's Republic of China (PRC) covering the period of review (POR) of December 1, 2010, through November 30, 2011. We preliminarily determine that sales made by New-Tec Integration (Xiamen) Co., Ltd. (New-Tec) were below normal value (NV). In addition, we are not rescinding this review with respect to WelCom Products, Inc. (WelCom), Yangjiang Shunhe Industrial Co., Ltd. and Yangjiang Shunhe Industrial & Trade Co., Ltd. (collectively, Shunhe), and Yuhuan Tongsheng Industry Company (Tongsheng) at this time (*see* ''Intent Not to Rescind in Part,'' *infra*). We invite interested parties to comment on these preliminary results.

FOR FURTHER INFORMATION CONTACT: Scott Hoefke, or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4947 or (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The merchandise subject to the order consists of hand trucks manufactured from any material, whether assembled or unassembled, complete or incomplete, suitable for any use, and certain parts thereof, namely the vertical frame, the handling area and the projecting edges or toe plate, and any combination thereof. They are typically imported under heading 8716.80.50.10 of the Harmonized Tariff Schedule of the United States (HTSUS), although they may also be imported under heading 8716.80.50.90. and 8716.90.50.60. Although the HTSUS subheadings are provided for convenience and customs purposes only, the written product description, available in *Notice of Antidumping Duty Order: Hand Trucks and Certain Parts Thereof From the People's Republic of China,* 69 FR 70122 (December 2, 2004), remains dispositive.

Intent Not To Rescind Review in Part

For those companies named in the *Initiation Notice* [1] for which all review requests have been withdrawn, but which have not previously received separate rate status, the Department's practice is to refrain from rescinding the review with respect to these companies at this time. Both Tongsheng and WelCom timely withdrew their requests for review. While the requests for review were timely withdrawn, the companies remain part of the PRC-wide entity. Additionally, we preliminarily find that Shunhe has no reviewable entries at this time. Although the PRC-

[1] *See Initiation of Antidumping Duty and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 77 FR 4759 (January 24, 2012) (*Initiation Notice*).

wide entity is not under review for these preliminary results, the possibility exists that the PRC-wide entity could be under review for the final results of this administrative review. Therefore, we are not rescinding this review with respect to Tongsheng, WelCom, and Shunhe at this time. We intend to rescind this review with respect to Tongsheng and Welcom companies in the final results if the PRC-wide entity is not reviewed and with respect to Shunhe if it is unable to demonstrate that it has reviewable entries.

Methodology

The Department has conducted this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act). Export Price is calculated in accordance with section 772 of the Act. Because the PRC is a non-market economy within the meaning of section 771(18) of the Act, normal value has been calculated in accordance with section 773(c) of the Act. Specifically, the respondent's factors of production have been valued using Thailand prices (when available); Thailand is economically comparable to the PRC and a significant producer of comparable merchandise. For a full description of these surrogate values and the methodology underlying our conclusions, please see memorandum entitled ''Hand Trucks and Certain Parts Thereof from the People's Republic of China: Surrogate-Value Memorandum'' dated concurrently with this notice, and the Preliminary Decision Memorandum, the latter of which is adopted hereby. The Preliminary Decision Memorandum is a public document and is on file electronically *via* Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the internet at *http://www.trade.gov.ia.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of the Review

The Department has determined that the following preliminary dumping margins exist for the period December 1, 2010, through November 30, 2011:

Manufacturer/exporter	Weighted-average margin (percent)
New-Tec Integration (Xiamen) Co., Ltd.	9.84

Disclosure and Public Comment

The Department will disclose to parties to this proceeding the calculations performed in reaching the preliminary results within five days of the date of publication of these preliminary results. *See* 19 CFR 351.224(b). Interested parties may submit written comments no later than 30 days of publication of the preliminary results. Rebuttals to written comments may be filed no later than five days after the written comments are filed.[2]

Any interested party may request a hearing within 30 days of publication of this notice. Hearing requests should contain the following information: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the case briefs. If a request for a hearing is made, parties will be notified of the date and time for the hearing to be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.[3]

The Department will issue the final results of this administrative review, including the results of our analysis of the issues raised in any such comments, within 120 days after the publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Deadline for Submission of Publicly Available Surrogate Value Information

In accordance with 19 CFR 351.301(c)(3)(ii), the deadline for submission of publicly available information to value FOPs under 19 CFR 351.408(c) is 20 days after the date of publication of these preliminary results. In accordance with 19 CFR 351.301(c)(1), if an interested party submits factual information less than ten days before, on, or after (if the Department has extended the deadline), the applicable deadline for submission of such factual information, an interested party may submit factual information to rebut, clarify, or correct the factual information no later than ten days after such factual information is served on the interested party. However, the Department generally will not accept in the rebuttal submission additional or alternative surrogate value information not previously on the record, if the deadline for submission of surrogate value information has passed.[4] Furthermore, the Department generally will not accept business proprietary information in either the surrogate value submissions or the rebuttals thereto, as the regulation regarding the submission of surrogate values allows only for the submission of publicly available information.[5]

Assessment Rates

Upon issuing the final results of the review, the Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. For any individually examined respondents whose weighted-average dumping margin is above *de minimis,* we will calculate importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1).[6]

We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is above *de minimis.* Where either the respondent's weighted-average dumping margin is zero or *de minimis,* or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. The Department recently announced a refinement to its assessment practice in NME cases. Pursuant to this refinement in practice, for entries that were not reported in the U.S. sales databases submitted by companies individually examined during this review, the Department will instruct CBP to liquidate such entries at the PRC-wide rate. In addition, if the Department determines that an exporter under review had no shipments of the

[2] *See* 19 CFR 351.309(c) and (d).

[3] *See* 19 CFR 351.310(c).

[4] *See, e.g., Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, In Part,* 72 FR 58809 (October 17, 2007), and accompanying Issues and Decision Memorandum at Comment 2.

[5] *See* 19 CFR 351.301(c)(3).

[6] In these preliminary results, the Department applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012).

subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.,* at that exporter's rate) will be liquidated at the PRC-wide rate.[7]

The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

Cash Deposit Requirements

The following cash deposit requirements, when imposed, will apply to all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for New-Tec, which has a separate rate, will be that established in the final results of this review (except, if the rate is zero or *de minimis,* then zero cash deposit will be required); (2) for any previously reviewed or investigated PRC and non-PRC exporter not listed above that received a separate rate in a previous segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (3) for all PRC exporters that have not been found to be entitled to a separate rate, the cash deposit rate will be that for the PRC-wide entity (*i.e.,* 383.60 percent); and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied the non-PRC exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213.

[7] For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

Dated: January 2, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

1. Background
2. Scope of the Order
3. Intent Not To Rescind Review in Part
4. Non-Market-Economy Country Status
5. Separate Rates Determination
6. Absence of de Jure Control
7. Absence of de Facto Control
8. Surrogate Country
9. Fair Value Comparisons
10. U.S. Price
11. Normal Value
12. Factors Valuation
13. Currency Conversion

[FR Doc. 2013–00269 Filed 1–8–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[Application No. 84–23A12]

Export Trade Certificate of Review

ACTION: Notice of issuance of an Export Trade Certificate of Review to Northwest Fruit Exporters, Application No. 84–23A12.

SUMMARY: The U.S. Department of Commerce issued an amended Export Trade Certificate of Review to Northwest Fruit Exporters on December 21, 2012. The Certificate has been amended twenty three times. The previous amendment was issued on August 12, 2011 (76 FR 55010, Sept. 6, 2011). The original Certificate was issued on June 11, 1984 (49 FR 24581, June 14, 1984).

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

NWF's Export Trade Certificate of Review has been amended to:

1. Add the following companies as a new Members of the Certificate within the meaning of section 325.2(l) of the Regulations (15 CFR 325.2(l)): Jenks Bros Cold Storage & Packing (Royal City, WA), HoneyBear Growers, Inc (Brewster, WA), and Crown Packing, LLC (Wenatchee, WA); and
2. Remove the following companies as a Member of NWF's Certificate: J & D Packing, LLC (Outlook, WA), Oregon Cherry Growers (Salem, OR), and Prentice Packing & Storage (Yakima, WA); and
3. Change the name of the following member: Conrad & Adams Fruit LLC is now Conrad & Adams Fruit L.L.C. (Grandview, WA).

The effective date of the amended certificate is October 3, 2012, the date on which NWF'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: January 3, 2013.

Joseph E. Flynn,

Office Director, Office of Competition and Economic Analysis.

[FR Doc. 2013–00187 Filed 1–8–13; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC402

Nominations for the Western and Central Pacific Fisheries Commission Advisory Committee

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

ACTION: Request for nominations.

SUMMARY: NMFS, on behalf of the Secretary of Commerce, is seeking nominations for the advisory committee established under the Western and Central Pacific Fisheries Convention Implementation Act (Act). The advisory committee, to be composed of individuals from groups concerned with the fisheries covered by the Western and Central Pacific Fisheries Convention (Convention), will be given the opportunity to provide input to the United States Commissioners to the Western and Central Pacific Fisheries Commission (Commission) regarding the deliberations and decisions of the Commission.

DATES: Nominations must be received no later than February 25, 2013.

ADDRESSES: Nominations should be directed to Michael Tosatto, Acting Regional Administrator, NMFS Pacific Islands Regional Office, and may be submitted by any of the following means:

- *Email: pir.wcpfc@noaa.gov.* Include in the subject line the following document identifier: ''Advisory committee nominations''. Email comments, with or without attachments, are limited to 5 megabytes.
- *Mail or hand delivery:* 1601 Kapiolani Blvd. Suite 1110, Honolulu, HI 96814.
- *Facsimile:* 808–973–2941.

FOR FURTHER INFORMATION CONTACT: Oriana Villar, NMFS Pacific Islands Regional Office; telephone: 808–944–2256; facsimile: 808–973–2941; email: *Oriana.Villar@noaa.gov.*

SUPPLEMENTARY INFORMATION:

The Convention and the Commission

The objective of the Convention is to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS) and the Agreement for the Implementation of the Provisions of the UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. The Convention establishes the Commission, the secretariat of which is based in Pohnpei, Federated States of Micronesia.

The Convention applies to all highly migratory fish stocks (defined as all fish stocks of the species listed in Annex I of the UNCLOS occurring in the Convention Area, and such other species of fish as the Commission may determine), except sauries.

The United States actively supported the negotiations and the development of the Convention and signed the Convention in 2000. It participated as a cooperating non-member of the Commission since 2005 and became a Contracting Party to the Convention and a full member of the Commission when it ratified the Convention in January 2007. Under the Act, the United States will be represented on the Commission by five Commissioners.

Advisory Committee

The Act (16 U.S.C. 6902) provides (in section 6902(d)) that the Secretary of Commerce, in consultation with the United States Commissioners to the Commission, will appoint certain members of the advisory committee established under the Act.

The members to be appointed to the advisory committee are to include not less than 15 nor more than 20 individuals selected from the various groups concerned with the fisheries covered by the Convention, providing, to the extent practicable, an equitable balance among such groups. On behalf of the Secretary of Commerce, NMFS is now seeking nominations for these appointments.

In addition to the 15–20 appointed members, the advisory committee also includes the chair of the Western Pacific Fishery Management Council's Advisory Committee (or designee), and officials of the fisheries management authorities of American Samoa, Guam, and the Northern Mariana Islands (or their designees).

Members of the advisory committee will be invited to attend all non-executive meetings of the United States Commissioners to the Commission and at such meetings will be given opportunity to examine and be heard on all proposed programs of investigation, reports, recommendations, and regulations of the Commission.

Each appointed member of the advisory committee will serve for a term of two years and is eligible for reappointment. This request for nominations is for the term to begin on or after August 2, 2013 and is for a term of two consecutive years.

The Secretaries of Commerce and State will furnish the advisory committee with relevant information concerning fisheries and international fishery agreements.

NMFS, on behalf of the Secretary of Commerce, will provide to the advisory committee administrative and technical support services as are necessary for its effective functioning.

Appointed members of the advisory committee will serve without pay, but while away from their homes or regular places of business in the performance of services for the advisory committee will be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5, United States Code. They will not be considered Federal employees while performing service as members of the advisory committee except for the purposes of injury compensation or tort claims liability as provided in chapter 81 of title 5, United States Code and Chapter 171 of title 28, United States Code.

Procedure for Submitting Nominations

Nominations for the advisory committee should be submitted to NMFS (see **ADDRESSES**). This request for nominations is for first time nominees as well as current Advisory Committee members. Self nominations are acceptable. Nominations should include the following information: (1) Full name, address, telephone, facsimile, and email of nominee; (2) nominee's organization(s) or professional affiliation(s) serving as the basis for the nomination, if any; and (3) a background statement, not to exceed one page in length, describing the nominee's qualifications, experience and interests, specifically as related to the fisheries covered by the Convention.

Authority: 16 U.S.C. 6902.

Dated: January 4, 2013.

Lindsay Fullenkamp,

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

[FR Doc. 2013–00271 Filed 1–8–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC350

Takes of Marine Mammals Incidental to Specified Activities; St. George Reef Light Station Restoration and Maintenance at Northwest Seal Rock, Del Norte County, CA

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

ACTION: Notice; proposed incidental take authorization; request for comments.

SUMMARY: We have received an application from the St. George Reef Lighthouse Preservation Society

(Society), for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment incidental to conducting aircraft operations, lighthouse renovation, and light maintenance activities on the St. George Reef Light Station on Northwest Seal Rock (NWSR) in the northeast Pacific Ocean from the period of February through April, 2013 and during the period of November through December, 2013. Per the Marine Mammal Protection Act, we are requesting comments on our proposal to issue an Incidental Harassment Authorization to the Society to incidentally harass, by Level B harassment only, four species of marine mammals during the specified activity.

DATES: Comments and information must be received no later than February 7, 2013.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing email comments is *ITP.Cody@noaa.gov.* Please include 0648–XC350 in the subject line. We are not responsible for email comments sent to other addresses other than the one provided here. Comments sent via email to *ITP.Cody@noaa.gov,* including all attachments, must not exceed a 10-megabyte file size.

All submitted comments are a part of the public record and we will post to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

To obtain an electronic copy of the application containing a list of the references used in this document, write to the previously mentioned address, telephone the contact listed here (see **FOR FURTHER INFORMATION CONTACT**), or visit the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

The following associated documents are also available at the same internet address: Environmental Assessment (EA) prepared by us; and our 2010 Finding of No Significant Impact (FONSI). Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Jeannine Cody, NMFS, Office of Protected Resources, NMFS, (301) 713–2289 or Monica DeAngelis, NMFS Southwest Regional Office, (562) 980–3232.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(D) of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce to authorize, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if, after notice of a proposed authorization to the public for review and public comment: (1) We make certain findings; and (2) the taking is limited to harassment.

We shall grant authorization for the incidental taking of small numbers of marine mammals if we find that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). The authorization must set forth the permissible methods of taking; other means of effecting the least practicable adverse impact on the species or stock and its habitat; and requirements pertaining to the mitigation, monitoring and reporting of such taking. We have defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the Marine Mammal Protection Act established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) of the Act establishes a 45-day time limit for our review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the public comment period, we must either issue or deny the authorization and must publish a notice in the **Federal Register** within 30 days of our determination to issue or deny the authorization.

Except with respect to certain activities not pertinent here, the Marine Mammal Protection Act defines ''harassment'' as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

We received an application from the Society on May 8, 2012, requesting that we issue an Incidental Harassment Authorization (Authorization) for the take, by Level B harassment only, of small numbers of marine mammals incidental to conducting to helicopter operations and restoration and maintenance activities on the St. George Reef Light Station (Station) for the 2013 season. After addressing comments from us and submitting required annual monitoring reports from the 2011 season, we determined the application complete and adequate on November 27, 2012.

The Society aims to: (1) Restore and preserve the Station on a monthly basis (February–April, and November–December, 2013); and (2) perform periodic, annual maintenance on the Station's optical light system.

The Station, which is listed in the National Park Service's National Register of Historic Places, is located on Northwest Seal Rock offshore of Crescent City, California in the northeast Pacific Ocean.

The proposed activities would occur in the vicinity of a possible pinniped haul out site located on Northwest Seal Rock. Acoustic and visual stimuli generated by: (1) Helicopter landings/takeoffs; (2) noise generated during restoration activities (e.g., painting, plastering, welding, and glazing); (3) maintenance activities (e.g., bulb replacement and automation of the light system); and (4) human presence, may have the potential to cause any pinnipeds hauled out on Northwest Seal Rock to flush into the surrounding water or to cause a short-term behavioral disturbance. These types of disturbances are the principal means of marine mammal taking associated with these activities and the Society has requested an authorization to take 204 California sea lions (*Zalophus californianus*); 36 Pacific Harbor seals (*Phoca vitulina*); 172 Steller sea lions (*Eumetopias jubatus*) within the eastern U.S. Stock; and six northern fur seals (*Callorhinus ursinus*) by Level B harassment.

To date, we have issued three, 1-year IHAs to the Society for the conduct of the same activities from 2010 to 2012 (75 FR 4774, January 29, 2010; 76 FR 10564, February 25, 2011; and 77 FR 8811, February 15, 2012). This is the Society's fourth request for an IHA; the current IHA will expire on December 31, 2012.

Description of the Specified Activity

The Society proposes to conduct the proposed activities (aircraft operations, lighthouse restoration, and light maintenance activities) from the period of February through April, 2013 and during the period of November through December, 2013, at a maximum frequency of one session per month. The proposed duration for each session would last no more than three days (e.g., Friday, Saturday, and Sunday).

Aircraft Operations

Because Northwest Seal Rock has no safe landing area for boats, the proposed restoration activities would require the Society to transport personnel and equipment from the California mainland to Northwest Seal Rock by a small helicopter. Helicopter landings take place on top of the engine room (caisson) which is approximately 15 meters (m) (48 feet (ft)) above the surface of the rocks on Northwest Seal Rock.

The Society proposes to transport no more than 15 work crew members and equipment to Northwest Seal Rock for each session and estimates that each session would require no more than 36 helicopter landings/takeoffs per month. During landing, the helicopter would land on the caisson to allow the work crew members to disembark and retrieve their equipment located in a basket attached to the underside of the helicopter. The helicopter would then return to the mainland to pick up additional personnel and equipment. Even though the Society would use the helicopter to transport work crew members and materials on the first and last days of the three-day activity, the helicopter would likely fly to and from the Station on all three days of the restoration and maintenance activities.

Proposed schedule: The Society would conduct a maximum of 16 flights (eight arrivals and eight departures) for the first day. The first flight would depart from Crescent City Airport at approximately 9 a.m. for a 6-minute flight to Northwest Seal Rock. The helicopter would land and takeoff immediately after offloading personnel and equipment every 20 minutes (min). The total duration of the first day's aerial operations could last for approximately 3 hours (hrs) and 26 min and would end at approximately 12:34 p.m. Crew members would remain overnight at the Station and would not return to the mainland on the first day.

For the second day, the Society would conduct a maximum of 10 flights (five arrivals and five departures) to transport additional materials on and off the islet. The first flight would depart from Crescent City Airport at 9 a.m. for a 6-minute flight to Northwest Seal Rock. The total duration of the second day's aerial operations could last up to three hours.

For the final day of operations, the Society could conduct a maximum of eight helicopter flights (four arrivals and four departures) to transport the remaining crew members and equipment/material back to the Crescent City Airport. The total duration of the third day's helicopter operations in support of restoration could last up to 2 hrs and 14 min.

As a mean of funding support for the restoration activities, the Society proposes to conduct public tours of the Station during the last day of the proposed restoration and maintenance activities. The Society proposes to transport visitors to the Station during the Sunday work window period. Although some of these flights would be conducted solely for the transportation of tourists, those flights would be conducted at a later stage when no pinnipeds are expected to be at the Station. The proposed IHA does not include additional allowance for animals that might be affected by additional flights for the transportation of tourists.

Lighthouse Restoration Activities

Restoration activities would include the removal of peeling paint and plaster, restoration of interior plaster and paint, refurbishing structural and decorative metal, reworking original metal support beams throughout the lantern room and elsewhere, replacing glass as necessary, and upgrading the present electrical system. The Society expects to complete most of the major restoration work within the next five years.

Light Maintenance Activities

The Society will need to conduct maintenance on the Station's beacon light at least once or up to two times per year within the proposed work window. Scheduled light maintenance activities would coincide with lighthouse restoration activities conducted monthly during the period of February through April, 2013 and during the period of November through December, 2013. The Society expects that maintenance activities would not exceed 3 hrs per each monthly session.

Emergency Light Maintenance

If the beacon light fails during the period from February 22, 2013, through April 30, 2013, or during the period of November 1, 2013, through December 31, 2013, the Society proposes to send a crew of two to three people to the Station by helicopter to repair the beacon light. For each emergency repair event, the Society proposes to conduct a maximum of four flights (two arrivals and two departures) to transport equipment and supplies. The helicopter may remain on site or transit back to shore and make a second landing to pick up the repair personnel.

In the case of an emergency repair between May 1, 2013, and October 31, 2013, the Society would consult with the NMFS Southwest Regional Office (SWRO) to best determine the timing of the trips to the lighthouse, on a case-by-case basis, based upon the existing environmental conditions and the abundance and distribution of any marine mammals present on NWSR. The SWRO biologists would have real-time knowledge regarding the animal use and abundance of the Northwest Seal Rock at the time of the repair request and would make a decision regarding when the trips to the lighthouse can be made during the emergency repair time window that would have the least practicable adverse impact to marine mammals. The SWRO would also ensure that the Society's request for incidental take during emergency repairs would not exceed the number of incidental take authorized in the proposed IHA. To date, the Society has not needed to conduct emergency light maintenance between May through October under any of the previous Authorizations.

Complete automation of the light generating system and automatic backup system would minimize maintenance and emergency repair visits to the island. The light is solar powered using one solar panel; an installed second panel serves as a backup which is automatically activated if needed. A second smaller bulb in the lantern is activated if the primary bulb fails. Use of high quality, durable materials and thorough weatherproofing is planned to minimize trips for maintenance and repair in the future. All tools and supplies are stored on the island so that a minimal number of transport trips for emergency maintenance will be necessary.

Acoustic Source Specifications

R44 Raven Helicopter

The Society plans to charter a Raven R44 helicopter, owned and operated by Air Shasta Rotor and Wing, LLC. The Raven R44, which seats three passengers and one pilot, is a compact-sized (1134 kilograms (kg), 2500 pounds (lbs)) helicopter with two-bladed main and tail rotors. Both sets of rotors are fitted with noise-attenuating blade tip caps that would decrease flyover noise.

Metrics Used in This Document

This section includes a brief explanation of the sound measurements frequently used in the discussions of acoustic effects in this document. Sound pressure is the sound force per unit area, and is usually measured in micropascals (μPa), where 1 pascal (Pa) is the pressure resulting from a force of one newton exerted over an area of one square meter. Sound pressure level (SPL) is expressed as the ratio of a measured sound pressure and a reference level. The commonly used reference pressure is 1 μPa for under water, and the units for SPLs are dB re: 1 μPa. The commonly used reference pressure is 20 μPa for in air, and the units for SPLs are dB re: 20 μPa.

SPL (in decibels (dB)) = 20 log (pressure/reference pressure).

SPL is an instantaneous measurement and can be expressed as the peak, the peak-peak (p-p), or the root mean square (rms). Root mean square, which is the square root of the arithmetic average of the squared instantaneous pressure values, is typically used in discussions of the effects of sounds on vertebrates and all references to SPL in this document refer to the root mean square unless otherwise noted. SPL does not take the duration of a sound into account.

Characteristics of the Aircraft Noise

Noise testing performed on the R44 Raven Helicopter, as required for Federal Aviation Administration approval, required an overflight at 150 m (492 ft) above ground level, 109 knots and a maximum gross weight of 1,134 kg (2,500 lbs). The noise levels measured on the ground at this distance and speed were 81.9 decibels (dB) re: 20 μPa (A-weighted) for the model R44 Raven I, or 81.0 dB re: 20 μPa (A-weighted) for the model R44 Raven II (NMFS, 2007).

The helicopter would land on the Station's caisson and presumably, the received sound levels would increase above 81–81.9 dB re: 20 μPa (A-weighted) at the landing area.

Characteristics of Restoration and Maintenance Noise

Restoration and maintenance activities would involve the removal of peeling paint and plaster, restoration of interior plaster and paint, refurbishing structural and decorative metal, reworking original metal support beams throughout the lantern room and elsewhere, replacing glass as necessary, upgrading the present electrical system; and annual light beacon maintenance. Any noise associated with these activities is likely to be from light construction (e.g., sanding, hammering, or use of hand drills). The Society proposes to confine all restoration activities to the existing structure which would occur on the upper levels of the Station. Pinnipeds hauled out on Northwest Seal Rock do not have access to this area.

We expect that acoustic stimuli resulting from the proposed helicopter operations; noise from maintenance and restoration activities; and human presence have the potential to harass marine mammals, incidental to the conduct of the proposed activities. We expect these disturbances to be temporary and result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B Harassment) of small numbers of certain species of marine mammals.

Description of the Specified Geographic Region

The Station is located on a small, rocky islet (41°50′24″ N, 124°22′06″ W) approximately nine kilometers (km) (6.0 miles (mi)) in the northeast Pacific Ocean, offshore of Crescent City, California (Latitude: 41°46′48″ N; Longitude: 124°14′11″ W). NWSR is approximately 91.4 m (300 ft) in diameter that peaks at 5.18 m (17 ft) above mean sea level. The Station, built in 1892, rises 45.7 m (150 ft) above the sea, consists of hundreds of granite blocks, is topped with a cast iron lantern room, and covers much of the surface of the islet.

Description of Marine Mammals in the Area of the Proposed Specified Activity

The marine mammals most likely to be harassed incidental to the Society's helicopter operations, lighthouse restoration, and lighthouse maintenance on Northwest Seal Rock are primarily Steller and California sea lions and to a lesser extent the Pacific harbor seal and the eastern Pacific stock of northern fur seal. We refer the public to Carretta *et al.,* (2011) and Allen and Angliss (2012) for general information on these species which are presented below this section. The publications are available at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/po2011.pdf* and *http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2011.pdf* respectively. We present a summary of information on these species below this section.

California Sea Lion

California sea lions are not listed as threatened or endangered under the Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*), nor are they categorized as depleted under the MMPA. The California sea lion is now a full species, separated from the Galapagos sea lion (*Z. wollebaeki*) and the extinct Japanese sea lion (*Z. japonicus*) (Brunner 2003, Wolf *et al.,* 2007, Schramm *et al.,* 2009). The estimated population of the U.S. stock of California sea lion is approximately 296,750 animals and the current maximum population growth rate is 12 percent (Carretta *et al.,* 2011).

Major rookeries for the California sea lion exist on the Channel Islands off southern California and on the islands situated along the east and west coasts of Baja California. The breeding areas of the California sea lion are on islands located in southern California, western Baja California, and the Gulf of California. Males are polygamous, establishing breeding territories that may include up to 14 females. They defend their territories with aggressive physical displays and vocalization. Sea lions reach sexual maturity at four to five years old and the breeding season lasts from May to August. Most pups are born from May through July and weaned at 10 months old.

Crescent Coastal Research (CCR) conducted a three-year (1998–2000) survey of the wildlife species on NWSR for the Society. They reported that counts of California sea lions on NWSR varied greatly (from six to 541) during the observation period from April 1997 through July 2000. CCR reported that counts for California sea lions during the spring (April–May), summer (June–August), and fall (September–October), averaged 60, 154, and 235, respectively (CCR, 2001).

The most current counts for the month of July by NMFS (2000 through 2004) have been relatively low as the total number of California sea lions recorded in 2000 and 2003 was 3 and 11, respectively (M. Lowry, NMFS, SWFSC, unpublished data). Based on the monitoring report for the 2011 season, the maximum numbers of California sea lions present during the April and November, 2011 work sessions was 2 and 90 animals, respectively (SGRLPS, 2012). There were no California sea lions present

during the March, 2012 work session (SGRLPS, 2012).

Pacific Harbor Seal

Pacific harbor seals are not listed as threatened or endangered under the Endangered Species Act, nor are they categorized as depleted under the Marine Mammal Protection Act. The estimated population of the California stock of Pacific harbor seals is approximately 30,196 animals (Carretta *et. al.,* 2011).

The animals inhabit near-shore coastal and estuarine areas from Baja California, Mexico, to the Pribilof Islands in Alaska. Pacific harbor seals are divided into two subspecies: *P. v. stejnegeri* in the western North Pacific, near Japan, and *P. v. richardsi* in the northeast Pacific Ocean. The latter subspecies, recognized as three separate stocks, inhabits the west coast of the continental United States, including: The outer coastal waters of Oregon and Washington states; Washington state inland waters; and Alaska coastal and inland waters. Two of these stocks, the California stock and Oregon/Washington coast stock, of Pacific harbor seals are identified off the coast of Oregon and California for management purposes under the MMPA. However, the stock boundary is difficult to distinguish because of the continuous distribution of harbor seals along the west coast and any rigid boundary line is (to a greater or lesser extent) arbitrary, from a biological perspective (Carretta *et al.,* 2011). Due to the location of the proposed project which is situated near the border of Oregon and California, both stocks could be present within the proposed project area.

In California, over 500 harbor seal haulout sites are widely distributed along the mainland and offshore islands, and include rocky shores, beaches and intertidal sandbars (Lowry *et al.,* 2005). Harbor seals mate at sea and females give birth during the spring and summer, although, the pupping season varies with latitude. Pups are nursed for an average of 24 days and are ready to swim minutes after being born. Harbor seal pupping takes place at many locations and rookery size varies from a few pups to many hundreds of pups. The nearest harbor seal rookery relative to the proposed project site is at Castle Rock National Wildlife Refuge, located approximately located 965 m (0.6 mi) south of Point St. George, and 2.4 km (1.5 mi) north of the Crescent City Harbor in Del Norte County, California (USFWS, 2007).

CCR noted that harbor seal use of Northwest Seal Rock was minimal, with only one sighting of a group of six animals, during 20 observation surveys. They hypothesized that harbor seals may avoid the islet because of its distance from shore, relatively steep topography, and full exposure to rough and frequently turbulent sea swells. For the 2010 and 2011 seasons, the Society did not observe any Pacific harbor seals present on Northwest Seal Rock during restoration activities (SGRLPS, 2010; 2011). During the 2012 season, the Society reported sighting a total of two harbor seals present on Northwest Seal Rock (SGRLPS, 2012).

Northern Fur Seal

Northern fur seals are not listed as threatened or endangered under the Endangered Species Act. However, they are categorized as depleted under the Marine Mammal Protection Act. Northern fur seals occur from southern California north to the Bering Sea and west to the Sea of Okhotsk and Honshu Island of Japan. Two separate stocks of northern fur seals are recognized within U.S. waters: An Eastern Pacific stock distributed among sites in Alaska, British Columbia; and a San Miguel Island stock distributed along the west coast of the continental U.S.

Northern fur seals may temporarily haul out on land at other sites in Alaska, British Columbia, and on islets along the west coast of the continental United States, but generally this occurs outside of the breeding season (Fiscus, 1983).

The estimated population of the San Miguel Island stock is 9,968 animals with a maximum population growth rate of 12 percent (Carretta *et al.,* 2011).

Northern fur seals breed in Alaska and migrate along the west coast during fall and winter. Due to their pelagic habitat, they are rarely seen from shore in the continental U.S., but individuals occasionally come ashore on islands well offshore (i.e., Farallon Islands and Channel Islands in California). During the breeding season, approximately 74 percent of the worldwide population is found on the Pribilof Islands in Alaska, with the remaining animals spread throughout the North Pacific Ocean (Lander and Kajimura, 1982).

CCR observed one male northern fur seal on Northwest Seal Rock in October, 1998 (CCR, 2001). It is possible that a few animals may use the island more often that indicated by the CCR surveys, if they were mistaken for other otariid species (i.e., eared seals or fur seals and sea lions) (M. DeAngelis, NMFS, pers. comm.).

For the 2010, 2011, and 2012 work seasons, the Society has not observed any northern fur seals present on Northwest Seal Rock during restoration activities (SGRLPS, 2010; 2011; 2012).

Steller Sea Lion

Steller sea lions consist of two distinct population segments: the western and eastern distinct population segments divided at 144° West longitude (Cape Suckling, Alaska). The eastern distinct population segment of the Steller sea lion is threatened; however NMFS is proposing to remove the eastern distinct population segment of Steller sea lions from the list of endangered wildlife, after a status review by its biologists found the species is recovering. The western distinct population segment is endangered under the Endangered Species Act. Both segments are depleted under the Marine Mammal Protection Act.

Steller sea lions range along the North Pacific Rim from northern Japan to California (Loughlin *et al.,* 1984), with centers of abundance and distribution in the Gulf of Alaska and Aleutian Islands, respectively. The species is not known to migrate, but individuals disperse widely outside of the breeding season (late May through early July), thus potentially intermixing with animals from other areas.

The western segment of Steller sea lions inhabit central and western Gulf of Alaska, Aleutian Islands, as well as coastal waters and breed in Asia (e.g., Japan and Russia). The eastern segment includes sea lions living in southeast Alaska, British Columbia, California, and Oregon.

The estimated population of the eastern distinct population segment ranges from a minimum of 52,847 up to 72,223 animals and the maximum population growth rate is 12.1 percent (Angliss and Allen, 2011).

The eastern distinct population segment of Steller sea lions breeds on rookeries located in southeast Alaska, British Columbia, Oregon, and California. There are no rookeries located in Washington state. Steller sea lions give birth in May through July and breeding commences a couple of weeks after birth. Pups are weaned during the winter and spring of the following year.

Despite the wide-ranging movements of juveniles and adult males in particular, exchange between rookeries by breeding adult females and males (other than between adjoining rookeries) appears low, although males have a higher tendency to disperse than females (NMFS 1995, Trujillo *et al.,* 2004, Hoffman *et al.,* 2006). A northward shift in the overall breeding distribution has occurred, with a contraction of the range in southern

California and new rookeries established in southeastern Alaska (Pitcher *et al.,* 2007).

CCR reported that Steller sea lion numbers at Northwest Seal Rock ranged from 20 to 355 animals. Counts of Steller sea lions during the spring (April–May), summer (June–August), and fall (September–October), averaged 68, 110, and 56, respectively (CCR, 2001). A more recent survey at NWSR between 2000 and 2004 showed Steller sea lion numbers ranged from 175 to 354 in July (M. Lowry, NMFS/SWFSC, unpubl. data). Winter use of NWSR by Steller sea lion is presumed to be minimal, due to inundation of the natural portion of the island by large swells.

For the 2010 season, the Society reported that no Steller sea lions were present in the vicinity of Northwest Seal Rock during restoration activities (SGRLPS, 2010). Based on the monitoring report for the 2011 season, the maximum numbers of Steller sea lions present during the April and November 2011, work sessions was 2 and 150 animals, respectively (SGRLPS, 2012). During the 2012 season, the Society did not observe any Steller sea lions present on Northwest Seal Rock during restoration activities.

Other Marine Mammals in the Proposed Action Area

There are several endangered cetaceans that have the potential to transit in the vicinity of Northwest Seal Rock including the blue (*Balaenoptera musculus*), fin (*Balaenoptera physalus*), humpback (*Megaptera novaeangliae*), sei (*Balaenoptera borealis*), north Pacific right (*Eubalena japonica*), sperm (*Physeter macrocephalus*), and southern resident killer (*Orcinus orca*) whales.

California (southern) sea otters (*Enhydra lutris nereis*), listed as threatened under the ESA and categorized as depleted under the MMPA, usually range in coastal waters within two km (1.2 mi) of shore. Neither CCR nor the Society has encountered California sea otters on Northwest Seal Rock during the course of the four-year wildlife study (CCR, 2001) nor has the Society encountered the species during the course of the previous three IHAs. The U.S. Fish and Wildlife Service (USFWS) manages the sea otter and we will not consider this species further in this proposed IHA notice.

All of the aforementioned species are found farther offshore than the proposed action area and are not likely to be affected by the restoration and maintenance activities. Accordingly, we will not consider these species in greater detail and the proposed IHA will only address requested take authorizations for pinnipeds.

Potential Effects on Marine Mammals

Acoustic and visual stimuli generated by: (1) Helicopter landings/takeoffs; (2) noise generated during restoration activities (e.g., painting, plastering, welding, and glazing); and (3) maintenance activities (e.g., bulb replacement and automation of the light system) may have the potential to cause Level B harassment of any pinnipeds hauled out on NWSR. The effects of sounds from helicopter operations and/or restoration and maintenance activities might include one of the following: temporary or permanent hearing impairment or behavioral disturbance (Southall, *et al.,* 2007).

Hearing Impairment

Marine mammals produce sounds in various important contexts—social interactions, foraging, navigating, and to responding to predators. The best available science suggests that pinnipeds have a functional aerial hearing sensitivity between 75 hertz (Hz) and 75 kilohertz (kHz) and can produce a diversity of sounds, though generally from 100 Hz to several tens of kHz (Southall, *et al.,* 2007).

Exposure to high intensity sound for a sufficient duration may result in auditory effects such as a noise-induced threshold shift—an increase in the auditory threshold after exposure to noise (Finneran, Carder, Schlundt, and Ridgway, 2005). Factors that influence the amount of threshold shift include the amplitude, duration, frequency content, temporal pattern, and energy distribution of noise exposure. The magnitude of hearing threshold shift normally decreases over time following cessation of the noise exposure. The amount of threshold shift just after exposure is called the initial threshold shift. If the threshold shift eventually returns to zero (i.e., the threshold returns to the pre-exposure value), it is called temporary threshold shift (TTS) (Southall *et al.,* 2007).

Pinnipeds have the potential to be disturbed by airborne and underwater noise generated by the engine of the aircraft (Born, Riget, Dietz, and Andriashek, 1999; Richardson, Greene, Malme, and Thomson, 1995). Data on underwater TTS-onset in pinnipeds exposed to pulses are limited to a single study which exposed two California sea lions to single underwater pulses from an arc-gap transducer and found no measurable TTS following exposures up to 183 dB re: 1 μPa (peak-to-peak) (Finneran, Dear, Carder, and Ridgway, 2003).

TTS has been demonstrated and studied in certain captive odontocetes and pinnipeds exposed to strong sounds (reviewed in Southall *et al.,* 2007). In 2004, researchers measured auditory fatigue to airborne sound in harbor seals, California sea lions, and northern elephant seals (*Mirounga angustirostris*) after exposure to non-pulse noise for 25 minutes (Kastak, Southall, Holt, Kastak, and Schusterman, 2004). In the study, the harbor seal experienced approximately 6 dB of TTS at 99 dB re: 20 μPa. Onset of TTS was identified in the California sea lion at 122 dB re: 20 μPa. The northern elephant seal experienced TTS-onset at 121 dB re: 20 μPa (Kastak *et al.,* 2004).

There is a dearth of information on acoustic effects of helicopter overflights on pinniped hearing and communication (Richardson *et al.,* 1995) and to NMFS' knowledge, there has been no specific documentation of TTS, let alone permanent threshold shift (PTS), in free-ranging pinnipeds exposed to helicopter operations during realistic field conditions.

In 2008, NMFS issued an IHA to the U.S. Fish and Wildlife Service (USFWS) for the take of small numbers of Steller sea lions and Pacific harbor seals, incidental to rodent eradication activities on an islet offshore of Rat Island, AK conducted by helicopter. The 15-minute aerial treatment consisted of the helicopter slowly approaching the islet at an elevation of over 1,000 feet (304.8 m); gradually decreasing altitude in slow circles; and applying the rodenticide in a single pass and returning to Rat Island. The gradual and deliberate approach to the islet resulted in the sea lions present initially becoming aware of the helicopter and calmly moving into the water. Further, the USFWS reported that all responses fell well within the range of Level B harassment (i.e., alert head raises without moving or limited, short-term displacement resulting from aircraft noise due to helicopter overflights).

As a general statement from the available information, pinnipeds exposed to intense (approximately 110 to 120 dB re: 20 μPa) non-pulse sounds often leave haulout areas and seek refuge temporarily (minutes to a few hours) in the water (Southall *et al.,* 2007). Any noise attributed to the Society's proposed helicopter operations on NWSR would be short-term (approximately 5 min per trip). NMFS would expect the ambient noise levels to return to a baseline state when helicopter operations have ceased for the day. Per Richardson *et al.* (1995), approaching aircraft generally flush animals into the water and noise from

a helicopter is typically directed down in a ''cone'' underneath the aircraft. As the helicopter landings take place 15 m (48 ft) above the surface of the rocks on NWSR, NMFS presumes that the received sound levels would increase above 81–81.9 dB re: 20 μPa (A-weighted) at the landing pad. However, NMFS does not expect that the increased received levels of sound from the helicopter would cause TTS or PTS because the pinnipeds would flush before the helicopter approached NWSR; thus increasing the distance between the pinnipeds and the received sound levels on NWSR during the proposed action.

Behavioral Disturbance

There is increasing recognition that the effect of human disturbance wildlife is highly dependent on the nature of the disturbance (Burger *et al.,* 1995; Klein *et al.,* 1995; and Kucey, 2005). Disturbances resulting from human activity can impact short- and long-term pinniped haul out behavior (Renouf *et al.,* 1981; Schneider and Payne, 1983; Terhune and Almon, 1983; Allen *et al.,* 1984; Stewart, 1984; Suryan and Harvey, 1999; Mortenson *et al.,* 2000; and Kucey and Trites, 2006). The apparent skittishness of both harbor seals and Steller sea lions raises concerns regarding behavioral and physiological impacts to individuals and populations experiencing high levels of human disturbance. It is well known that human activity can flush harbor seals off haul out sites (Allen *et al.,* 1984; Calambokidis *et al.,* 1991; Suryan and Harvey, 1999; Mortenson *et al.,* 2000).

The Hawaiian monk seal (*Monachus schauinslandi*) has been shown to avoid beaches that have been disturbed often by humans (Kenyon, 1972). Stevens and Boness (2003) concluded that after the 1997–98 El Niño, when populations of the South American fur seal, *Arctocephalus australis,* in Peru declined dramatically, seals abandoned some of their former primary breeding sites, but continued to breed at adjacent beaches that were more rugged (i.e., less likely to be used by humans). Abandoned and unused sites were more likely to have human disturbance than currently used sites. In one case, human disturbance appeared to cause Steller sea lions to desert a breeding area at Northeast Point on St. Paul Island, Alaska (Kenyon, 1962).

It is likely that the initial helicopter approach to the Station would cause a subset, or all of the marine mammals hauled out on NWSR to depart the rock and flush into the water. The physical presence of aircraft could also lead to non-auditory effects on marine mammals involving visual or other cues. Airborne sound from a low-flying helicopter or airplane may be heard by marine mammals while at the surface or underwater. In general, helicopters tend to be noisier than fixed wing aircraft of similar size and underwater sounds from aircraft are strongest just below the surface and directly under the aircraft. Noise from aircraft would not be expected to cause direct physical effects but have the potential to affect behavior. The primary factor that may influence abrupt movements of animals is engine noise, specifically changes in engine noise. Responses by mammals could include hasty dives or turns, change in course, or flushing and stampeding from a haul out site. There are few well documented studies of the impacts of aircraft overflight over pinniped haul out sites or rookeries, and many of those that exist, are specific to military activities (Efroymson *et al.,* 2001).

Several factors complicate the analysis of long- and short-term effects for aircraft overflights. Information on behavioral effects of overflights by military aircraft (or component stressors) on most wildlife species is sparse. Moreover, models that relate behavioral changes to abundance or reproduction, and those that relate behavioral or hearing effects thresholds from one population to another are generally not available. In addition, the aggregation of sound frequencies, durations, and the view of the aircraft into a single exposure metric is not always the best predictor of effects and it may also be difficult to calculate. Overall, there has been no indication that single or occasional aircraft flying above pinnipeds in water cause long term displacement of these animals (Richardson *et al.,* 1995). The Lowest Observed Adverse Effects Levels (LOAELs) are rather variable for pinnipeds on land, ranging from just over 150 m (492 ft) to about 2,000 m (6,562 ft) (Efroymson *et al.,* 2001). A conservative (90th percentile) distance effects level is 1,150 m (3,773 ft). Most thresholds represent movement away from the overflight. Bowles and Stewart (1980) estimated an LOAEL of 305 m (1,000 ft) for helicopters (low and landing) in California sea lions and harbor seals observed on San Miguel Island, CA; animals responded to some degree by moving within the haul out and entering into the water, stampeding into the water, or clearing the haul out completely. Both species always responded with the raising of their heads. California sea lions appeared to react more to the visual cue of the helicopter than the noise.

If pinnipeds are present on NWSR, it is likely that a helicopter landing at the Station would cause some number of the pinnipeds on NWSR to flush; however, when present, they appear to show rapid habituation to helicopter landing and departure (Crescent Coastal Research, 2001; Guy Towers, SGRLPS, pers. com.). According to the CCR Report (2001), while up to 40 percent of the California and Steller sea lions present on the rock have been observed to enter the water on the first of a series of helicopter landings, as few as zero percent have flushed on subsequent landings on the same date. In fact, the Society reported that during the November 2011 work session, Steller sea lions and California sea lions exhibited minimal ingress and egress from Northwest Seal Rock during helicopter approaches and departures (SGRLPS, 2011).

If pinnipeds are present on NWSR, Level B behavioral harassment of pinnipeds may occur during helicopter landing and takeoff from NWSR due to the pinnipeds temporarily moving from the rocks and lower structure of the Station into the sea due to the noise and appearance of helicopter during approaches and departures. It is expected that all or a portion of the marine mammals hauled out on the island will depart the rock and move into the water upon initial helicopter approaches. The movement to the water is expected to be gradual due to the required controlled helicopter approaches (see Proposed Mitigation section), the small size of the aircraft, the use of noise-attenuating blade tip caps on the rotors, and behavioral habituation on the part of the animals as helicopter trips continue throughout the day. During the sessions of helicopter activity, if present on NWSR, some animals may be temporarily displaced from the island and either raft in the water or relocate to other haul-outs.

Sea lions have shown habituation to helicopter flights within a day at the project site and most animals are expected to return soon after helicopter activities cease for that day. By clustering helicopter arrival/departures within a short time period, animals are expected to show less response to subsequent landings. No impact on the population size or breeding stock of Steller sea lions, California sea lions, Pacific harbor seals, or northern fur seals is expected to occur.

Restoration and maintenance activities would involve the removal of peeling paint and plaster, restoration of interior plaster and paint, refurbishing

structural and decorative metal, reworking original metal support beams throughout the lantern room and elsewhere, replacing glass as necessary, upgrading the present electrical system; and annual light beacon maintenance. Any noise associated with these activities is likely to be from light construction (e.g., sanding, hammering, or use of hand drills) and the pinnipeds may be disturbed by human presence. Animals respond to disturbance from humans in the same way as they respond to the risk of predation, by avoiding areas of high risk, either completely or by using them for limited periods (Gill *et al.,* 1996).

Mortality

Sudden movement of large numbers of animals may cause a stampede. In order to prevent such stampedes from occurring within the sea lion colony, certain mitigation requirements and restrictions, such as controlled helicopter approaches and limited access period during the pupping season, will be imposed should an IHA be issued. As such, and because any pinnipeds nearby likely would avoid the approaching helicopter, the Society anticipates that there will be no instances of injury or mortality during the proposed project.

Anticipated Effects on Habitat

We expect that there will be no long- or short-term physical impacts to pinniped habitat on NWSR. The Society proposes to confine all restoration activities to the existing structure which would occur on the upper levels of the Station which are not used by marine mammals. The Society would remove all waste, discarded materials and equipment from the island after each visit. The proposed activities will not result in any permanent impact on habitats used by marine mammals, including the food sources they use. The main impact associated with the proposed activity will be temporarily elevated noise levels and the associated direct effects on marine mammals, previously discussed in this notice.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and the availability of such species or stock for taking for certain subsistence uses.

As a way to reduce or minimize adverse impacts that would result from the proposed project to the lowest level practicable, we propose that the following mitigation measures would be required.

Time and Frequency: Lighthouse restoration activities are to be conducted at maximum of once per month between February 1, 2013, through April 30, 2013, or between November 1, 2013, through December 31, 2013. Each restoration session will last no more than three days. Maintenance of the light beacon will occur only in conjunction with restoration activities.

Helicopter Approach and Timing Techniques: The Society shall ensure that helicopter approach patterns to the lighthouse will be such that the timing techniques are least disturbing to marine mammals. To the extent possible, the helicopter should approach NWSR when the tide is too high for the marine mammals to haul-out on NWSR.

Since the most severe impacts (stampede) are precipitated by rapid and direct helicopter approaches, initial approach to the Station must be offshore from the island at a relatively high altitude (e.g., 800–1,000 ft, or 244–305 m). Before the final approach, the helicopter shall circle lower, and approach from area where the density of pinnipeds is the lowest. If for any safety reasons (e.g., wind condition) such helicopter approach and timing techniques cannot be achieved, the Society must abort the restoration and maintenance activities for that day.

Avoidance of Visual and Acoustic Contact with People on Island: The Society members and restoration crews shall be instructed to avoid making unnecessary noise and not expose themselves visually to pinnipeds around the base of the lighthouse. Although no impacts from these activities were seen during the 2001 CCR study, it is relatively simple to avoid this potential impact. The door to the lower platform (which is used at times by pinnipeds) shall remain closed and barricaded to all tourists and other personnel.

Mitigation Conclusions

We have carefully evaluated the proposed mitigation measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Based on our evaluation of the proposed measures, we have preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Summary of Previous Monitoring

The Society complied with the mitigation and monitoring required under the previous authorizations (2010–2012). In compliance with the 2012 IHA, the Society submitted a final report on the activities at the Station, covering the period of February 15, 2012 through April 30, 2012. During the effective dates of the 2012 IHA, the Society conducted one work session in March, 2012. The Society's aircraft operations and restoration activities on NWSR did not exceed the activity levels analyzed under the 2012 authorization. During the March 2012 work session, the Society observed two harbor seals hauled out on Northwest Seal Rock. Both animals (a juvenile and an adult) departed the rock, entered the water, and did not return to the Station during the duration of the activities.

Proposed Monitoring

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that we must set forth ''requirements pertaining to the monitoring and reporting of such taking''. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for IHAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

At least once during the period between February 22, 2013, through April 30, 2013, or during the period of November 1, 2013, through December 31, 2013 a qualified biologist shall be present during all three workdays at the

Station. The biologist hired will be subject to approval by us.

The qualified biologist shall document use of the island by the pinnipeds, frequency, (i.e., dates, time, tidal height, species, numbers present, and any disturbances), and note any responses to potential disturbances. In the event of any observed Steller sea lion injury, mortality, or the presence of newborn pup, the Society will notify the NMFS SWRO Administrator and the NMFS Director of Office of Protected Resources immediately.

Aerial photographic surveys may provide the most accurate means of documenting species composition, age and sex class of pinnipeds using the project site during human activity periods. Aerial photo coverage of the island shall be completed from the same helicopter used to transport the Society's personnel to the island during restoration trips. Photographs of all marine mammals hauled out on the island shall be taken at an altitude greater than 300 m (984 ft) by a skilled photographer, prior to the first landing on each visit included in the monitoring program. Photographic documentation of marine mammals present at the end of each three-day work session shall also be made for a before and after comparison. These photographs will be forwarded to a biologist capable of discerning marine mammal species. Data shall be provided to us in the form of a report with a data table, any other significant observations related to marine mammals, and a report of restoration activities (see Reporting). The original photographs can be made available to us or other marine mammal experts for inspection and further analysis.

Proposed Reporting

The Society's personnel will record data to document the number of marine mammals exposed to helicopter noise and to document apparent disturbance reactions or lack thereof. The Society and NMFS will use the data to estimate numbers of animals potentially taken by Level B harassment.

Interim Monitoring Report

The Society will submit interim monitoring reports to the NMFS SWRO Administrator and the NMFS Director of Office of Protected Resources no later than 30 days after the conclusion of each monthly session. The interim report will describe the operations that were conducted and sightings of marine mammals near the proposed project. The report will provide full documentation of methods, results, and interpretation pertaining to all monitoring.

Each interim report will provide:

(i) A summary and table of the dates, times, and weather during all helicopter operations, and restoration and maintenance activities.

(ii) Species, number, location, and behavior of any marine mammals, observed throughout all monitoring activities.

(iii) An estimate of the number (by species) of marine mammals that are known to have been exposed to acoustic stimuli associated with the helicopter operations, restoration and maintenance activities.

(iv) A description of the implementation and effectiveness of the monitoring and mitigation measures of the IHA and full documentation of methods, results, and interpretation pertaining to all monitoring.

Final Monitoring Report

In addition to the interim reports, the Society will submit a draft Final Monitoring Report to us no later than 90 days after the project is completed to the Regional Administrator and the Director of Office of Protected Resources at NMFS Headquarters. Within 30 days after receiving comments from us on the draft Final Monitoring Report, the Society must submit a Final Monitoring Report to the Regional Administrator and the NMFS Director of Office of Protected Resources. If the Society receives no comments from us on the draft Final Monitoring Report, the draft Final Monitoring Report will be considered to be the Final Monitoring Report.

The final report will provide:

(i) A summary and table of the dates, times, and weather during all helicopter operations, and restoration and maintenance activities.

(ii) Species, number, location, and behavior of any marine mammals, observed throughout all monitoring activities.

(iii) An estimate of the number (by species) of marine mammals that are known to have been exposed to acoustic stimuli associated with the helicopter operations, restoration and maintenance activities.

(iv) A description of the implementation and effectiveness of the monitoring and mitigation measures of the IHA and full documentation of methods, results, and interpretation pertaining to all monitoring.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the IHA (if issued), such as an injury (Level A harassment), serious injury or mortality (e.g., stampede), the Society shall immediately cease the specified activities and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401 and/or by email to *Michael.Payne@noaa.gov* and *ITP.Cody@noaa.gov* and to the Southwest Regional Stranding Coordinator at 562–980–3230 (*Sarah.Wilkin@noaa.gov*). The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities will not resume until we are able to review the circumstances of the prohibited take. We will work with the Society to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The Society may not resume their activities until notified by us via letter, email, or telephone.

In the event that the Society discovers an injured or dead marine mammal, and the biologist (if present) determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as described in the next paragraph), the Society will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401 and/or by email to *Michael.Payne@noaa.gov* and *ITP.Cody@noaa.gov* and to the Southwest Regional Stranding Coordinator at 562–980–3230 (*Sarah.Wilkin@noaa.gov*). The report must include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. We will work with the Society to determine whether modifications in the activities are appropriate.

In the event that the Society discovers an injured or dead marine mammal, and the lead biologist (if present) determines that the injury or death is not associated with or related to the activities authorized in the IHA (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the Society will report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at

301–427–8401 and/or by email to *Michael.Payne@noaa.gov* and *ITP.Cody@noaa.gov* and to the Southwest Regional Stranding Coordinator at 562–980–3230 (*Sarah.Wilkin@noaa.gov*), within 24 hours of the discovery. The Society will provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Only take by Level B harassment is anticipated and authorized as a result of the helicopter operations and restoration and maintenance activities on NWSR.

Based on pinniped survey counts conducted by CCR on NWSR in the spring of 1997, 1998, 1999, and 2000 (CCR, 2001), we estimate that approximately 204 California sea lions (calculated by multiplying the average monthly abundance of California sea lions (zero in April 1997 and 34 in April 1998) present on NWSR by 6 months of the proposed restoration and maintenance activities); 172 Steller sea lions (our estimate of the maximum number of Steller sea lions that could be present on NWSR with a 95-percent confidence interval); 36 Pacific harbor seals (calculated by multiplying the maximum number of harbor seals present on NWSR (6) by 6 months); and 6 northern fur seals (calculated by multiplying the maximum number of northern fur seals present on NWSR (1) by 6 months) could be potentially affected by Level B behavioral harassment over the course of the proposed IHA. Estimates of the numbers of marine mammals that might be affected are based on consideration of the number of marine mammals that could be disturbed appreciably by approximately 51 hrs of aircraft operations during the course of the proposed activity. These incidental harassment take numbers represent approximately 0.14 percent of the U.S. stock of California sea lion, 0.42 percent of the eastern U.S. stock of Steller sea lion, 0.11 percent of the California stock of Pacific harbor seals, and 0.06 percent of the San Miguel Island stock of northern fur seal. Because of the required mitigation measures and the likelihood that some pinnipeds will avoid the area, no injury or mortality to pinnipeds is expected nor requested.

Negligible Impact and Small Numbers Analyses and Determinations

We have defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, we consider:

(1) The number of anticipated mortalities;

(2) The number and nature of anticipated injuries;

(3) The number, nature, and intensity, and duration of Level B harassment; and

(4) The context in which the takes occur.

As mentioned previously, we estimate that up to four species of marine mammals could be potentially affected by Level B harassment over the course of the IHA.

No takes by Level A harassment, serious injury, or mortality are anticipated to occur as a result of the Society's proposed activities, and none are authorized. Only short-term behavioral disturbance is anticipated to occur due to the brief and sporadic duration of the proposed activities; the availability of alternate areas near NWSR for marine mammals to avoid the resultant acoustic disturbance; and limited access to NWSR during the pupping season. Due to the nature, degree, and context of the behavioral harassment anticipated, the activities are not expected to impact rates of recruitment or survival.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, we preliminarily find that the taking by Level b harassment from the Society's planned helicopter operations and restoration/maintenance activities, would have a negligible impact on the affected species or stocks of marine mammals.

We also preliminarily find that the taking would be limited to small numbers of marine mammals, relative to the population sizes of the affected species or stocks (i.e., for each species, these numbers are less than one percent).

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action.

Endangered Species Act (ESA)

The Steller sea lion, eastern Distinct Population Segment (DPS) is listed as threatened under the ESA and occurs in the planned action area. NMFS Headquarters' Office of Protected Resources, Permits, Conservation, and Education Division conducted a formal section 7 consultation under the ESA with the Southwest Region, NMFS. On January 27, 2010, the Southwest Region issued a BiOp and concluded that the issuance of IHAs are likely to adversely affect, but not likely to jeopardize the continued existence of Steller sea lions. NMFS has designated critical habitat for the eastern Distinct Population Segment of Steller sea lions in California at Año Nuevo Island, Southeast Farallon Island, Sugarloaf Island and Cape Mendocino, California pursuant to section 4 of the ESA (see 50 CFR 226.202(b)). Northwest Seal Rock is neither within nor nearby these designated areas. Finally, the BiOp included an ITS for Steller sea lions. The ITS contains reasonable and prudent measures implemented by terms and conditions to minimize the effects of this take.

We have again reviewed the 2010 BiOp and determined that there is no new information regarding effects to Stellar sea lions; the action has not been modified in a manner which would cause adverse effects not previously evaluated; there has been no new listing of species or designation of critical habitat that could be affected by the action; and, the action will not exceed the extent or amount of incidental take authorized in the ITS. Therefore, the proposed IHA does not require the reinitiation of Section 7 consultation under the ESA.

National Environmental Policy Act (NEPA)

To meet our NEPA requirements for the issuance of an IHA to the Society, we have prepared an Environmental Assessment (EA) in 2010 that was specific to conducting aircraft operations and restoration and maintenance work on the St. George Reef Light Station. The EA, titled ''Issuance of an Incidental Harassment Authorization to Take Marine Mammals by Harassment Incidental to Conducting Aircraft Operations, Lighthouse Restoration and Maintenance Activities on St. George Reef Lighthouse Station in

Del Norte County, California,'' evaluated the impacts on the human environment of our authorization of incidental Level B harassment resulting from the specified activity in the specified geographic region. At that time, we concluded that issuance of an IHA November 1 through April 30, annually would not significantly affect the quality of the human environment and issued a Finding of No Significant Impact (FONSI) for the 2010 EA regarding the Society's activities. In conjunction with the Society's 2012 application, we have again reviewed the 2010 EA and determined that there are no new direct, indirect or cumulative impacts to the human and natural environment associated with the IHA requiring evaluation in a supplemental EA and we, therefore, intend to preliminarily reaffirm the 2010 FONSI. An electronic copy of the EA and the FONSI for this activity is available upon request (see **ADDRESSES**).

Helen M. Golde,

Acting Office Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–00202 Filed 1–8–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Department of the Army

Intent To Grant an Exclusive License of a U.S. Government-Owned Invention

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: In accordance with 35 U.S.C. 209(e), and 37 CFR 404.7(a)(1)(i) and 37 CFR 404.7(b)(1)(i), announcement is made of the intent to grant an exclusive, revocable license to the invention claimed in U.S. Patent No. 6,316,197, entitled ''Method of Diagnosing of Exposure to Toxic Agents by Measuring Distinct Pattern in the Levels of Expression of Specific Genes,'' issued on November 13, 2001, and foreign rights to Cascade Biotherapeutics, Inc., with its principal place of business at 4938 Hampden Lane #319, Bethesda, Maryland 20814–2914.

ADDRESSES: Commander, U.S. Army Medical Research and Materiel Command, ATTN: Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, MD 21702–5012.

FOR FURTHER INFORMATION CONTACT: For licensing issues, Dr. Paul Mele, Office of Research & Technology Applications, (301) 619–6664. For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808; both at telefax (301) 619–5034.

SUPPLEMENTARY INFORMATION: Anyone wishing to object to grant of this license can file written objections along with supporting evidence, if any, within 15 days from the date of this publication. Written objections are to be filed with the Command Judge Advocate (see **ADDRESSES**).

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2013–00226 Filed 1–8–13; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF ENERGY

Plutonium-238 Production for Radioisotope Power Systems for National Aeronautics and Space Administration and National Security Missions

AGENCY: Department of Energy.

ACTION: Notice of Intent to Prepare a Supplement Analysis; Notice of Cancellation of an Environmental Impact Statement.

SUMMARY: The Department of Energy (DOE) issued the *Programmatic Environmental Impact Statement for Accomplishing Expanded Civilian Nuclear Energy Research and Development and Isotope Production Missions in the United States, Including the Role of the Fast Flux Test Facility* (Nuclear Infrastructure or NI PEIS) in December 2000 to evaluate alternatives for enhancement of DOE's nuclear infrastructure. After considering the analysis in the NI PEIS and other relevant factors, DOE decided to reestablish domestic production of plutonium-238 (Pu-238) for radioisotope power systems (RPSs) to support the National Aeronautics and Space Administration (NASA) and national security missions. Although a Record of Decision (ROD) for the NI PEIS was published in January 2001, DOE has not implemented the decision to date. That decision included using the Advanced Test Reactor at the Idaho National Laboratory (INL) and the High Flux Isotope Reactor at the Oak Ridge National Laboratory (ORNL) in Tennessee to irradiate neptunium-237 (Np-237) targets; using the Radiochemical Engineering Development Center at ORNL to fabricate Np-237 targets and isolate Pu-238; utilizing TA-55 at Los Alamos National Laboratory in New Mexico to purify and encapsulate Pu-238; and, using existing facilities at INL to assemble and test the RPSs. Subsequent to the decision, DOE issued the draft *Environmental Impact Statement for the Proposed Consolidation of Nuclear Operations Related to Production of Radioisotope Power Systems* (Draft Consolidation EIS) in 2005 to consolidate the nuclear operations related to RPSs at a single site. DOE is now proposing to implement that earlier decision based on the NI PEIS and cancel the Consolidation EIS. Prior to proceeding with implementation of that earlier decision, DOE will prepare a Supplement Analysis (SA) in accordance with DOE's National Environmental Policy Act (NEPA) Implementing Procedures to determine whether a supplement to the NI PEIS or a new EIS should be prepared, or that no additional NEPA review is warranted.

FOR FURTHER INFORMATION CONTACT: For further information on the Pu–238 Production Program, please contact: Ms. Alice Caponiti, Program Director for Infrastructure Capabilities, Office of Space and Defense Power Systems (NE–75), Office of Nuclear Energy, U.S. Department of Energy, 1000 Independence Ave. SW., Washington, DC 20585, Phone 301–903–6062, *alice.caponiti@nuclear.energy.gov.*

For information on NEPA analysis for Pu-238 production, please contact: Dr. Rajendra Sharma, NEPA Compliance Officer, Office of Nuclear Energy (NE–31), U.S. Department of Energy, 1000 Independence Ave. SW., Washington, DC 20585, Phone 301–903–2899, *rajendra.sharma@nuclear.energy.gov.*

For general information on the DOE NEPA process, please contact: Ms. Carol Borgstrom, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Ave. SW., Washington, DC 20585, Phone 202–586–4600; leave a message at 1–800–472–2756; facsimile 202–586–7031; or send email to: *asknepa@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the authority of the Atomic Energy Act of 1954, DOE's missions include: (1) Producing isotopes for research and applications in medicine and industry; (2) meeting nuclear material needs of other Federal agencies; and (3) conducting research and development activities for civilian use of nuclear power. As part of these responsibilities, DOE and its predecessor agencies have supplied Pu-238 for U.S. space programs and national security missions for more than five decades. NASA uses RPSs, which are fueled by Pu-238, as the source of

electric power and heat for deep space missions. Nuclear reactors and chemical processing facilities at DOE's Savannah River Site (SRS) historically produced Pu-238. However, the relevant nuclear reactors and the chemical processing facilities and capabilities in F-Canyon and H-Canyon at SRS have been shut down or are no longer available. Lacking any source of domestic production of Pu-238, DOE signed a 5-year contract in 1992 to purchase up to 10 kilograms (22 pounds) of Pu-238 per year from Russia, not to exceed 40 kilograms (88 pounds) total. This purchase agreement was executed through a series of contracts and extensions. Purchases were suspended in 2009 due to a restructuring of the Russian nuclear industry and a need to establish a new contracting arrangement. Although DOE plans to pursue a new agreement under new terms with Russia, this process could delay any delivery of Pu-238 by three or more years, and such an arrangement will always be a risk to NASA missions. As discussed in detail in Section 1.2.2 of the NI PEIS, updated mission guidance from NASA at the time the NI PEIS was prepared indicated that the U.S. inventory of Pu-238 reserved for U.S. space missions was likely to be depleted by 2005. Therefore, DOE needed to review the adequacy of its nuclear infrastructure to meet NASA's demands for Pu-238-fueled RPSs.

Partially in response to this on-going need for Pu-238, DOE evaluated potential enhancements to its nuclear infrastructure that would allow it to meet its responsibilities under the Atomic Energy Act of 1954 for the foreseeable future in the NI PEIS (DOE/EIS–0310), which was issued on December 15, 2000 (65 FR 78484). The NI PEIS evaluated the potential environmental impacts that could result from implementation of reasonable alternatives and options that were considered for enhancement of DOE's nuclear infrastructure. After considering the potential environmental impacts, costs, public comments, nonproliferation issues, and programmatic factors, DOE selected the Preferred Alternative identified in the Final NI PEIS (Alternative 2, Option 7) to reestablish domestic production of Pu-238 to support U.S. space exploration and national security missions. For this purpose, the Advanced Test Reactor (ATR) in Idaho and the High Flux Isotope Reactor (HFIR) at ORNL in Tennessee were to be used to irradiate neptunium-237 (Np-237) targets; this use would not interfere with the primary missions of ATR and HFIR. The Radiochemical Engineering Development Center (REDC) at ORNL was selected for fabricating targets and isolating Pu-238 from the irradiated targets to produce up to five kilograms of Pu-238 per year. The decision also allowed for continued purchase of Pu-238 from Russia to meet near-term space mission requirements while reestablishing domestic production capabilities. The NI PEIS ROD was published on January 26, 2001 (66 FR 7877).

In the ROD, DOE had decided to transport Np-237, after conversion to neptunium oxide (NpO_2), from SRS to REDC at ORNL for target fabrication. After the September 11, 2001, terrorist attack, DOE required additional security and safeguards for special nuclear materials (SNMs). Np-237 is considered an SNM. REDC did not meet requirements for storage of SNMs and it would have required costly upgrades to qualify for safe, secure storage of NpO_2. Two alternative locations which met the requirements for safe storage of NpO_2 were identified, one at each of the DOE's Oak Ridge and Idaho sites. DOE prepared an SA (DOE/EIS–0310–SA–01) for the proposed change of storage location of NpO_2 from REDC to the Y–12 National Security Complex at the Oak Ridge site and/or Argonne National Laboratory-West (renamed Materials and Fuels Complex [MFC]) at the INL site in Idaho to determine whether a supplement to the NI PEIS would be necessary. DOE determined that no additional NEPA documentation was necessary and amended its ROD (69 FR 50180, August 13, 2004) to change the NpO_2 storage location from REDC to the MFC at INL. Consistent with this decision, NpO_2 for use as target material for production of Pu-238 has been transported from SRS to INL and is now stored at MFC.

Proposed Consolidation

By the end of fiscal year 2004, DOE had taken no other action or incurred any expenses to implement the NI PEIS ROD related to production of Pu-238. On November 16, 2004, DOE published a *Notice of Intent to Prepare Environmental Impact Statement for the Proposed Consolidation of Nuclear Operations Related to Production of Radioisotope Power Systems* (69 FR 67139). At the time, DOE's ongoing and planned-to-be-established RPS-related production operations were located at three DOE sites in Idaho, New Mexico, and Tennessee, requiring the transport of radioactive material that could be avoided by consolidation of these activities at a single, highly secure DOE site. The proposed consolidation of these operations, which included production, purification, and encapsulation of Pu-238, would be consistent with DOE's approach on consolidating nuclear materials to enhance security of nuclear materials and reduce risks associated with their transport. The existing and planned operations related to RPS production in November 2004 were as follows: Np-237, used in preparation of targets as the feed material for Pu-238 production, was to be transported from SRS to INL for storage per amendment to the NI PEIS ROD (the shipment is now complete and Np-237 is currently stored at INL); the production capability was planned to be established at ORNL according to the NI PEIS ROD where the targets would be fabricated in REDC, irradiated at ATR in Idaho (supplemented by HFIR in Oak Ridge) and then processed in REDC to recover Pu-238; Pu-238 was then to have been transported to LANL; Pu-238 was to be purified and encapsulated at LANL and transported to INL; and RPS assembly and test operations were to be conducted as ongoing operations at INL in existing facilities.

Under the preferred alternative identified in the Draft Consolidation EIS (DOE/EIS–0373), DOE proposed to consolidate all activities related to RPS production within the secure area at INL. New construction for the Pu-238 production, purification, and encapsulation part of the infrastructure was proposed due to the very limited capability of existing facilities in the secure area. No new construction was required for the assembly and test operations that were already being located in the secure area at INL. The consolidation of the RPS production infrastructure would have included the following activities: (1) Np-237 would be stored at the INL as already decided; (2) Pu-238 production capability (including Np-237 target fabrication and processing) would be established at INL with ATR serving as the primary irradiation facility, and HFIR would be used only as a back-up facility if necessary; (3) Pu-238 operations carried out at LANL would be transferred to INL and (4) the existing facility, the Space and Security Power Systems Facility, at INL would continue to be established and maintained for RPS assembly and test operations as already planned. DOE proposed to use existing facilities for the production of Pu-238 during the time period required for the new facilities at INL to become operational. This period between 2007 and 2011 was referred to in the Consolidation EIS as the ''bridge'' period. The Notice of Availability for

the Draft Consolidation EIS was published on July 1, 2005 (70 FR 38132).

In response to public comments, DOE explored other locations and facilities for the ''bridge'' alternative, in addition to those analyzed in the Draft Consolidation EIS. While review of other reasonable alternatives at DOE sites was in progress, it became evident that refurbishment of existing facilities to make them suitable for the bridge period would not be cost effective. In addition, the escalating cost estimate of proposed new construction at INL did not favor the proposed consolidation. Therefore, DOE postponed issuance of the Final Consolidation EIS while the program reanalyzed its approach to Pu–238 production, with or without consolidation. On the basis of this reanalysis, DOE now believes that consolidation is no longer a reasonable alternative due to very high cost of refurbishment of facilities for the bridge period and for proposed new construction at the consolidation site. Therefore, the Consolidation EIS is hereby cancelled.

Next Steps

In order to restart Pu-238 production, implementation of the decision made in the NI PEIS ROD offers the optimum approach. Since the NI PEIS ROD was issued nearly 12 years ago, DOE will prepare an SA in accordance with DOE's NEPA Implementing Procedures at 10 CFR 1021.314 prior to implementing that decision. There are no changes to the proposed action as analyzed in the NI PEIS. If there are significant new circumstances or information relevant to environmental concerns, DOE will prepare a supplemental EIS in accordance with 10 CFR 1021.314 and the Council on Environmental Quality Regulations at 40 CFR 1502.9. Otherwise, DOE may determine that the 2001 decision can be implemented without further NEPA documentation. DOE's determination will be announced in the **Federal Register** and the SA and the determination will be available to the public and posted on the DOE NEPA Web site. Copies of the determination and SA will be provided upon written request and will be available for inspection in the appropriate DOE public reading room(s) or other appropriate location(s) for a reasonable period of time.

Issued in Washington, DC, on January 2, 2013.

Peter B. Lyons,

Assistant Secretary for Nuclear Energy.

[FR Doc. 2013–00239 Filed 1–8–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–31–000]

Gulf South Pipeline Company, LP; Notice of Application for Abandonment

Take notice that on December 19, 2012, Gulf South Pipeline Company, LP (Gulf South), 9 Greenway Plaza, Suite 2800, Houston, TX 77046, filed in Docket No. CP13–31–000, an application pursuant to sections 157.7 and 157.18 of the Commission's Regulations under the Natural Gas Act (NGA) as amended. Gulf South seeks authority to abandon the Magnolia Gas Storage Facility (Magnolia Facility) at the Napoleonville salt dome in Assumption Parish, Louisiana, and the storage services provided from that facility, all as more fully set forth in the application on file with the Commission and open to public inspection. Gulf South also seeks Commission authority to idle the facilities remaining at the Magnolia Facility which were constructed and placed into natural gas service in 2003, but are not proposed for refunctionalization as transmission facilities in Docket No. CP13–12–000. These facilities will remain physically in place and held for future use.

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.

Any questions concerning this application may be directed to Michael E. McMahon, Senior Vice President and General Counsel; J. Kyle Stephens, Vice President, Regulatory Affairs; or M.L. Gutierrez, Director, Regulatory Affairs, at Boardwalk Pipeline Partners, LP, 9 Greenway Plaza, Suite 2800, Houston, TX 77046, telephone (713) 479–8252, fax (713) 479–1745 or email: *Mike.McMahon@bwpmlp.com, Kyle.Stephens@bwpmlp.com* or *Nell.Gutierrez@bwpmlp.com.*

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, before the comment date of this notice, 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 14 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.

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 commenter's 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 commenter's will not be required to serve copies of filed documents on all other parties. However, the non-party commentary, 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.

Comment Date: 5:00 p.m. Eastern Time on January 24, 2013.

Dated: January 3, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–00264 Filed 1–8–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL13–35–000]

Southwestern Public Service Company; Southwest Power Pool, Inc.; Notice of Complaint

Take notice that on December 31, 2012, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e (2000), Southwestern Public Service Company (Complainant) filed a formal complaint against Southwest Power Pool, Inc. (Respondent), requesting the establishment of a January 1, 2013 refund effective date and a finding from the Federal Energy Regulatory Commission (Commission) that the Respondent has violated the FPA by implementing a 40 percent increase in the Tri-County Electric Cooperative, Inc. Annual Transmission Revenue Requirement through an annual update under transmission formula rate protocols that are not just and reasonable.

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 January 22, 2013.

Dated: January 3, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–00267 Filed 1–8–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL13–34–000]

New England States Committee on Electricity v. ISO New England Inc.; Notice of Complaint

Take notice that on December 28, 2012, pursuant to section 206 of the Rules and Practice and Procedure, 18 CFR 385.206 and sections 206 of the Federal Power Act, 16 U.S.C. 824(e), New England States Committee on Electricity (Complainant) filed a formal complaint against ISO New England Inc. (Respondent) alleging that the Respondent's proposed tariffs governing the Forward Capacity market (FCM) are unjust and unreasonable.

The Complainant certifies that copies of the complaint were served on the contacts for the Respondent and the New England Power Pool as listed on the Commission's list of Corporate Officials and on parties and regulatory agencies the Complainant reasonably expects to be affected by this Complaint, including all of the parties that have intervened in Docket ER12–953–001.

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 January 17, 2013.

Dated: January 3, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–00266 Filed 1–8–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–2–000]

Sabine Pass Liquefaction, LLC and Sabine Pass LNG, L.P.; Notice of Intent To Prepare an Environmental Assessment for the Proposed Sabine Pass Liquefaction Modification 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 Sabine Pass Liquefaction Modification Project (Project) involving the modification of facilities for Sabine Pass Liquefaction LLC and Sabine Pass LNG (Sabine Pass) in Cameron County, Louisiana. The Project facilities, described below, are proposed in support of the Sabine Pass facilities that were previously authorized (CP11–72–000) and are currently under construction. 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 need to be evaluated in the EA. Please note that the

scoping period will close on February 4, 2013.

Comments on the Project may be submitted in written form or electronically, as described in the Public Participation section of this notice. This notice is being sent to the Commission's current environmental mailing for this Project. State and local government representatives are asked to notify their constituents of this proposed Project and encourage them to comment on their areas of concern.

Summary of the Proposed Project

The Project would consist of the following facilities:

- Construction and operation of a heavies removal unit (HRU) to be located within the existing Sabine Pass facility;
- condensate storage, metering and send-out facilities;
- four gas pipeline meter stations;
- additional workspaces, laydown and parking areas;
- construction and operation of two additional water supply pipelines to be installed via horizontal directional drill (HDD) and the associated workspace for the HDD entry and exit sites; and
- natural gas liquids (NGL) truck loading facilities.

A Project location map depicting the proposed facilities is attached to this notice as Appendix 1.[1]

Land Requirements for Construction

The HRU, condensate storage, and metering facilities would be located within the existing Sabine Pass LNG Import Terminal (SPLNG Terminal) property. No additional land would be required for these facilities. The additional workspace and parking would affect approximately 153.6 acres of land outside of the boundary of the SPLNG Terminal. Construction and operation of the two additional water supply pipelines would temporarily impact approximately 0.92 acres of additional land in an upland area also located outside the SPLNG Terminal.

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[2] 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 results of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- Land use;
- Water resources, fisheries, and wetlands;
- Cultural resources;
- Vegetation and wildlife;
- Air quality and noise;
- Endangered and threatened species;
- Reliability; and
- Public safety.

We will also evaluate reasonable alternatives to the proposed 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 also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before making our recommendation to the Commission. To ensure your comments are considered, please carefully follow the instructions in the Public Participation section beginning on page 4.

With this notice, we are asking agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EA. Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with applicable State Historic Preservation Office (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the Project's potential effects on historic properties.[3] We will define the Project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project is further developed. On natural gas projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this Project will document our findings on the impacts on historic properties and summarize the status on consultations under section 106.

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 in your comments so that they will be received in Washington, DC on or before February 7, 2013.

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the project docket number (CP13–2–000) with your submission. The Commission encourages electronic filing of comments and has expert eFiling staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You may file your comments electronically by using the *eComment* feature, which is located on the Commission's Web site at *www.ferc.gov* under the link to *Documents and Filings.* An eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments electronically by using the *eFiling* feature, which is located on the Commission's Web site at *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

[1] The appendices referenced in this notice are not printed in the **Federal Register**, but they are being provided to all those who receive this notice in the mail. Copies of the NOI can be obtained from the Commission's Web site at the ''eLibrary'' link, Commission's Public Reference Room, or by calling (202) 502–8371. For instructions on connecting to eLibrary, refer to the end of this notice.

[2] ''We'', ''us'', and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

[3] The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Historic properties are defined in those regulations as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register for Historic Places.

submission. New eFiling users must first create an account by clicking on ''eRegister''. You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing''; or

(3) You may file a paper copy of your comments at 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; interested Indian tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, 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 proposed project.

If the EA is published for distribution, 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 2).

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 included in the User's Guide under the ''e-filing'' link on the Commission's 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 at *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., CP13–2). 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 now 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: January 3, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–00263 Filed 1–8–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14459–000]

EH California Hydro, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments and Motions To Intervene

On October 11, 2012, EH California Hydro, LLC 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 Lake Clementine Hydro Project to be located at the U.S, Corps of Engineer's North Fork dam on the North Fork of the American River, near the City of Auburn, Placer County, California. 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.

To harness the water that now flows over the spillway of the North Fork Dam, the applicant plans to install two hydro generating units, with a total installed capacity of 6.9 megawatts and an estimated annual generation of 27.8 gigawatt-hours. The applicant's plans include building a submerged morning glory intake; a penstock siphon through the dam's left abutment, a silo powerhouse, and a tailrace.

Applicant Contact: Mr. John R. Collins, EH California Hydro, LLC, 5425 Wisconsin Avenue, Suite 600, Chevy Chase, Maryland 20815; phone: (301) 718–4433.

FERC Contact: Jim Fargo at *james.fargo@ferc.gov;* phone: (202) 502–6095.

Competing Application: This application competes with Project No. 13432–002 filed October 2, 2012. Competing applications had to be filed on or before December 9, 2012.

Deadline for filing comments or motions to intervene: 60 days from the issuance of this notice. Comments and motions to intervene 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–14459) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: January 3, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–00261 Filed 1–8–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR13–21–000]

Minnesota Energy Resources Corporation; Notice of Petition for Rate Approval

Take notice that on January 2, 2013, Minnesota Energy Resources Corporation (MERC) filed a rate election pursuant to section 284.123(b)(1) of the Commission's regulations and to revise its Statement of Operating Conditions. MERC proposes to utilize rates that conform to the recently revised rates approved by the Minnesota Public Utilities Commission, as more fully detailed in the petition.

Any person desiring to participate in this rate 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 Monday, January 14, 2013.

Dated: January 3, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–00258 Filed 1–8–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR13–20–000]

ONEOK WesTex Transmission, L.L.C.; Notice of Petition for Rate Approval

Take notice that on December 21, 2012, ONEOK WesTex Transmission, L.L.C. (OWT) filed a rate election pursuant to section 284.123(b)(1) of the Commissions regulations. OWT states the rate election for interruptible transportation service is based on rates for comparable service on file with the Railroad Commission of Texas. OWT states that the rate election would allow a modest increase to its existing transportation and fuel rates, however, OWT does not propose to change its existing transportation and fuel rates, as more fully detailed in the petition.

Any person desiring to participate in this rate 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 Monday, January 14, 2013.

Dated: January 3, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–00262 Filed 1–8–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IS12–302–000]

Enterprise TE Products Pipeline Company LLC; Notice of Change in Date of Settlement Conference

Take notice that the informal settlement conference that was to be convened in this proceeding on January 3, 2013, will now be convened commencing at 10:00 a.m. on January 10, 2013, at the offices of the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, for the purpose of exploring the possible settlement of the above-referenced dockets.

Any party, as defined by 18 CFR 385.102(c), or any participant as defined by 8 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214).

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–502–8659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

For additional information, please contact James Keegan, *james.keegan@ferc.gov,* 202–502–8158 or Gary Denkinger, *marc.denkinger@ferc.gov,* 202–502–8662.

Dated: January 3, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–00260 Filed 1–8–13; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2006–0243; FRL–9374–1]

1-Methyl-3,5,7-Triaza-1-Azoniatricyclodecane Chloride (Busan1024); Amendment To Terminate Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's order for the amendment to terminate uses, voluntarily requested by the registrant and accepted by the Agency, of products containing the pesticide, Busan 1024, pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This cancellation order follows an August 13, 2008 **Federal Register** Notice of Receipt of Request for Amendments to Delete Uses from the registrant listed in Table 2, to voluntarily amend to terminate uses of this product registration. This is the last product containing this pesticide registered for use in the United States. In the August 13, 2008 notice, EPA indicated that it would issue an order implementing the amendment to terminate uses, unless the Agency received substantive comments within the 30-day comment period that would merit its further review of this request, or unless the registrant withdrew the request within this period. The Agency did not receive any comments on the notice. Further, the registrant did not withdraw the request. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested amendment to terminate uses. Any distribution, sale, or use of the products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

DATES: The cancellations are effective January 9, 2013.

FOR FURTHER INFORMATION CONTACT: Elizabeth Hernandez, Antimicrobials Division (7510P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 347–0241; fax number: (703) 308–6467; email address: *hernandez.elizabeth@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can i get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2006–0243, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. 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 OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. What action is the agency taking?

This notice announces the amendment to terminate uses, as requested by the registrant, of a product registered under FIFRA section 3. This registration is listed in Table 1 of this unit.

TABLE 1—1-METHYL-3,5,7-TRIAZA-1-AZONIATRICYCLODECANE CHLORIDE (BUSAN1024) PRODUCT CANCELLATION

EPA Registration No.	Product name	Company	Uses to be terminated
1448–92	Busan 1024	Buckman Laboratories, Inc	Laundry starch, petroleum production and recovery, textiles, papermaking chemicals and coatings, metalworking fluids.

Table 2 of this unit includes the name and address of record for the registrant of the product in Table 1 of this unit.

TABLE 2—REGISTRANT OF CANCELLED AND/OR AMENDED PRODUCT

EPA Company No.	Company name and address
1448	Buckman Laboratories, Inc. 1256 North McLean Blvd. Memphis, TN 38134.

III. Summary of Public Comments Received and Agency Response to Comments

During the public comment period provided, EPA received no comments in response to the August 13, 2008 **Federal Register** notice announcing the Agency's receipt of the request for voluntary amendment to terminate uses of Busan 1024.

IV. Cancellation Order

Pursuant to FIFRA section 6(f), EPA hereby approves the requested amendment to terminate uses of 1-Methyl-3,5,7-Triaza-1-Azoniatricyclodecane Chloride (Busan 1024) registration identified in Table 1 of Unit II. Accordingly, the Agency orders that the product registration identified in Table 1 of Unit II. is hereby amended to terminate the affected uses. Any distribution, sale, or use of existing stocks of the product identified in Table 1 of Unit II. in a manner inconsistent with any of the Provisions for Disposition of Existing Stocks set forth in Unit VI. will be considered a violation of FIFRA.

V. What is the agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the Administrator may approve such a request.

VI. Provisions for Disposition of Existing Stocks

The Agency has authorized the registrants to sell or distribute product under the previously approved labeling for a period of 12 months after approval of the revision, unless other restrictions

have been imposed, as in special review actions.

EPA's existing stocks policy (56 FR 29362) provides that: ''If a registrant requests to voluntarily cancel a registration where the Agency has identified no particular risk concerns, the registrant has complied with all applicable conditions of reregistration, conditional registration, and data call ins, and the registration is not subject to a Registration Standard, Label Improvement Program, or reregistration decision, the Agency will generally permit a registrant to sell or distribute existing stocks for 1 year after the cancellation request was received. Persons other than registrants will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted.''

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. The effective date of this cancellation is January 9, 2013. The cancellation order that is the subject of this notice includes the following existing stock provisions:

The registrant may sell and distribute existing stocks of the product listed in Table 1 until January 9, 2014. Persons other than the registrant may sell and distribute existing stocks of the product listed in Table 1 until exhausted. Use of the product listed in Table 1 may continue until existing stocks are exhausted, provided that such use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled product.

List of Subjects

Environmental protection, Pesticides and pests, Busan 1024, 1-Methyl-3,5,7-Triaza-1-Azoniatricyclodecane Chloride.

Dated: December 18, 2012.

Jennifer McLain,

Acting Director, Antimicrobials Division, Office of Pesticide Programs.

[FR Doc. 2013–00265 Filed 1–8–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2012–0979; FRL–9375–1]

Availability of Draft Chemical Risk Assessments; Public Comment Opportunity

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: With this document, EPA is announcing the availability of and opening the 60-day public comment period for several draft chemical risk assessments. These draft risk assessments address five of the initial seven chemicals from the Agency's TSCA Work Plan identified on March 1, 2012, for assessment during 2012. The chemicals are antimony trioxide, methylene chloride, n-methylpyrrolidone, trichloroethylene, and 1,3,4,6,7,8-hexahydro-4,6,6,7,8,8,-hexamethylcyclopenta[g]-2-benzopyran. Methylene chloride and n-methylpyrrolidone are included in a single docket because both assessments will be addressed by the same peer review panel. EPA is also asking the public for nominations of expert peer reviewers and to submit names with contact information (full name, address, affiliation, telephone, and email) within 30 days of the opening of this public comment period. The nominations of expert peer reviewers from the public will be relayed to the independent peer review contractor setting up the individual peer review panels. Public comments submitted on these draft risk assessments will be included in materials submitted to peer review panels for their reviews of the assessments after this public comment period closes.

DATES: Comments for nominations of peer reviewers must be received on or before February 8, 2013 and comments on the draft assessments and the charge questions for the external peer reviews must be received on or before March 11, 2013.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number for the corresponding chemical risk assessment as identified in this document, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. ATTN: Docket ID Number [Please include the applicable docket ID number as identified in this document]. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information. To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Stanley Barone, Risk Assessment Division (7403M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–1169; fax number: (202) 564–7450; email address: *barone.stan@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including those interested in environmental and human health; the chemical industry; chemical users; consumer product companies and members of the public interested in the assessment of chemical risks. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

II. What authorities apply to this action?

In the Agency's February 2012 *TSCA Work Plan Chemicals Methods Document (http://www.epa.gov/oppt/existingchemicals/pubs/wpmethods.pdf),* released to the public on March 1, 2012, EPA described the two-step process the Agency used to identify potential candidate chemicals for near-term review and assessment under the Toxic Substances Control Act (TSCA) (15 U.S.C. 2601, *et seq.*). The Agency announced its intent to use the TSCA Work Plan to help focus and direct the activities of the Existing Chemicals Program in the Office of Pollution Prevention and Toxics (OPPT). EPA also identified an initial group of seven of the Work Plan Chemicals to begin assessment in 2012. EPA invited public comment throughout this process through a non-regulatory docket created for this activity, EPA–HQ–OPPT–2011–0516,

which can be accessed online at *http://www.regulations.gov.*

As described in the *Methods Document,* EPA notes that identification of a chemical as a TSCA Work Plan Chemical does not itself constitute a finding by the Agency that the chemical presents a risk to human health or the environment. Rather, identification of a chemical as a TSCA Work Plan Chemical indicates only that the Agency intends to consider it for further review.

III. What action is the agency taking?

EPA is announcing the availability of and opening the public comment period for the following draft chemical risk assessments. EPA also invites comments on whether there are other uses that may result in high potential consumer exposures EPA should consider as future assessment and/or collection priorities for these chemicals. This unit identifies the individual draft chemical risk assessments by title, docket ID number, and chemical or chemicals covered. Use the specific docket ID number provided in this unit to locate a copy of the chemical-specific document, as well as to submit comments via *http://www.regulations.gov.*

A. Docket ID Number EPA–HQ–OPPT–2012–0722

Title: Availability of Draft Chemical Risk Assessments; Public Comment Opportunity: 1,3,4,6,7,8-Hexahydro-4,6,6,7,8,8,-hexamethylcyclopenta[g]-2-benzopyran (HHCB) (CASRN 1222–05–5).

Chemical Covered: 1,3,4,6,7,8-Hexahydro-4,6,6,7,8,8,-hexamethylcyclopenta[g]-2-benzopyran (HHCB; CASRN 1222–05–5).

Summary: HHCB is a synthetic polycyclic musk used as an ingredient in a wide range of consumer products including perfumes, cosmetics, shampoos, lotions, detergents, fabric softeners, and cleaning agents. The draft assessment focuses on environmental risk due to release of HHCB to the aquatic and terrestrial environment from all combined uses. Human health risks have been evaluated previously and are summarized in this draft assessment.

For HHCB, EPA is asking for nominations of peer reviewers who are experts in the following areas: Aquatic ecotoxicology, terrestrial ecotoxicology, fate and biodegradation, fate and bioaccumulation, environmental risk assessment (aquatic and terrestrial), and analytical chemistry of organic waste water contaminants.

B. Docket ID Number EPA–HQ–OPPT–2012–0723

Title: Availability of Draft Chemical Risk Assessments; Public Comment Opportunity: Trichloroethylene (CASRN 79–01–6).

Chemicals Covered: Trichloroethylene (TCE; CASRN 79–01–6).

Summary: The draft assessment focuses on uses of TCE as a degreaser and in consumer products used by individuals in the arts/crafts field. Given the range of endpoints (cancer; non-cancer, including potential effects on the developing fetus), the susceptible populations addressed are children and adults of all ages (including pregnant women). Thus, the draft assessment focuses on all human lifestages.

For TCE, EPA is asking for nominations of peer reviewers who are experts in the following areas: Toxicology of TCE (developmental cardiotoxicity, immunotoxicology, reproductive toxicology, and cancer biology), expertise in physiologically based pharmaco-kinetics modeling for TCE, exposure of volatile organics, experts on use of volatiles as solvent degreasers and in the arts/crafts field, chemical/environmental risk assessment experts, experts familiar with environmental release data (i.e., TRI, NEI) and associated modeling/interpretation.

C. Docket ID Number EPA–HQ–OPPT–2012–0724

Title: Availability of Draft Chemical Risk Assessments; Public Comment Opportunity: Antimony Trioxide (CASRN 1309–64–4).

Chemical Covered: Antimony trioxide (ATO; CASRN 1309–64–4).

Summary: This draft assessment focuses on the ecological hazards that may be associated with ATO use in flame retardants. Human health risks for the flame retardant use have been evaluated previously and are summarized in this draft assessment. Because ATO use in plastics was previously evaluated for human health and the environment, that use scenario is not evaluated here.

For ATO, EPA is asking for nominations of peer reviewers who are experts in the following areas: Exposure modeling, aquatic ecotoxicology, terrestrial ecotoxicology, inorganic chemistry addressing water and sediment issues, and ground water.

D. Docket ID Number EPA–HQ–OPPT–2012–0725

Title: Availability of Draft Chemical Risk Assessments; Public Comment Opportunity: Methylene Chloride (dichloromethane, DCM; CASRN 75–09–2) and N-Methylpyrrolidone (NMP; CASRN 872–50–4).

Chemicals Covered: Methylene Chloride (dichloromethane, DCM; CASRN 75–09–2) and N-Methylpyrrolidone (NMP; CASRN 872–50–4).

Summary: These related draft assessments focus on the use of DCM and NMP in paint stripping and will be addressed by the same peer review panel. With regard to DCM, the draft assessment focuses on inhalation exposure to consumers and workers, and addresses human health concerns for both cancer and non-cancer effects. The low concern for environmental effects of DCM is discussed in the draft assessment. With regard to NMP, the draft assessment focuses on inhalation and dermal exposure to consumers and workers. The low concern for environmental effects of NMP is discussed in the draft assessment.

For DCM and NMP, EPA is asking for nominations of peer reviewers who are experts in the following areas: Inhalation toxicology, toxicokinetics/PBPK modeling, dermal toxicology, neurotoxicology, immunotoxicology, developmental and reproductive toxicology, cancer biology, expertise in U.S. consumer modeling (inhalation and dermal), expertise in occupational exposure assessment (inhalation and dermal) especially as related to volatile organic chemicals.

The draft risk assessments on the two remaining chemicals from the initial group of seven Work Plan chemicals scheduled to begin assessment in 2012—the long- and medium-chain chlorinated paraffins—are on a different schedule for completion and will be made available for public comment through another **Federal Register** notice issued on a later date.

V. What is the next step?

The list of candidate peer reviewers, those nominated by the public as well as those identified by a contractor, will be made available in the **Federal Register** for public comment. After a 30-day comment period, informed by any comments, the contractor will select the peer reviewers. The detailed Peer Review Plans for the draft assessments are accessible through the Agency's Peer Review Agenda Web site at *http://cfpub.epa.gov/si/si_public_pr_agenda.cfm.* EPA will consider comments received from the public and the subsequent peer review when finalizing the individual chemical risk assessments and will describe in a written report how EPA addressed public and reviewer comments in the

final assessments. EPA will issue another **Federal Register** notice to announce the availability of the final risk assessments. If you have any questions about any of these risk assessments or the Agency's programs in general, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

Environmental protection, Reporting and recordkeeping requirements.

Dated: January 3, 2013.

Wendy C. Hamnett,

Director, Office of Pollution Prevention and Toxics.

[FR Doc. 2013–00268 Filed 1–8–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9769–2]

National Environmental Education Advisory Council

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Under the Federal Advisory Committee Act, EPA gives notice of a teleconference meeting of the National Environmental Education Advisory Council (NEEAC). The NEEAC was created by Congress to advise, consult with, and make recommendations to the Administrator of the Environmental Protection Agency (EPA) on matters related to activities, functions and policies of EPA under the National Environmental Education Act (the Act).

The purpose of this teleconference is to discuss specific topics of relevance for consideration by the council in order to provide advice and insights to the Agency on environmental education.

DATES: The National Environmental Education Advisory Council will hold a public teleconference on Monday, January 28, 2013, from 2:00 p.m. until 3:30 p.m. Eastern Daylight Time.

FOR FURTHER INFORMATION CONTACT: Javier Araujo, Designated Federal Officer, *araujo.javier@epa.gov,* 202–564–2642, U.S. EPA, Office of Environmental Education, Ariel Rios North Room 1426, 1200 Pennsylvania Avenue NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: Members of the public wishing to gain access to the teleconference, make brief oral comments, or provide a written statement to the NEEAC must contact Javier Araujo, Designated Federal Officer, at *araujo.javier@epa.gov* or 202–564–2642 by January 14, 2013.

Meeting Access: For information on access or services for individuals with disabilities or to request accommodations please contact Javier Araujo at *araujo.javier@epa.gov* or 202–564–2642, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Stephanie Owens,

Deputy Associate Administrator, Office of External Affairs and Environmental Education.

[FR Doc. 2013–00259 Filed 1–8–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9769–1]

Notice of Administrative Settlement Agreement for Recovery of Past and Future Response Costs Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as Amended

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), notice is hereby given that a proposed administrative settlement agreement for recovery of past and future response costs (''Proposed Agreement'') associated with the DuPont-Newport Superfund Site, Newcastle County, Delaware, was executed by the Environmental Protection Agency (''EPA'') and by the United States Department of Justice (''DOJ'') pursuant to the authority of the Attorney General of the United States to settle and compromise claims of the United States. The Proposed Agreement is now subject to public comment, after which EPA and DOJ may modify or withdraw their consent if comments received disclose facts or considerations that indicate that the Proposed Agreement is inappropriate, improper, or inadequate. The Proposed Agreement would resolve potential EPA claims under Section 107(a) of CERCLA, against E.I. DuPont de Nemours and Company and BASF Corporation (''Settling Parties''). The Proposed Agreement would require Settling Parties to reimburse EPA $178,646.09 for past response costs paid by EPA or DOJ on behalf of EPA and to pay future response costs for the Site.

For thirty (30) days following the date of publication of this notice, EPA will receive written comments relating to the Proposed Agreement. EPA's response to any comments received will be available for public inspection at the U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103.

DATES: Comments must be submitted on or before February 8, 2013.

ADDRESSES: The Proposed Agreement and additional background information relating to the Proposed Agreement are available for public inspection at the U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103. A copy of the Proposed Agreement may be obtained from Mary E. Rugala (3RC43), Senior Assistant Regional Counsel, U.S. Environmental Protection Agency, 1650 Arch Street, Philadelphia, PA 19103. Comments should reference the ''DuPont-Newport Superfund Site, Proposed Administrative Settlement Agreement for Recovery of Past and Future Response Costs'' and ''EPA Docket No. CERC–03–2013–0003CR,'' and should be forwarded to Mary E. Rugala at the above address.

FOR FURTHER INFORMATION CONTACT: Mary E. Rugala (3RC43), U.S. Environmental Protection Agency, 1650 Arch Street, Philadelphia, PA 19103, Phone: (215) 814–2686; *rugala.mary@epa.gov*

Dated: December 18, 2012.

Ronald J. Borsellino,

Director, Hazardous Site Cleanup Division, U.S. Environmental Protection Agency, Region III.

[FR Doc. 2013–00250 Filed 1–8–13; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice: 2013–0100]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the U.S.

ACTION: Submission for OMB review and comments request.

Form Title: EIB 92–53 Small Business Multi-Buyer Export Credit Insurance Policy Enhanced Assignment of Policy Proceeds.

SUMMARY: The Export Import Bank of the U.S. (Ex-Im Bank) pursuant to the Export Import Bank Act of 1945, as amended (12 U.S.C. 635, et seq.), facilitates the finance of export of U.S.

goods and services. By neutralizing the effect of export credit insurance and guarantees offered by foreign governments and by absorbing credit risks that the private sector will not accept, Ex-Im Bank enables U.S. exporters to compete fairly in foreign markets on the basis of price and product. This collection of information is used by exporters to convey legal rights to, and describe the duties and obligations that have to be met by their financial institution lender in order to share insurance policy proceeds from Ex-Im Bank approved insurance claims.

The changes that were made to this agreement include language clarifications and changes to the descriptions of the rights and obligations of the parties to the agreement. The changes were made to provide clarity and specificity for exporters/lenders based on issues that have arisen through either exporter/lender inquiries or interpretations made during processing of claims. The language of the existing agreement frequently results in improper documentation by our lender partners which increases claim processing times and causes significant resource burdens to Ex-Im Bank. The language in the existing agreement also creates the potential for fraud, resulting in losses to Ex-Im Bank. Recent changes to the Ex-Im Bank Charter (12 U.S.C. 635(i)(2)(i) and a–6(b)) mandate that Ex-Im Bank must develop practices to identify, prevent and monitor for potential fraud. Therefore changes to the agreement were required to comply with this mandate and protect the U.S. taxpayer from fraud related loss. In addition, the changes to this agreement protect Ex-Im Bank's lender partners who are parties to the agreement, allowing us to maintain our relationships with our lender partners, and fulfill our agency mission to finance exports (through our lender partners) and create jobs. Due to the Ex-Im Bank Charter mandate to reduce fraud, the changes in the form need to be immediately disseminated to exporters/lenders so that they can change practices where needed, especially where documentation of export transactions is involved.

This application can be viewed at *www.exim.gov/pub/pending/EIB92-53.PDF*

DATES: Comments should be received on or before February 8, 2013 to be assured of consideration.

ADDRESSES: Comments may be submitted through *WWW.Regulations.Gov* or mailed to Walter Kosciow, Export Import Bank of the United States, 811 Vermont Ave. NW., Washington, DC 20571.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 92–53 Small Business Multi-Buyer Export Credit Insurance Policy Enhanced Assignment of Policy Proceeds.

OMB Number: 3048–XXXX.

Type of Review: New.

Need and Use: The form represents the exporter's directive to Ex-Im Bank to whom and where the insurance proceeds should be sent, and also describes the duties and obligations that have to be met by the financial institution in order to share in the policy proceeds. The form is typically part of the documentation required by financial institution lenders in order to provide financing of an exporter's foreign accounts receivable. Foreign accounts receivable insured by Ex-Im Bank represent stronger collateral to secure the financing. By recording which policyholders have completed this form, Ex-Im Bank is able to determine how many of its exporter policyholders require Ex-Im Bank insurance policies to support lender financing.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Estimated Respondents per Year: 110.

Frequency of Responses: Yearly.

Estimated Hours per Response: 15 minutes.

Estimated Annual Burden Hours 27.5 hours.

Reviewing Time in Hours: 1 hours.

Responses per year: 110.

Review Time per Year: 110 hours.

Average Wages per Hour: $32.50.

Average Cost per Year: $3,575.00.

Benefits and Overhead: 28%–$1000.

Total Government Cost: $4,575.00.

The annual cost to the Government would be $4,575.00.

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. 2013–00216 Filed 1–8–13; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

[Public Notice 2013–0101]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB Review and Comments Request.

Form Title: EIB 92–32 Notification by Insured of Amounts Payable Under Single-Buyer Export Credit Insurance Policy

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

This form represents the exporter's directive to Ex-Im Bank to whom and where the insurance proceeds should be sent. The forms are typically part of the documentation required by financial institution lenders in order to provide financing of an exporter's foreign accounts receivable. Foreign accounts receivable insured by Ex-Im Bank represent stronger collateral to secure the financing. By recording which policyholders have completed this form, Ex-Im Bank is able to determine how many of its exporter policyholders require Ex-Im Bank insurance policies to support lender financing.

The application can be reviewed at: *www.exim.gov/pub/pending/eib92-32.pdf* Single Buyer Export Credit Insurance Policy.

DATES: Comments should be received on or before March 11, 2013 to be assured of consideration.

ADDRESSES: Comments maybe submitted electronically on *www.regulations.gov* or by mail to Arnold Chow, Export-Import Bank of the United States, 811 Vermont Ave. NW., Washington, DC 20571.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 92–32 Single Buyer Export Credit Insurance Policy.

OMB Number: 3048–XXXX.

Type of Review: New.

Need and Use: The information requested enables the applicant to provide Ex-Im Bank with the information necessary to obtain legislatively required assurance of repayment and fulfills other statutory requirements.

Annual Number of Respondents: 150.

Estimated Time per Respondent: 1 hour.

Frequency of Reporting or Use: Annually.

Government Review Time: 1 hour.

Total Hours: 150 hours.

Cost to the Government: $16,320.

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. 2013–00218 Filed 1–8–13; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

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. 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 PRA comments should be submitted on or before March 11, 2013. 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 contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to the Federal Communications Commission via email to *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0562.

Title: Section 76.916, Petition for Recertification.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; State, local or tribal government.

Number of Respondents and Responses: 10 respondents; 15responses.

Estimated Time per Response: 10 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 4(i) and 623 of the Communications Act of 1934, as amended.

Total Annual Burden: 150 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: 47 CFR 76.916 provides that a franchising authority wishing to assume jurisdiction to regulate basic cable service and associated rates after its request for certification has been denied or revoked, may file a petition for recertification with the Commission. The petition must be served on the cable operator and on any interested party that participated in the proceeding denying or revoking the original certification. Oppositions to petitions may be filed within 15 days after the petition is filed. Replies may be filed within seven days of filing of oppositions.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2013–00249 Filed 1–8–13; 8:45 am]

BILLING CODE 6712–01–P

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 February 8, 2013. 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* 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: 3060–0316.

Title: 47 CFR 76.1700, Records to be maintained locally by Cable System Operators; 76.1702, Equal Employment Opportunity; 76.1703, Commercial Records on Children's Programs; 76.170, Leased Access; 76.1711, Emergency Alert System (EAS) Tests and Activation.

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: 3,000 respondents and 3,000 responses.

Estimated Hours per Response: 25 hours.

Frequency of Response: Recordkeeping requirement.

Total Annual Burden: 75,000 hours.

Total Annual Cost: None.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Sections 4(i), 303 and 308 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: Confidentiality is not required with this collection of information.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: The Commission is revising this collection to remove the requirements for 47 CFR 76.1704(a) from this collection. It has been discovered that this rule section has already been approved under collection 3060–0289, so we are removing the requirements for Section 76.1704(a) from this collection to avoid duplication.

OMB Control Number: 3060–0419.

Title: Network Non-duplication Protection and Syndication Exclusivity: Sections 76.94, Notification; 76.95, Exceptions; 76.105, Notifications; 76.106, Exceptions; 76.107, Exclusivity Contracts; and 76.1609, Non-Duplication and Syndicated Exclusivity.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 5,555 respondents; 208,460 responses.

Estimated Time per Response: 0.5–2.0 hours.

Frequency of Response: On occasion reporting requirement; One time reporting requirement; Third party disclosure requirement.

Obligation To Respond: Required to obtain or retain benefits. The statutory authority for this Information collection is contained in Section 4(i) of the Communications Act of 1934, as amended.

Total Annual Burden: 193,012.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The Commission is requesting that the Office of Management and Budget (OMB) approve the revision of this collection for a three year time period. This collection is being revised to receive approval for the information collection requirements that are contain in 47 CFR 76.105(b). Section 76.105(b) states that broadcasters entering into contracts on or after August 18, 1988, which contain syndicated exclusivity protection shall notify affected cable systems within sixty calendar days of the signing of such a contract. Broadcasters who have entered into contracts prior to August 18, 1988, and who comply with the requirements specified in § 76.109 shall notify affected cable systems on or before June 19, 1989.

OMB Control Number: 3060–0844.

Title: Carriage of the Transmissions of Television Broadcast Stations: Section 76.57, Channel positioning; Section 76.59, Modification of television markets; Section 76.61, Disputes concerning carriage; Section 76.64, Retransmission consent.

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: 818 respondents and 15,932 responses.

Estimated Time per Response: 1 to 40 hrs.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 1, 4(i) and (j), 325, 336, 614 and 615 of the Communications Act of 1934, as amended.

Total Annual Burden: 21,372 hours.

Total Annual Cost: $43,972.

Nature and Extent of Confidentiality: No need for confidentiality required with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: The Commission is requesting that the Office of Management and Budget (OMB) approve the revision of this collection for a three year time period. This collection is being revised to receive approval for the information collection requirements that are contain in 47 CFR 76.57(e), as well as modified to remove collections which have already been approved under OMB Control Nos. 3060–0419 (Network Non-duplication Protection and Syndication Exclusivity: Sections 76.94, Notification; 76.95, Exceptions; 76.105, Notifications; 76.106, Exceptions; 76.107, Exclusivity Contracts; and 76.1609, Non Duplication and Syndicated Exclusivity), 3060–0548 (Cable Television System Signal Carriage Obligation Recordkeeping: Section 76.1708, Principal Headend; Sections 76.1709 and 76.1620, Availability of Signals; Section 76.1614, Identification of Must-Carry Signals), and 3060–0652 (Section 76.309, Customer Service Obligations; Section 76.1602, Customer Service—General Information, Section 76.1603, Customer Service—Rate and Service Changes and 76.1619, Information and Subscriber Bills).

OMB Control No.: 3060–0678.

Title: Part 25 of the Federal Communications Commission's Rules Governing the Licensing of, and Spectrum Usage by, Commercial Earth Stations and Space Stations.

Form No.: FCC Form 312; Schedule S.

Type of Review: Revision of a currently approved information collection.

Respondents: Business or other for-profit.

Number of Respondents: 1,248 respondents; 1,248 responses.

Estimated Time per Response: 0.25–22 hours per response.

Frequency of Response: On occasion and annual reporting requirements; third-party disclosure requirement; recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in 47 U.S.C. 154, 301, 302, 303, 307, 309, 332 and 705 unless otherwise noted. *Total Annual Burden:* 9,765 hours.

Annual Cost Burden: $22,375,860.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: In general, there is no need for

confidentiality with this collection of information.

Needs and Uses: On September 28, 2012, the Federal Communications Commission (''Commission'') released a Report and Order (R&O) titled, ''In the Matter of 2006 Biennial Regulatory Review—Revision of Part 25,'' FCC 12–116. With two exceptions, the amendments are non-substantive; that is, they neither impose new requirements nor eliminate or alter existing requirements. The two substantive amendments adopted in the R&O do not increase paperwork burdens. Therefore, the number of respondents, number of responses, annual burden hours and annual costs have not been amended from the previous submission to the Office of Management and Budget (OMB) on September 2, 2010.

In this Report and Order, the Commission amended various provisions of Part 25 of its rules pertaining to licensing and operation of satellite service radio stations. Among other things, the Commission added definitions for several technical terms that appear in Part 25 but are not defined there, and it deleted definitions of terms that are not used in Part 25. The Commission also eliminated redundant text from several rule sections, revised the wording of other provisions that were ambiguous or unduly confusing, updated cross-references to Commission rules or recommendations of the International Telecommunication Union (ITU), and corrected grammatical, spelling, and typographical errors. The two substantive amendments the Commission adopted in this Report and Order amended the rules in minor ways by: (1) Eliminating requirements to identify a radio service and station location in correspondence in 47 CFR 25.110 and (2) codifying an established practice of allowing applicants to cross-reference, rather than re-submit, previously filed information regarding non-U.S.-licensed satellites in 47 CFR 25.137. Collectively, the changes adopted in this Report and Order will facilitate preparation of earth and space station applications, promote compliance with the Commission's operating rules, and ease administrative burdens for applicants, licensees, and the Commission. The information collection requirements accounted for in this collection are necessary to determine the technical and legal qualifications of applicants or licensees to operate a station and to determine whether the authorization is in the public interest, convenience and necessity. Without such information, the Commission could not determine whether to permit respondents to provide telecommunications services in the United States. Therefore, the Commission would not be able to fulfill its statutory responsibilities in accordance with the Communications Act of 1934, as amended, and the obligations imposed on parties to the World Trade Organization (WTO) Basic Telecom Agreement.

OMB Control Number: 3060–0692.

Type of Review: Extension of a currently approved collection.

Title: Sections 76.802 and 76.804, Home Wiring Provisions; Section 76.613, Interference from a Multi-channel Video Programming Distributor (MVPD).

Form Number: N/A.

Respondents: Individuals or households; Business or other for-profit entities.

Number of Respondents: 22,000.

Estimated Time per Response: 0.083—2 hours.

Frequency of Response: On occasion reporting requirement; Recordkeeping requirement; Annual reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Sections 1, 4, 224, 251, 303, 601, 623, 624 and 632 of the Communications Act of 1934, as amended.

Total Annual Burden: 36,114 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: In the Cable Television Consumer Protection and Competition Act of 1992, Congress directed the FCC to adopt rules governing the disposition of home wiring owned by a cable operator when a subscriber terminates service. The rules at 76.800 et seq., implement that directive. The intention of the rules is to clarify the status and provide for the disposition of existing cable operator-owned wiring in single family homes *58991 and multiple dwelling units upon the termination of a contract for cable service by the home owner or MDU owner. Section 76.613(d) requires that when Multichannel Video Programming Distributors (MVPDs) cause harmful signal interference MVPDs may be required by the District Director and/or Resident Agent to prepare and submit a report regarding the cause(s) of the interference, corrective measures planned or taken, and the efficacy of the remedial measures.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2013–00285 Filed 1–8–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notice

AGENCY: Federal Election Commission.

Federal Register Citation of Previous Announcement—78 FR 97 (January 2, 2013).

DATE & TIME: Tuesday, January 8, 2013 at 10:00 a.m.

PLACE: 999 E Street NW., Washington, DC

STATUS: This meeting will be closed to the public.

Changes in the Meeting—The January 8, 2013 meeting will be continued on Thursday, January 10, 2013.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Shelley E. Garr,

Deputy Secretary of the Commission.

[FR Doc. 2013–00290 Filed 1–7–13; 11:15 am]

BILLING CODE 6715–01–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.: 011961–012.

Title: The Maritime Credit Agreement.

Parties Alianca Navegacao e Logistica Ltda. & Cia.; A.P. Moller-Maersk A/S trading under the name of Maersk Line; China Shipping Container Lines Co., Ltd.; CMA CGM S.A.; Companhia Libra de Navegacao; Compania Libra de Navegacion Uruguay S.A.; Compania Sud Americana de Vapores, S.A.; COSCO Container Lines Company Limited; Dole Ocean Cargo Express; Hamburg-Süd; Hoegh Autoliners A/S; Hyundai Merchant Marine Co., Ltd.;

Independent Container Line Ltd.; Kawasaki Kisen Kaisha, Ltd.; Nippon Yusen Kaisha; Norasia Container Lines Limited; Safmarine Container Lines N.V.; United Arab Shipping Company (S.A.G.); Wallenius Wilhelmsen Logistics AS; YangMing Marine Transport Corp.; Zim Integrated Shipping Services, Ltd.

Filing Party: Wayne R. Rohde, Esq.; Cozen O'Connor; 1627 I Street NW., Suite 1100; Washington, DC 20006.

Synopsis: The amendment removes Hoegh Autoliners A/S. as party to the Agreement.

Agreement No.: 012128–002.

Title: Southern Africa Agreement.

Parties: A.P. Moller-Maersk A/S trading under the name Maersk Line, and Mediterranean Shipping Company S.A.

Filing Party: Wayne R. Rohde, Esquire; Cozen O'Connor; 1627 I Street NW., Suite 1100; Washington, DC 20006–4007.

Synopsis: The amendment deletes Safmarine Container Lines N.V. as a party to the agreement and makes the corresponding technical corrections necessary to reflect the fact that the agreement has only two parties.

By Order of the Federal Maritime Commission.

Dated: January 4, 2013.

Karen V. Gregory,

Secretary.

[FR Doc. 2013–00274 Filed 1–8–13; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

The Commission gives notice that the following applicants have filed an application for an Ocean Transportation Intermediary (OTI) license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF) pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. 40101). Notice is also given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a licensee.

Interested persons may contact the Office of Ocean Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by email at *OTI@fmc.gov.*

Best Global Logistics USA, Inc. dba Siam Intercargo Services (NVO & OFF), 1207 West Mahalo Place, Suite 100, Compton, CA 90220, *Officers:* Tai-Chuen (Larry) Che, Vice President (QI), Wing-Ham Chu, Director, *Application Type:* Delete Trade Name Siam Intercargo Services/QI Change.

Carmichael International Service dba C.I. Container Line (NVO & OFF), 533 Glendale Blvd., Los Angeles, CA 90026, *Officers:* John Salvo, Co-President (QI), Vincent Salvo, Co-President, *Application Type:* QI Change.

OTA America, Inc. (NVO & OFF), 927 Teak Street, Brea, CA 92821, *Officers:* Dookee Kim, Secretary (QI), Kyoungmi Lee, CEO, *Application Type:* New NVO & OFF License.

Salmad Ocean Line & Logistics, Inc. (NVO & OFF), 4854 Old National Hwy., Suite 205, College Park, GA 30337, *Officer:* Amadu K. Jah, President (QI), *Application Type:* Name Change to Sea Freight Express, Inc.

Watercraft Mix, Inc. (NVO & OFF), 4380 E. 11th Avenue, Hialeah, FL 33013, *Officer:* Dmitry Poyarkov, President (QI),

Application Type: QI Change.

By the Commission.

Dated: January 4, 2013.

Karen V. Gregory,

Secretary.

[FR Doc. 2013–00273 Filed 1–8–13; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel, Chemosensory Fellowships Review Meeting.

Date: February 22, 2013.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Kausik Ray, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, Rockville, MD 20850, 301–402–3587, *rayk@nidcd.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special, Emphasis Panel, NIDCD P30 Review Meeting.

Date: March 8, 2013.

Time: 8:00 a.m. to 3:30 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: Kausik Ray, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, Rockville, MD 20850, 301–402–3587, *rayk@nidcd.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: January 3, 2013.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–00176 Filed 1–8–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel, Middle Ear P50 Review.

Date: February 8, 2013.

Time: 4:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Christine A. Livingston, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institutes of Health/NIDCD, 6120 Executive Blvd.—MSC 7180, Bethesda, MD 20892, (301) 496–8683, *livingsc@mail.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel, Chemical Senses Clinical Trial Review.

Date: February 28, 2013.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852.

Contact Person: Christine A. Livingston, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institutes of Health/NIDCD, 6120 Executive Blvd.—MSC 7180, Bethesda, MD 20892, (301) 496–8683, *livingsc@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: January 3, 2013.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–00175 Filed 1–8–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood 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 Heart, Lung, and Blood Institute Special Emphasis Panel Phase II Trials in Lung Disease.

Date: February 1, 2013.

Time: 8:00 a.m. to 5:00 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: Stephanie L. Constant, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7189, Bethesda, MD 20892, 301–443–8784, *constantsl@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: January 3, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–00172 Filed 1–8–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group, Pregnancy and Neonatology Study Section.

Date: February 5–6, 2013.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Michael Knecht, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6176, MSC 7892, Bethesda, MD 20892, (301) 435–1046, *knechtm@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group, Sensorimotor Integration Study Section.

Date: February 8, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Delfina Santa Monica Hotel, 530 West Pico Boulevard, Santa Monica, CA 90405.

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: Healthcare Delivery and Methodologies Integrated Review Group, Dissemination and Implementation Research in Health Study Section.

Date: February 8, 2013.

Time: 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: Jacinta Bronte-Tinkew, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3164, MSC 7770, Bethesda, MD 20892, (301) 806–0009, *brontetinkewjm@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: February 8, 2013.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Inner Harbor, 301 W. Lombard Street, Baltimore, MD 21201.

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, Cancer Therapeutics Area Grant Application.

Date: February 8, 2013.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Dupont Circle Hotel, 1500 New Hampshire Avenue NW., Washington, DC 20036.

Contact Person: Denise R. Shaw, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6158, MSC 7804, Bethesda, MD 20892, 301–435–0198, *shawdeni@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, PAR–10–018 Accelerating the Pace of Drug Abuse Research Using Existing Epidemiology, Prevention, and Treatment Research Data.

Date: February 8, 2013.

Time: 11:00 a.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: 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 11–

045: Outcome Measures For Use In Treatment Trials For Individuals With Intellectual and Developmental Disabilities (R01).

Date: February 8, 2013.

Time: 3:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Marriott at Metro Center, 775—12th Street NW., Washington, DC 20005.

Contact Person: Jane A. Doussard-Roosevelt, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3184, MSC 7848, Bethesda, MD 20892, (301) 435–4445, *doussarj@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 3, 2013.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–00173 Filed 1–8–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; 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: Communication Disorders Review Committee.

Date: February 14–15, 2013.

Time: February 14, 2013, 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Baltimore Marriott Waterfront, 700 Aliceanna Street, Baltimore, MD 21202.

Time: February 15, 2013, 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Baltimore Marriott Waterfront, 700 Aliceanna Street, Baltimore, MD 21202.

Contact Person: Shiguang Yang, DVM, Ph.D., Scientific Review Branch, Division of Extramural Activities, NIDCD, NIH, 6120 Executive Blvd., Suite 400C, Bethesda, MD 20892, 301–435–1425, *yangshi@nidcd.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: January 3, 2013.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–00174 Filed 1–8–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2010–0316]

National Boating Safety Advisory Council; Vacancies

AGENCY: Coast Guard, DHS.

ACTION: Request for applications.

SUMMARY: The Coast Guard seeks applications for membership on the National Boating Safety Advisory Council (NBSAC). This Council advises the Coast Guard on recreational boating safety regulations and other major boating safety matters.

DATES: Applicants should submit a cover letter and resume in time to reach Mr. Jeff Ludwig, the Alternate Designated Federal Officer (ADFO) on or before March 11, 2013.

ADDRESSES: Applicants should send their cover letter and resume to the following address: Commandant (CG–BSX–2)/NBSAC, *Attn:* Mr. Jeff Ludwig, U.S. Coast Guard, 2100 Second St. SW., Stop 7581, Washington, DC 20593–7581. You can also call 202–372–1061; or email *jeffrey.a.ludwig@uscg.mil.* This notice is available in our online docket, USCG–2010–0316, at *http://www.regulations.gov.* Members of the public should not submit personal information into a docket, as it becomes public record.

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Ludwig, ADFO of National Boating Safety Advisory Committee; telephone 202–372–1061; fax 202–372–1908; or email at *jeffrey.a.ludwig@uscg.mil.*

SUPPLEMENTARY INFORMATION: The National Boating Safety Advisory Council (NBSAC) is a federal advisory committee under the *Federal Advisory Committee Act,* (Pub. L. 92–463; 5 U.S.C. App. 2). It was established under authority of 46 U.S.C. 13110 and advises the Coast Guard on boating safety regulations and other major boating safety matters. NBSAC has 21 members: Seven representatives of State officials responsible for State boating safety programs, seven representatives of recreational boat manufacturers and associated equipment manufacturers, and seven representatives of national recreational boating organizations and the general public, at least five of whom are representatives of national recreational boating organizations. Members are appointed by the Secretary of the Department of Homeland Security.

The Council usually meets at least twice each year at a location selected by the Coast Guard. It may also meet for extraordinary purposes. Subcommittees or working groups may also meet to consider specific problems.

We will consider applications for seven positions that expire or become vacant on December 31, 2013:

- Two representatives of State officials responsible for State boating safety programs;
- Three representatives of recreational boat and associated equipment manufacturers; and
- Two representatives of national recreational boating organizations.

Applicants are considered for membership on the basis of their particular expertise, knowledge, and experience in recreational boating safety. Applicants for the 2013 vacancies announced in the **Federal Register** on February 10, 2012, (77 FR 7170) will be considered for the 2014 vacancies and do not need to submit another application. Applications submitted for years prior to 2012 should submit an updated application to ensure consideration for the vacancies announced in this notice.

To be eligible, you should have experience in one of the categories listed above. Registered lobbyists are not eligible to serve on Federal advisory committees. Registered lobbyists are lobbyists required to comply with provisions contained in The Lobbying Disclosure Act of 1995 (Pub. L. 104–65; as amended by Title II of Pub. L. 110–81). Each member serves for a term of three years. Members may be considered to serve consecutive terms. All members serve at their own expense and receive no salary, or other compensation from the Federal Government. The exception to this policy is when attending NBSAC meetings; members may be reimbursed for travel expenses and provided per diem in accordance with Federal Travel Regulations.

The Department of Homeland Security (DHS) does not discriminate in

employment on the basis of race, color, religion, sex, national origin, political affiliation, sexual orientation, gender identity, marital status, disability and genetic information, age, membership in an employee organization, or other non-merit factor. DHS strives to achieve a widely diverse candidate pool for all of its recruitment actions.

If you are selected as a member from the general public, you will be appointed and serve as a special Government employee (SGE) as defined in section 202(a) of title 18, United States Code. As a candidate for appointment as a SGE, applicants are required to complete a Confidential Financial Disclosure Report (OGE Form 450). A completed OGE Form 450 is not releasable to the public except under an order issued by a Federal court or as otherwise provided under the *Privacy Act* (5 U.S.C. 552a). Only the Designated Agency Ethics Official or his or her designate may release a Confidential Financial Disclosure Report. Applicants can obtain this form by going to the Web site of the Office of Government Ethics (*www.oge.gov*) or by contacting the individual listed above. Applications which are not accompanied by a completed OGE Form 450 will not be considered.

If you are interested in applying to become a member of the Committee, send your cover letter and resume to Jeff Ludwig, Alternate Designated Federal Officer (ADFO) of NBSAC at Commandant (CG–BSX–2)/NBSAC, U.S. Coast Guard, 2100 Second St. SW., STOP 7581, Washington, DC, 20593–7581. Send your cover letter and resume in time for it to be received by the ADFO on or before March 11, 2013. To visit our online docket, go to *http://www.regulations.gov*, enter the docket number for this notice (USCG–2010–0316) in the Search box, and click ''Go.'' Please do not post your resume on this site. During the vetting process, applicants may be asked to provide date of birth and social security number.

Dated: December 31, 2012.

Paul F. Thomas,

Captain, U.S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2013–00215 Filed 1–8–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2010–0012; OMB No. 1660–0022]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Community Rating System (CRS) Program—Application Worksheets and Commentary

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; correction.

On Tuesday, November 27, 2012, the Federal Emergency Management Agency (FEMA) published a notice in the **Federal Register** at 77 FR 70798 notifying the public that it was submitting a request for review and approval of a collection of information under the emergency processing procedures in Office of Management and Budget (OMB) regulation 5 CFR 1320.13.

In that notice, FEMA stated that it was requesting that the approval authorize FEMA to use the collection through June 14, 2012. The correct date is June 14, 2013.

Dated: December 19, 2012.

Loretta A. Cassatt,

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DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2527–12; DHS Docket No. USCIS–2012–0014]

RIN 1615–ZB17

Extension and Redesignation of South Sudan for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This Notice announces that the Secretary of Homeland Security (Secretary) is both extending the existing designation of South Sudan for Temporary Protected Status (TPS) for 18 months from May 3, 2013 through November 2, 2014, and redesignating South Sudan for TPS for 18 months, effective May 3, 2013 through November 2, 2014.

The extension allows currently eligible TPS beneficiaries to retain TPS through November 2, 2014. The redesignation of South Sudan allows additional individuals who have been continuously residing in the United States since January 9, 2013, to obtain TPS, if eligible. The Secretary has determined that an extension and redesignation are warranted because the conditions in South Sudan that prompted the TPS designation not only continue to be met but have deteriorated. There continues to be a substantial, but temporary, disruption of living conditions in South Sudan based upon ongoing armed conflict and extraordinary and temporary conditions in that country that prevent South Sudanese who now have TPS from returning in safety.

This Notice also sets forth procedures necessary for nationals of South Sudan (or aliens having no nationality who last habitually resided in South Sudan) to either: (1) Re-register under the extension if they already have TPS and to apply for renewal of their Employment Authorization Documents (EADs) with U.S. Citizenship and Immigration Services (USCIS) or (2) submit an initial registration application under the redesignation and apply for an EAD.

For individuals who have already been granted TPS under the South Sudan designation, the 60-day re-registration period runs from January 9, 2013 through March 11, 2013. USCIS will issue new EADs with a November 2, 2014 expiration date to eligible South Sudanese TPS beneficiaries who timely re-register and apply for EADs under this extension. Under the redesignation, individuals who currently do not have TPS (or an initial TPS application pending) may submit an initial TPS application during the 180-day initial registration period that runs from January 9, 2013 through July 8, 2013. In addition to demonstrating continuous residence in the United States since January 9, 2013, initial applicants for TPS under this redesignation must demonstrate that they have been continuously physically present in the United States since May 3, 2013, the effective date of the redesignation of South Sudan, before USCIS will be able to grant them TPS.

Some individuals who are TPS beneficiaries under the current designation of Sudan may now be nationals of South Sudan, and may now qualify for TPS under South Sudan. In addition to regular procedures, this

notice sets forth special procedures for such individuals to register and apply for TPS under the South Sudan redesignation.

DATES: *Extension of TPS:* The 18-month extension of the TPS designation of South Sudan is effective May 3, 2013, and will remain in effect through November 2, 2014. The 60-day re-registration period runs from January 9, 2013 through March 11, 2013.

Redesignation of South Sudan for TPS: The redesignation of South Sudan for TPS is effective May 3, 2013, and will remain in effect through November 2, 2014, a period of 18 months. The 180-day initial registration period for new applicants under the South Sudan TPS redesignation runs from January 9, 2013 through July 8, 2013.

Further Information

- For further information on TPS, including guidance on the application process and additional information on eligibility, please visit the USCIS TPS Web page at *http://www.uscis.gov/tps.* You can find specific information about this extension and redesignation of South Sudan for TPS by selecting ''TPS Designated Country: South Sudan'' from the menu on the left of the TPS Web page.
- You can also contact the TPS Operations Program Manager at the Family and Status Branch, Service Center Operations Directorate, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW., Washington, DC 20529–2060; or by phone at (202) 272–1533 (this is not a toll-free number). **Note:** The phone number provided here is solely for questions regarding this TPS notice. It is not for individual case status inquiries.
- Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS Web site at *http://www.uscis.gov,* or call the USCIS National Customer Service Center at 800–375–5283 (TTY 800–767–1833). Service is available in English and Spanish only.
- Further information will also be available at local USCIS offices upon publication of this Notice.

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

CPA—Comprehensive Peace Agreement
DHS—Department of Homeland Security
DOS—Department of State
EAD—Employment Authorization Document
Government—U.S. Government
HRW—Human Rights Watch
INA—Immigration and Nationality Act
OCHA—UN Office for the Coordination of Humanitarian Affairs
OSC—U.S. Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices
SAF—Sudan Armed Forces
Secretary—Secretary of Homeland Security
South Sudan—Republic of South Sudan
SPLA—Sudan People's Liberation Army (South Sudan's military)
TPS—Temporary Protected Status
UN—United Nations
UNHCR—UN High Commissioner for Refugees
USAID—U.S. Agency for International Development
USCIS—U.S. Citizenship and Immigration Services

What is Temporary Protected Status (TPS)?

- TPS is a temporary immigration status granted to eligible nationals of a country designated for TPS under the Immigration and Nationality Act (INA), or to persons without nationality who last habitually resided in the designated country.
- During the TPS designation period, TPS beneficiaries are eligible to remain in the United States and may obtain work authorization, so long as they continue to meet the requirements of TPS status.
- TPS beneficiaries may also be granted travel authorization as a matter of discretion.
- The granting of TPS does not lead to permanent resident status.
- When the Secretary terminates a country's TPS designation, beneficiaries return to the same immigration status they maintained before TPS (unless that status has since expired or been terminated) or to any other lawfully obtained immigration status they received while registered for TPS.

When was South Sudan designated for TPS?

On October 13, 2011, the Secretary designated South Sudan for TPS, effective November 3, 2011, based on an ongoing armed conflict and extraordinary and temporary conditions within that country. *See* 76 FR 63629; sections 244(b)(1)(A) and (C) of the INA, 8 U.S.C. 1254a(b)(1)(A) and (C). This announcement is the first extension and first redesignation of TPS for South Sudan since the designation in 2011.

What authority does the Secretary of Homeland Security have to extend the designation of South Sudan for TPS?

Section 244(b)(1) of the INA, 8 U.S.C. 1254a(b)(1), authorizes the Secretary, after consultation with appropriate Government agencies, to designate a foreign state (or part thereof) for TPS.[1] The Secretary may then grant TPS to eligible nationals of that foreign state (or aliens having no nationality who last habitually resided in that state). *See* section 244(a)(1)(A) of the INA, 8 U.S.C. 1254a(a)(1)(A).

At least 60 days before the expiration of a country's TPS designation or extension, the Secretary, after consultation with appropriate Government agencies, must review the conditions in a foreign state designated for TPS to determine whether the conditions for the TPS designation continue to be met. *See* section 244(b)(3)(A) of the INA, 8 U.S.C. 1254a(b)(3)(A). If the Secretary determines that a foreign state continues to meet the conditions for TPS designation, the designation is extended for an additional 6 months (or in the Secretary's discretion for 12 or 18 months). *See* section 244(b)(3)(C) of the INA, 8 U.S.C. 1254a(b)(3)(C). If the Secretary determines that the foreign state no longer meets the conditions for TPS designation, the Secretary must terminate the designation. *See* section 244(b)(3)(B) of the INA, 8 U.S.C. 1254a(b)(3)(B).

What is the Secretary's authority to redesignate South Sudan for TPS?

In addition to extending an existing TPS designation, the Secretary, after consultation with appropriate Government agencies, may redesignate a country (or part thereof) for TPS. *See* section 244(b)(1) of the INA, 8 U.S.C. 1254a(b)(1); *see also* section 244(c)(1)(A)(i) of the INA, 8 U.S.C. 1254a(c)(1)(A)(i) (requiring that ''the alien has been continuously physically present since the effective date of *the most recent designation of the state.*'' (emphasis added)). This is one of several instances in which the Secretary, and prior to the establishment of the Department of Homeland Security (DHS) the Attorney General, have simultaneously extended a country's TPS designation and redesignated the country for TPS. *See, e.g.,* 77 FR 25723 (May 1, 2012) (extension and redesignation for Somalia); 76 FR 29000 (May 19, 2011) (extension and redesignation for Haiti); 62 FR 16608 (Apr. 7, 1997) (extension and redesignation for Liberia).

[1] As of March 1, 2003, in accordance with section 1517 of title XV of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, any reference to the Attorney General in a provision of the INA describing functions transferred from the Department of Justice to the Department of Homeland Security ''shall be deemed to refer to the Secretary'' of Homeland Security. *See* 6 U.S.C. 557 (codifying HSA, tit. XV, sec. 1517).

When the Secretary designates or redesignates a country for TPS, she also has the discretion to establish the date from which TPS applicants must demonstrate that they have been ''continuously resid[ing]'' in the United States. *See* section 244(c)(1)(A)(ii) of the INA, 8 U.S.C.S 1254a(c)(1)(A)(ii). This discretion permits the Secretary to tailor the ''continuous residence'' date to offer TPS to the group of eligible individuals that the Secretary deems appropriate.

The Secretary has determined that the ''continuous residence'' date for applicants for TPS under the redesignation of South Sudan shall be January 9, 2013. Initial applicants for TPS under this redesignation must also show they have been ''continuously physically present'' in the United States since May 3, 2013, which is the effective date of the Secretary's redesignation of South Sudan. *See* section 244(c)(1)(A)(i) of the INA, 8 U.S.C. 1254a(c)(1)(A)(i). For each initial TPS application filed under the redesignation, the final determination whether the applicant has met the ''continuous physical presence'' requirement cannot be made until May 3, 2013. USCIS, however, will issue EADs, as appropriate, during the registration period in accordance with 8 CFR 244.5(b).

Why is the Secretary extending the TPS designation for South Sudan and simultaneously redesignating South Sudan for TPS through November 2, 2014?

Over the past year, DHS and the Department of State (DOS) have continued to review conditions in South Sudan. Based on this review and after consulting with DOS, the Secretary has determined that an 18-month extension is warranted because the armed conflict is ongoing and the extraordinary and temporary conditions that prompted the November 3, 2011 designation persist. The Secretary has further determined that the conditions in South Sudan, which have deteriorated, support redesignating South Sudan for TPS and changing the ''continuous residence'' and ''continuous physical presence'' dates so as to continue affording TPS protection to the fewer than 10 South Sudanese nationals who arrived in the United States before October 7, 2004 and registered under the initial designation and to extend TPS protection to eligible South Sudanese nationals who arrived between October 7, 2004 and January 9, 2013.

Ongoing armed conflict throughout much of South Sudan caused continued insecurity and led to continued internal displacement and refugee flight into neighboring countries, even as South Sudanese return to South Sudan en masse. Violence and ensuing population displacement, along with environmental and economic factors, have created one of the worst humanitarian crises in the world. Efforts by the international community to get aid to the civilian population continue to be severely compromised by weather-related factors, poor infrastructure, and threats to the safety of aid workers.

The signing of the Comprehensive Peace Agreement (CPA) in January 2005 put an end to more than two decades of civil war in Sudan. There was significant progress towards fulfilling the mandates of the CPA, such as the creation of South Sudan on July 9, 2011. However, unresolved CPA issues created political tensions that led to military confrontations along the Sudan-South Sudan border (specifically the transitional areas of Abyei, Blue Nile State, and Southern Kordofan). Since May 2011 and continuing in 2012, sporadic violent conflicts involving the Sudan Armed Forces (SAF) and South Sudan's military—Sudan People's Liberation Army (SPLA)—have led to loss of civilian life and mass displacement.

As part of the CPA, the contested territory of Abyei was to be jointly administered until local residents determined whether they would join Sudan or the South Sudan, but the referendum has yet to be held. In the months leading up to South Sudan's independence, both the Sudanese and the South Sudanese armies reinforced their positions near Abyei. On May 19, 2011, in a move condemned by the United Nations (UN) as a breach of the 2005 CPA, SAF and Sudanese police attacked and took control of Abyei. The UN News Service reported that as a result of the conflict, more than 110,000 people were displaced into Agok and South Sudan. On June 20, 2011, Sudan and South Sudan reached an agreement on temporary administration measures and demilitarization of the area. Although the SAF and the majority of the Sudanese Police had withdrawn from the area by June 2012, the UN reported that as of July 2012, the majority of those who fled the fighting in 2011 remained displaced in and outside the Abyei area because of the lack of a civilian Abyei administration, the continued presence of armed forces, and the presence of landmines.

In June 2011, fighting between the SAF and the SPLA erupted in Kadugli, the capital of Southern Kordofan. On June 25, 2011, the UN Office for the Coordination of Humanitarian Affairs (OCHA) reported that Sudanese government forces conducted airstrikes and artillery shelling in the eastern and southern parts of the Nuba Mountains in Southern Kordofan. Hostilities increased in April 2012, when South Sudanese forces captured the disputed oilfield of Heglig.

In September 2011, a new battle zone erupted in Blue Nile State. Human Rights Watch (HRW) interviewed witnesses who ''described indiscriminate bombings in civilian areas, killings, and other serious abuses by Sudanese armed forces since armed conflict broke out there.'' Ground fighting and aerial bombing of Sudan's Southern Kordofan and Blue Nile states by the SAF have killed hundreds of civilians and forced thousands to flee across the international border into crowded refugee camps in Unity and Upper Nile states in South Sudan.

South Sudan's human rights record is poor and includes instances of extrajudicial killings, disappearances, arbitrary arrest and detention, forced population movements, rape, and forced conscription of children. Rebel groups are also responsible for serious abuses. Violence related to inter-tribal clashes and sporadic conflict related to irregular armed groups within South Sudan continued to threaten stability and negatively impact the civilian population. HRW noted that ''both the government and the UN peacekeepers have been unable to protect civilians and prevent these often predictable outbreaks of violence.'' DOS reported that since the beginning of 2012, over 12,000 South Sudanese refugees fled to neighboring countries. Inter-communal violence remains a serious problem, involving large-scale and armed violent attacks among neighboring communities and groups. The South Sudanese Government does not have the capability to secure much of its own territory, and relies on the UN Mission in South Sudan to provide protection of civilians in critical situations.

South Sudan is already considered one of the poorest, least-developed places in the world, and the ongoing humanitarian crisis has left much of South Sudan's population of 8 million in need of humanitarian assistance. The more than 620,000 South Sudanese returning from Sudan since October 2010 continue to strain limited resources, and high levels of humanitarian needs are reported in areas that have a high concentration of returnees. In January 2012, the Office of the UN High Commissioner for Refugees (UNHCR) reported that over 550,000 people had been internally displaced in South Sudan. OCHA further reported that there were over 160,000 new internally displaced people between

January and mid-July 2012. Furthermore, the UNHCR reported that as of July 2012, there were over 200,000 refugees living in South Sudan (around 170,000 were from Sudan), stretching existing humanitarian capabilities. The Government of South Sudan lacks the capacity and resources to meet the basic needs of the majority of its own citizens and refugees from neighboring countries.

OCHA estimated in July 2012 that more than half of South Sudan's 8 million population is at risk of food insecurity. DOS reported that an estimated 2.9 million people currently require food assistance. Significant areas of South Sudan are experiencing drought conditions, which is exacerbating the situation, pushing food deficits higher. The food shortages, the arrival of returnees and refugees, insecurity, and ongoing conflict have impaired the delivery of basic health services to large portions of the South Sudanese population.

There are multiple factors impeding delivery of humanitarian aid. Although the Government of South Sudan made some positive efforts to reduce interference in humanitarian operations, USAID reported that ''[i]nsecurity, landmines, and transportation and communication challenges due to limited infrastructure restrict humanitarian activities across South Sudan.'' It is estimated that there are fewer than 100 km of paved roads in South Sudan and the accessibility of those roads is compromised during the rainy season.

Based upon this review and after consultation with appropriate Government agencies, the Secretary finds that:

- The conditions that prompted the November 3, 2011 designation of South Sudan for TPS continue to be met. *See* sections 244(b)(3)(A) and (C) of the INA, 8 U.S.C. 1254a(b)(3)(A) and (C).
- There continues to be an armed conflict in South Sudan and, due to such conflict, requiring the return of South Sudanese nationals to South Sudan would pose a serious threat to their personal safety. *See* section 244(b)(1)(A) of the INA, 8 U.S.C. 1254a(b)(1)(A).
- There continue to be extraordinary and temporary conditions in South Sudan that prevent South Sudanese nationals from returning to South Sudan in safety. *See* section 244(b)(1)(C) of the INA, 8 U.S.C. 1254a(b)(1)(C).
- It is not contrary to the national interest of the United States to permit South Sudanese (and persons who have no nationality who last habitually resided in South Sudan) who meet the eligibility requirements of TPS to remain in the United States temporarily. *See* section 244(b)(1)(C) of the INA, 8 U.S.C. 1254a(b)(1)(C).
- The designation of South Sudan for TPS should be extended for an additional 18-month period from May 3, 2013 through November 2, 2014. *See* section 244(b)(3)(C) of the INA, 8 U.S.C. 1254a(b)(3)(C).
- Based on current country conditions, South Sudan should be simultaneously redesignated for TPS effective May 3, 2013 through November 2, 2014. *See* sections 244(b)(1)(A), (b)(1)(C) and (b)(2) of the INA; 8 U.S.C.S 1254a(b)(1)(A), (b)(1)(C) and (b)(2).
- TPS applicants must demonstrate that they have continuously resided in the United States since January 9, 2013.
- The date by which TPS applicants must demonstrate that they have been continuously physically present in the United States is May 3, 2013, the effective date of the redesignation of South Sudan for TPS.
- There are fewer than 10 current South Sudanese TPS beneficiaries who are expected to be eligible to re-register for TPS under the extension. DHS recognizes that some individuals who registered under the designation of Sudan may be eligible for TPS under the redesignation of South Sudan and may choose to apply as such. They will be granted TPS under the South Sudan redesignation if they present satisfactory evidence of South Sudanese nationality and are otherwise eligible.
- It is estimated that fewer than 4,000 additional individuals may be eligible for TPS under the combined redesignations of South Sudan and Sudan. With the creation of South Sudan having just occurred July 9, 2011, it is difficult to breakdown this estimate between the two countries. This population includes potentially eligible South Sudanese and Sudanese who are in a lawful nonimmigrant status or who have no other status.

Notice of Extension of the TPS Designation of South Sudan and Redesignation of South Sudan for TPS

By the authority vested in me as Secretary under section 244 of the INA, 8 U.S.C. 1254a, I have determined, after consultation with the appropriate Government agencies, that the conditions that prompted the 2011 designation of South Sudan for TPS not only continue to be met but have deteriorated. *See* section 244(b)(3)(A) of the INA, 8 U.S.C. 1254a(b)(3)(A). On the basis of this determination, I am simultaneously extending the existing TPS designation of South Sudan for 18 months from May 3, 2013 through November 2, 2014, and redesignating South Sudan for TPS for 18 months from May 3, 2013 through November 2, 2014. *See* sections 244(b)(1)(A), (b)(1)(C) and (b)(2) of the INA; 8 U.S.C. 1254a(b)(1)(A), (b)(1)(C) and (b)(2). I have also determined that eligible individuals must demonstrate that they have continuously resided in the United States since January 9, 2013. *See* section 244(c)(1)(A)(ii) of the INA, 8 U.S.C. 1254a(c)(1)(A)(ii).

Janet Napolitano,
Secretary.

Required Application Forms and Application Fees To Register or Re-register for TPS

To register or re-register for TPS for South Sudan, an applicant must submit each of the following two applications:

1. Application for Temporary Protected Status (Form I–821).

- If you are filing an initial application, you must pay the fee for the Application for Temporary Protected Status (Form I–821). *See* 8 CFR 244.2(f)(1) and 244.6 and information on initial filing on the USCIS TPS Web page at *http://www.uscis.gov/tps*.
- If you are filing a re-registration, you do not need to pay the fee for the Application for Temporary Protected Status (Form I–821). *See* 8 CFR 244.17;
- If you are currently a TPS beneficiary under the Sudan TPS designation (or you have a pending TPS Sudan initial application) and are now filing an initial application for the South Sudan designation, you do not need to pay the fee for the Application for Temporary Protected Status (Form I–821). But you do need to provide either a copy of (1) A Sudan TPS Approval Notice (Form I–797) showing you are currently a Sudan TPS beneficiary, (2) an EAD showing that you are currently a Sudan TPS beneficiary, or (3) a receipt notice for an Application for Temporary Protected Status (Form I–821) if you have a pending TPS Sudan initial application; and

2. Application for Employment Authorization (Form I–765).

- If you are applying for initial registration and want an EAD, you must pay the fee for the Application for Employment Authorization (Form I–765) only if you are age 14 through 65. No fee for the Application for Employment Authorization (Form I–765) is required if you are under the age of 14 or 66 and older and applying for initial registration.
- If you are applying for re-registration, you must pay the fee for the Application for Employment

Authorization (Form I–765) only if you want an EAD.

• You do not pay the fee for the Application for Employment Authorization (Form I–765) if you are not requesting an EAD, regardless of whether you are applying for initial registration or re-registration.

• If you have a pending Application for Employment Authorization (Form I–765) that you previously submitted with your request for Sudan TPS and you have not yet received your EAD under Sudan TPS, then you do not need to repay the Application for Employment Authorization (Form I–765) fee. But you must submit a copy of your receipt notice for the Application for Employment Authorization (Form I–765) related to Sudan TPS (or your fee waiver grant notice) with your new application. Your fee (or fee waiver grant) will be applied to your application for an EAD under the South Sudan TPS designation, if your Sudan TPS EAD has not been mailed to you yet.

You must submit both completed application forms together. If you are unable to pay for the application and/or biometrics fee, you may apply for a fee waiver by completing a Request for Fee Waiver (Form I–912) or submitting a personal letter requesting a fee waiver, and by providing satisfactory supporting documentation. For more information on the application forms and fees for TPS, please visit the USCIS TPS Web page at *http://www.uscis.gov/tps*. Fees for the Application for Temporary Protected Status (Form I–821), the Application for Employment Authorization (Form I–765), and biometric services are also described in 8 CFR 103.7(b)(1)(i).

Biometric Services Fee

Biometrics (such as fingerprints) are required for all applicants 14 years of age or older. Those applicants must submit a biometric services fee. As previously stated, if you are unable to pay for the biometric services fee, you may apply for a fee waiver by completing a Request for Fee Waiver (Form I–912) or by submitting a personal letter requesting a fee waiver, and providing satisfactory supporting documentation. For more information on the biometric services fee, please visit the USCIS Web site at *http://www.uscis.gov*. If necessary, you may be required to visit an Application Support Center to have your biometrics captured.

Refiling an *Initial* TPS Application After Receiving a Denial of a Fee Waiver Request

If you request a fee waiver when filing your initial TPS application package and your request is denied, you may refile your application packet before the initial filing deadline of July 8, 2013. If you submit your application with a fee waiver request before that deadline, but you receive a fee waiver denial and there are fewer than 45 days before the filing deadline (or the deadline has passed), you may still refile your application within the 45-day period after the date on the USCIS fee waiver denial notice. Your application will not be rejected even if the filing deadline has passed, provided it is mailed within those 45 days and all other required information for the application is included. **Note:** If you wish, you may also wait to request an EAD and pay the Application for Employment Authorization (Form I–765) fee after USCIS grants you TPS, if you are found eligible. If you choose to do this, you would still need to file the Application for Employment Authorization (Form I–765) without fee and without requesting an EAD with the Application for Temporary Protected Status (Form I–821).

Refiling a *Re-Registration* TPS Application After Receiving a Denial of a Fee Waiver Request

USCIS urges all re-registering applicants to file as soon as possible within the 60-day re-registration period so that USCIS can process the applications and issue EADs promptly. Filing early will also allow those applicants who may receive denials of their fee waiver requests to have time to refile their applications *before* the re-registration deadline. If, however, an applicant receives a denial of his or her fee waiver request and is unable to refile by the re-registration deadline, the applicant may still refile his or her application. This situation will be reviewed under good cause for late re-registration. However, applicants are urged to refile within 45 days of the date on their USCIS fee waiver denial notice, if at all possible. *See* section 244(c)(3)(C) of the INA; 8 U.S.C. 1254a(c)(3)(C); 8 CFR 244.17(c). For more information on good cause for late re-registration, visit the USCIS TPS Web page at *http://www.uscis.gov/tps*. **Note:** As previously stated, although a re-registering TPS beneficiary age 14 and older must pay the biometric services fee (but not the initial TPS application fee) when filing a TPS re-registration application, the applicant may decide to wait to request an EAD, and therefore not pay the Application for Employment Authorization (Form I–765) fee until after USCIS has approved the individual's TPS re-registration, if he or she is eligible.

Mailing Information

Mail your application for TPS to the proper address in Table 1.

TABLE 1—MAILING ADDRESSES

If . . .	Mail to . . .
You are applying through the U.S. Postal Service	USCIS, P.O. Box 6943, Chicago, IL 60680–6943.
You are using a non-U.S. Postal Service delivery service	USCIS, Attn: TPS South Sudan, 131 S. Dearborn 3rd Floor, Chicago, IL 60603–5517.

If you were granted TPS by an Immigration Judge (IJ) or the Board of Immigration Appeals (BIA), and you wish to request an EAD or are re-registering for the first time following a grant of TPS by the IJ or BIA, please mail your application to the appropriate address in Table 1 above. Upon receiving a Receipt Notice from USCIS, please send an email to *TPSijgrant.vsc@uscis.dhs.gov* with the receipt number and state that you submitted a re-registration and/or request for an EAD based on an IJ/BIA grant of TPS. You can find detailed information on what further information you need to email and the email addresses on the USCIS TPS Web page at *http://www.uscis.gov/tps*.

E-Filing

You cannot electronically file your application when re-registering or applying for initial registration for South Sudan TPS. Please mail your application to the mailing address listed in Table 1 above.

Employment Authorization Document (EAD)

May I request an interim EAD at my local USCIS office?

No. USCIS will not issue interim EADs to TPS applicants and re-registrants at local offices.

Will my current EAD, which is set to expire on May 2, 2013, be automatically extended for 6 months?

No. This notice does not automatically extend previously issued EADs. DHS has announced the extension of the TPS designation of South Sudan and established the re-registration period at an early date to allow sufficient time for USCIS to process EAD requests prior to the May 2, 2013 expiration date. You must apply during the 60-day re-registration period. Failure to apply for TPS during the re-registration period without good cause may result in gaps in work authorization. DHS strongly encourages you to apply as early as possible within the re-registration period.

When hired, what documentation may I show to my employer as proof of employment authorization and identity when completing Employment Eligibility Verification (Form I–9)?

You can find a list of acceptable document choices on the ''Lists of Acceptable Documents'' for Employment Eligibility Verification (Form I–9). You can find additional detailed information on the USCIS I–9 Central Web page at *http://www.uscis.gov/I-9Central*. Employers are required to verify the identity and employment authorization of all new employees by using Employment Eligibility Verification (Form I–9). Within 3 days of hire, an employee must present proof of identity and employment authorization to his or her employer.

You may present any document from List A (reflecting both your identity and employment authorization), or one document from List B (reflecting identity) together with one document from List C (reflecting employment authorization). An EAD is an acceptable document under ''List A.'' Employers may not reject a document based upon a future expiration date.

What documentation may I show my employer if I am already employed but my current TPS-related EAD is set to expire?

You must present any document from List A or any document from List C on Employment Eligibility Verification (Form I–9) to reverify employment authorization. Your employer is required to reverify on Employment Eligibility Verification (Form I–9) the employment authorization of current employees upon the expiration of a TPS-related EAD. Your employer should use either Section 3 of the Form I–9 originally completed for the employee or, if this section has already been completed or if the version of Form I–9 is no longer valid, in Section 3 of a new Form I–9 using the most current version. Note that your employer may not specify which List A or List C document employees must present.

USCIS anticipates that it will be able to process and issue new EADs for existing TPS South Sudan beneficiaries before their current EADs expire on May 2, 2013. However, re-registering beneficiaries are encouraged to file as early as possible within the 60-day re-registration period to help ensure that they receive their EADs promptly.

Can my employer require that I produce any other documentation to prove my status, such as proof of my South Sudanese citizenship?

No. When completing Employment Eligibility Verification (Form I–9), including reverifying employment authorization, employers must accept any documentation that appears on the ''Lists of Acceptable Documents'' for Employment Eligibility Verification (Form I–9) and that reasonably appears to be genuine and that relates to you. Employers may not request documentation that does not appear on the ''Lists of Acceptable Documents.'' Therefore, employers may not request proof of South Sudanese citizenship when completing Employment Eligibility Verification (Form I–9) for new hires or reverifying the employment authorization of current employees. If presented with EADs that are unexpired on their face, employers should accept such EADs as valid List A documents so long as the EADs reasonably appear to be genuine and to relate to the employee. See below for important information about your rights if your employer rejects lawful documentation, requires additional documentation, or otherwise discriminates against you based on your citizenship or immigration status, or your national origin.

Note to All Employers

Employers are reminded that the laws requiring proper employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth reverification requirements. For general questions about the employment eligibility verification process, employers may call the USCIS Form I–9 Customer Support at 888–464–4218 (TDD for the hearing impaired is at 877–875–6028). For questions about avoiding discrimination during the employment eligibility verification process, employers may also call the Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) Employer Hotline at 800–255–8155 (TDD for the hearing impaired is at 800–237–2515), which offers language interpretation in numerous languages.

Note to Employees

For general questions about the employment eligibility verification process, employees may call the USCIS National Customer Service Center at 800–375–5283 (TDD for the hearing impaired is at 800–767–1833); calls are accepted in English and Spanish. Employees or applicants may also call the OSC Worker Information Hotline at 800–255–7688 (TDD for the hearing impaired is at 1–800–237–2515) for information regarding employment discrimination based upon citizenship, immigration status, or national origin, or for information regarding discrimination related to Employment Eligibility Verification (Form I–9) and E-Verify. The OSC Worker Information Hotline provides language interpretation in numerous languages. In order to comply with the law, employers must accept any document or combination of documents acceptable for Employment Eligibility Verification (Form I–9) completion if the documentation reasonably appears to be genuine and to relate to the employee. Employers may not require extra or additional documentation beyond what is required for Employment Eligibility Verification (Form I–9) completion. Further, employers participating in E-verify who receive an E-verify initial mismatch (''tentative nonconfirmation'' or ''TNC'') on employees must inform employees of the mismatch and give such employees an opportunity to challenge the mismatch. Employers are prohibited from taking adverse action against such employees based on the initial mismatch unless and until E-Verify returns a final nonconfirmation. For example, employers must allow employees challenging their mismatches to continue to work without any delay in start date or training and without any change in hours or pay, while the final E-Verify determination remains

pending. Additional information is available on the OSC Web site at *http://www.justice.gov/crt/about/osc* and the USCIS Web site at *http://www.dhs.gov/E-verify*.

Note Regarding Federal, State, and Local Government Agencies (Such as Departments of Motor Vehicles)

While Federal government agencies must follow the guidelines laid out by the Federal government, state and local government agencies establish their own rules and guidelines when granting certain benefits. Each state may have different laws, requirements, and determinations about what documents you need to provide to prove eligibility for certain benefits. Whether you are applying for a Federal, state, or local government benefit, you may need to provide the government agency with documents that show you are a TPS beneficiary and/or show you are authorized to work based on TPS. Examples are:

(1) Your EAD that has a valid expiration date;

(2) A copy of your Application for Temporary Protected Status Receipt Notice (Form I–797) for this re-registration; and/or

(3) A copy of your past or current Application for Temporary Protected Status Approval Notice (Form I–797), if you receive one from USCIS.

Check with the government agency regarding which document(s) the agency will accept. You may also provide the agency with a copy of this notice.

Some benefit-granting agencies use the USCIS Systematic Alien Verification for Entitlements Program (SAVE) to verify the current immigration status of applicants for public benefits. If such an agency has denied your application based solely or in part on a SAVE response, the agency must offer you the opportunity to appeal the decision in accordance with the agency's procedures. If the agency has received and acted upon or will act upon a SAVE verification and you do not believe the response is correct, you may make an InfoPass appointment for an in-person interview at a local USCIS office. Detailed information on how to make corrections, make an appointment, or submit a written request can be found at the SAVE Web site at *http://www.uscis.gov/save,* then by choosing ''How to Correct Your Records'' from the menu on the right.

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DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2526–12; DHS Docket No. USCIS–2012–0013]

RIN 1615–ZB16

Extension and Redesignation of Sudan for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This Notice announces that the Secretary of Homeland Security (Secretary) is both extending the existing designation of Sudan for Temporary Protected Status (TPS) for 18 months from May 3, 2013 through November 2, 2014, and redesignating Sudan for TPS for 18 months, effective May 3, 2013 through November 2, 2014.

The extension allows currently eligible TPS beneficiaries to retain TPS through November 2, 2014. The redesignation of Sudan allows additional individuals who have been continuously residing in the United States since January 9, 2013, to obtain TPS, if eligible. The Secretary has determined that an extension and redesignation are warranted because the conditions in Sudan that prompted the TPS designation not only continue to be met but have deteriorated. There continues to be a substantial, but temporary, disruption of living conditions in Sudan based upon ongoing armed conflict and extraordinary and temporary conditions in that country that prevent Sudanese who now have TPS from returning in safety.

This Notice also sets forth procedures necessary for nationals of Sudan (or aliens having no nationality who last habitually resided in Sudan) to either: (1) Re-register under the extension if they already have TPS and to apply for renewal of their Employment Authorization Documents (EADs) with U.S. Citizenship and Immigration Services (USCIS) or (2) submit an initial registration application under the redesignation and apply for an EAD.

For individuals who have already been granted TPS under the Sudan designation, the 60-day re-registration period runs from January 9, 2013 through March 11, 2013. USCIS will issue new EADs with a November 2, 2014 expiration date to eligible Sudanese TPS beneficiaries who timely re-register and apply for EADs under this extension.

Under the redesignation, individuals who currently do not have TPS (or an initial TPS application pending) may submit an initial application during the 180-day initial registration period that runs from January 9, 2013 through July 8, 2013. In addition to demonstrating continuous residence in the United States since January 9, 2013, initial applicants for TPS under this redesignation must demonstrate that they have been continuously physically present in the United States since May 3, 2013, the effective date of the redesignation of Sudan, before USCIS will be able to grant them TPS.

In a separate **Federal Register** notice published on January 9, 2013, the Secretary has redesignated South Sudan for TPS. Some individuals who are TPS beneficiaries under the current designation of Sudan may now be nationals of South Sudan, and may now qualify for TPS under South Sudan. The South Sudan notice sets forth special procedures for such individuals to register and apply for TPS under the South Sudan redesignation.

DATES: *Extension of TPS:* The 18-month extension of the TPS designation of Sudan is effective May 3, 2013, and will remain in effect through November 2, 2014. The 60-day re-registration period runs from January 9, 2013 through March 11, 2013.

Redesignation of Sudan for TPS: The redesignation of Sudan for TPS is effective May 3, 2013, and will remain in effect through November 2, 2014, a period of 18 months. The 180-day initial registration period for new applicants under the Sudan TPS redesignation runs from January 9, 2013 through July 8, 2013.

Further Information

- For further information on TPS, including guidance on the application process and additional information on eligibility, please visit the USCIS TPS Web page at *http://www.uscis.gov/tps*. You can find specific information about this extension and redesignation of Sudan for TPS by selecting ''TPS Designated Country: Sudan'' from the menu on the left of the TPS Web page.
- You can also contact the TPS Operations Program Manager at the Family and Status Branch, Service Center Operations Directorate, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW., Washington, DC 20529–2060; or by phone at (202) 272–1533 (this is not a toll-free number). **Note:** The phone number provided here is solely for questions regarding this TPS notice. It is not for individual case status inquiries.

• Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS Web site at *http://www.uscis.gov,* or call the USCIS National Customer Service Center at 800–375–5283 (TTY 800–767–1833). Service is available in English and Spanish only.

• Further information will also be available at local USCIS offices upon publication of this Notice.

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

CPA—Comprehensive Peace Agreement
DHS—Department of Homeland Security
DOS—Department of State
EAD—Employment Authorization Document
Government—U.S. Government
HRW—Human Rights Watch
IDP—Internally Displaced People
INA—Immigration and Nationality Act
OCHA—UN Office for the Coordination of Humanitarian Affairs
OSC—U.S. Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices
SAF—Sudan Armed Forces
Secretary—Secretary of Homeland Security
South Sudan—Republic of South Sudan
SPLA—Sudan People's Liberation Army (South Sudan's military)
TPS—Temporary Protected Status
UN—United Nations
UNAMID—UN-African Union Hybrid Mission in Darfur
USCIS—U.S. Citizenship and Immigration Services

What is Temporary Protected Status (TPS)?

• TPS is a temporary immigration status granted to eligible nationals of a country designated for TPS under the Immigration and Nationality Act (INA), or to persons without nationality who last habitually resided in the designated country.

• During the TPS designation period, TPS beneficiaries are eligible to remain in the United States and may obtain work authorization, so long as they continue to meet the requirements of TPS status.

• TPS beneficiaries may also be granted travel authorization as a matter of discretion.

• The granting of TPS does not lead to permanent resident status.

• When the Secretary terminates a country's TPS designation, beneficiaries return to the same immigration status they maintained before TPS, if any (unless that status has since expired or been terminated), or to any other lawfully obtained immigration status they received while registered for TPS.

When was Sudan designated for TPS?

On November 4, 1997, the Attorney General designated Sudan for TPS based on an ongoing armed conflict and extraordinary and temporary conditions within that country. *See* 62 FR 59737; sections 244(b)(1)(A) and (C) of the INA, 8 U.S.C. 1254a(b)(1)(A) and (C). Following the initial designation of Sudan for TPS in 1997, the Attorney General and, later, the Secretary have extended TPS and/or redesignated Sudan for TPS a total of 12 times. The last extension of TPS for Sudan was announced on October 13, 2011, based on the Secretary's determination that the conditions warranting the designation continued to be met. *See* 76 FR 63635. This announcement is the thirteenth extension and the third redesignation of TPS for Sudan since the original designation in 1997.

What authority does the Secretary of Homeland Security have to extend the designation of Sudan for TPS?

Section 244(b)(1) of the INA, 8 U.S.C. 1254a(b)(1), authorizes the Secretary, after consultation with appropriate Government agencies, to designate a foreign state (or part thereof) for TPS.[1] The Secretary may then grant TPS to eligible nationals of that foreign state (or aliens having no nationality who last habitually resided in that state). *See* section 244(a)(1)(A) of the INA, 8 U.S.C. 1254a(a)(1)(A).

At least 60 days before the expiration of a country's TPS designation or extension, the Secretary, after consultation with appropriate Government agencies, must review the conditions in a foreign state designated for TPS to determine whether the conditions for the TPS designation continue to be met. *See* section 244(b)(3)(A) of the INA, 8 U.S.C. 1254a(b)(3)(A). If the Secretary determines that a foreign state continues to meet the conditions for TPS designation, the designation is extended for an additional 6 months (or, in the Secretary's discretion, for 12 or 18 months). *See* section 244(b)(3)(C) of the INA, 8 U.S.C. 1254a(b)(3)(C). If the Secretary determines that the foreign state no longer meets the conditions for TPS designation, the Secretary must terminate the designation. *See* section 244(b)(3)(B) of the INA, 8 U.S.C. 1254a(b)(3)(B).

What is the Secretary's authority to redesignate Sudan for TPS?

In addition to extending an existing TPS designation, the Secretary, after consultation with appropriate Government agencies, may redesignate a country (or part thereof) for TPS. *See* section 244(b)(1) of the INA, 8 U.S.C. 1254a(b)(1); *see also* section 244(c)(1)(A)(i) of the INA, 8 U.S.C. 1254a(c)(1)(A)(i) (requiring that ''the alien has been continuously physically present since the effective date of *the most recent designation of the state*'' (emphasis added)). This is one of several instances in which the Secretary, and prior to the establishment of the Department of Homeland Security (DHS) the Attorney General, have simultaneously extended a country's TPS designation and redesignated the country for TPS. *See, e.g.,* 77 FR 25723 (May 1, 2012) (extension and redesignation for Somalia); 76 FR 29000 (May 19, 2011) (extension and redesignation for Haiti); 62 FR 16608 (Apr. 7, 1997) (extension and redesignation for Liberia).

When the Secretary designates or redesignates a country for TPS, she also has the discretion to establish the date from which TPS applicants must demonstrate that they have been ''continuously resid[ing]'' in the United States. *See* section 244(c)(1)(A)(ii) of the INA, 8 U.S.C.S 1254a(c)(1)(A)(ii). This discretion permits the Secretary to tailor the ''continuous residence'' date to offer TPS to the group of eligible individuals that the Secretary deems appropriate.

The Secretary has determined that the ''continuous residence'' date for applicants for TPS under the redesignation of Sudan shall be January 9, 2013. Initial applicants for TPS under this redesignation must also show they have been ''continuously physically present'' in the United States since May 3, 2013, which is the effective date of the Secretary's redesignation of Sudan. *See* section 244(c)(1)(A)(i) of the INA, 8 U.S.C. 1254a(c)(1)(A)(i). For each initial TPS application filed under the redesignation, the final determination whether the applicant has met the ''continuous physical presence'' requirement cannot be made until May 3, 2013. USCIS, however, will issue EADs, as appropriate, during the registration period in accordance with 8 CFR 244.5(b).

[1] As of March 1, 2003, in accordance with section 1517 of title XV of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, any reference to the Attorney General in a provision of the INA describing functions transferred from the Department of Justice to the Department of Homeland Security ''shall be deemed to refer to the Secretary'' of Homeland Security. *See* 6 U.S.C. 557 (codifying HSA, tit. XV, sec. 1517).

Why is the Secretary extending the TPS designation for Sudan and simultaneously redesignating Sudan for TPS through November 2, 2014?

Over the past year, DHS and the Department of State (DOS) have continued to review conditions in Sudan. Based on this review and after consulting with DOS, the Secretary has determined that an 18-month extension is warranted because the armed conflict is ongoing and the extraordinary and temporary conditions that prompted the November 4, 1997 designation and the last redesignation on October 7, 2004 persist. The Secretary has further determined that the conditions in Sudan, which have deteriorated, support redesignating Sudan for TPS and changing the ''continuous residence'' and ''continuous physical presence'' dates so as to continue affording TPS protection to the approximately 300 Sudanese nationals who arrived in the United States before October 7, 2004 and registered under the initial designation or redesignations and to extend TPS protection to eligible Sudanese nationals who arrived between October 7, 2004 and January 9, 2013.

Ongoing armed conflict throughout much of Sudan has caused continued insecurity and has led to continued internal displacement and refugee flight into neighboring countries. Violence and ensuing population displacement, along with environmental and economic factors, have created one of the worst humanitarian crises in the world. Efforts by the international community to get aid to the civilian population continue to be severely compromised by threats to the safety of aid workers and restrictions on the movement and operations of aid organizations.

Citizens of Sudan are affected by violent conflicts in four distinct areas: Darfur and the three transitional areas along the Sudan-South Sudan border (Abyei, Blue Nile State, and Southern Kordofan). In some areas of Darfur, Government-rebel clashes declined somewhat. However, in Darfur, rebel factions, bandits, and unidentified assailants have killed and abducted civilians, humanitarian workers, and personnel of the United Nations-African Union Hybrid Mission in Darfur (UNAMID); beaten and raped civilians; and used child soldiers. Since the initial deployment of UNAMID on December 31, 2007, over 35 peacekeepers have been killed in Darfur as a result of hostile actions. Inter-ethnic violence is a severe problem, and has resulted in civilian deaths and displacement. Peace agreements for Darfur were signed in 2006, 2007, 2010, and 2011, yet the fighting has continued. The ethnic and racial elements of the violence in Darfur distinguish it from the political and socio-economic based conflict between Sudan and South Sudan. In July and August 2012, there were attacks on the Kassab internally displaced people (IDP) camp in North Darfur. According to the American Free Press, these attacks killed an undetermined number of people and displaced 25,000 people temporarily.

The 2005 Comprehensive Peace Agreement (CPA) ended Sudan's decades-long civil war. But while provisions of the CPA have been upheld, many contentious issues remain unresolved and present the potential for conflict. Since South Sudan's secession, the three transition areas have remained the most contentious and violent regions. As part of the CPA, the contested territory of Abyei was to be jointly administered until local residents determined whether they would join Sudan or the South Sudan, but the referendum has yet to be held. In the months leading up to South Sudan's independence, both the Sudanese and the South Sudanese armies reinforced their positions near Abyei. On May 19, 2011, in a move condemned by the United Nations (UN) as a breach of the 2005 CPA, Sudan Armed Forces (SAF) and Sudanese police attacked and took control of Abyei. The UN News Service reported that as a result of the conflict, more than 110,000 people were displaced into Agok and South Sudan. Although the SAF and the majority of the Sudanese police had withdrawn from the area by early June 2012, the UN reported that as of July 2012, the majority of those who fled the fighting in 2011 remained displaced in and outside the Abyei area because of the lack of a civilian Abyei administration, the continued presence of armed forces, and the presence of landmines.

In June 2011, fighting between the SAF and South Sudan's military—the Sudan People's Liberation Army (SPLA)—erupted in Kadugli, the capital of Southern Kordofan. On June 25, 2011, UN Office for the Coordination of Humanitarian Affairs (OCHA) reported that Sudanese government forces conducted airstrikes and artillery shelling in the eastern and southern parts of the Nuba Mountains in Southern Kordofan. Hostilities increased in April 2012, when South Sudanese forces captured the disputed oilfield of Heglig.

In September 2011, a new battle zone erupted in Blue Nile State. Human Rights Watch (HRW) interviewed witnesses who ''described indiscriminate bombings in civilian areas, killings, and other serious abuses by Sudanese armed forces since armed conflict broke out there.'' In the states of Southern Kordofan and Blue Nile, Sudanese government forces provided support, weapons, and ammunition to government-aligned militias, and the Sudanese government seldom took action against soldiers or militia members who attacked civilians. According to UN reports, the fighting in these two states displaced or severely affected over 650,000 people—an increase of over 400,000–500,000 individuals since August 2011.

In addition to the continued violence in Darfur and the three transitional areas, the government of Sudan has responded with violence to disperse recent protests and to repress participants and organizers, which has resulted in deaths and arrests of activists. For the most part, these were peaceful demonstrations. Beginning in January 2011, antigovernment protestors demonstrated in Khartoum (the capital of Sudan) calling for President Omar al-Bashir to resign. Protestors were met with forceful resistance from police and security forces. Protests continued in the capital as well as other locations during the spring of 2011 and again in December of 2011. Small but sustained anti-regime protests began again in Khartoum and other major towns throughout Sudan in June 2012 and continued through July and August 2012. The U.S. Embassy in Khartoum had received reports that anywhere from 1,000–2,000 individuals from youth activist groups, opposition parties, and universities have been arrested and held in detention for prolonged periods of time without access to legal recourse. Reuters reported in August 2012 accounts of several deaths and an unknown number of injuries.

Insecurity due to ongoing fighting and the ongoing targeting of civilians has led to continued displacement of the Sudanese population. The U.S. Government and humanitarian observers have repeatedly condemned the Sudanese government for targeting civilians in aerial bombing campaigns. Despite these international concerns, the Sudanese military has persisted in bombing campaigns against civilians, including the use of ''cluster bombs.'' Furthermore, the government's human rights record is extremely poor and includes instances of extrajudicial killings, disappearances, arbitrary arrest and detention, forced population movements, rape, slavery, forced conscription of children, and severely restricted freedom of assembly,

association, religion, speech, and movement. The Internal Displacement Monitoring Centre estimated that as of December 2011, there were over 4 million internally displaced people. The UN High Commissioner for Refugees reported that there were more than 500,000 refugees originating from Sudan.

Myriad factors contribute to the ongoing humanitarian crisis in Sudan that has left much of Sudan's population of approximately 26 million in need of humanitarian assistance. While there were improvements in the levels of food security in some regions, drought and flooding contributed to increased food insecurity and malnutrition in others. The ability of aid workers to provide much needed humanitarian aid has not only been compromised by dangers to aid workers but also by government prohibitions on operations and access to certain areas where large populations of people are in need of assistance.

Based upon this review and after consultation with appropriate Government agencies, the Secretary finds that:

- The conditions that prompted the October 7, 2004 redesignation of Sudan for TPS continue to be met. *See* sections 244(b)(3)(A) and (C) of the INA, 8 U.S.C. 1254a(b)(3)(A) and (C).
- There continues to be an armed conflict in Sudan and, due to such conflict, requiring the return of Sudanese nationals to Sudan would pose a serious threat to their personal safety. *See* section 244(b)(1)(A) of the INA, 8 U.S.C. 1254a(b)(1)(A).
- There continue to be extraordinary and temporary conditions in Sudan that prevent Sudanese nationals from returning to Sudan in safety. *See* section 244(b)(1)(C) of the INA, 8 U.S.C. 1254a(b)(1)(C).
- It is not contrary to the national interest of the United States to permit Sudanese nationals (and persons who have no nationality who last habitually resided in Sudan) who meet the eligibility requirements of TPS to remain in the United States temporarily. *See* section 244(b)(1)(C) of the INA, 8 U.S.C. 1254a(b)(1)(C).
- The designation of Sudan for TPS should be extended for an additional 18-month period from May 3, 2013 through November 2, 2014. *See* section 244(b)(3)(C) of the INA, 8 U.S.C. 1254a(b)(3)(C).
- Based on current country conditions, Sudan should be simultaneously redesignated for TPS effective May 3, 2013 through November 2, 2014. *See* sections 244(b)(1)(A), (b)(1)(C), and (b)(2) of the INA; 8 U.S.C. 1254a(b)(1)(A), (b)(1)(C), and (b)(2).
- TPS applicants must demonstrate that they have continuously resided in the United States since January 9, 2013.
- The date by which TPS applicants must demonstrate that they have been continuously physically present in the United States is May 3, 2013, the effective date of the redesignation of Sudan for TPS.
- There are approximately 300 current Sudanese TPS beneficiaries who are expected to be eligible to re-register for TPS under the extension. DHS recognizes that some individuals who registered under the designation of Sudan may be eligible for TPS under the redesignation of South Sudan. If such individuals present satisfactory documentation of their South Sudanese nationality, and are otherwise eligible for TPS, they may choose to register under the TPS redesignation of South Sudan instead of Sudan.
- It is estimated that fewer than 4,000 additional individuals may be eligible for TPS under the combined redesignations of Sudan and South Sudan. With the creation of South Sudan having just occurred on July 9, 2011, it is difficult to break down this estimate between the two countries. This population includes potentially eligible Sudanese and South Sudanese who are in lawful nonimmigrant status or who have no other status.

Notice of Extension of the TPS Designation of Sudan and Redesignation of Sudan for TPS

By the authority vested in me as Secretary under section 244 of the INA, 8 U.S.C. 1254a, I have determined, after consultation with the appropriate Government agencies, that the conditions that prompted the redesignation of Sudan for TPS on October 7, 2004, not only continue to be met, but have deteriorated. *See* section 244(b)(3)(A) of the INA, 8 U.S.C. 1254a(b)(3)(A). On the basis of this determination, I am simultaneously extending the existing TPS designation of Sudan for 18 months from May 3, 2013 through November 2, 2014, and redesignating Sudan for TPS for 18 months from May 3, 2013 through November 2, 2014. *See* sections 244(b)(1)(A), (b)(1)(C), and (b)(2) of the INA; 8 U.S.C. 1254a(b)(1)(A), (b)(1)(C), and (b)(2). I have also determined that eligible individuals must demonstrate that they have continuously resided in the United States since January 9, 2013. *See* section 244(c)(1)(A)(ii) of the INA, 8 U.S.C. 1254a(c)(1)(A)(ii).

Janet Napolitano,

Secretary.

Required Application Forms and Application Fees To Register or Re-register for TPS

To register or re-register for TPS for Sudan, an applicant must submit each of the following two applications:

1. Application for Temporary Protected Status (Form I–821).

- If you are filing an initial application, you must pay the fee for the Application for Temporary Protected Status (Form I–821). *See* 8 CFR 244.2(f)(1) and 244.6 and information on initial filing on the USCIS TPS Web page at *http://www.uscis.gov/tps*.
- If you are filing a re-registration, you do not need to pay the fee for the Application for Temporary Protected Status (Form I–821). *See* 8 CFR 244.17.

and

2. Application for Employment Authorization (Form I–765).

- If you are applying for initial registration and want an EAD, you must pay the fee for Application for the Employment Authorization (Form I–765) only if you are age 14 through 65. No fee for the Application for Employment Authorization (Form I–765) is required if you are under the age of 14 or 66 and older and applying for initial registration.
- If you are applying for re-registration, you must pay the fee for the Application for Employment Authorization (Form I–765) only if you want an EAD.
- You do not pay the fee for the Application for Employment Authorization (Form I–765) if you are not requesting an EAD, regardless of whether you are applying for initial registration or re-registration.

You must submit both completed application forms together. If you are unable to pay for the application and/or biometrics fee, you may apply for a fee waiver by completing a Request for Fee Waiver (Form I–912) or submitting a personal letter requesting a fee waiver, and by providing satisfactory supporting documentation. For more information on the application forms and fees for TPS, please visit the USCIS TPS Web page at *http://www.uscis.gov/tps*. Fees for the Application for Temporary Protected Status (Form I–821), the Application for Employment Authorization (Form I–765), and biometric services are also described in 8 CFR 103.7(b)(1)(i).

Biometric Services Fee

Biometrics (such as fingerprints) are required for all applicants 14 years of age or older. Those applicants must submit a biometric services fee. As previously stated, if you are unable to pay for the biometric services fee, you may apply for a fee waiver by completing a Request for Fee Waiver (Form I–912) or by submitting a personal letter requesting a fee waiver, and providing satisfactory supporting documentation. For more information on the biometric services fee, please visit the USCIS Web site at *http://www.uscis.gov*. If necessary, you may be required to visit an Application Support Center to have your biometrics captured.

Refiling an *Initial* TPS Application After Receiving a Denial of a Fee Waiver Request

If you request a fee waiver when filing your initial TPS application package and your request is denied, you may refile your application packet before the initial filing deadline of July 8, 2013. If you submit your application with a fee waiver request before that deadline, but you receive a fee waiver denial and there are fewer than 45 days before the filing deadline (or the deadline has passed), you may still refile your application within the 45-day period after the date on the USCIS fee waiver denial notice. Your application will not be rejected even if the filing deadline has passed, provided it is mailed within those 45 days and all other required information for the application is included. **Note:** If you wish, you may also wait to request an EAD and pay the Application for Employment Authorization (Form I–765) fee after USCIS grants you TPS, if you are found eligible. If you choose to do this, you would still need to file the Application for Employment Authorization (Form I–765) without fee and without requesting an EAD with the Application for Temporary Protected Status (Form I–821).

Refiling a *Re-Registration* TPS Application After Receiving a Denial of a Fee Waiver Request

USCIS urges all re-registering applicants to file as soon as possible within the 60-day re-registration period so that USCIS can process the applications and issue EADs promptly. Filing early will also allow those applicants who may receive denials of their fee waiver requests to have time to refile their applications *before* the re-registration deadline. If, however, an applicant receives a denial of his or her fee waiver request and is unable to refile by the re-registration deadline, the applicant may still refile his or her application. This situation will be reviewed under good cause for late re-registration. However, applicants are urged to refile within 45 days of the date on their USCIS fee waiver denial notice, if at all possible. *See* section 244(c)(3)(C) of the INA; 8 U.S.C. 1254a(c)(3)(C); 8 CFR 244.17(c). For more information on good cause for late re-registration, visit the USCIS TPS Web page at *http://www.uscis.gov/tps*. **Note:** As previously stated, although a re-registering TPS beneficiary age 14 and older must pay the biometric services fee (but not the initial TPS application fee) when filing a TPS re-registration application, the applicant may decide to wait to request an EAD, and therefore not pay the Application for Employment Authorization (Form I–765) fee until after USCIS has approved the individual's TPS re-registration, if he or she is eligible.

Mailing Information

Mail your application for TPS to the proper address in Table 1.

TABLE 1—MAILING ADDRESSES

If . . .	Mail to . . .
You are applying through the U.S. Postal Service	USCIS, P.O. Box 6943, Chicago, IL 60680–6943.
You are using a non-U.S. Postal Service delivery service	USCIS, Attn: TPS Sudan, 131 S. Dearborn 3rd Floor, Chicago, IL 60603–5517.

If you were granted TPS by an Immigration Judge (IJ) or the Board of Immigration Appeals (BIA), and you wish to request an EAD or are re-registering for the first time following a grant of TPS by the IJ or BIA, please mail your application to the appropriate address in Table 1 above. Upon receiving a Receipt Notice from USCIS, please send an email to *TPSijgrant.vsc@uscis.dhs.gov* with the receipt number and state that you submitted a re-registration and/or request for an EAD based on an IJ/BIA grant of TPS. You can find detailed information on what further information you need to email and the email addresses on the USCIS TPS Web page at *http://www.uscis.gov/tps*.

E-Filing

You cannot electronically file your application when re-registering or applying for initial registration for Sudan TPS. Please mail your application to the mailing address listed in Table 1 above.

Employment Authorization Document (EAD)

May I request an interim EAD at my local USCIS office?

No. USCIS will not issue interim EADs to TPS applicants and re-registrants at local offices.

Will my current EAD, which is set to expire on May 2, 2013, be automatically extended for 6 months?

No. This notice does not automatically extend previously issued EADs. DHS has announced the extension of the TPS designation of Sudan and established the re-registration period at an early date to allow sufficient time for USCIS to process EAD requests prior to the May 2, 2013 expiration date. You must apply during the 60-day re-registration period. Failure to apply for TPS during the re-registration period without good cause may result in gaps in work authorization. DHS strongly encourages you to apply as early as possible within the re-registration period.

When hired, what documentation may I show to my employer as proof of employment authorization and identity when completing Employment Eligibility Verification (Form I–9)?

You can find a list of acceptable document choices on the ''Lists of Acceptable Documents'' for Employment Eligibility Verification (Form I–9). You can find additional detailed information on the USCIS I–9 Central Web page at *http://www.uscis.gov/I-9Central*. Employers are required to verify the identity and employment authorization of all new employees by using Employment Eligibility Verification (Form I–9). Within 3 days of hire, an employee must present proof of identity and

employment authorization to his or her employer.

You may present any document from List A (reflecting both your identity and employment authorization), or one document from List B (reflecting identity) together with one document from List C (reflecting employment authorization). An EAD is an acceptable document under ''List A.'' Employers may not reject a document based upon a future expiration date.

What documentation may I show my employer if I am already employed but my current TPS-related EAD is set to expire?

You must present any document from List A or any document from List C on Employment Eligibility Verification (Form I–9) to reverify employment authorization. Your employer is required to reverify on Employment Eligibility Verification (Form I–9) the employment authorization of current employees upon the expiration of a TPS-related EAD. Your employer should use either Section 3 of the Form I–9 originally completed for the employee or, if this section has already been completed or if the version of Form I–9 is no longer valid, in Section 3 of a new Form I–9 using the most current version. Note that your employer may not specify which List A or List C document employees must present.

USCIS anticipates that it will be able to process and issue new EADs for existing TPS Sudan beneficiaries before their current EADs expire on May 2, 2013. However, re-registering beneficiaries are encouraged to file as early as possible within the 60-day re-registration period to help ensure that they receive their EADs promptly.

Can my employer require that I produce any other documentation to prove my status, such as proof of my Sudanese citizenship?

No. When completing Employment Eligibility Verification (Form I–9), including reverifying employment authorization, employers must accept any documentation that appears on the ''Lists of Acceptable Documents'' for Employment Eligibility Verification (Form I–9) and that reasonably appears to be genuine and that relates to you. Employers may not request documentation that does not appear on the ''Lists of Acceptable Documents.'' Therefore, employers may not request proof of Sudanese citizenship when completing Employment Eligibility Verification (Form I–9) for new hires or reverifying the employment authorization of current employees. If presented with EADs that are unexpired on their face, employers should accept such EADs as valid List A documents so long as the EADs reasonably appear to be genuine and to relate to the employee. See below for important information about your rights if your employer rejects lawful documentation, requires additional documentation, or otherwise discriminates against you based on your citizenship or immigration status, or your national origin.

Note to All Employers

Employers are reminded that the laws requiring proper employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth reverification requirements. For general questions about the employment eligibility verification process, employers may call the USCIS Form I–9 Customer Support at 888–464–4218 (TDD for the hearing impaired is at 877–875–6028). For questions about avoiding discrimination during the employment eligibility verification process, employers may also call the Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) Employer Hotline at 800–255–8155 (TDD for the hearing impaired is at 800–237–2515), which offers language interpretation in numerous languages.

Note to Employees

For general questions about the employment eligibility verification process, employees may call the USCIS National Customer Service Center at 800–375–5283 (TDD for the hearing impaired is at 800–767–1833); calls are accepted in English and Spanish. Employees or applicants may also call the OSC Worker Information Hotline at 800–255–7688 (TDD for the hearing impaired is at 800–237–2515) for information regarding employment discrimination based upon citizenship, immigration status, or national origin, or for information regarding discrimination related to Employment Eligibility Verification (Form I–9) and E-Verify. The OSC Worker Information Hotline provides language interpretation in numerous languages. In order to comply with the law, employers must accept any document or combination of documents acceptable for Employment Eligibility Verification (Form I–9) completion if the documentation reasonably appears to be genuine and to relate to the employee. Employers may not require extra or additional documentation beyond what is required for Employment Eligibility Verification (Form I–9) completion. Further, employers participating in E-verify who receive an E-verify initial mismatch (''tentative nonconfirmation'' or ''TNC'') on employees must inform employees of the mismatch and give such employees an opportunity to challenge the mismatch. Employers are prohibited from taking adverse action against such employees based on the initial mismatch unless and until E-Verify returns a final nonconfirmation. For example, employers must allow employees challenging their mismatches to continue to work without any delay in start date or training and without any change in hours or pay, while the final E-Verify determination remains pending. Additional information is available on the OSC Web site at *http://www.justice.gov/crt/about/osc* and the USCIS Web site at *http://www.dhs.gov/E-verify*.

Note Regarding Federal, State, and Local Government Agencies (Such as Departments of Motor Vehicles)

While Federal government agencies must follow the guidelines laid out by the Federal government, state and local government agencies establish their own rules and guidelines when granting certain benefits. Each state may have different laws, requirements, and determinations about what documents you need to provide to prove eligibility for certain benefits. Whether you are applying for a Federal, state, or local government benefit, you may need to provide the government agency with documents that show you are a TPS beneficiary and/or show you are authorized to work based on TPS. Examples are:

(1) Your EAD that has a valid expiration date;

(2) A copy of your Application for Temporary Protected Status Receipt Notice (Form I–797) for this re-registration; and/or

(3) A copy of your past or current Application for Temporary Protected Status Approval Notice (Form I–797), if you receive one from USCIS.

Check with the government agency regarding which document(s) the agency will accept. You may also provide the agency with a copy of this notice.

Some benefit-granting agencies use the USCIS Systematic Alien Verification for Entitlements Program (SAVE) to verify the current immigration status of applicants for public benefits. If such an agency has denied your application based solely or in part on a SAVE response, the agency must offer you the

opportunity to appeal the decision in accordance with the agency's procedures. If the agency has received and acted upon or will act upon a SAVE verification and you do not believe the response is correct, you may make an InfoPass appointment for an in-person interview at a local USCIS office. Detailed information on how to make corrections, make an appointment, or submit a written request can be found at the SAVE Web site at *http://www.uscis.gov/save,* then by choosing ''How to Correct Your Records'' from the menu on the right.

[FR Doc. 2013–00049 Filed 1–8–13; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Administrative Rulings

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; Extension of an existing information collection.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Administrative Rulings. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This information collection was previously published in the **Federal Register** (77 FR 66626) on November 6, 2012, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before February 8, 2013.

ADDRESSES: Interested persons are invited to submit written comments on this information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for U.S. Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one 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/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components 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 collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information.

Title: Administrative Rulings.

OMB Number: 1651–0085.

Form Number: None.

Abstract: The collection of information in 19 CFR Part 177 is necessary in order to enable Customs and Border Protection (CBP) to respond to requests by importers and other interested persons for the issuance of administrative rulings. These rulings pertain to the interpretation of applicable laws related to prospective and current transactions involving classification, marking, and country of origin. The collection of information in Part 177 of the CBP Regulations is also necessary to enable CBP to make proper decisions regarding the issuance of binding rulings that modify or revoke prior CBP binding rulings. This collection of information is authorized by 19 U.S.C. 66, 1202, (General Note 3(i), Harmonized Tariff Schedule of the United States). The application to obtain an administrative ruling is accessible at: *https://apps.cbp.gov/erulings.*

Action: CBP proposes to extend the expiration date of this information collection with no change to the estimated burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Rulings

Estimated Number of Respondents: 12,000.

Estimated Time per Respondent: 10 hours.

Estimated Total Annual Burden Hours: 120,000.

Appeals

Estimated Number of Respondents: 200.

Estimated Time per Respondent: 40 hours.

Estimated Total Annual Burden Hours: 8,000.

Dated: January 3, 2013.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2013–00145 Filed 1–8–13; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–ES–2012–N299; FXES11130600000D2–123–FF06E00000]

Endangered and Threatened Wildlife and Plants; Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered or threatened species. The Endangered Species Act of 1973, as amended (Act), prohibits activities with endangered and threatened species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing these permits.

DATES: To ensure consideration, please send your written comments by February 8, 2013.

ADDRESSES: You may submit comments or requests for copies or more information by any of the following methods. Alternatively, you may use one of the following methods to request hard copies or a CD–ROM of the documents. Please specify the permit you are interested in by number (e.g., Permit No. TE–123456).

• *Email: permitsR6ES@fws.gov.* Please refer to the respective permit number (e.g., Permit No. TE–123456) in the subject line of the message.

• *U.S. Mail:* Kris Olsen, Permit Coordinator, Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 25486–DFC, Denver, CO 80225.

• *In-Person Drop-off, Viewing, or Pickup:* Call (303) 236–4256 to make an appointment during regular business hours at 134 Union Blvd., Suite 645, Lakewood, CO 80228.

FOR FURTHER INFORMATION CONTACT: Kris Olsen, Permit Coordinator Ecological Services, (303) 236–4256 (phone); *permitsR6ES@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Background

The Act (16 U.S.C. 1531 et seq.) prohibits activities with endangered and threatened species unless a Federal permit allows such activity. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR 17, the Act provides for permits, and requires that we invite public comment before issuing these permits.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes applicants to conduct activities with U.S. endangered or threatened species for scientific purposes, enhancement of propagation or survival, or interstate commerce (the latter only in the event that it facilitates scientific purposes or enhancement of propagation or survival). Our regulations implementing section 10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Applications Available for Review and Comment

We invite local, State, and Federal agencies, and the public to comment on the following applications. Please refer to the appropriate permit number (e.g., Permit No. TE–123456) for the application when submitting comments.

Documents and other information the applicants have submitted with these applications are available for review, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

Permit Application Number: TE–064680

Applicant: David Worthington, National Park Service, Capitol Reef National Park, Torrey, Utah.

The applicant requests renewal of an existing permit to remove and reduce to possession *Schoenocrambe barnebyi* (Barney reed-mustard) and *Sclerocactus wrightiae* (Wright fishhook cactus), in conjunction with surveys and population monitoring for the purpose of enhancing each species' survival. Activities would occur on Federal lands in Utah, throughout the range of each species.

Permit Application Number: TE–207948

Applicant: John Mull, Weber State University, Ogden, Utah.

The applicant requests renewal of an existing permit to remove and reduce to possession *Astragalus holmgreniorum* (Holmgren milk-vetch), in conjunction with surveys and population monitoring for the purpose of enhancing each species' survival. Activities would occur on Federal lands in Arizona and Utah, throughout the range of the species.

National Environmental Policy Act (NEPA)

In compliance with NEPA (42 U.S.C. 4321 *et seq.*), we have made an initial determination that the proposed activities in these permits are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement (516 DM 6 Appendix 1, 1.4C(1)).

Public Availability of Comments

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*)

Dated: January 2, 2013.

Michael G. Thabault,

Assistant Regional Director, Mountain-Prairie Region.

[FR Doc. 2013–00133 Filed 1–8–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

[FWS–R5–ES–2012–N195; FXES11130300000–134–FF03E00000]

Endangered and Threatened Wildlife and Plants; Draft Revised Indiana Bat Summer Survey Guidelines

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (USFWS), announce the availability of our draft revised summer survey guidelines for the Indiana bat (*Myotis sodalis*) for public review and comment. The Indiana bat is federally listed as endangered under the Endangered Species Act of 1973, as amended (Act). The draft guidelines were prepared by representatives of the U.S. Department of Agriculture's Forest Service, U.S. Department of Defense's Army Corps of Engineers, U.S. Department of the Interior's Geological Survey and USFWS, Kentucky Department of Fish and Wildlife Resources, New York State Department of Environmental Conservation, and the Indiana Department of Natural Resources. We request review and comment on our guidelines—along with acoustic identification software testing criteria our 2013 contingency plan—from local, State, and Federal agencies and the public.

DATES: Comments on the draft guidelines must be received on or before February 8, 2013.

ADDRESSES: *Obtaining Documents:* The draft survey guidelines, acoustic identification software testing criteria, and 2013 contingency plan are available at *http://www.fws.gov/midwest/Endangered/mammals/inba/inbasummersurveyguidance.html.* The documents are also available by request, by U.S. mail from the U.S. Fish and Wildlife Service, Ecological Services Field Office, 620 South Walker Street, Bloomington, IN 47403–2121; or by phone at 812–334–4261, x1216.

Submitting Comments: If you wish to comment on the documents, you may submit your comments in writing by any one of the following methods:

• *U.S. mail:* U.S. Fish and Wildlife Service, 620 South Walker Street, Bloomington, IN 47403–2121;

• *Hand-delivery:* Field Supervisor at the above U.S. mail address;

• *Email: indiana_bat@fws.gov;* or

• *Fax:* 812–334–4273. Include ''Indiana Bat Summer Survey Guidelines'' in the subject line of the facsimile transmittal.

FOR FURTHER INFORMATION CONTACT: Questions or requests for additional information may be directed to any of the following: (1) Mr. Andrew King, Endangered Species Biologist, at the Bloomington, Indiana, Field Office address or phone above; (2) Ms. Robyn Niver, Endangered Species Biologist, by U.S. mail at U.S. Fish and Wildlife Service, Ecological Services Field Office, 3817 Luker Road, Cortland, NY 13045; or by phone at 607–753–9334; or (3) Mr. Mike Armstrong, Endangered Species Biologist, by U.S. mail at U.S. Fish and Wildlife Service, Ecological Services Field Office, J. C. Watts Federal Building, Room 265, 330 West Broadway, Frankfort, KY 40601–8670; or by phone at 502–229–4632.

SUPPLEMENTARY INFORMATION:

Background

The Indiana bat was originally listed as in danger of extinction under the Endangered Species Preservation Act of 1966. Summer survey guidelines (mist-netting protocols) were first developed for the species in the early 1990s and the USFWS provided revised mist-netting guidelines in our 2007 Draft Revised Recovery Plan. The USFWS recently convened a group of State and Federal agency representatives to revise existing survey guidelines. We solicited peer review through the bat working groups across the range of the Indiana bat between February and March 2012 and received comments from 57 individuals. Based upon comments received and the results of pilot testing of the survey guidelines at known Indiana bat maternity colonies in the summer of 2012, we offer the revised guidelines for public review and comment.

In addition to soliciting comments on draft survey guidelines for determining presence or probable absence of Indiana bats in the summer, we request comment on our proposed approach and criteria for testing the accuracy and suitability of available acoustic identification software programs. Only programs that pass our suitability test would be approved by the USFWS for official survey use. Our goal is to incorporate comments and finalize the draft survey guidelines and testing criteria in time for implementation in the 2013 field season. However, should no USFWS-approved software programs be concurrently available, we propose to follow an intermediary contingency plan. The draft survey guidelines, draft acoustic identification software testing criteria, and 2013 contingency plan, with instructions for commenting, are available on the Internet (see **ADDRESSES**).

Request for Public Comments

We invite written comments on (1) The draft survey guidelines, (2) the acoustic identification software testing criteria, and (3) the 2013 contingency plan. Substantive comments may or may not result in changes to the USFWS guidance document. Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

While all comments we receive will be considered in developing final documents, we encourage commenters to focus on those portions of the guidelines that have been revised, particularly those topics noted above that address peer-review comments.

All comments received by the date specified in **DATES** will be considered in preparing final documents. Methods of submitting comments are in **ADDRESSES**.

Public Availability of Comments

Responses to individual commenters will not be provided; however, we will provide the comments we receive and a summary of how we addressed substantive comments in a frequently asked questions document on the Web site listed above. If you submit comments or information by email to *indiana_bat@fws.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made by hard copy 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. We will post all hard copy and email submissions on the Web site listed above in **ADDRESSES**.

Comments and materials we receive will be available on our Web site; however, individuals without internet access may request an appointment to inspect the comments during normal business hours at our office in Bloomington, Indiana (see **ADDRESSES**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 2, 2013.

Lynn M. Lewis,

Assistant Regional Director, Ecological Services, Midwest Region.

[FR Doc. 2013–00213 Filed 1–8–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNM–922000–L51100000–GA0000–LVEMG12CG300; NMNM–126813]

Notice of Availability of the Environmental Assessment and Notice of Public Hearing for the Peabody Natural Resources Company Federal Coal Lease Application, NM

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Federal coal management regulations, the Peabody Natural Resources Company, Federal Coal Lease-by-Application Environmental Assessment (EA) is available for public review and comment. The Department of the Interior, Bureau of Land Management (BLM) New Mexico State Office, will hold a public hearing to receive comments on the EA, Fair Market Value (FMV), and Maximum Economic Recovery (MER) of the coal resources for Peabody Natural Resources Company, NMNM–126813.

DATES: The public hearing will be held at 3 p.m. on February 8, 2013. Written comments should be received no later than March 11, 2013.

ADDRESSES: The public hearing will be held at the Cibola County Convention Room, 515 West High St., Grants, New Mexico. Written comments should be sent to Gary Torres at the BLM Farmington Field Office, 6251 College Blvd., Suite A, Farmington, NM 87402 or by fax at 505–564–7608. Copies of the Draft EA, the unsigned Finding of No Significant Impact (FONSI) and the MER report are available at the Farmington Field Office address above. The documents are also available electronically at the following Web site: *http://www.blm.gov/nm/st/en/fo/Farmington_Field_Office/ffo_nepa/ffo_mineral_eas_open.html.*

FOR FURTHER INFORMATION CONTACT: Shannon Hoefeler at 505–564–7732, *shoefele@blm.gov,* or Gary Torres at 505–564–7612, *gtorres@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: A lease-by-application was filed by Peabody

Natural Resources Company. The coal resource to be offered is limited to coal recoverable by surface mining methods. The Federal coal is located in lands outside established coal production regions and may supplement the reserves at the El Segundo Mine. The Federal coal resources are located in McKinley County, New Mexico.

New Mexico Principal Meridian

T. 17 N., R. 9 W.,
Sec. 34, ALL.

These lands contain 640 acres, more or less.

The EA addresses the cultural, socioeconomic, environmental, and cumulative impacts that would likely result from leasing these coal lands. Two alternatives are addressed in the EA:

Alternative 1: (Proposed Action)—The tracts would be leased as requested in the application; and

Alternative 2: (No Action)—The application would be rejected or denied. The Federal coal reserves would be bypassed.

Proprietary data marked as confidential may be submitted to the BLM in response to this solicitation of public comments. Data so marked shall be treated in accordance with the laws and regulations governing the confidentiality of such information. A copy of the comments submitted by the public on the EA, FONSI, FMV, and MER, except those portions identified as proprietary by the author and meeting exemptions stated in the Freedom of Information Act, will be available for public inspection at the BLM Farmington Field Office, 6251 College Blvd., Suite A, Farmington, NM 87402, during regular business hours from 9 a.m. to 4 p.m. Monday through Friday, excluding Federal holidays.

Comments on the EA, FMV, and MER should address, but not necessarily be limited to, the following:

1. The quality and quantity of the coal resources;

2. The method of mining to be employed to obtain MER of the coal, including: Specifications of the seams to be mined; timing and rate of production; restrictions to mining; and the inclusion of the tracts in an existing mining operation;

3. The FMV appraisal including, but not limited to: the evaluation of the tract as an incremental unit of an existing mine; quality and quantity of the coal resource; potential sales value of the severed coal; mining and reclamation costs; net present value discount factors; depreciation and other tax accounting factors; the mining method or methods; and any comparable sales data on similar coal lands. The values given above may or may not change as a result of comments received from the public and changes in market conditions between now and when final economic evaluations are completed.

Written comments on the EA, MER, and FMV should be sent to Gary Torres at the above address or sent via email to *gtorres@blm.gov* prior to close of business March 11, 2013. Please note ''Coal Lease by Application'' in the subject line for all emails. Substantive comments, whether written or oral, will receive equal consideration prior to any lease offering.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 CFR parts 3422 and 3425.

Jesse J. Juen,

State Director.

[FR Doc. 2013–00180 Filed 1–8–13; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWY910000 L16100000 XX0000]

Notice of Public Meeting; Wyoming Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Wyoming Resource Advisory Council (RAC) will meet as indicated below.

DATES: The meeting will be held February 6, 2013, (1:30 p.m. to 5:00 p.m.), February 7, (8:00 a.m. to 5:00 p.m.) and February 8, (8:00 a.m. to noon) 2012.

ADDRESSES: The meeting will be at the High Desert District, Rock Springs Field Office, 280 Highway 191 North, Rock Springs, Wyoming in the Pilot Butte Conference Room.

FOR FURTHER INFORMATION CONTACT: Cindy Wertz, Wyoming Resource Advisory Council Coordinator, Wyoming State Office, 5353 Yellowstone, Cheyenne, WY 82009; telephone 307–775–6014; email *wertz@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: This 10-member RAC advises the Secretary of the Interior on a variety of management issues associated with public land management in Wyoming.

Planned agenda topics include a tour of the Rock Springs Wild Horse Holding Facility, a discussion of checkerboard land ownership, landscape scale partnerships, invasive weeds, trails and follow up from previous meetings.

On Wednesday, February 6, the meeting will begin at 1:30 p.m. with a tour of the Wild Horse Holding Facility on Lionkol Road. Following the tour, the group will meet at the High Desert District Office Pilot Butte Conference Room.

All RAC meetings are open to the public with time allocated for hearing public comments. On Friday, February 8, there will be public comment period beginning at 8:00 a.m. The public may also submit written comments to the RAC. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. If there are no members of the public interested in speaking, the meeting will move promptly to the next agenda item.

Dated: January 2, 2013.

Donald A. Simpson,

State Director, Wyoming.

[FR Doc. 2013–00220 Filed 1–8–13; 8:45 am]

BILLING CODE 4310–22–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–838]

Certain Food Waste Disposers and Components and Packaging Thereof; Notice of the Commission's Determination Not To Review Initial Determinations Granting Complainant's Motions To Partially Terminate the Investigation and To Withdraw the Complaint; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's (''ALJ'') initial determinations (''IDs'') (Order Nos. 6, and 8) granting (1) a motion by complainant Emerson Electric Co. of St. Louis, Missouri (''Emerson'') to partially terminate the investigation and (2) a motion to terminate the investigation based on withdrawal of the complaint.

FOR FURTHER INFORMATION CONTACT: Amanda S. Pitcher, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2737. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on April 20, 2012, based on a complaint filed by Emerson of St. Louis, Missouri, alleging violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) by reason of (1) Infringement of the claim of U.S. Patent No. D535,850 ('850 patent); (2) infringement of U.S. Trademark Registration No. 2,518,010 and common law trademarks; (3) unfair competition by passing off; (4) trademark dilution; and (5) trade dress infringement. 77 FR 23751 (Apr. 20, 2012). The Commission's Notice of Investigation named Anaheim Manufacturing Co. of Brea, California as the only respondent. The Notice of Investigation was amended to add respondents Jiangsu Mega Motors and Zhjiang Zhongda Technical Export Co. Ltd. The Office of Unfair Import Investigations (''OUII'') was also named as a party.

On November 28, 2012, Emerson filed a motion for partial termination with respect to Emerson's allegations of infringement of the '850 patent, trademark infringement by inducement, and trademark dilution. On December 3, 2012, Emerson filed a letter supplementing its motion to state that there are no agreements among the parties concerning the subject matter of the investigation. On December 4, 2012, the ALJ granted Emerson's motion, in Order No. 6, finding that there are no agreements, written or oral, express or implied between the parties concerning the investigation. In addition, the ALJ found that there are no extraordinary circumstances that would preclude granting the motion and that partial termination is in the public interest.

On December 7, 2012, Emerson filed a motion to terminate the investigation based on withdrawal of the remaining allegations in the complaint and to stay the procedural schedule. On December 11, 2012, the ALJ granted Emerson's motion, in Order No. 8, finding that there are no agreements, written or oral, express or implied between the parties concerning the investigation. In addition, the ALJ found that there are no extraordinary circumstances that would preclude granting the motion and that termination of the investigation is in the public interest.

The Commission has determined not to review the subject IDs and to terminate the investigation.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

By order of the Commission.

Issued: January 3, 2013.

William R. Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2013–00178 Filed 1–8–13; 8:45 am]

BILLING CODE 7020–02–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Hearings of the Judicial Conference Advisory Committee on Rules of Bankruptcy Procedure

Federal Register Citation of Previous Announcements: 77 FR H9828.

AGENCY: Advisory Committee on Rules of Bankruptcy Procedure, Judicial Conference of the United States.

ACTION: Notice of Cancellation of Open Hearing.

SUMMARY: The following public hearing on proposed amendments to the Federal Rules of Bankruptcy Procedure has been canceled: Bankruptcy Rules Hearing, February 1, 2013, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Benjamin J. Robinson, Deputy Rules Officer and Counsel, Administrative Office of the United States Courts, Washington, DC. 20544, telephone (202) 502–1820.

Dated: January 2, 2013.

Notice of Meeting Cancellation.

Benjamin J. Robinson,

Rules Committee Deputy and Counsel.

[FR Doc. 2013–00230 Filed 1–8–13; 8:45 am]

BILLING CODE 2210–55–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Hearings of The Judicial Conference Advisory Committee on Rules of Appellate Procedure

Federal Register Citation of Previous Announcement: 77FR 49828.

AGENCY: Judicial Conference of the United States, Advisory Committee on Rules of Appellate Procedure.

ACTION: Notice of Cancellation of Open Hearing.

SUMMARY: The following public hearing on proposed amendments to the Federal Rules of Appellate Procedure has been canceled: Appellate Rules Hearing, February 1, 2013, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Benjamin J. Robinson, Deputy Rules Officer and Counsel, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: January 2, 2013.

Benjamin J. Robinson,

Rules Committee Deputy and Counsel.

[FR Doc. 2013–00233 Filed 1–8–13; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed First Amendment to Consent Decree Under the Clean Air Act

On January 2, 2013, the Department of Justice lodged a proposed first amendment to a consent decree with the United States District Court for the Southern District of Texas in the lawsuit entitled *United States* v. *Formosa Plastics Corporation, Texas, et al.,* Civil Action No. 09–00061.

Under the original 2010 consent decree, Formosa Plastics Corporation, Texas, Formosa Hydrocarbons, Inc. (collectively ''FPC TX''), and Formosa Plastics Corporation, Louisiana (collectively ''Defendants'') agreed to undertake numerous measures to come

into compliance with various environmental statutes and regulations at their facilities in Point Comfort, Texas, and Baton Rouge, Louisiana. The Defendants still are in the process of complying with the 2010 Decree. However, at the Point Comfort Facility, FPX TX violated certain leak detection and repair (''LDAR'') provisions of the Decree (which are based on regulations promulgated under the Clean Air Act, 42 U.S.C. 7401, *et seq.*), and the United States and FPC TX agreed to a proposed first amendment to the Consent Decree. Under the proposed first amendment, FPC TX will undertake a comprehensive review of equipment such as valves, pumps, and compressors at the Point Comfort facility to determine the applicability of certain LDAR requirements and will pay a stipulated penalty of $1,447,925.

The publication of this notice opens a period of public comment on the first amendment. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Formosa Plastics Corporation, Texas, et al.,* D.J. Ref. No. 90–5–2–1–08995. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By e-mail	*pubcomment-ees.enrd@usdoj.gov*
By mail	Assistant Attorney General U.S. DOJ—ENRD P.O. Box 7611 Washington, DC 20044–7611.

During the public comment period, the first amendment may be examined and downloaded at this Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the first amendment upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check in the amount of $ 8.50 (25 cents per page reproduction cost) payable to the United States Treasury.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–00210 Filed 1–8–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On January 4, 2013, the Department of Justice lodged a proposed consent decree with the United States District Court for the Eastern District of Wisconsin in the lawsuit entitled *United States* v. *Wisconsin Public Service Corporation,* Civ. No. 13–C–10 (E.D. Wis.).

In this civil enforcement action under the federal Clean Air Act, the United States alleges that Wisconsin Public Service Corporation (''WPS'') failed to comply with certain requirements of the Act intended to protect air quality. The complaint seeks injunctive relief and civil penalties for violations of the Prevention of Significant Deterioration (''PSD'') and Title V provisions of the Clean Air Act, 42 U.S.C. 7470–92 and 42 U.S.C. 7661a–76661f, and related state and federal implementing regulations. The complaint alleges that WPS failed to obtain appropriate permits and failed to install and operate required pollution control devices to reduce emissions of various air pollutants at the Weston Generation Station, a coal-fired power plant in Marathon County, Wisconsin.

The proposed consent decree would resolve past Clean Air Act violations and would require WPS to reduce harmful emissions of sulfur dioxide (''SO_2''), nitrogen oxides (''NO_X''), and particular matter (''PM'') emissions, at the Weston Generation Station, as well as the Pulliam Generation Station, a coal-fired power plant located in Brown County, Wisconsin. The reductions would be achieved through emission control requirements and limitations specified by the proposed consent decree, including installation and operation of pollution controls; retirement, refueling, or repowering of certain generating units; and annual emission caps at both the Weston and Pulliam plants. WPS will also spend $6 million to fund environmental mitigation projects that will further reduce emissions and benefit communities adversely affected by pollution from its plants, and pay a civil penalty of $1.2 million.

The publication of this notice opens a period for public comment on the proposed consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Wisconsin Public Service Corporation,* Civ. No. 13–C–10 (E.D. Wis.), D.J. Ref. No. 90–5–2–1–1230/1. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By e-mail	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General U.S. DOJ—ENRD P.O. Box 7611 Washington, DC 20044–7611.

During the public comment period, the proposed consent decree may be examined and downloaded at this Justice Department Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the proposed consent decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $19.00 (25 cents per page reproduction cost) payable to the United States Treasury.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–00232 Filed 1–8–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Partial Consent Decree Under the Clean Water Act

Notice is hereby given that on January 3, 2013, a proposed partial Consent Decree (''Decree'') was lodged in *U.S.* v. *BP Exploration and Production, et al,* Civil No. 10–4536 (E.D. La.) (That case is centralized in MDL 2179: *In Re: Oil Spill by the Oil Rig ''Deepwater Horizon'' in the Gulf of Mexico, on April 20, 2010.*)

In this civil enforcement action the United States sought, among other things, civil penalties under Section 311(b) of the Clean Water Act, 33 U.S.C. 1321(b), from the ''Transocean Defendants'' (Transocean Deepwater Inc., Transocean Offshore Deepwater Drilling Inc., Transocean Holdings LLC, and Triton Asset Leasing GmbH). That claim arises against the Transocean Defendants, and other defendants as well, from the discharge of oil into the Gulf of Mexico resulting from the blowout of the Macondo Well that began in April 2010.

Under the proposed Decree, the Transocean Defendants will pay a $1 billion civil penalty. The proposed Decree does not conclude any claim against the Transocean Defendants other than those claims for penalty specified in the proposed Decree. The proposed Decree also does not resolve any claim brought against other defendants in this civil enforcement action.

Also under the proposed Decree, the Transocean Defendants must comply with court-enforceable strictures aimed at reducing the chances of another blowout-and-discharge-of-oil and at improving emergency response capabilities. Examples of these requirements include: Certifications of maintenance and repair of blowout preventers before each drilling job, consideration of process safety risks, and personnel training related to oil spills and responses to other emergencies. The Transocean Defendants will have to meet these requirements for at least five years on all their drilling operations in waters near the United States.

The Department of Justice will receive for a period of twenty-one (21) calendar days from the date of this publication comments relating to the proposed Decree. The 21-day period (and not a longer period of time) is provided to ensure both a proper public comment period and an opportunity for the Department of Justice to receive, consider, and address public comments before the first phase of the civil trial, scheduled to begin on February 25, 2013, before the United States District Court for the Eastern District of Louisiana. 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 *U.S.* v. *BP Exploration and Production et al,* Civil No. 10–4536 (E.D. La.) (centralized in MDL 2179: *In Re: Oil Spill by the Oil Rig ''Deepwater Horizon'' in the Gulf of Mexico,* April 20, 2012), D.J. Ref. 90–5–1–1–10026.

During the public comment period, the proposed Decree may be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the proposed 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 $19.50 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if requesting by fax, forward a check in that amount to the Consent Decree Library at the address given above.

Maureen M. Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–00209 Filed 1–8–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—ASTM International Standards

Notice is hereby given that, on December 12, 2012, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), ASTM International (''ASTM'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ASTM has provided an updated list of current, ongoing ASTM standards activities originating between September and December 2012 designated as Work Items. A complete listing of ASTM Work Items, along with a brief description of each, is available at *http://www.astm.org.*

On September 15, 2004, ASTM filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 10, 2004 (69 FR 65226).

The last notification was filed with the Department on September 10, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on October 11, 2012 (77 FR 61786).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2013–00283 Filed 1–8–13; 8:45 am]

BILLING CODE 4410–11–P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Extend an Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and Request for Comments.

SUMMARY: Under the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3501 *et seq.*), and as part of its continuing effort to reduce paperwork and respondent burden, the National Science Foundation (NSF) is inviting the general public or other Federal agencies to comment on this proposed continuing information collection. The National Science Foundation (NSF) will publish periodic summaries of proposed projects.

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 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.

DATES: Written comments on this notice must be received by March 11, 2013 to be assured consideration. Comments received after that date will be considered to the extent practicable. Send comments to address below.

FOR ADDITIONAL INFORMATION OR COMMENTS: Contact Suzanne Plimpton, the NSF Reports Clearance Officer, phone (703) 292–7556, or send email to splimpto@nsf.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays).

SUPPLEMENTARY INFORMATION:

Title of Collection: Survey of Earned Doctorates.

OMB Approval Number: 3145–0019.

Expiration Date of Approval: May 31, 2014.

Type of Request: Intent to seek approval to extend an information collection for three years.

1. *Abstract:* Established within the National Science Foundation by the America COMPETES Reauthorization Act of 2010 § 505, codified in the National Science Foundation Act of 1950, as amended, the National Center

for Science and Engineering Statistics (NCSES) serves as a central Federal clearinghouse for the collection, interpretation, analysis, and dissemination of objective data on science, engineering, technology, and research and development for use by practitioners, researchers, policymakers, and the public. The Survey of Earned Doctorates (SED) is part of an integrated survey system that meets the human resources part of this mission.

The SED has been conducted annually since 1958 and is jointly sponsored by six Federal agencies in order to avoid duplication. It is an accurate, timely source of information on one of our Nation's most important resources—highly educated individuals. Data are obtained via paper questionnaire or Web survey from each person earning a research doctorate at the time they receive the degree. Data are collected on their field of specialty, educational background, sources of support in graduate school, debt level, postgraduation plans for employment, and demographic characteristics.

The Federal government, universities, researchers, and others use the information extensively. The National Science Foundation, as the lead agency, publishes statistics from the survey in several reports, but primarily in the annual publication series, ''Science and Engineering Doctorates'' and the Interagency Report, ''Doctorate Recipients from U.S. Universities.'' These reports are available in print and electronically on the World Wide Web.

The survey will be collected in conformance with the Privacy Act of 1974. Responses from individuals are voluntary. NSF will ensure that all individually identifiable information collected will be kept strictly confidential and will be used for research or statistical purposes, analyzing data, and preparing scientific reports and articles.

2. *Expected Respondents:* A total response rate of 92.8% of the 49,010 persons who earned a research doctorate was obtained in academic year 2011. This level of response rate has been consistent for several years. The respondents will be individuals and the estimated number of respondents annually is around 48,000 (based on the 2011 response rate).

3. *Estimate of Burden:* In 2014, approximately 52,000 individuals are expected to receive research doctorates from United States institutions. The Foundation estimates that, on average, 20 minutes per respondent will be required to complete the survey. The annual respondent burden for completing the SED is therefore estimated at 17,333 hours, based on 52,000 respondents.

Additional time is needed to complete the Missing Information Letter (MIL), which is sent to any survey respondent who did not provide data on any of eight ''critical items'' (year of Master's, year of Bachelor's, postgraduation location (state or country), birth date, citizenship status, race, ethnicity, and gender) on their original response. Most MILs address fewer than eight missing items. Based on past results, the average respondent is expected to spend two minutes completing the MIL. The SED receives an average of 2,000 completed MILs each survey round, for an annual MIL completion burden estimate of 67 hours.

In addition to the actual survey, the SED also requires the collection of administrative data from participating institutions. The Institutional Coordinator at the institution helps distribute the survey, track it, collect it and submit the completed questionnaires to the SED survey contractor. Based on focus groups conducted with Institutional Coordinators, it is estimated that the SED demands no more than 1% of the Institutional Coordinator's time over the course of a year, which computes to 20 hours per year per individual contact (40 hours per week × 50 weeks per year × .01). With 530 programs participating in the SED, the estimated annual burden to Institutional Coordinators of administering the SED is 10,600 hours.

Therefore, the total annual information burden for the SED is estimated to be 28,000 hours. This is higher than the last annual estimate approved by OMB due to the increased number of respondents (doctorate recipients).

Dated: January 3, 2013.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2013–00179 Filed 1–8–13; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

National Science Board; Sunshine Act Meetings; Notice

The National Science Board, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of a teleconference meeting of the Executive Committee National Science Board.

AGENCY HOLDING MEETING: National Science Board.

DATE AND TIME: Monday, January 7, 2012 from 2:00–2:15 p.m.

SUBJECT MATTER: Review of Board member proposal requesting NSF funding.

STATUS: Closed.

PLACE: This meeting will be held by teleconference originating at the National Science Board Office, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230.

UPDATES: Please refer to the National Science Board Web site *www.nsf.gov/nsb* for additional information. Meeting information and schedule updates (time, place, subject matter or status of meeting) may be found at *http://www.nsf.gov/nsb/notices/.*

AGENCY CONTACT: Dedric A. Carter, 703/292–8002, (*dacarter@nsf.gov*).

Ann Bushmiller,

NSB Senior Legal Counsel.

[FR Doc. 2013–00334 Filed 1–7–13; 4:15 pm]

BILLING CODE 7555–01–P

NEIGHBORHOOD REINVESTMENT CORPORATION

Corporate Administration Committee Board of Directors Meeting; Sunshine Act

TIME AND DATE: 2:00 p.m., Monday, January 14, 2013.

PLACE: 1325 G Street NW., Suite 800, Boardroom, Washington, DC 20005.

STATUS: Open.

CONTACT PERSON FOR MORE INFORMATION: Erica Hall, Assistant Corporate Secretary, (202) 220–2376; *ehall@nw.org.*

AGENDA:

I. Call to Order

II. Officer Performance Reviews

III. Human Resources Update

IV. Corporate Administration Committee Charter

V. Adjournment

Erica Hall,

Assistant Corporate Secretary.

[FR Doc. 2013–00301 Filed 1–7–13; 11:15 am]

BILLING CODE 7570–02–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68576; File No. SR–Phlx–2012–145]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Fee Schedule for the Following Direct Data Feed Products: Top of Phlx Options Data Feed, the Top of Phlx Options Plus Orders Data Feed, the PHLX Orders Data Feed and the PHLX Depth of Market Data Feed

January 3, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 21, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend its fee schedule for the four direct data feed products.

While changes to the Pricing Schedule pursuant to this proposal are effective upon filing, the Exchange has designated the proposed amendment to be operative on January 2, 2013.

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are bracketed.[3]

* * * * *

IX. Proprietary Data Feed Fees

TOP OF PHLX OPTIONS (''TOPO'')

Account type	Monthly charge
Internal Distributor	$2,000
External Distributor	2,500
Non-Professional Subscriber	1
Professional Subscriber	40

• *A Non-Professional Subscriber is a natural person who is neither: (i) registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an ''investment adviser'' as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt. A Non-Professional Subscriber may only use the data provided for personal purposes and not for any commercial purpose.*

• *A Professional Subscriber is any Subscriber that is not a Non-Professional Subscriber. If the NASDAQ OMX Subscriber agreement is signed in the name of a business or commercial entity, such entity would be considered a Professional Subscriber.*

• *The Monthly Charge per Subscriber (both Professional and Non-Professional) covers the usage of all four PHLX data products and will not be assessed separately for each data product. PHLX data is comprised of Top of Phlx Options (''TOPO''), TOPO Plus Orders, PHLX Orders and PHLX Depth Data feeds. For example, if a firm has one Professional (Non-Professional) Subscriber accessing TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market the firm would only report the Subscriber once and pay $40 ($1 for Non-Professional).*

• A ''distributor'' of NASDAQ OMX PHLX data is any entity that receives a feed or data file of data directly from NASDAQ OMX PHLX or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). All distributors shall execute a NASDAQ OMX Subscriber agreement.

Non-Display Enterprise License

The $10,000 per month Non-Display Enterprise License fee permits distribution to an unlimited number of internal non-display Subscribers without incurring additional fees for each internal Subscriber. The Non-Display Enterprise License covers non-display Subscriber fees for all PHLX proprietary direct data feed products and is in addition to any other associated distributor fees for PHLX proprietary direct data feed products.

Managed Data Solutions

The charges to be paid by Distributors and Subscribers of Managed Data Solutions products containing Top of PHLX Options shall be:

Fee schedule for Managed Data Solutions	Price
Managed Data Solution Administration Fee (for the right to offer Managed Data Solutions to client organizations)	$1,500/mo Per Distributor.
PHLX Managed Data Solution Subscriber Fee	$250/mo per Subscriber.

TOPO PLUS ORDERS

Account type	Monthly charge
Internal Distributor	$4,000
External Distributor	5,000
Non-Professional Subscriber	1
Professional Subscriber	[2]*40*

[• The Monthly Charge and Subscriber Fees applicable to TOPO Plus Orders users are effective beginning June 1, 2010.]

[• The Monthly Charge applicable to Internal Distributors of TOPO Plus Orders will apply to Specialized Order Feed users that have not migrated to TOPO Plus Orders on or before June 1, 2010.]

[• A Non-Professional Subscriber is a natural person who is neither: (i) registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an ''investment adviser'' as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt. A Non-Professional Subscriber may only use the data provided for

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Changes are marked to the rules of PHLX are found at *http://nasdaqomxphlx.cchwallstreet.com/*.

personal purposes and not for any commercial purpose.]

[• A Professional Subscriber is any Subscriber that is not a Non-Professional Subscriber. If the NASDAQ OMX Subscriber agreement is signed in the name of a business or commercial entity, such entity would be considered a Professional Subscriber.]

PHLX ORDERS

Account type	Monthly charge
Internal Distributor	$3,000
External Distributor	3,500
Non-Professional Subscriber	*1*
Professional Subscriber	*40*

PHLX DEPTH DATA

Account type	Monthly charge
Internal Distributor	$4,000
External Distributor	4,500
Non-Professional Subscriber	*1*
Professional Subscriber	*40*

PHLX OPTIONS TRADE OUTLINE ("PHOTO")

Account type	Monthly charge
End of Day Product Subscriber	$500
Intra-Day Product Subscriber	1,500

PHOTO HISTORICAL DATA

Account type	Charge per calendar month requested
End of Day Product Subscriber	400
Intra-Day Product Subscriber	750

[9] For example, a subscriber who requests End of Day PHOTO Historical Data for the Month of March, 2009 would be charged $400. A subscriber who requests End of Day PHOTO Historical Data for the months of March, 2009 and April, 2009 would be charged $400 for the March, 2009 End of Day data and $400 for the April, 2009 End of day data, for a total of $800, etc. A subscriber who requests Intra-Day PHOTO Historical Data for the Month of March, 2009 would be charged $750.00. A subscriber who requests Intra-Day PHOTO Historical Data for the months of March, 2009 and April, 2009 would be charged $750 for the March, 2009 Intra-Day data and $750 for the April, 2009 Intra-Day data, for a total of $1,500, etc.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the fees for TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data products. TOPO provides Subscribers a direct data feed that includes the Exchange's best bid and offer position, with aggregate size, based on displayable order and quoting interest. The TOPO Plus Orders data feed product combines the TOPO and PHLX Orders data feeds and provides Exchange top-of-market data (including quotes and trades), together with real-time full depth order information. TOPO Plus Orders data enables Subscribers to monitor their order book(s), including single and complex orders,[4] and Complex Order Live Auction (''COLA'')[5] for all options listed on PHLX. The PHLX Orders data feed provides the same single and complex order information described above that makes up the ''Plus Orders'' portion of the TOPO Plus Orders data product. The PHLX Depth of Market data feed includes full depth of quotes and orders, imbalance information and last sale data for options listed on PHLX.[6]

The Exchange proposes to modify the method for assessing fees for Professional Subscribers. Currently, the Exchange assesses a $20 monthly fee for Professional Subscribers to TOPO Plus Orders. There is currently no monthly Professional Subscriber fee for TOPO, PHLX Orders, or PHLX Depth of Market.[7]

The Exchange proposes to establish a single monthly Professional Subscriber fee of $40 that will entitle such Subscriber to access all PHLX data feeds. This will increase the monthly Professional Subscriber Fee on TOPO Plus Orders from $20 to $40 per Subscriber, however it will simultaneously add access to the remaining PHLX data feeds. The proposal will result in the Exchange for the first time assessing a $40 per month fee for Professional Subscribers of TOPO, PHLX Orders and PHLX Depth of Market. Professional Subscribers will pay the monthly Subscriber fee once for access to any or all of the current data feeds of PHLX data. For example, the firm would only report the Professional Subscriber once and pay $40 for access to TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market.

Similarly, the Exchange is modifying the method for assessing Non-Professional Subscriber fees. Presently, the monthly Subscriber Fee assessed to External Distributors for TOPO Plus Orders is $1 per Non-Professional Subscriber. The Exchange now proposes to assess a monthly Subscriber Fee of $1 per Non-Professional Subscriber to External Distributors for TOPO, PHLX Orders and PHLX Depth of Market. Similar to the inclusive fee for Professional Subscribers, Non-Professional Subscribers will pay the monthly fee of $1 to access any or all of the data feeds of PHLX data. The Exchange believes that by allowing access to multiple products for one price, it will allow for a broad dissemination of PHLX data overall and a wider range of consumer choice.

Finally, the Exchange proposes to establish a monthly Non-Display Enterprise License fee of $10,000. This enterprise license will entitle a distributor to provide market data to an unlimited number of internal non-display devices within a firm rather than incurring per Subscriber charges.[8] This pricing structure offers two advantages. First, it establishes a

[4] A Complex Order is an order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, priced as a net debit or credit based on the relative prices of the individual components, for the same account, for the purpose of executing a particular investment strategy. See Exchange Rule 1080.08(a)(i).

[5] *See* Exchange Rule 1080.08(e).

[6] PHLX Depth of Market is the equivalent of, and is based on, the NASDAQ ITCH to Trade Options or ''ITTO'' data feed that NASDAQ offers under NASDAQ Options Market (''NOM'') Rules, Chapter VI, Section 1(a)(3)(A). *See* Securities Exchange Act Release No. 63983 (February 25, 2011), 76 FR 12178 (March 4, 2011) (SR–NASDAQ–2011–032).

[7] PHLX proposes to move the definitions in the rule text above without changing the meaning of the definitions.

[8] The foregoing fee structure is similar to the structure in place for the NASDAQ Options Market (''NOM'') enterprise license which entitles a distributor to provide BONO[SM] and ITTO market data to an unlimited number of non-display devices within the firm without any per Subscriber charge. See NASDAQ Options Rules, Chapter XV, Sec. 4 (a) NASDAQ Options Market Data Distributor Fees.

monthly fee cap for distributors with large customer bases, effectively lowering average cost per user and marginal costs per user beyond the monthly breakpoint. Second, the enterprise license offers administrative ease by eliminating the need for distributors to tally, track, and report to the Exchange a specific number of individual users. This is a voluntary option; distributors are permitted to choose between existing pricing and the new enterprise license.

The Exchange notes that the categories of TOPO, PHLX Orders, PHLX Depth of Market or TOPO Plus Orders market data and fees compete with similar products offered by other markets such as International Stock Exchange (''ISE''), NYSE, NOM and Chicago Board Options Exchange (''CBOE''). For example, ISE offers market data products that are similar to TOPO: A data feed that shows the top of the market entitled TOP Quote Feed, and a data feed that shows the top five price levels entitled Depth of Market. NYSE offers a market data product for Arca and Amex that is similar to TOPO and PHLX Depth of Market: a feed that shows top of book, last sale, and depth of quote and is entitled NYSE Arca Book for Options. A subsidiary of CBOE for which CBOE charges fees offers a market data feed that is similar to TOPO and shows BBO, last sale, and top of book data. And BATS offers Multicast PITCH, which is their depth of market and last sale feed similar to PHLX Depth of Market.

2. Statutory Basis

Phlx believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[9] in general, and with Section 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides an equitable allocation of reasonable fees among Subscribers and recipients of PHLX data and is not designed to permit unfair discrimination between them. In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[11]

By removing ''unnecessary regulatory restrictions'' on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well. TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data products are precisely the sort of market data products that the Commission envisioned when it adopted Regulation NMS.

On July 21, 2010, President Barack Obama signed into law H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''), which amended Section 19 of the Act. Among other things, Section 916 of the Dodd-Frank Act amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase ''on any person, whether or not the person is a member of the self-regulatory organization'' after ''due, fee or other charge imposed by the self-regulatory organization.'' As a result, all self-regulatory organization (''SRO'') rule proposals establishing or changing dues, fees, or other charges are immediately effective upon filing regardless of whether such dues, fees, or other charges are imposed on members of the SRO, non-members, or both. Section 916 further amended paragraph (C) of Section 19(b)(3) of the Act to read, in pertinent part, ''At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) [of Section 19(b)], the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, 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 this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved.''

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition* v. *SEC,* No. 09–1042 (D.C. Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data. ''In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.' '' *NetCoalition,* at 15 (quoting H.R. Rep. No. 94–229, at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 323). The court's conclusions about Congressional intent are therefore reinforced by the Dodd-Frank Act amendments, which create a presumption that exchange fees, including market data fees, may take effect immediately, without prior Commission approval, and that the Commission should take action to suspend a fee change and institute a proceeding to determine whether the fee change should be approved or disapproved only where the Commission has concerns that the change may not be consistent with the Act.

Phlx believes that the proposed fee is fair and equitable in accordance with Section 6(b)(4) of the Act, and not unreasonably discriminatory in accordance with Section 6(b)(5) of the Act. As described above, the proposed fee is based on pricing conventions and distinctions that exist in Phlx's current fee schedule, and the fee schedules of other exchanges. These distinctions (top-of-book versus Depth-of-Book, Professional versus non-Professional Subscribers, and Internal versus External Distribution) are each based on principles of fairness and equity that have helped for many years to maintain fair, equitable, and not unreasonably discriminatory fees, and that apply with equal or greater force to the current proposal. The use of enterprise licenses is also a well-established method for assessing equitable fees, providing as it does a pricing and administrative efficiency benefit for high-volume usage.

Importantly, the proposed products are entirely optional to all parties. Firms are not required to purchase TOPO,

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data feed or to utilize any specific pricing alternative if they do choose to purchase TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data feed. Phlx is not required to make TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data feed available or to offer specific pricing alternatives for potential purchases. Phlx can discontinue offering a pricing alternative (as it has in the past) and firms can discontinue their use at any time and for any reason (as they often do), including due to their assessment of the reasonableness of fees charged. Phlx continues to establish and revise pricing policies aimed at increasing fairness and equitable allocation of fees among Subscribers. If the market deems the proposed fees to be unfair or inequitable, firms can diminish or discontinue their use of this data.

Phlx believes that periodically it must adjust TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data feed Enterprise Data Subscriber fees to reflect market forces. Given that this fee change represents the first Professional and Non-Professional Subscriber price change to TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data products, Phlx believes it is an appropriate time to adjust these fees to more accurately reflect the investments made to enhance this product through capacity upgrades and data sets added. This also reflects that the market for TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data feed information is highly competitive and continually evolves as products develop and change.

B. Self-Regulatory Organization's Statement on Burden on Competition

Phlx does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, the market for options orders and executions is already highly competitive and Phlx's proposal is itself pro-competitive in several ways. First, TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data feed offer a comprehensive, competitive alternative to the consolidated data OPRA feed for users and situations where consolidated data is unnecessary. Second, Phlx believes that offering TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data feed will help attract new Subscribers and new order flow to the Phlx market, thereby improving execution quality and Phlx's ability to compete in the market for options order flow and executions.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[12] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2012–145 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.

All submissions should refer to File Number SR-Phlx-2012–145. 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-Phlx-2012–145 and should be submitted on or before January 30, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–00255 Filed 1–8–13; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68573; File No. SR–C2–2012–043]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Adopt a HAL System

January 3, 2013.

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 December 21, 2012, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On January 2, 2013, the Exchange submitted Amendment No. 1 to the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

proposed rule change.[3] 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 the Substance of the Proposed Rule Change

The Exchange proposes to adopt a HAL system. The text of the proposed rule change is provided in Exhibit 5. The text of the proposed rule change is also available on the Exchange's Web site *(http://www.c2exchange.com/Legal/)*, at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to adopt a rule that governs the operation of its new HAL system (''HAL''). HAL is a feature within the C2 System that provides automated order handling in designated classes for qualifying electronic orders that are not automatically executed by the System. Regarding HAL eligibility, the Exchange shall designate eligible order size, eligible order type, eligible order origin code (*i.e.,* public customer orders, non-Market Maker broker-dealer orders, and Market Maker broker-dealer orders), and classes in which HAL shall be activated. HAL shall automatically process upon receipt: (i) An eligible order that is marketable against the Exchange's disseminated quotation while that quotation is not the national best bid or offer (''NBBO''), unless the Exchange's quotation contains resting orders and does not contain sufficient Market-Maker quotation interest to satisfy the entire order; (ii) an eligible order that would improve the Exchange's disseminated quotation and that is marketable against quotations disseminated by other exchanges that are participants in the Options Order Protection and Locked/Crossed Market Plan (the ''Linkage Plan''); or (iii) an order submitted to HAL as a result of the price check parameters of Rule 6.17.

For order handling and responses regarding HAL, orders that are received by HAL pursuant to the paragraph above shall immediately upon receipt be electronically exposed at the NBBO price. The exposure shall be for a period of time determined by the Exchange on a class-by-class basis, which period of time shall not exceed one second. All Trading Permit Holders (''TPHs'') may submit responses to the exposure message during the exposure period. Responses (i) must be priced equal to or better than the Exchange's best bid/offer; (ii) must be limited to the size of the order being exposed; and (iii) may be cancelled and/or replaced any time during the exposure period.

Regarding the allocation of exposed orders, any responses priced at the prevailing NBBO or better shall immediately trade against the order (on a first come, first served basis). At the conclusion of the exposure period, the Exchange will evaluate all remaining responses as well as the disseminated best bid/offer on other exchanges and execute any remaining portion of the exposed order to the fullest extent possible at the best price(s) by first executing against responses (pursuant to the matching algorithm in effect for the class except that the participation entitlement and market turner status shall not apply to responses), and, second, routing Immediate-or-Cancel (''IOC'') Intermarket Sweep Orders (''ISOs'') to other exchanges. Any portion of a routed IOC ISO that returns unfilled shall trade against the Exchange's best bid/offer unless another exchange is quoting at a better price in which case new IOC ISOs shall be generated and routed to trade against such better prices. Any executions at the Exchange's best bid/offer will first trade against interest that was resting at the price at the time the exposed order was received, and any remaining balance will trade against all new interest at that price (in both cases pursuant to the matching algorithm for that class). All executions on the Exchange pursuant to this paragraph shall comply with Rule 6.81. Executions will be subject to price check parameters set forth in Rule 6.17 when such price check functionality is enabled.

Regarding the early termination of the exposure period, in addition to the receipt of a response to trade the entire exposed order at the NBBO or better, the exposure period will also terminate early under the following circumstances: (i) If during the exposure period the Exchange receives an unrelated order (or quote) on the opposite side of the market from the exposed order that could trade against the exposed order at the prevailing NBBO price or better, then the orders will trade at the prevailing NBBO price unless the unrelated order is a customer order in which case the orders will trade at the midpoint of the unrelated order's limit price and the prevailing NBBO. The exposure period shall not terminate if a quantity remains on the exposed order after such trade; (ii) If during the exposure period the Exchange receives an unrelated order on the same side of the market as the exposed order that is priced equal to or better than the exposed order, then the exposure period shall terminate and the exposed order shall be processed in accordance with paragraph (c) (which regards allocation of exposed orders); (iii) If during the exposure of an order that is marketable against the Exchange's best bid/offer at the time the order was exposed (''Exchange Initial BBO''), Market-Maker interest at the Exchange Initial BBO decrements to a contract size equal to the size of the exposed order, then the exposure period shall terminate and the exposed order shall be processed in accordance with paragraph (c) (which regards allocation of exposed orders).

The purpose of the proposed change is to provide C2 TPHs with the opportunity to improve their prices and ''step up'' to meet the NBBO in order to interact with orders sent to the Exchange. This will allow the market participant sending an order to C2 to increase its chances of receiving an execution at C2 (the market participant's chosen venue) instead of having the order be routed to another exchange. This ''step up'' process allows market participants to take into account factors beyond just disseminated prices, such as execution costs, system reliability, and quality of service, when determining the exchange to which to route an order. A market participant that prefers C2 due to some combination of these other factors will know that, even if C2 is not displaying a price that is the NBBO, the market participant may still receive an execution at C2 because a C2 TPH may ''step up'' to match the NBBO.

Further, HAL and the ''step up'' process enable C2 TPHs to add liquidity that is available to interact with orders sent to the Exchange. Indeed, when a C2 TPH ''steps up'' to match the NBBO that is displayed on another exchange, more

[3] In Amendment No. 1, the Exchange modified the description of the proposed rule change to reflect the proposed rule text that provides that HAL will be open to all Trading Permit Holders.

contracts may be executed at this NBBO price here on C2 than are available at that same price on the other exchange.

C2's proposed HAL and the ''step up'' process are not novel concepts. C2's proposed HAL is nearly identical to the Hybrid Agency Liaison (''CBOE HAL'') offered on the Chicago Board Options Exchange, Incorporated (''CBOE''), which provides the same manner of ''step up'' process. There are a couple of differences between CBOE HAL and the proposed C2 HAL. First, CBOE HAL operates on CBOE's Hybrid Trading System, which combines both open outcry and electronic trading, whereas the proposed C2 HAL would be entirely electronic (as C2 is an all-electronic exchange). The proposed C2 HAL rule does not incorporate the minimal CBOE HAL language regarding Hybrid.[4]

Second, on CBOE HAL, only Market-Makers with an appointment in the relevant option class and TPHs acting as agent for orders resting at the top of CBOE's book in the relevant option series opposite the order submitted to CBOE HAL may submit responses to the exposure message during the exposure period (unless CBOE determines, on a class-by-class basis, to allow all TPHs to submit responses to the exposure message). C2 has determined that, on its proposed C2 HAL, all TPHs may submit responses to the exposure message during the exposure period. As such, Interpretation and Policy .01 to CBOE Rule 6.14A (the CBOE rule regarding HAL), which prohibits the redistribution of exposure messages to market participants not eligible to respond to such messages (except in classes in which CBOE allows all TPHs to respond to such messages) does not apply to the proposed C2 HAL, as all C2 TPHs are permitted to respond to all exposure messages. Despite these differences, the proposed C2 HAL would otherwise operate in an identical manner to the CBOE HAL, which has been approved by the Securities and Exchange Commission (the ''Commission'').[5]

The Exchange believes that the Commission has always been clear that honoring better prices on other markets can be accomplished by matching those better prices.[6] The proposed HAL and a ''step up'' process would allow C2 TPHs to do just that. And if a C2 market participant wants to ensure that an order does not go through the proposed HAL process, that market participant can submit an Immediate-or-Cancel order (which is not exposed to HAL).

The Exchange also proposes to adopt Interpretation and Policy .01 to new Rule 6.18, which will state that the Exchange may determine, on a class-by-class basis, to not route ISOs to other exchanges on behalf of non-public customer orders that are exposed pursuant to this Rule. In such cases, any unexecuted balance of such non-public customer orders shall be cancelled at the conclusion of the exposure period. Under the Linkage Plan, the Exchange is not obligated to route orders to another exchange; the Linkage Plan only requires that C2 not trade through a better price at another exchange. In certain circumstances, particularly with orders of non-public customer market participants, the Exchange may elect not to route an order to another exchange in order to not incur the costs associated with routing such order.

The Exchange also proposes to adopt Interpretation and Policy .02 to new Rule 6.18, which will state that all pronouncements regarding determinations by the Exchange pursuant to Rule 6.18 and the Interpretations and Policies thereunder will be announced to Trading Permit Holders via Regulatory Circular. This method of notification will allow the Exchange to promptly inform TPHs of any new or modification to any determinations made by the Exchange.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[7] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

Adopting HAL, a ''step up'' program, on C2 will provide TPHs with the opportunity to improve their prices to match the NBBO in order to interact with orders sent to the Exchange. This will allow the market participant sending an order to C2 to increase its chances of receiving an execution at C2 (the market participant's chosen venue) instead of having the order be routed to another exchange. This ''step up'' process allows market participants to take into account factors beyond just disseminated prices, such as execution costs, system reliability, and quality of service, when determining the exchange to which to route an order. A market participant that prefers C2 due to some combination of these other factors will know that, even if C2 is not displaying a price that is the NBBO, the market participant may still receive an execution at C2 because a C2 TPH may ''step up'' to match the NBBO. Therefore, the fact that HAL allows a market participant who elects to send an order to C2 to have a greater likelihood of achieving execution at this chosen venue without the risk of paying a lower price removes an impediment to and perfects the mechanism for a free and open national market system.

Further, HAL and the ''step up'' process enable C2 TPHs to add liquidity that is available to interact with orders sent to the Exchange. Indeed, when a C2 TPH ''steps up'' to match the NBBO that is displayed on another exchange, more contracts may be executed at this NBBO price here on C2 than are available at that same price on the other exchange. This increased liquidity benefits all market participants on C2, thereby perfecting the mechanism for a free and open national market system and protecting investors and the public interest.

C2's proposed HAL is nearly identical to CBOE HAL, which provides the same manner of ''step up'' process. The only differences between CBOE HAL and the proposed C2 HAL are that (1) CBOE HAL operates on CBOE's Hybrid Trading System, which combines both open outcry and electronic trading, whereas the proposed C2 HAL would be entirely electronic (as C2 is an all-electronic exchange), and (2) the proposed C2 HAL will be open to all C2 TPHs.[9] Despite these differences, the proposed C2 HAL would otherwise operate in an identical manner to the CBOE HAL, which has been approved

[4] *See* CBOE Rule 6.14A.

[5] *See* Securities Exchange Act Release No. 60551 (August 20, 2009), 74 FR 43196 (August 26, 2009) (SR–CBOE–2009–040).

[6] For example, in adopting the Order Protection Rule (Rule 611) under Regulation NMS in 2005, the Commission stated: ''The Order Protection Rule generally requires that trading centers match the best quoted prices, cancel orders without an execution, or route orders to the trading centers quoting the best prices.'' *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005), at 37525 (S7–10–04).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] On CBOE HAL, only Market-Makers with an appointment in the relevant option class and Trading Permit Holders acting as agent for orders resting at the top of CBOE's book in the relevant option series opposite the order submitted to CBOE HAL may submit responses to the exposure message during the exposure period (unless CBOE determines, on a class-by-class basis, to allow all TPHs to submit responses to the exposure message).

by the Commission.[10] As such, C2 merely desires to adopt a mechanism that is nearly identical to one that already exists on CBOE. Permitting C2 to operate on an even playing field relative to other exchanges removes impediments to and to perfects the mechanism for a free and open market and a national market system.

The Commission has always been clear that honoring better prices on other markets can be accomplished by matching those better prices.[11] The proposed HAL and a ''step up'' process would allow C2 TPHs to do just that.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 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. The proposed C2 HAL is open to all market participants. The ''step-up'' feature of the proposed C2 HAL allows for price improvement. When such price improvement is achieved via this ''stepping up'' to meet (or beat) the best quoted price at another exchange, market participants are able to receive the best quoted price while still achieving execution on C2, the exchange to which they elected to send their orders.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

A. significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6)[13] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2012–043 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2012–043. 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 NW., 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–C2–2012–043, and should be submitted on or before January 30, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–00200 Filed 1–8–13; 8:45 am]

BILLING CODE 8011–01–P

[10] *See* Securities Exchange Act Release No. 60551 (August 20, 2009), 74 FR 43196 (August 26, 2009) (SR–CBOE–2009–040).

[11] For example, in adopting the Order Protection Rule (Rule 611) under Regulation NMS in 2005, the Commission stated: ''The Order Protection Rule generally requires that trading centers match the best quoted prices, cancel orders without an execution, or route orders to the trading centers quoting the best prices.'' *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005), at 37525 (S7–10–04).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68488; File No. SR–NYSEArca–2012–142]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To List and Trade the Guggenheim Enhanced Total Return ETF Under NYSE Arca Equities Rule 8.600

December 20, 2012.

Correction

In notice document 2012–31120 appearing on pages 76326–76332 in the issue of December 27, 2012, the File No. is corrected to read as set forth above.

[FR Doc. C1–2012–31120 Filed 1–8–13; 8:45 am]

BILLING CODE 1505–01–D

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68575; File No. SR–BOX–2012–024]

Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule for Trading on BOX

January 3, 2013.

Pursuant to Section 19(b)(1) under the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 21, 2012, BOX Options Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to amend its Fee Schedule relating to the fees assessed by FINRA in connection with use of its Central Registration Depository (''CRD System''). While changes to the Fee Schedule pursuant to this proposal will be effective upon filing, the changes will become operative on January 2, 2013. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://boxexchange.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 Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Section V of its Fee Schedule to reflect a recent fee change made by FINRA,[5] relating to the CRD system.[6] The fees assessed under Section V are collected and retained by FINRA via the CRD system for the registration of associated persons of Exchange members that are not also FINRA members. The Exchange originally adopted the fees under Section V to mirror the fees assessed by FINRA on its members for use of the CRD system in connection with the Exchange's participation in Web CRD.[7] FINRA recently amended the fees assessed for use of the CRD system, which will become effective January 2, 2013.[8] The CRD system fees are use-based and there is no distinction in the cost incurred by FINRA if the user is a FINRA member or a member of an exchange that is not a FINRA member. Accordingly, the Exchange is proposing to amend the fees under Section V.B. to mirror those assessed by FINRA, which will be implemented concurrently with the amended FINRA fees on January 2, 2013.[9]

In addition to increasing the existing CRD system fees, FINRA adopted a disclosure processing fee for each initial or amended Form BD that includes the initial reporting, amendment, or certification of one or more disclosure events or proceedings.[10] BOX Options Participants use the Form BD to, among other things, report disclosure matters in which they or a control affiliate have been involved. Prior to the adoption of this fee, FINRA did not have a fee designed to cover the costs associated with the review of Form BD, notwithstanding that the review is similar to that performed of Options Participants' Forms U4 and U5. Such reviews include confirming that the matter is properly reported; reviewing any documentation submitted and determining whether additional documentation is required; conducting any necessary independent research; and, depending on the matter reported, analyzing whether the event or proceeding subjects the individual or member to a statutory disqualification pursuant to Section 3(a)(39) of the Act.[11] FINRA adopted a $110 fee for the review of a Form BD, which mirrors the increased fee adopted for the review of Forms U4 and U5. As such, the Exchange is amending its Fee Schedule to reflect the $110 disclosure processing fee for FINRA's review of disclosure information submitted by BOX Options Participants that are not members of FINRA.

FINRA currently collects a fee of $27.50 to process the first and third fingerprint submission by a member, either electronically or via a hard copy fingerprint card. And the fee is $13.00 for the second fingerprint card submission. FINRA is increasing the processing fee for the first and third fingerprint submission to $29.50 if submitted electronically, and $44.50 if submitted by a hard copy fingerprint card. And the fee collected by FINRA is increasing for the second submission, to $15.00 for an electronic submission, and $30.00 for a hard copy, respectively. In addition to processing fingerprints submitted by members, FINRA also processes fingerprint results where the member had fingerprints processed through another SRO. FINRA is increasing this fee from $13.00 to $30.00. As a result of these FINRA fingerprint processing fee increases, the Exchange also proposes to amend its Fee Schedule to reflect these changes.

The Exchange is proposing that the implementation date of the proposed rule change will be January 2, 2013. Specifically, the proposed initial/transfer registration, disclosure filing, and fingerprint fees would become effective for filings or fingerprints submitted on or after January 2, 2013. Lastly, the proposed system processing fee would become effective for the 2013 Renewal Program.[12]

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[13] in general, and with Section 6(b)(4) of the Act[14] and Section 6(b)(5) of the Act,[15] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* Securities Exchange Act Release No. 67247 (June 25, 2012), 77 FR 38866 (June 29, 2012) (SR–FINRA–2012–030).

[6] The CRD system is the central licensing and registration system for the U.S. securities industry. The CRD system enables individuals and firms seeking registration with multiple states and self-regulatory organizations (''SRO'') to do so by submitting a single form, fingerprint card and a combined payment of fees to FINRA. Through the CRD system, FINRA maintains the qualification, employment and disciplinary histories of registered associated persons of broker-dealers.

[7] *See* Securities Exchange Act Release No. 66979 (May 14, 2012) 77 FR 29740 (May 18, 2012) (Notice of Immediate Effectiveness of Proposed Rule Change To Adopt the Fee Schedule For Trading on BOX). *See also,* Section 4(b)(3) of Schedule A to the FINRA By-Laws.

[8] *Supra* note 5.

[9] The Exchange notes that it is not adopting all of the changes made in the FINRA filing. Certain fees and requirements are specific to FINRA and the Exchange elected to not adopt them because either such fees did not apply to Exchange-only members or such fees did not directly cover the costs associated with the use of the CRD system. For example, under FINRA Section 4(h) of Schedule A, FINRA assesses a fee of $10 per day, up to $300 for each day that a new disclosure event or a change in the status of a previously reported disclosure event is not timely filed on an initial or amended Form U5 or an amended Form U4. This fee provides a financial incentive to a FINRA member to file its Forms U4 and U5 timely. The Exchange elected to not adopt such a fee applicable to its members that are not also FINRA members.

[10] *Id.* [sic]

[11] 15 U.S.C. 78c(a)(39).

[12] As part of FINRA's 2013 Renewal Program, Preliminary Renewal Statements reflecting the proposed $45 system processing fee will be made available to members in the fourth quarter of 2012.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4).

[15] 15 U.S.C. 78f(b)(5).

persons using any facility or system which the Exchange operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers. All similarly situated Options Participants are subject to the same fee structure, and every firm must use the CRD system for registration and disclosure.

The change is reasonable because the proposed fees are identical to those adopted by FINRA for use of the CRD system for disclosure and the registration of associated persons of FINRA members. As FINRA noted in amending its fees, it believed the fees are reasonable based on the increased costs associated with operating and maintaining the CRD system, and listed a number of enhancements made to the CRD system since the last fee increase, including: (1) Incorporation of various uniform registration form changes; (2) electronic fingerprint processing; (3) Web EFT™, which allows subscribing firms to submit batch filings to the CRD system; (4) increases in the number and types of reports available through the CRD system; and (5) significant changes to BrokerCheck, including making BrokerCheck easier to use and expanding the amount of information made available through the system. These increased costs are similarly borne by FINRA when a BOX Options Participant that is not a member of FINRA uses the CRD system. Accordingly, the fees collected for such use should likewise increase in lockstep with the fees assessed FINRA members, as is proposed by the Exchange.

The proposed change, like FINRA's proposal, is consistent with an equitable allocation of fees because the fees will apply equally to all individuals and Options Participants required to report information to the CRD system. Thus, those Options Participants that register more individuals or submit more filings through the CRD system will generally pay more in fees than those that use the CRD system to a lesser extent.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA's CRD system is the central licensing and registration system for the U.S. securities industry and the proposed change will simply provide notice to BOX Options Participants of a FINRA fee change that will apply across all registered industry participants. As such, the Exchange does not believe that the proposed rule change will impose any additional burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act [16] and Rule 19b–4(f)(2) thereunder,[17] because it establishes or changes a due, fee, or other charge applicable only to a member.

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 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 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–BOX–2012–024 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–BOX–2012–024. 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 Exchange's principal office. 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–BOX–2012–024, and should be submitted on or before January 30, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–00254 Filed 1–8–13; 8:45 am]

BILLING CODE 8011–01–P

[16] 15 U.S.C. 78s(b)(3)(A)(ii).

[17] 17 CFR 240.19b–4(f)(2).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68569; File No. SR–NYSEArca–2012–140]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To List and Trade Options on the Nasdaq-100 Index (NDX) and the Reduced-Value Nasdaq-100 Index (MNX) and To Amend NYSE Arca Rule 5.15(a)(1) To Provide That There Are No Position Limits for Options on NDX and MNX

January 3, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 20, 2012, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 list and trade options on Nasdaq–100 Index (NDX) and the reduced-value Nasdaq-100 Index (MNX) and to amend NYSE Arca Rule 5.15(a)(1) to provide that there are no position limits for options on NDX and MNX. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.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 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 list and trade options on the full and reduced values of the Nasdaq 100 Index (the ''Index''), a stock index calculated and maintained by Nasdaq.[3] Specifically, the Exchange proposes to list options based on Nasdaq-100 Index (NDX) and the reduced-value Nasdaq–100 Index (MNX) and to amend Rule 5.15(a)(1) to provide that there are no position limits for options on NDX and MNX. The Exchange also proposes to list and trade FLEX Options and Long-Term Equity Option Series (''LEAPS'') on NDX and MNX. The options on NDX and MNX listed on the Exchange will be identical to those already listed on multiple exchanges.

The Exchange notes that it initially listed for trading options on NDX and MNX as broad-based index options in January 2010 without filing a Rule 19b–4 filing with the Commission.[4] In addition, when initially listed and traded, because none of the other exchanges that list and trade NDX and MNX had position limits for those indices, nor did the Options Clearing Corporation disseminate position limits information for NDX and MNX, the Exchange similarly did not apply position limits to NDX and MNX. The Exchange is filing the proposed rule change because options on the Index will not otherwise qualify for listing on the Exchange due to the component weightings of the Index. Specifically, Exchange Rule 5.12(a)(8), which allows the listing of options on a broad-based index currently requires that no component of a broad-based index account for more than ten percent of the weight of the index, and the five highest weighted component securities in the index do not, in the aggregate, account for more than thirty-three percent (33%) of the weight of the index.[5] Therefore, like other options exchanges that currently trade options on the Index, the Exchange is seeking to file in order to list and trade options on the Index under the conditions and according to the standards set forth below.

Index Design and Composition

The Index was launched in January 1985 and represents the largest non-financial domestic and international issues listed on Nasdaq based on market capitalization. The Index reflects companies across major industry groups, including computer hardware and software, telecommunications, retail/wholesale trade, and biotechnology.

The Index is calculated using a modified capitalization-weighted methodology. The value of the Index equals the aggregate value of the Index share weights of each of the component securities multiplied by each security's respective official closing price on Nasdaq, divided by the Divisor. The Divisor serves the purpose of scaling such aggregate value (otherwise in the trillions) to a lower order of magnitude which is more desirable for Index reporting purposes. If trading in an Index security is halted while the market is open, the last Nasdaq traded price for that security is used for all index computations until trading resumes. If trading is halted before the market is open, the previous day's official closing price is used. Additionally, the Index ordinarily is calculated without regard to dividends on component securities. The modified capitalization-weighted methodology is expected to retain, in general, the economic attributes of capitalization weighting, while providing enhanced diversification. To accomplish this, Nasdaq reviews the composition of the Index quarterly and adjusts the weighting of Index components using a proprietary algorithm, if certain pre-established weight distribution requirements are not met.

Nasdaq has certain eligibility requirements for inclusion in the Index.[6] For example, to be eligible for inclusion in the Index, a component security must be exclusively listed on the Nasdaq National Market, or dually listed on a national securities exchange prior to January 1, 2004.[7] Only one class of security per issuer is considered for inclusion in the Index.

Additionally, the issuer of a component security cannot be a financial or investment company and cannot currently be involved in bankruptcy proceedings. Criteria for inclusion also require the average daily trading volume of a component security to be at least 200,000 shares on Nasdaq. If a component security is of a foreign issuer, based on its country of incorporation, it must have listed options or be eligible for listed-options trading. In addition, the issuer of a component security must not have entered into any definitive agreement or other arrangement which will likely result in the security no longer being Index eligible. An issuer of a component security also must not have annual financial statements with an audit opinion that is currently withdrawn.

As of November 26, 2012, the following were characteristics of the Index:

- The total capitalization of all components of the Index was $3.11 trillion;
- Regarding component capitalization, (a) the highest capitalization of a component was $554.57 billion (Apple, Inc.), (b) the lowest capitalization of a component was $2.12 billion (Apollo Group, Inc.), (c) the mean capitalization of the components was $31.05 billion, and (d)

[3] A description of the Index is available on Nasdaq's Web site at *http://dynamic.nasdaq.com/dynamic/nasdaq100_activity.stm.*

[4] *See* Exchange Rule 5.15.

[5] *See* Exchange Rule 5.12(a)(8).

[6] The initial eligibility criteria and continued eligibility criteria are available on Nasdaq's Web site at *http://dynamic.nasdaq.com/dynamic/nasdaq100_activity.stm.*

[7] One of the eligibility requirements it that the security must be seasoned (it has been listed on the market for three whole months [sic]). In the case of spin-offs, the operating history of the spin-off will be considered by Nasdaq. Additionally, if a component security will otherwise qualify to be in the top 25% of securities included in the Index by market capitalization for the six prior consecutive months, it will be eligible if it had been listed for one year.

the median capitalization of the components was $10.91 billion;

• Regarding component price per share, (a) the highest price per share of a component was $661.15 (Google, Inc.), (b) the lowest price per share of a component was $2.76 (Sirius XM Radio, Inc.), (c) the mean price per share of the components was $70.30, and (d) the median price per share of the components was $40.38;

• Regarding component weightings, (a) the highest weighting of a component was 18.52% (Apple, Inc.), (b) the lowest weighting of a component was 0.07% (Apollo Group, Inc.), (c) the mean weighting of the components was 1.00%, (d) the median weighting of the components was 0.37%, and (e) the total weighting of the top five highest weighted components was 40.78% (Apple Inc., Microsoft Corporation, Google Inc., Oracle Inc., and Amazon.com, Inc.);

• Regarding component available shares, (a) the most available shares of a component was 8.42 billion shares (Microsoft Corp.), (b) the least available shares of a component was 39.76 million shares (Intuitive Surgical, Inc.), (c) the mean available shares of the components was 750.27 million shares, and (d) the median available shares of the components was 295.85 million shares;

• Regarding the six-month average daily volumes of the components, (a) the highest six-month average daily volume of a component was 61.25 million shares (Sirius XM Radio Inc.), (b) the lowest six-month average daily volume of a component was 331,667 shares (Intuitive Surgical, Inc.), (c) the mean six-month average daily volume of the components was 6.94 million shares, (d) the median six-month average daily volume of the components was 3.13 million shares, (e) the average of six-month average daily volumes of the five most heavily traded components was 43.34 million shares (Sirius XM Radio, Inc., Microsoft Corp., Intel Corp., Cisco Systems, Inc., and Micron Technology, Inc.), and (f) 100% of the components had a six-month average daily volume of at least 50,000; and

• Regarding option eligibility, (a) 100% of the components were options eligible, as measured by weighting, and (b) 100% of the components were options eligible, as measured by number.

Index Calculation and Index Maintenance

In recent years, the value of the Full-size Nasdaq 100 Index has increased significantly, such that the value of the Index stood at 3,012.03 as of November 29, 2012. As a result, the premium for the Full-size Nasdaq 100 Index options also has increased. The Exchange believes that this has caused Full-size Nasdaq 100 Index options to trade at a level that may be uncomfortably high for retail investors. The Exchange believes that listing options on reduced values will attract a greater source of customer business than if the options were based only on the full value of the Index. The Exchange further believes that listing options on reduced values will provide an opportunity for investors to hedge, or speculate on, the market risk associated with the stocks comprising the Index. Additionally, by reducing the values of the Index, investors will be able to use this trading vehicle while extending a smaller outlay of capital. The Exchange believes that this should attract additional investors and, in turn, create a more active and liquid trading environment.[8]

The Full-size Nasdaq 100 Index and the Mini Nasdaq 100 Index levels are calculated continuously, using the last sale price for each component stock in the Index, and are disseminated every 15 seconds throughout the trading day.[9] The Full-size Nasdaq 100 Index level equals the current market value of component stocks multiplied by 125 and then divided by the stocks' market value of the adjusted base period. The adjusted base period market value is determined by multiplying the current market value after adjustments, times the previous base period market value and then dividing that result by the current market value before adjustments. To calculate the value of the Mini Nasdaq 100 Index, the full value of the Index is divided by ten. To maintain continuity for the Index's value, the divisor is adjusted periodically to reflect events such as changes in the number of common shares outstanding for component stocks, company additions or deletions, corporate restructurings, or other capitalization changes.

The settlement values for purposes of settling both Full-size Nasdaq 100 Index (''Full-size Settlement Value'') and Mini Nasdaq 100 Index (''Mini Settlement Value'') are calculated based on a volume-weighted average of prices reported in the first five minutes of trading for each of the component securities on the last business day before the expiration date (''Settlement Day'').[10] The Settlement Day is normally the Friday preceding ''Expiration Saturday.''[11] If a component security in the Index does not trade on Settlement Day, the closing price from the previous trading day will be used to calculate both the Full-size Settlement Value and Mini Settlement Value.[12] Accordingly, trading in options on the Index will normally cease on the Thursday preceding an Expiration Saturday. Nasdaq monitors and maintains the Index. Nasdaq is responsible for making all necessary adjustments to the Index to reflect component deletions; share changes; stock splits; stock dividends; stock price adjustments due to restructuring, mergers, or spin-offs involving the underlying components; and other corporate actions. Some corporate actions, such as stock splits and stock dividends, require simple changes to the available shares outstanding and the stock prices of the underlying components.

The component securities are evaluated on an annual basis, except under extraordinary circumstances which may result in an interim evaluation, as follows: securities listed on Nasdaq that meet its eligibility criteria are ranked by market value using closing prices as of the end of October and publicly available total shares outstanding as of the end of November. Eligible component securities which are already in the Index and ranked in the top 100 (based on market value) are retained in the Index. Component securities that are ranked from 101 to 125 are also retained, provided that those securities were ranked in the top 100 eligible securities as of the previous ranking review or have been added to the Index subsequent to the previous ranking review. Securities not meeting such criteria are replaced. The replacement securities chosen are those Index-eligible securities not currently in the

[8] Options trading on MNX have generated considerable interest from investors, as measured by its robust trading volume on multiple exchanges in the third quarter of 2012 (126,151 contracts total).

[9] Full-size Nasdaq 100 Index and Mini Nasdaq 100 Index levels are disseminated through the Nasdaq Index Dissemination Services (''NIDS'') during normal Nasdaq trading hours (9:30 a.m. to 4:00 p.m. ET). The Index is calculated using Nasdaq prices (not consolidated) during the day and the official closing price for the close. The closing value of the Index may change until 5:15 p.m. ET due to corrections to the NOCP of the component securities. In addition, the Index is published daily on Nasdaq's Web site and through major quotation vendors such as Reuters and Thomson's ILX.

[10] The aggregate exercise value of the option contract is calculated by multiplying the Index value by the Index multiplier, which is 100.

[11] For any given expiration month, options on the Nasdaq 100 Index will expire on the third Saturday of the month.

[12] Full-size Settlement Values and Mini Settlement Values are disseminated by Nasdaq.

Index that have the largest market capitalization.

Generally, the list of annual additions and deletions to the Index is publicly announced in early December, and changes to the Index are made effective after the close of trading on the third Friday in December. Moreover, if at any time during the year a component security is determined by Nasdaq to become ineligible for continued inclusion in the Index based on the continued eligibility criteria, that component security will be replaced with the largest market capitalization component not currently in the Index that met the eligibility criteria described earlier.

The Exchange will monitor the Index on a quarterly basis, and will not list any additional series for trading and will limit all transactions in such options to closing transactions only for the purpose of maintaining a fair and orderly market and protecting investors if: (i) the number of securities in the Index drops by one-third or more; (ii) 10% or more of the weight of the Index is represented by component securities having a market value of less than $ 75 million; (iii) less than 80% of the weight of the Index is represented by component securities that are eligible for options trading pursuant to Exchange Rule 5.3.; (iv) 10% or more of the weight of the Index is represented by component securities trading less than 20,000 shares per day; or (v) the largest component security accounts for more than 25% of the weight of the Index or the largest five components in the aggregate account for more than 50% of the weight of the Index.

The Exchange represents that, if the Index ceases to be maintained or calculated, or if the Index values are not disseminated every 15 seconds by a widely available source, it will not list any additional series for trading and will limit all transactions in such options to closing transactions only for the purpose of maintaining a fair and orderly market and protecting investors.

Contract Specifications

The proposed contract specifications are identical to the contract specifications of NDX and MNX options that are currently listed on other exchanges. The Index is a broad-based index. Options on the Nasdaq 100 Index are European-style and A.M. cash-settled. The Exchange's trading hours for index options (9:30 a.m. to 4:15 p.m. ET), will apply to options on the Nasdaq 100 Index. Exchange Rules that are applicable to the trading of options on broad-based indexes will apply to both NDX and MNX. The trading of NDX and MNX options will be subject to, among others, Exchange Rules governing margin requirements and trading halt procedures for index options.

The Exchange also proposes to amend Rule 5.15(a)(1) to establish that there are no position limits for options on NDX, which is consistent with the treatment of position limits for NDX on other options markets.[13] Because MNX is the reduced-value option on the NDX broad-based index option, pursuant to existing Rule 5.15(a), MNX will also have no position limits pursuant to this proposed change. The NDX contracts will be aggregated with the MNX contracts, where ten MNX contracts equal one NDX contract.[14] The Exchange will set strike price intervals for MNX contracts and NDX contract that will be similar to the strike price intervals that are already being used by multiple exchanges that list these options.[15] The minimum increment size for series trading below $ 3 is $ 0.05, and for series trading at or above $ 3 is $ 0.10.[16] The Exchange's margin rules will be applicable.[17] The Exchange may list options on both the NDX and the NMX in up to seven consecutive expiration months plus up to three successive expiration months in the March cycle.[18] The Exchange intends to list the same NDX and MNX options that are already listed by multiple other options exchanges. The trading of LEAPS NDX and LEAPS MNX options will be subject to the same rules that govern the trading of all the Exchange's index options, including sales practice rules, margin requirements, and trading rules.[19] The trading of FLEX NDX and FLEX MNX options will be subject to the same rules that govern the trading of all the Exchange's index options, including sales practice rules, margin requirements, and trading rules.[20]

Surveillance and Capacity

The Exchange represents that it has an adequate surveillance program in place for options traded on the Index and intends to apply those same program procedures that it applies to the Exchange's other index options. Additionally, the Exchange is a member of the Intermarket Surveillance Group (''ISG'') under the Intermarket Surveillance Group Agreement, dated June 20, 1994.[21] The ISG members work together to coordinate surveillance and investigative information sharing in the stock and options markets. In addition, the major futures exchanges are affiliated members of the ISG, which allows for the sharing of surveillance information for potential intermarket trading abuses.

The Exchange represents that it has the necessary systems capacity to support new options series that will result from the introduction of NDX, MNX, NDX LEAPS, MNX LEAPS, FLEX NDX, and FLEX MNX.

Finally, the Exchange proposes to amend Commentary .01 to Rule 5.22 to provide that the reporting authority designated by the Exchange for the Index underlying the NDX and MNX index options is NASDAQ OMX Group, Inc.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[22] of the Act, in general, and furthers the objectives of Section 6(b)(5),[23] 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.

The Exchange believes that the rule proposal will remove impediments to and perfect the mechanism of a free and open market because it enabling [sic] the Exchange to immediately list and trade full and reduced-size options on the Index in a manner consistent with other options exchanges. The Exchange believes that the proposed rule change would be beneficial to market participants, including market makers, institutional investors and retail investors, by specifying that there are no position limits on NDX and MNX. The Exchange further notes that the rule proposal will remove impediments to and perfect the mechanism of a free and open market because it will harmonize how position limits are treated for NDX and MNX options across options markets. The Commission has already approved the listing and trading and the elimination of position limits for NDX

[13] *See* NYSE MKT LLC (''NYSE MKT'') Rule 904C; Chicago Board Options Exchange (''CBOE'') Rule 24.4; NASDAQ OMX PHLX (''Phlx'') Rule 1001A.

[14] *See* Exchange Rule 5.15(c).

[15] *See* Exchange Rule 5.19.

[16] *See* Exchange Rule 6.72.

[17] *See* Exchange Rule 5.25.

[18] *See* Exchange Rule 5.19.

[19] *See* Exchange Rule 5.19(b).

[20] *See* Exchange Rule 5, Section 4.

[21] A list of the current members and affiliate members of ISG can be found at *www.isgportal.com.*

[22] 15 U.S.C. 78f(b).

[23] 15 U.S.C. 78f(b)(5).

and MNX options for other options exchanges, and the Exchange believes that harmonizing the standard across options markets will enable market participants to handle trading in NDX and MNX options similarly regardless of which options market in which they are trading.

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

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [24] and Rule 19b–4(f)(6) thereunder.[25]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it can list and trade NDX and MNX options with no position limits without delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[26] The Commission notes the proposal is substantively identical to prior proposed rule changes and existing rules of other exchanges, and does not raise any new regulatory issues.[27] For these reasons, the Commission designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–NYSEArca–2012–140 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–NYSEArca–2012–140. 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–NYSEArca–2012–140 and should be submitted on or before January 30, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–00196 Filed 1–8–13; 8:45 am]

BILLING CODE 8011–01–P

[24] 15 U.S.C. 78s(b)(3)(A).

[25] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

[26] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[27] *See, e.g.,* Security Exchange Act Release Nos. 57654 (April 11, 2008), 73 FR 21003 (April 17, 2008) (SR–NASDAQ–2008–028) and 57936 (June 6, 2008), 73 FR 33481 (June 12, 2008) (SR–Phlx–2008–36). *See also* NYSE MKT Rule 904C, CBOE Rule 24.4, and Phlx Rule 1001A.

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68577; File No. SR–Phlx–2012–141]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX LLC Relating to Professional Options Transaction Charges

January 3, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 21, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend certain electronic Professional [3] Options

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Professional'' means any person or entity that (i) is not a broker or dealer in securities,

Transaction Charges in Section II[4] of the Exchange's Pricing Schedule entitled ''Multiply Listed Options.''

While changes to the Pricing Schedule pursuant to this proposal are effective upon filing, the Exchange has designated the proposed amendment to be operative on January 2, 2013.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Section II of the Exchange's Pricing Schedule to increase the electronic Professional Options Transaction Charges for both Penny Pilot Options[5] and non-Penny Pilot Options.[6] The Exchange believes that increasing the electronic Professional Options Transaction Charges in Penny Pilot and non-Penny Pilot Options will allow the Exchange to compete more effectively. The Exchange also believes that the proposed fees will operate to assist the Exchange in recouping increased costs generally tied to supporting a larger number of options classes, option series and overall transaction volume.

Specifically, the Exchange proposes to increase the electronic Professional Options Transaction Charges for both Penny Pilot Options and non-Penny Pilot Options from $0.25 to $0.30 per contract. The Exchange is not proposing to increase the floor Professional Options Transaction Charges or any other electronic Professional transaction charges.

The Exchange also proposes to amend its Pricing Schedule at Section II to add another column to the Professional fees to differentiate electronic and floor fees as it does today with other market participants.[7] The Exchange also proposes a technical amendment to the Specialist,[8] Market Maker,[9] Broker-Dealer[10] and Firm[11] transaction fees to correct the Pricing Schedule to note an ''N/A'' for electronic FLEX[12] and Cabinet[13] Options pricing instead of $0.10 per contract. While the $0.10 per contract fee is noted on the Pricing Schedule, no market participant has been assessed that fee because FLEX and Cabinet Options are transacted on the Exchange's trading floor and are not transacted electronically.[14] The Exchange proposes to note ''N/A'' for those electronic fees because these types of transactions are not able to be executed electronically on the Exchange and this would correct the Pricing Schedule to reflect no fee is being assessed.

2. Statutory Basis

The Exchange believes that its proposal to amend its Pricing Schedule is consistent with Section 6(b) of the Act[15] in general, and furthers the objectives of Section 6(b)(4) of the Act[16] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities.

The Exchange's proposal to increase the electronic Professional Options Transaction Charges in both Penny Pilot and non-Penny Pilot Options is reasonable because of the greater costs incurred by the Exchange associated with supporting a larger number of options classes, option series and overall transaction volume. Also, the Exchange believes increasing the electronic Professional Options Transaction Charges in both Penny Pilot and non-Penny Pilot Options from $0.25 to $0.30 per contract is reasonable because the $0.05 per contract increase would allow the Exchange to recoup the aforementioned costs while also continuing to assess a Professional a rate that is lower than Broker-Dealer and Firm electronic rates. Also, the increased Professional fees are comparable with electronic Professional fees at other options exchanges.[17]

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and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). *See* Rule 1000(b)(14).

[4] Section II of the Pricing Schedule includes options overlying equities, ETFs, ETNs, and indexes which are Multiply Listed.

[5] The Penny Pilot was established in January 2007; and in October 2009, it was expanded and extended through June 30, 2012. See Securities Exchange Act Release Nos. 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007) (SR–Phlx–2006–74) (notice of filing and approval order establishing Penny Pilot); 60873 (October 23, 2009), 74 FR 56675 (November 2, 2009) (SR–Phlx–2009–91) (notice of filing and immediate effectiveness expanding and extending Penny Pilot); 60966 (November 9, 2009), 74 FR 59331 (November 17, 2009) (SR–Phlx–2009–94) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 61454 (February 1, 2010), 75 FR 6233 (February 8, 2010) (SR–Phlx–2010–12) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 62028 (May 4, 2010), 75 FR 25890 (May 10, 2010) (SR–Phlx–2010–65) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 62616 (July 30, 2010), 75 FR 47664 (August 6, 2010) (SR–Phlx–2010–103) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 63395 (November 30, 2010), 75 FR 76062 (December 7, 2010) (SR–Phlx–2010–167) (notice of filing and immediate effectiveness extending the Penny Pilot); 65976 (December 15, 2011), 76 FR 79247 (December 21, 2011) (SR–Phlx–2011–172) (notice of filing and immediate effectiveness extending the Penny Pilot); and 67326 (June 29, 2012), 77 FR 40126 (July 6, 2012) (SR–Phlx–2012–86) (notice of filing and immediate effectiveness extending the Penny Pilot). *See also* Exchange Rule 1034.

[6] Non-Penny Pilot refers to options classes not in the Penny Pilot.

[7] Today, the Specialist, Market Maker, Broker-Dealer and Firm fees are differentiated between electronic and firm fees.

[8] A ''Specialist'' is an Exchange member who is registered as an options specialist pursuant to Rule 1020(a).

[9] A ''Market Maker'' includes Registered Options Traders (Rule 1014(b)(i) and (ii)), which includes Streaming Quote Traders (*see* Rule 1014(b)(ii)(A)) and Remote Streaming Quote Traders (*see* Rule 1014(b)(ii)(B)). Directed Participants are also market makers.

[10] Broker-Dealers are assessed a Penny Pilot Options Transaction Charge of $0.45 per contract for electronic orders and a non-Penny Pilot Options Transaction Charge of $0.60 for electronic orders.

[11] Firms are assessed a Penny Pilot Options Transaction Charge of $0.40 per contract for electronic orders and a non-Penny Pilot Options Transaction Charge of $0.45 for electronic orders.

[12] A FLEX option is a customized option that provides parties to the transaction with the ability to fix terms including the exercise style, expiration date, and certain exercise prices. *See* Exchange Rule 1079. FLEX Options are a trademark of the Chicago Board Options Exchange.

[13] An ''accommodation'' or ''cabinet'' trade refers to trades in listed options on the Exchange that are worthless or not actively traded. Cabinet trading is generally conducted in accordance with Exchange Rules, except as provided in Exchange Rule 1059 entitled ''Accommodation Trading'', which sets forth specific procedures for engaging in cabinet trading below $1 per option contract. Cabinet or accommodation trading of option contracts is intended to accommodate persons wishing to effect closing transactions in those series of options dealt in on the Exchange for which there is no auction market.

[14] The Exchange's systems do not allow for FLEX or Cabinet transactions to be executed electronically.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(4).

[17] The Chicago Board Options Exchange Incorporated (''CBOE'') assesses professionals and voluntary professionals a $0.30 per contract transaction fee for electronic orders. *See* CBOE's Fees Schedule. *See also* NYSE Amex LLC's (''NYSE Amex'') Fee Schedule, which assesses Professional Customers a $0.32 per contract fee for electronic

Continued

The Exchange's proposal to increase the electronic Professional Options Transaction Charges in both Penny Pilot and non-Penny Pilot Options is equitable and not unfairly discriminatory because Professionals would continue to be assessed lower fees as compared to Broker-Dealers and Firms with respect to electronic options transactions charges. Market Makers and Specialists would be assessed lower fees, both electronic and floor, as compared to Professionals, because Market Makers and Specialists have burdensome quoting obligations [18] to the market which do not apply to Professionals, Customers, Firms and Broker-Dealers. Customers are not assessed Options Transactions Charges in either Penny Pilot or non-Penny Pilot Options because Customer order flow brings liquidity to the market, which in turn benefits all market participants. Broker-Dealers and Firms today pay higher fees as compared to a Professional for electronic transactions and this is not changing. The Professional Options Transaction Charges in both Penny Pilot and non-Penny Pilot Options for non-electronic transactions or floor transactions would remain unchanged.

The Exchange believes that assessing higher electronic Options Transaction Charges in both Penny Pilot and non-Penny Pilot Options of $0.30 per contract as compared to a floor Options Transaction Charge in both Penny Pilot and non-Penny Pilot Options of $0.25 per contract is reasonable, equitable and not unfairly discriminatory because these fees recognize the distinction between the floor order entry model and the electronic model and the proposed fees respond to competition along the same lines.[19] Floor participants incur costs associated with accessing the floor, i.e. need for a floor broker, and other costs which are not born by electronic members. Today, the Exchange assesses different fees for electronic as compared to floor transactions for Firms, Broker-Dealers, Specialists and Market Makers in Section II of the Pricing Schedule. The Exchange is proposing to likewise distinguish electronic and floor Professional Options Transactions Charges in both Penny and non-Penny Pilot Options. Other options exchanges likewise distinguish floor and electronic fees for Professionals.[20] The Exchange believes that the proposed fees are in line with similar fees offered on other exchanges.

The Exchange operates in a highly competitive market, comprised of eleven exchanges, in which market participants can easily and readily direct order flow to competing venues if they deem fee and rebate levels at a particular venue to be excessive.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed electronic Professional Options Transaction Charges in Penny and non-Penny Pilot Options remain competitive with fees at other options exchanges. The Exchange believes that the proposed fees are competitive and do not misalign the differentials currently assessed with respect to other market participants. Market participants can easily and readily direct order flow to competing venues if they deem fee and rebate levels at a particular venue to be excessive. Accordingly, the fees that are assessed and the rebates paid by the Exchange must remain competitive with fees charged and rebates paid by other venues and therefore must continue to be reasonable and equitably allocated to those members that opt to direct orders to the Exchange rather than competing venues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[21] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2012–141 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–Phlx–2012–141. 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

orders which take liquidity from 1 to 16,999 contracts.

[18] *See* Exchange Rule 1014 entitled ''Obligations and Restrictions Applicable to Specialists and Registered Options Traders.''

[19] A transaction resulting from an order that was electronically delivered utilizes Phlx XL II. *See* Exchange Rules 1014 and 1080. Electronically delivered orders do not include orders transacted on the Exchange floor. A transaction resulting from an order that is non-electronically-delivered is represented on the trading floor by a floor broker. *See* Exchange Rule 1063. All orders will be either electronically or non-electronically delivered.

[20] CBOE assesses a Professional and Voluntary Professional a $0.25 per contract manual fee in Penny and Non-Penny Classes and assesses a $0.45 per contract electronic fee in Penny and a $0.60 per contract electronic fee in Non-Penny Pilot Options. NYSE Amex assesses a $0.25 per contract fee for manual Professional Customer transactions and a tiered electronic Professional Customer rate starting at $.32 per contract for electronic orders which take liquidity from 1 to 16,999 contracts.

[21] 15 U.S.C. 78s(b)(3)(A)(ii).

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–Phlx–2012–141 and should be submitted on or before January 30, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–00256 Filed 1–8–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 3468570; File No. SR–ISE–2012–82]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Make Non-Substantive, Technical Corrections to ISE Rules

January 3, 2013.

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 December 21, 2012, the International Securities Exchange, LLC (the ''Exchange'' or ''ISE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to make a number of non-substantive, technical corrections to its rules. Examples of such technical corrections include updating ISE rule number citations and cross references, correcting typographical errors, deleting obsolete rule text, and updating references to outdated terms, such as changing references from the National Association of Securities Dealers (''NASD'') to Financial Industry Regulatory Authority (''FINRA''). The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to make a number of non-substantive, technical corrections to its rules. Examples of such technical corrections include updating ISE rule number citations and cross references, correcting typographical errors, deleting obsolete rule text, and updating references to outdated terms, such as changing references from NASD to FINRA. Following is a narrative description of each of the corrections:

- The Table of Contents to the ISE Rules is being amended to reflect that ISE Rule 718 is now ''Reserved'' since ISE Rule 718 (Accommodation Liquidations (Cabinet Trades)) was deleted.
- The Table of Contents is being amended to make conforming changes to the title of ISE Rule 720 (Obvious and Catastrophic Errors) so that it matches the title as it appears in the rules.
- ISE Rule 210 (Liability for Payment of Fees) is being amended to update an incorrect rule cross-reference number in paragraph (a).
- ISE Rule 312 (Limitation on Affiliation between the Exchange and Members) is being amended to delete references in paragraph (a) to Maple Merger Sub LLC because that subsidiary no longer exists. Paragraphs (b) and (c) are being deleted since the Exchange is no longer affiliated with Direct Edge ECN LLC (''DE ECN''), DE ECN is no longer a facility of the Exchange, and ISE (including its affiliates) no longer maintains an ownership interest in Ballista Securities LLC. Since paragraphs (b) and (c) are being deleted, the opening paragraph no longer needs to be designated as paragraph (a), so the (a) is being deleted.
- ISE Rule 604 (Continuing Education for Registered Persons) is being amended to change a reference in paragraph (b) from NASD to FINRA and brackets are being changed to parentheses wherever they appear throughout the rule.
- ISE Rule 704 (Collection and Dissemination of Quotations) is being amended to change references in paragraphs (a) and (b) from Rule 11Ac1–1 to Rule 602 of Regulation NMS.
- ISE Rule 713 (Priority of Quotes and Orders) is being amended to update an incorrect rule cross-reference number in paragraph (a), as well as to add non-substantive words to correct the sentence structure of paragraph (a). Additionally, Supplementary Material .03 to ISE Rule 713 was amended to update an incorrect rule cross-reference number in paragraph (d).
- ISE Rule 715 (Types of Orders) is being amended to correct the defined term of ''Priority Customer Orders'' in paragraph (g), and to correct the defined term of ''Add Liquidity Order'' in paragraph (n). In addition, Supplementary Material .02 to ISE Rule 713 is being moved into ISE Rule 713 itself as new paragraphs (o), (p), and (q), since ISE has fully-migrated to its new trading system, Optimise. Thus, it is no longer necessary to separately maintain those order types in the Supplementary Material.
- ISE Rule 718 (Accommodation Liquidations (Cabinet Trades)) is being deleted in its entirety, since that trading functionality is not offered in Optimise, and therefore not possible on the Exchange. ISE Rule 718 is now ''Reserved.''
- ISE Rule 722 (Complex Orders) is being amended to delete the obsolete clause to ISE's Optimise platform in Supplementary Material .03 and .04. In addition, ISE Supplementary Material .05 is being amended to correct the defined term ''Priority Customer Orders'', to insert a missing word, and to update an incorrect rule cross-reference number.
- ISE Rule 723 (Price Improvement Mechanism for Crossing Transactions) is being amended to delete paragraph (d)(6) since that trading functionality is not offered in Optimise. As a result, the corresponding sentence that cross-referenced paragraph (d)(6) is being deleted from Supplementary Material .05 and .09.

[22] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

• ISE Rule 802 (Appointment of Market Makers) is being amended to delete obsolete references to ''Second Market Primary Market Makers'' in Supplementary Material .02, since ISE no longer operates a ''Second Market.''

• ISE Rule 804 (Market Maker Quotations) is being amended to delete obsolete rule text in paragraph (g), since that rule text related to 'Automated Quotation Adjustments' functionality contained in ISE's prior trading system which has been retired. The rule text that is contained in Supplementary Material .01 relates to 'Automated Quotation Adjustments' functionality contained in ISE's current trading system, Optimise. Accordingly, the Exchange has moved the rule text in Supplementary Material .01 into paragraph (g) of ISE Rule 804 itself, since there is only one method for such functionality.

• ISE Rule 1503 (Failure to Obtain Reinstatement) is being amended to update an incorrect rule cross-reference number.

• ISE Rule 1615 (Disciplinary Functions) is being amended to change references in Supplementary Material .01 from NASD to FINRA.

• ISE Rule 1800 (Arbitration) is being amended to change references in paragraph (a) from the NASD Code of Arbitration to the FINRA Code of Arbitration, as well as update a number of corresponding FINRA rule cross-reference numbers contained in paragraphs (a), (c), and (d). Paragraph (b) is being amended to change a reference from NASD to FINRA.

• ISE Rule 2114 (Doing Business with the Public) is being amended to change a reference from NASD to FINRA.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) [3] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes it is appropriate to make these technical corrections to its rules so that Exchange members and investors have a clear and accurate understanding of the meaning of the Exchange's rules. By removing obsolete rule text, the Exchange is eliminating any potential for confusion about how its systems operate, particularly since the Exchange recently operated two trading systems while it migrated from its prior system to Optimise, its new trading system. By updating references from NASD to FINRA and related, corresponding rules, the Exchange is eliminating any inaccuracies in its rules. The Exchange further believes that the proposed rule change is not unfairly discriminatory because it treats all market participants equally and will not have an adverse impact on any market participant.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule changes are non-substantive and therefore do not implicate the competition analysis.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) [4] of the Act and Rule 19b–4(f)(6) [5] thereunder. The Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing the proposed rule change.

A proposed rule change filed under Rule 19b–4(f)(6) [6] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[7] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because this rule change is not proposing any substantive changes and is merely correcting inaccuracies in the Exchange's rules. Additionally, the Exchange will be able to immediately remove obsolete rule text and correct inaccurate references and cross references in the Exchange's rules which will eliminate member confusion and provide clarity on how the rules apply. Therefore, the Commission designates the proposal operative upon filing.[8]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–ISE–2012–82 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–2012–82. 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

[3] 15 U.S.C. 78f(b)(5).

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6).

[6] 17 CFR 240.19b–4(f)(6).

[7] 17 CFR 240.19b–4(f)(6)(iii).

[8] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2012–82, and should be submitted on or before January 30, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–00197 Filed 1–8–13; 8:45 am]

BILLING CODE 8011–01–P

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68572; File No. SR–CBOE–2012–132]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Schedule

January 3, 2013.

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 December 28, 2012, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule.[3] More specifically, the Exchange is proposing to make changes to the section ''Regulatory Fees.'' Under the Exchange's Regulatory Fees, the Exchange charges a fee to Designated Primary Market-Makers[4] (''DPMs'') and firms for which the Exchange is the Designated Examining Authority (''DEA'') called the ''DPM's and Firm Designated Examining Authority Fee.'' Under such fee, the Exchange currently charges DPMs and TPHs for which the Exchange is the DEA $0.50 per $1,000 of gross revenue as reported on quarterly FOCUS reports filed by such TPHs (excluding commodity commission revenue). In addition, this fee is subject to a monthly minimum fee of $1,000 per month for Clearing TPHs and $275 for non-Clearing TPHs. The Exchange is proposing to increase this fee from $.50 per $1,000 of gross revenue to $0.60 per $1,000 of gross revenue. In addition, the Exchange is proposing to increase the monthly minimum fee for Clearing TPHs from $1,000 to $1,500 and the monthly minimum fee for non-Clearing TPHs from $275 to $400. New proposed text has been added to the ''Regulatory Fees'' section of the Fees Schedule to reflect this charge.

The Exchange has determined that these changes are necessary to increase the revenue of the Exchange for the purpose of continuing to adequately fund its regulatory functions. Specifically, the Exchange is proposing to increase this fee in order to help more closely cover the costs of regulating these TPHs. The proposed modifications are reasonable as they have not been recently changed to reflect growing regulatory costs.[5] In addition, the Exchange believes the proposed changes to the Fees Schedule are equitably allocated to all TPHs in which the Exchange is the DEA as all will be charged equally based upon their gross revenue.

The proposed changes are to take effect on January 1, 2013.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an 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 facilitation 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. Additionally, the Exchange believes the proposed rule change is consistent with

[3] *See* Exchange Rule 2.20, which authorizes the Exchange, from time to time, to ''fix the fee and charges payable by Trading Permit Holders.''

[4] *See* Exchange Rule 8.80, which defines a ''Designated Primary Market-Maker'' as a ''TPH organization that is approved by the Exchange to function in allocated securities as a Market-Maker * * * and is subject to the obligations under Rule 8.85 * * *.''

[5] *See* Securities Exchange Act Release No. 34–50903 (December 21, 2004), 69 FR 78070 (December 29, 2004) (SR–CBOE–2004–084) (immediately effective rule increasing, among other things, the firm FOCUS Minimum Monthly Fee to $275 for non-clearing members while maintaining a monthly minimum of $1000 for clearing members). *See also* Securities Exchange Act Release No. 34–63701 (January 11, 2011), 76 FR 2934 (January 18, 2011) (SR–CBOE–2010–116) (immediately effective rule change to increase, among other things, the DPMs and Designated Examining Authority Fee to $.50 per $1,000 of gross revenue as reported on quarterly FOCUS reports filed).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

Section 6(b)(4) of the Act,[8] which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

In particular, the proposed rule change is equitable and not unfairly discriminatory as it is allocated to all Exchange DPMs and TPHs for which the Exchange is the DEA equally based upon their gross revenue. In addition, the fee is reasonable as it is a slight increase to the current Exchange fee which has not recently been updated to reflect current regulatory costs.[9] The Exchange believes the proposed rule change will protect investors and the public interest by increasing the Exchange's regulatory revenue to allow the Exchange to more adequately perform its regulatory functions and, thus, also allow the Exchange to better prevent fraudulent and manipulative acts and practices.

Finally, the Exchange also believes the proposed rule change is consistent with Section 6(b)(1) of the Act,[10] which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's TPHs and persons associated with its TPHs with the Act, the rules and regulations thereunder, and the rules of the Exchange. The proposed rule change is designed to fund the Exchange's regulatory program, and, more specifically, to help more closely cover the costs of regulating Exchange DPMs and those TPHs for which the Exchange is the DEA. Thus, the proposed changes will help the Exchange to enforce compliance of its TPHs with the Act and Exchange rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In particular, the proposed rule change will serve to aid the Exchange in fulfilling its obligations as a Self-Regulatory Organization by further funding the Exchange regulatory program.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and paragraph (f) of Rule 19b–4 [12] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2012–132 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2012–132. 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–CBOE–2012–132 and should be submitted on or before January 30, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–00199 Filed 1–8–13; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78f(b)(4).

[9] *See supra* note 5.

[10] 15 U.S.C. 78f(b)(1).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68571; File No. SR–C2–2012–046]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Schedule

January 3, 2013.

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 December 28, 2012, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Fees Schedule. The text of the proposed rule change is provided below.[3]

* * * * *

C2 Options Exchange, Incorporated Rules

* * * * *

1.–7. No change.

8. Regulatory Fees

A) Firm Designated Examining Authority Fee $0.[4]*60* per $1,000 of gross revenue (subject to a monthly minimum fee of $[1,000] *1,500* for clearing firms and $[275] *400* for non-clearing firms)—As reported on quarterly FOCUS Report, Form X–17A–5. Excludes commodity commission revenue.

* * * * *

The text of the proposed rule change is also available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule.[4] More specifically, the Exchange is proposing to make changes to the section ''Regulatory Fees.'' Under the Exchange's Regulatory Fees, the Exchange charges a fee to firms for which the Exchange is the Designated Examining Authority (''DEA'') called the ''Firm Designated Examining Authority Fee.'' Under such fee, the Exchange currently charges these Trading Permit Holders (''TPHs'') for which the Exchange is the DEA $0.40 per $1,000 of gross revenue as reported on quarterly FOCUS reports filed by such TPHs (excluding commodity commission revenue). In addition, this fee is subject to a monthly minimum fee of $1,000 per month for Clearing TPHs and $275 for non-Clearing TPHs. The Exchange is proposing to increase this fee from $.40 per $1,000 of gross revenue to $0.60 per $1,000 of gross revenue. In addition, the Exchange is proposing to increase the monthly minimum fee for Clearing TPHs from $1,000 to $1,500 and the monthly minimum fee for non-Clearing TPHs from $275 to $400. New proposed text has been added to the ''Regulatory Fees'' section of the Fees Schedule to reflect this charge.

The Exchange has determined that these changes are necessary to increase the revenue of the Exchange for the purpose of continuing to adequately fund its regulatory functions. Specifically, the Exchange is proposing to increase this fee in order to help more closely cover the costs of regulating these TPHs for which the Exchange is the DEA. The proposed modifications are reasonable as they have never been changed to reflect growing regulatory costs.[5] In addition, the Exchange believes the proposed changes to the Fees Schedule are equitably allocated to all TPHs in which the Exchange is the DEA as all will be charged based upon their gross revenue.

The proposed changes are to take effect on January 1, 2013.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an 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 facilitation 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. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[8] which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

In particular, the proposed rule change is equitable and not unfairly discriminatory as it is allocated to all Exchange DPMs and TPHs for which the Exchange is the DEA equally based upon their gross revenue. In addition, the fee is reasonable as it is a slight increase to the current Exchange fee which has not recently been updated to reflect current regulatory costs.[9] The Exchange believes the proposed rule change will protect investors and the public interest by increasing the Exchange's regulatory revenue to allow the Exchange to more adequately perform its regulatory functions and, thus, also allow the Exchange to better prevent fraudulent and manipulative acts and practices.

Finally, the Exchange also believes the proposed rule change is consistent with Section 6(b)(1) of the Act,[10] which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's TPHs and persons associated with its TPHs with the Act, the rules and regulations thereunder, and the rules of the Exchange. The proposed rule change is designed to fund the Exchange's regulatory program, and, more specifically, to help more closely cover the costs of regulating Exchange DPMs and those TPHs for which the Exchange is the DEA. Thus, the proposed changes will help the Exchange to enforce compliance of its TPHs with the Act and Exchange rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 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. In particular, the proposed rule change will serve to aid the Exchange in fulfilling its obligations as a Self-Regulatory Organization by

[3] The Commission notes that new text is in italics and deleted text is in brackets.

[4] *See* Exchange Rule 2.1, which authorizes fees to Participants to be ''fixed from time to time by the Exchange.''

[5] *See* Securities Exchange Act Release No. 34–63175 (October 25, 2010), 75 FR 66813 (October 29, 2010) (SR–C2–2010–006) (immediately effective rule establishing, among other things, the Designated Examining Authority Fee of $.40 per $1,000 of gross revenue as reported on quarterly FOCUS reports filed and the firm FOCUS Minimum Monthly Fee of $1000 for clearing members and $275 for non-clearing members).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78f(b)(4).

[9] *See supra* note 5.

[10] 15 U.S.C. 78f(b)(1).

further funding the Exchange regulatory program.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and paragraph (f) of Rule 19b–4 [12] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2012–046 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2012–046. 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–C2–2012–046 and should be submitted on or before January 30, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–00198 Filed 1–8–13; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68574; File No. SR–Phlx–2012–130]

Self-Regulatory Organizations; NASDAQ OX PHLX LLC; Order Approving Proposed Rule Change To Amend Performance Evaluations With Respect to Quote Submissions of Streaming Quote Traders and Remote Streaming Quote Traders

January 3, 2013.

I. Introduction

On October 31, 2012, NASDAQ OMX PHLX LLC (''Exchange'' or ''Phlx'') 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 performance evaluations with respect to Streaming Quote Traders (''SQTs'') and Remote Streaming Quote Traders (''RSQTs''). The proposed rule change was published for comment in the **Federal Register** on November 19, 2012.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend the performance evaluations with respect to SQTs and RSQTs. Exchange Rule 510 sets forth standards by which the Exchange periodically conducts an evaluation of SQTs and RSQTs to determine whether they have fulfilled performance standards relating to, among other things, quality of markets, efficient quote submission to the Exchange (including quotes submitted through a third party vendor), competition among market makers, observance of ethical standards, and administrative factors.

Specifically, the Exchange proposes to amend the evaluation standards with respect to quote submission. According to the Exchange, Phlx reviews the percentage of total quotes that represent the Phlx best bid or offer, quoting requirements pursuant to Exchange Rule 1014, the number of requests for a quote spread parameter and efficient quote submission. To evaluate efficient quote submission, the Exchange currently considers how an SQT or RSQT optimizes the submission of quotes through the Specialized Quote Feed [4] by evaluating the number of individual quotes per quote block received by the Exchange.

Instead of evaluating the number of individual quotes per quote block, the Exchange proposes to utilize quote-to-trade and quote-to-contracts traded ratios to evaluate SQTs and RSQTs. According to the Exchange, the quote-to-trade and quote-to-contract traded data would provide statistical information on spreads and efficiency, which would allow the Exchange to obtain more precise information to evaluate performance.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to national

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68217 (November 13, 2012), 77 FR 69525.

[4] Exchange Rule 1080.01(a) provides that ''[a] specialist, [remote streaming quote trader] or [streaming quote trader] may establish an option pricing model via a specialized connection, which is known as a specialized quote feed ('SQF'). Specialists, [streaming quote traders] and [remote streaming quote traders] individually determine which model to select per option and may change models during the trading day. Each pricing model requires the specialist, [streaming quote traders] and [remote streaming quote traders] to input various parameters, such as interest rates, volatilities (delta, vega, theta, gamma, etc.) and dividends.''

securities exchanges.[5] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[6] which requires that the rules of an exchange be designed, among other things, to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that the proposal should provide the Exchange with a better metric to evaluate the quote submission quality of SQTs and RSQTs. In particular, the Exchange represented that it could capture the following data in a report for each SQT and RSQT: executed contracts, trade count, total quotes, executed contract to quote ratio and trade count to quote ratio. The Commission believes that such additional information, which is not available today, should enable the Exchange to better judge the quality of quotes provided. The proposal would analyze the number of contracts executed, in addition to the number of quotes received by the Exchange. The Commission believes that the number of executed contracts to quote ratio should provide the Exchange with more useful information to judge actual liquidity supplied on the Exchange. The proposal would also analyze the number of trades to quotes. The Commission believes that this aspect of the proposal is reasonably designed to enable the Exchange to better evaluate smaller participants, who may execute lesser size, but who may still have a high trade-to-quote ratio if they are present at the national best bid or offer. Finally, the Exchange has represented that these standards which would be applied to all members and member organizations of the Exchange in a uniform matter that is equitable and not unfairly discriminatory.[7]

For the reasons stated above, the Commission believes that the proposal is consistent with the requirements of the Act and is designed to promote just and equitable principles of trade, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

[5] In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(5).

[7] *See* email from Angela Dunn, Associate General Counsel, Phlx, to Steve Kuan, Special Counsel, Commission, dated January 3, 2013.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (SR–Phlx–2012–130), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–00201 Filed 1–8–13; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68578; File No. SR–BOX–2012–025]

Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule for Trading on BOX

DATE: January 3, 2013.

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 December 26, 2012, BOX Options Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to amend the Fee Schedule for trading on BOX. In particular, the Exchange proposes to amend certain Exchange Fees for Professionals set forth in Section I of the Fee Schedule so that Professional accounts are assessed the same fees as Broker-Dealers. While changes to the Fee Schedule pursuant to this proposal will be effective upon filing, the changes will become operative on January 2, 2013. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://boxexchange.com.*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule for trading on BOX. In particular, the Exchange proposes to amend certain Exchange Fees for Professionals set forth in Section I of the Fee Schedule so that Professional accounts are assessed the same fees as Broker-Dealers.

For Auction Transactions,[5] the Exchange proposes to increase Professional fees for Improvement Orders in the PIP and Responses in the Solicitation and Facilitation mechanisms from $0.15 to $0.35, the same fee Broker-Dealers are currently charged. Note that Exchange Fees for Primary Improvement Orders, Facilitation Orders, and Solicitation Orders will continue to be based upon a Participant's monthly average daily volume (''ADV'') in Auction Transactions as calculated at the end of each month as set forth in Section I.A. of the Fee Schedule. The Exchange notes that the proposed fees for Professionals are within the range of Professional fees presently assessed in the industry.[6]

[5] Auction Transactions are those transactions executed through the Price Improvement Period (''PIP''), Solicitation, and Facilitation auction mechanisms.

[6] Professional customers are charged $0.33 per contract for Select Symbols on the International Securities Exchange (''ISE''), $0.32 per contract for taking liquidity on NYSE Amex, and $0.45 or more per contract on the NASDAQ Options Market (''NOM'') for adding or removing liquidity in non-

Continued

Also, the Exchange proposes to implement a $0.22 per contract surcharge for Professionals for all transactions in options on the Nasdaq-100® Index (NDX) and on the Mini-NDX® Index (MNX). BOX currently charges Market Makers and Broker-Dealers $0.22 per contract for transactions in NDX and MNX. BOX incurs licensing fees for transactions in these classes of options and believes it is appropriate and reasonable to pass that fee through to BOX Participants, including Professional accounts.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[7] in general, and Section 6(b)(4) of the Act,[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among BOX Options Participants and other persons using its facilities.

The Exchange believes the proposed fee change for Professionals in Auction Transactions is reasonable, equitable and not unfairly discriminatory because it charges Professionals, whose activity on BOX is akin to the order flow activity and system usage to that of Broker-Dealers, the same fee for competing in Auction Transactions as the fee charged to Broker-Dealers. BOX does not assess ongoing systems access fees, ongoing fees for access to BOX market data, or fees related to order cancellation. Professional accounts, while Public Customers by virtue of not being broker-dealers, generally engage in trading activity more similar to broker-dealer proprietary trading accounts (more than 390 orders per day on average). BOX notes that as of December 2012, orders for Professionals generally account for a majority of the orders BOX receives on a given trading day. This level of trading activity draws on a greater amount of BOX system resources than that of non-Professional Public Customers, and thus, greater ongoing BOX operational costs. Simply, the more orders submitted to BOX, the more messages sent to and received from BOX, the more orders potentially routed to away exchanges, and the more BOX system resources utilized. As such, rather than passing the costs of these higher order volumes along to all market participants, the Exchange believes it is more reasonable and equitable to assess those costs to the persons directly responsible. To that end, BOX aims to recover costs incurred by assessing Professional accounts a market competitive fee for competing in Auction Transactions.

The Exchange believes the proposed change to increase Professional fees is not unfairly discriminatory as the fees will apply to all Professionals and Broker-Dealers competing in Auction Transactions equally. Further, Professionals and Broker-Dealers are free to change the manner in which they access BOX. A Professional may, by sending fewer than 390 orders per day across the industry, begin participating as a non-Professional, Public Customer and potentially reduce transaction fees. Additionally, Professionals will still benefit from certain priority advantages as a customer in Auction Transactions.[9] As noted above, Professionals' order sending behavior and trading activity tend to be more similar to Broker-Dealers trading on a proprietary basis. This is particularly true in considering orders in response to BOX auction mechanisms. As such, the Exchange believes it is not unfairly discriminatory to charge them the same fee as Broker-Dealers when competing for customer order flow in these Auction Transactions.

Professionals may elect to register as a Broker-Dealer and, once registered, may apply to become a BOX Market Maker, subject to Exchange Fees based on their ADV. The Exchange believes the proposed Auction Transaction fees for Professionals is equitable and not unfairly discriminatory because such Participants are not subject to the same obligations as Market Makers when providing liquidity to the market. In particular, Market Makers must maintain active two-sided markets in appointed classes, and must meet certain minimum quoting requirements. As such, the Exchange believes it is appropriate that Market Makers be charged comparably lower Auction Transaction fees as compared to Professionals when the Market Makers provide greater volumes of liquidity to the market. In light of the ability to access BOX in a variety of ways, each of which is priced differently, Professionals, Broker-Dealers, and other market participants may each select the most economically beneficial manner to access BOX.

Further, the Exchange believes the proposed fee change is equitable and not unfairly discriminatory because it will assure that retail investors (non-Professional, Public Customers) continue to receive the appropriate marketplace advantages for Auction Transactions on BOX, while furthering fair competition among marketplace professionals by treating them equally when they compete for these desirable customer orders. The Exchange believes it is reasonable and equitable to assess Auction Transaction fees for Professionals that are the same as those fees for Broker-Dealers because it applies a pricing structure that groups these sophisticated market participants together when they are competing in this manner.

Generally, competing options exchanges assess Professionals fees at comparable rates to those proposed by the Exchange, and comparable to fees charged to Broker-Dealers.[10] The Exchange operates within a highly competitive market in which market participants can readily direct order flow to any of several other competing venues if they deem fees at a particular venue to be excessive. As such, the Exchange believes the proposed increases are reasonable and equitable.

The Exchange further believes the proposed fee change is equitable and not unfairly discriminatory because Professionals generally do not initiate Auction Transactions, unlike some Broker-Dealers. Doing so requires, in part, guaranteeing a customer order and execution. Initiating an Auction Transaction for the benefit of the customer order, an [sic] taking on this guarantee provides these Participants potentially discounted fees.[11] The Exchange believes it is reasonable, equitable, and not unfairly discriminatory to charge Professional accounts the same fee as Broker-Dealers to compete for customer orders in Auction Transactions because when acting in response to an auction, as opposed to initiating the transaction, Professionals' behavior, systems' sophistication, and trading activity are similar to Broker-Dealers, and distinct from the retail investors on the opposite side of the Auction Transaction.

The Exchange believes it is equitable and not unfairly discriminatory for Public Customers to be charged lower fees than Professionals and Broker-

Penny Pilot securities. See ISE fee schedule, available at: *http://www.ise.com/assets/documents/OptionsExchange/legal/fee/fee_schedule.pdf*, NYSE Amex Options Fee Schedule, available at: *https://globalderivatives.nyx.com/sites/globalderivatives.nyx.com/files/nyse_amex_options_fee_schedule_12_01_12_.pdf*, and see NOM Fee Schedule, available at: *http://www.nasdaqtrader.com/Micro.aspx?id=OptionsPricing.*

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] *See* Rules 7150(f)(4) and 7270 regarding allocation and executions within each BOX auction mechanism.

[10] *Supra,* note 6.

[11] *See* Section I.A. of the Fee Schedule that provides Tiered Fees with potential discounts for Participants that Initiate Auction Transactions.

Dealers for Auction Transactions on BOX. The securities markets generally, and BOX in particular, have historically aimed to improve markets for investors and develop various features within the market structure for the benefit of non-Professional, Public Customers.[12] As such, the Exchange believes the proposed fees for Professional customer transactions are appropriate and not unfairly discriminatory. The Exchange believes it promotes the best interests of investors to have lower Auction Transaction costs for non-Professional, Public Customers, and that the BOX fee structure will continue to attract this customer order flow to these auction mechanisms which BOX believes will provide greater potential price improvement to these investors.

Regarding the surcharge for transactions in NDX and MNX, due to a licensing agreement with The NASDAQ OMX Group, Inc. (''NASDAQ OMX'') to use various indices and trademarks in connection with the listing and trading of these index options, BOX will pay a per contract license fee of $0.22 to NASDAQ OMX for NDX and MNX options contracts traded on BOX. The Exchange proposes to assess a surcharge fee for Professional transactions in NDX and MNX options to offset the costs BOX incurs for each such transaction. The Exchange believes that passing this cost through to BOX Options Participants that trade these options, including Professionals, is the most equitable means of recovering the costs of the license.

The Exchange's proposal to assess Professionals, Broker-Dealers and Market Makers a $.22 per contract surcharge for transactions in MNX and NDX, as compared to no surcharge being assessed to non-Professional Public Customers, is equitable and not unfairly discriminatory because the Exchange believes that a lower fee for non-Professional, Public Customers benefits all BOX market participants by incentivizing market participants to transact a greater number of Public Customer orders, which results in increased liquidity on BOX.

The Exchange believes that the proposed fees will keep BOX competitive with other exchanges and will apply in an equitable manner among BOX Participants. The Exchange believes the proposed fees are fair and reasonable and must be competitive with fees in place on other exchanges.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The BOX auction mechanisms, the PIP in particular, provide the opportunity for market participants to compete for customer orders. The PIP has no limitations regarding the number of Market Makers, Options Participants that are not Market Makers, and customers that can participate and compete for orders in the PIP. BOX asserts that Participants are actively competing for customer orders, which is clearly supported by the simple fact that price improvement occurs in the PIP. Since the PIP began in 2004, customers have received more than $400 million in savings through better executions on BOX, a monthly average of more than $3.5 million over that time.

The Exchange does not believe the proposed fee change will inhibit Professionals' ability to compete within BOX Auction Transactions. Broker-Dealers currently compete actively within the PIP, and BOX does not believe assessing Professionals a $0.35 per contract fee equivalent to that of Broker-Dealers, would impede Professionals' ability, or the incentive for Professionals, to compete therein. BOX notes that its market model and fees are generally intended to benefit retail customers by providing incentives for Participants to submit their customer order flow to BOX, and the PIP in particular. BOX makes a substantial amount of PIP-related data and statistics available to the public on its Web site *www.boxexchange.com*. Specifically, PIP Fee Pilot reports are available at: *http://boxexchange.com/boxrReports_en;* daily PIP volumes and average price improvement at: *http://boxexchange.com/volumes_en;* and BOX execution quality reports at: *http://boxexchange.com/executionQualityReport_en.* The data indisputably supports that the PIP provides price improvement for customer orders.

The fee change proposed would charge Professionals the same fee as Broker-Dealers when competing in Auction Transactions. Because this change would charge Professionals similarly to Broker-Dealers in this particular circumstance, charge them a fee comparable to what Professionals and Broker-Dealers pay on competing exchanges,[13] and for additional reasons as stated above, the Exchange does not believe that the proposed change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[14] and Rule 19b–4(f)(2) thereunder,[15] because it establishes or changes a due, fee, or other charge applicable only to a member.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–BOX–2012–025 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,

[12] Note that BOX has historically imposed different, and higher, routing fees for Professionals as compared to non-Professional Public Customers. *See* Securities Exchange Act Release Nos. 65538 (October 12, 2011), 76 FR 64413 (October 18, 2011) (Adopting a $0.50 per contract routing fee for Professionals while providing routing to non-Professional Public Customers at no charge), and 68149 (November 5, 2012), 77 FR 67693 (November 13, 2012) (Continuing to charge Professionals $0.50 per contract executed on away exchanges and exempting Public Customer accounts from a routing fee for Directed Orders, provided 33% or more of a Participant's Public Customer Directed Orders received during the month are executed through PIP, and less than 45% of a Participant's Directed Orders received during the month are routed to and executed on an away exchange).

[13] *Supra,* note 6.

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

[15] 17 CFR 240.19b–4(f)(2).

Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BOX–2012–025. 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–BOX–2012–025 and should be submitted on or before January 30, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–00257 Filed 1–8–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68568; File No. SR–NASDAQ–2012–145]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend Fee Pilot Program for NASDAQ Last Sale

January 3, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on December 20, 2012, The NASDAQ Stock Market LLC (''NASDAQ'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a 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 the Substance of the Proposed Rule Change

NASDAQ is proposing to extend for three months the fee pilot pursuant to which NASDAQ distributes the NASDAQ Last Sale (''NLS'') market data products. NLS allows data distributors to have access to real-time market data for a capped fee, enabling those distributors to provide free access to the data to millions of individual investors via the Internet and television. Specifically, NASDAQ offers the ''NASDAQ Last Sale for NASDAQ'' and ''NASDAQ Last Sale for NYSE/Amex''[3] data feeds containing last sale activity in U.S. equities within the NASDAQ Market Center and reported to the FINRA/NASDAQ Trade Reporting Facility (''FINRA/NASDAQ TRF''), which is jointly operated by NASDAQ and the Financial Industry Regulatory Authority (''FINRA''). The purpose of this proposal is to extend the existing pilot program for three months, from January 1, 2013 to March 31, 2013.

This pilot program supports the aspiration of Regulation NMS to increase the availability of proprietary data by allowing market forces to determine the amount of proprietary market data information that is made available to the public and at what price. During the pilot period, the program has vastly increased the availability of NASDAQ proprietary market data to individual investors. Based upon data from NLS distributors, NASDAQ believes that since its launch in July 2008, the NLS data has been viewed by over 50,000,000 investors on Web sites operated by Google, Interactive Data, and Dow Jones, among others.

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are in brackets.

* * * * *

7039. NASDAQ Last Sale Data Feeds

(a) For a three month pilot period commencing on [October 1, 2012] *January 1, 2013,* NASDAQ shall offer two proprietary data feeds containing real-time last sale information for trades executed on NASDAQ or reported to the NASDAQ/FINRA Trade Reporting Facility.

(1) ''NASDAQ Last Sale for NASDAQ'' shall contain all transaction reports for NASDAQ-listed stocks; and

(2) ''NASDAQ Last Sale for NYSE/[Amex]*NYSE MKT''* shall contain all such transaction reports for NYSE- and NYSE [Amex]*MKT*-listed stocks.

(b) Each distributor of the NASDAQ Last Sale Data Feeds may elect between two alternate fee schedules, depending upon the choice of distributors to report usage based on either a username/password entitlement system or a quote counting mechanism or both. All fees for the NASDAQ Last Sale Data Products are ''stair-stepped'' in that the fees are reduced for distributors with more users but the lower rates apply only to users in excess of the specified thresholds rather than applying to all users once a threshold is met. In addition, there shall be a maximum fee of $50,000 per month for NASDAQ Last Sale for NASDAQ and NASDAQ Last Sale for NYSE/[Amex]*NYSE MKT.*

(1) Firms that choose to report usage for either a username/password entitlement system or quote counting mechanism or both shall elect between paying a fee for each user or a fee for each query. A firm that elects to pay for each query may cap its payment at the monthly rate per user. Firms shall pay the following fees:

(A) No change.

(B) NASDAQ Last Sale for NYSE/[Amex]*NYSE MKT*

Users/mo	Price	Quotes	Price
1–9,999	$0.30/usermonth	0–10M	$0.0015/query.
10,000–49,999	$0.24/usermonth	10M–20M	$0.0012/query.
50,000–99,999	$0.18/usermonth	20M–30M	$0.0009/query.

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] This filing reflects the change of the name of the product from ''NASDAQ Last Sale for NYSE/Amex'' to ''NASDAQ Last Sale for NYSE/NYSE MKT'' in the text of Rule 7039, due to the change in the name of NYSE Amex to NYSE MKT.

Users/mo	Price	Quotes	Price
100,000+	$0.15/usermonth	30M+	$0.000725/query.

(2) Firms that choose not to report usage based on either a username/password entitlement system or quote counting mechanism or both may distribute NASDAQ Last Sale Data Products under alternate fee schedules depending upon whether they distribute data via the Internet or via Television:

(A) The fee for distribution of NASDAQ Last Sale Data Products via the Internet shall be based upon the number of Unique Visitors to a Web site receiving such data. The number of Unique Visitors shall be validated by a vendor approved by NASDAQ in NASDAQ's sole discretion.

(i) No change.

(ii) NASDAQ Last Sale for NYSE/[Amex] *NYSE MKT*

Unique visitors	Monthly fee
1–100,000	$0.018/Unique Visitor.
100,000–1M	$0.015/Unique Visitor.
1M+	$0.012/Unique Visitor.

(B) Distribution of NASDAQ Last Sale Data Products via Television shall be based upon the number of Households receiving such data. The number of Households to which such data is available shall be validated by a vendor approved by NASDAQ in NASDAQ's sole discretion.

(i) No change.

(ii) NASDAQ Last Sale for NYSE/[Amex] *NYSE MKT*

Households	Monthly fee
1–1M	$0.00048/Household.
1M–5M	$0.00042/Household.
5M–10M	$0.00036/Household.
10M+	$0.0003/Household.

(C) No change.

(c) No change.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Prior to the launch of NLS, public investors that wished to view market data to monitor their portfolios generally had two choices: (1) Pay for real-time market data or (2) use free data that is 15 to 20 minutes delayed. To increase consumer choice, NASDAQ proposed a pilot to offer access to real-time market data to data distributors for a capped fee, enabling those distributors to disseminate the data at no cost to millions of internet users and television viewers. NASDAQ now proposes a three-month extension of that pilot program, subject to the same fee structure as is applicable today.

NLS consists of two separate ''Level 1'' products containing last sale activity within the NASDAQ market and reported to the jointly-operated FINRA/NASDAQ TRF. First, the ''NASDAQ Last Sale for NASDAQ'' data product is a real-time data feed that provides real-time last sale information including execution price, volume, and time for executions occurring within the NASDAQ system as well as those reported to the FINRA/NASDAQ TRF. Second, the ''NASDAQ Last Sale for NYSE/NYSE MKT'' data product provides real-time last sale information including execution price, volume, and time for NYSE- and NYSE MKT-securities executions occurring within the NASDAQ system as well as those reported to the FINRA/NASDAQ TRF. By contrast, the securities information processors (''SIPs'') that provide ''core'' data consolidate last sale information from all exchanges and trade reporting facilities (''TRFs''). Thus, NLS replicates a subset of the information provided by the SIPs.

NASDAQ established two different pricing models, one for clients that are able to maintain username/password entitlement systems and/or quote counting mechanisms to account for usage, and a second for those that are not. Firms with the ability to maintain username/password entitlement systems and/or quote counting mechanisms are eligible for a specified fee schedule for the NASDAQ Last Sale for NASDAQ Product and a separate fee schedule for the NASDAQ Last Sale for NYSE/NYSE MKT Product. Firms that are unable to maintain username/password entitlement systems and/or quote counting mechanisms also have multiple options for purchasing the NASDAQ Last Sale data. These firms choose between a ''Unique Visitor'' model for Internet delivery or a ''Household'' model for television delivery. Unique Visitor and Household populations must be reported monthly and must be validated by a third-party vendor or ratings agency approved by NASDAQ at NASDAQ's sole discretion. In addition, to reflect the growing confluence between these media outlets, NASDAQ offered a reduction in fees when a single distributor distributes NASDAQ Last Sale Data Products via multiple distribution mechanisms.

NASDAQ also established a cap on the monthly fee, currently set at $50,000 per month, for all NASDAQ Last Sale products. The fee cap enables NASDAQ to compete effectively against other exchanges that also offer last sale data for purchase or at no charge. As with the distribution of other NASDAQ proprietary products, all distributors of the NASDAQ Last Sale for NASDAQ and/or NASDAQ Last Sale for NYSE/NYSE MKT products pay a single $1,500/month NASDAQ Last Sale Distributor Fee in addition to any applicable usage fees. The $1,500 monthly fee applies to all distributors and does not vary based on whether the distributor distributes the data internally or externally or distributes the data via both the Internet and television.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(4) of the Act,[5] in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data. In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers (''BDs'') increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4).

NASDAQ believes that its NASDAQ Last Sale market data products are precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by lessening regulation of the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[6]

By removing unnecessary regulatory restrictions on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well.

The recent decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010), upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data. ''In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.' *NetCoalition,* at 535 (quoting H.R. Rep. No. 94–229, at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 323). The court agreed with the Commission's conclusion that ''Congress intended that 'competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.' ''[7]

The Court in *NetCoalition,* while upholding the Commission's conclusion that competitive forces may be relied upon to establish the fairness of prices, nevertheless concluded that the record *in that case* did not adequately support the Commission's conclusions as to the competitive nature of the market for NYSE Arca's data product at issue in that case. As explained below in NASDAQ's Statement on Burden on Competition, however, NASDAQ believes that there is substantial evidence of competition in the marketplace for data that was not in the record in the *NetCoalition* case, and that the Commission is entitled to rely upon such evidence in concluding that the fees established in this filing are the product of competition, and therefore in accordance with the relevant statutory standards.[8] Moreover, NASDAQ further notes that the product at issue in this filing—a NASDAQ last sale data product that replicates a subset of the information available through ''core'' data products whose fees have been reviewed and approved by the SEC—is quite different from the NYSE Arca depth-of-book data product at issue in *NetCoalition.* Accordingly, any findings of the court with respect to that product may not be relevant to the product at issue in this filing.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. NASDAQ's ability to price its Last Sale Data Products is constrained by (1) competition between exchanges and other trading platforms that compete with each other in a variety of dimensions; (2) the existence of inexpensive real-time consolidated data and market-specific data and free delayed consolidated data; and (3) the inherent contestability of the market for proprietary last sale data.

The market for proprietary last sale data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price, and distribution of its data products. Without trade executions, exchange data products cannot exist. Moreover, data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, the operation of the exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content and content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (*e.g.,* if the software can be downloaded over the Internet after being purchased).[9] In NASDAQ's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of

[6] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[7] *NetCoalition,* at 535.

[8] It should also be noted that Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'') has amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to make it clear that all exchange fees, including fees for market data, may be filed by exchanges on an immediately effective basis. Although this change in the law does not alter the Commission's authority to evaluate and ultimately disapprove exchange rules if it concludes that they are not consistent with the Act, it unambiguously reflects a conclusion that market data fee changes do not require prior Commission review before taking effect, and that a proceeding with regard to a particular fee change is required only if the Commission determines that it is necessary or appropriate to suspend the fee and institute such a proceeding.

[9] *See* William J. Baumol and Daniel G. Swanson, ''The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power,'' *Antitrust Law Journal,* Vol. 70, No. 3 (2003).

trading and placing orders are *the* source of the information that is distributed) and are each subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, NASDAQ would be unable to defray its platform costs of providing the joint products.

An exchange's BD customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A BD will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the BD chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the BD will choose not to buy it. Moreover, as a BD chooses to direct fewer orders to a particular exchange, the value of the product to that BD decreases, for two reasons. First, the product will contain less information, because executions of the BD's trading activity will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that BD because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the BD is directing orders will become correspondingly more valuable.

Similarly, in the case of products such as NLS that are distributed through market data vendors, the vendors provide price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Retail BDs, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. NASDAQ and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully. Moreover, NASDAQ believes that products such as NLS can enhance order flow to NASDAQ by providing more widespread distribution of information about transactions in real time, thereby encouraging wider participation in the market by investors with access to the Internet or television. Conversely, the value of such products to distributors and investors decreases if order flow falls, because the products contain less content.

Analyzing the cost of market data distribution in isolation from the cost of all of the inputs supporting the creation of market data will inevitably underestimate the cost of the data. Thus, because it is impossible to create data without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of market data. It would be equally misleading, however, to attribute all of the exchange's costs to the market data portion of an exchange's joint product. Rather, all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. NASDAQ pays rebates to attract orders, charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an ''excessive'' price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including thirteen SRO markets, as well as internalizing BDs and various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated TRFs compete to attract internalized transaction reports. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products.

The large number of SROs, TRFs, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, NYSE MKT, NYSE Arca, BATS, and Direct Edge.

Any ATS or BD can combine with any other ATS, BD, or multiple ATSs or BDs to produce joint proprietary data products. Additionally, order routers and market data vendors can facilitate single or multiple BDs' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ATSs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS and Arca did before registering as exchanges by publishing proprietary book data on the Internet. Second, because a single order or transaction report can appear in a core data product, an SRO proprietary product, and/or a non-SRO proprietary product, the data available in proprietary products is

exponentially greater than the actual number of orders and transaction reports that exist in the marketplace. Indeed, in the case of NLS, the data provided through that product appears both in (i) real-time core data products offered by the SIPs for a fee, and (ii) free SIP data products with a 15-minute time delay, and finds a close substitute in last-sale products of competing venues.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, BATS Trading and Direct Edge. Today, BATS and Direct Edge provide data at no charge in order to attract order flow, and use market data revenue rebates from the resulting executions to maintain low execution charges for their users. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume.

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While BDs have previously published their proprietary data individually, Regulation NMS encourages market data vendors and BDs to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg and Thomson Reuters.

Moreover, consolidated data provides two additional measures of pricing discipline for proprietary data products that are a subset of the consolidated data stream. First, the consolidated data is widely available in real-time at $1 per month for non-professional users. Second, consolidated data is also available *at no cost* with a 15- or 20-minute delay. Because consolidated data contains marketwide information, it effectively places a cap on the fees assessed for proprietary data (such as last sale data) that is simply a subset of the consolidated data. The mere availability of low-cost or free consolidated data provides a powerful form of pricing discipline for proprietary data products that contain data elements that are a subset of the consolidated data, by highlighting the optional nature of proprietary products.

The competitive nature of the market for products such as NLS is borne out by the performance of the market. In May 2008, the Internet portal Yahoo! began offering its Web site viewers real-time last sale data (as well as best quote data) provided by BATS. In response, in June 2008, NASDAQ launched NLS, which was initially subject to an ''enterprise cap'' of $100,000 for customers receiving only one of the NLS products, and $150,000 for customers receiving both products. The majority of NASDAQ's sales were at the capped level. In early 2009, BATS expanded its offering of free data to include depth-of-book data. Also in early 2009, NYSE Arca announced the launch of a competitive last sale product with an enterprise price of $30,000 per month. In response, NASDAQ combined the enterprise cap for the NLS products and reduced the cap to $50,000 (*i.e.,* a reduction of $100,000 per month). Although each of these products offers only a specific subset of data available from the SIPs, NASDAQ believes that the products are viewed as substitutes for each other and for core last-sale data, rather than as products that must be obtained in tandem. For example, while Yahoo! and Google now both disseminate NASDAQ's product, several other major content providers, including MSN and Morningstar, use the BATS product.

In this environment, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. ''No one disputes that competition for order flow is 'fierce'.'' *NetCoalition* at 24. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A BD that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. If a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected BDs will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data. Similarly, increases in the cost of NLS would impair the willingness of distributors to take a product for which there are numerous alternatives, impacting NLS data revenues, the value of NLS as a tool for attracting order flow, and ultimately, the volume of orders routed to NASDAQ and the value of its other data products.

In establishing the price for the NASDAQ Last Sale Products, NASDAQ considered the competitiveness of the market for last sale data and all of the implications of that competition. NASDAQ believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of numerous alternatives to NLS, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources ensures that NASDAQ cannot set unreasonable fees, or fees that are unreasonably discriminatory, without losing business to these alternatives. Accordingly, NASDAQ believes that the acceptance of the NLS product in the marketplace demonstrates the consistency of these fees with applicable statutory standards.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Three comment letters were filed regarding the proposed rule change as originally published for comment NASDAQ responded to these comments in a letter dated December 13, 2007. Both the comment letters and NASDAQ's response are available on the SEC Web site at *http://www.sec.gov/comments/sr-nasdaq-2006-060/nasdaq2006060.shtml*. In addition, in response to prior filings to extend the NLS pilot,[10] the Securities Industry and Financial Markets Association (''SIFMA'') and NetCoalition filed comment letters contending that the SEC should suspend and institute disapproval proceedings with respect to the filing.[11] SIFMA and NetCoalition have filed petitions seeking review by the United States Court of Appeals for the District of Columbia Circuit with respect to the NLS pricing pilots in effect from July 1, 2011 through September 30, 2011, October 1, 2011

[10] Securities Exchange Act Release No. 67376 (July 9, 2012), 77 FR 41467 (July 13, 2012) (SR–NASDAQ–2012–078); Securities Exchange Act Release No. 65488 (October 5, 2011), 76 FR 63334 (October 21, 2011) (SR–NASDAQ–2011–132); Securities Exchange Act Release No. 64856 (July 12, 2011), 76 FR 41845 (July 15, 2011) (SR–NASDAQ–2011–092); Securities Exchange Act Release No. 64188 (April 5, 2011), 76 FR 20054 (April 11, 2011) (SR–NASDAQ–2011–044).

[11] SIFMA and NetCoalition did not comment on the most recent extension of the NLS pilot. Securities Exchange Act Release No. 67979 (October 3, 2012), 77 FR 61810 (October 11, 2012) (SR–NASDAQ–2012–108).

through December 31, 2011, and from July 1, 2012 through September 30, 2012. These appeals have been stayed pending resolution of the consolidated case *NetCoalition* v. *SEC,* Nos. 10–1421, 10–1422, 11–1001, and 11–1065 (''*NetCoalition II''*), which is awaiting a decision by the Court following oral arguments in November 2012.

While containing a few superficial modifications from prior letters, SIFMA and NetCoalition's most recently submitted letter continues to mischaracterize the import of the original *NetCoalition* case. Specifically, the court made findings about the extent of the Commission's record in support of determinations about a depth-of-book product offered by NYSE Arca. In making this limited finding, the court nevertheless squarely rejected contentions that cost-based review of market data fees was required by the Act:

> The petitioners believe that the SEC's market-based approach is prohibited under the Exchange Act because the Congress intended ''fair and reasonable'' to be determined using a cost-based approach. The SEC counters that, because it has statutorily-granted flexibility in evaluating market data fees, its market-based approach is fully consistent with the Exchange Act. We agree with the SEC.[12]

While the court noted that cost data could sometimes be relevant in determining the reasonableness of fees, it acknowledged that submission of cost data may be inappropriate where there are ''difficulties in calculating the direct costs * * * of market data,'' *Id.* at 539. That is the case here, due to the fact that the fixed costs of market data production are inseparable from the fixed costs of providing a trading platform, and the marginal costs of market data production are minimal or even zero. Because the costs of providing execution services and market data are not unique to either of the provided services, there is no meaningful way to allocate these costs among the two ''joint products''—and any attempt to do so would result in inherently arbitrary cost allocations.[13]

SIFMA and NetCoalition further contend the prior filing lacked evidence supporting a conclusion that the market for NLS is competitive, asserting that arguments about competition for order flow and substitutability were rejected in *NetCoalition.* While the court did determine that the record before it was not sufficient to allow it to endorse those theories on the facts of that case, the court did not itself make any conclusive findings about the actual presence or absence of competition or the accuracy of these theories: rather, it simply made a finding about the state of the SEC's record. Moreover, analysis about competition in the market for depth-of-book data is only tangentially relevant to the market for last sale data. As discussed above and in prior filings, perfect and partial substitutes for NLS exist in the form of real-time core market data, free delayed core market data, and the last sale products of competing venues, additional competitive entry is possible, and evidence of competition is readily apparent in the pricing behavior of the venues offering last sale products and the consumption patterns of their customers. Thus, although NASDAQ believes that the competitive nature of the market for all market data, including depth-of-book data, will ultimately be established, SIFMA and NetCoalition's letters not only mischaracterize the *NetCoalition* decision, they also fail to address the characteristics of the product at issue and the evidence already presented.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[14] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2012–145 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.

All submissions should refer to File Number SR–NASDAQ–2012–145. 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 NASDAQ. 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–2012–145 and should be submitted on or before January 30, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–00253 Filed 1–8–13; 8:45 am]

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[12] *NetCoalition,* 615 F3d. at 534.

[13] The court also explicitly acknowledged that the ''joint product'' theory set forth by NASDAQ's economic experts in *NetCoalition* (and also described in this filing) could explain the competitive dynamic of the market and explain why consideration of cost data would be unavailing. The court found, however, that the Commission could not rely on the theory because it was not in the Commission's record. *Id.* at 541 n.16. For the purpose of providing a complete explanation of the theory, NASDAQ is further submitting as Exhibit 3 to this filing a study that was submitted to the Commission in SR–NASDAQ–2011–010. *See* Statement of Janusz Ordover and Gustavo Bamberger at 2–17 (December 29, 2010).

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

[15] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 8147]

30-Day Notice of Proposed Information Collection: Smart Traveler Enrollment Program

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments directly to the Office of Management and Budget (OMB) up to February 8, 2013.

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 the OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Derek A. Rivers, Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS/L), U.S. Department of State, SA–29, 4th Floor, Washington, DC 20520 or at *CA-OCS-L@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Smart Traveler Enrollment Program (STEP).
- *OMB Control Number:* 1405–0152.
- *Type of Request:* Extension.
- *Originating Office:* Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS).
- *Form Number:* DS–4024, DS–4024e.
- *Respondents:* United States Citizens and Nationals.
- *Estimated Number of Respondents:* 988,292.
- *Estimated Number of Responses:* 988,292.
- *Average Hours per Response:* 20 minutes.
- *Total Estimated Burden:* 329,430 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Voluntary

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this 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 information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of proposed collection: The STEP makes it possible for U.S. nationals to register on-line from anywhere in the world. In the event of a family emergency, natural disaster or international crisis, U.S. embassies and consulates rely on this registration information to provide critical information and assistance to them. Statute *22 U.S.C. 2715* is one of the main legal authorities that deem the usage of this form necessary.

Methodology: 99% of responses are received via electronic submission on the Internet. The service is available on the Department of State, Bureau of Consular Affairs Web site *http://travel.state.gov* at *https://step.state.gov/step/*. The paper version of the collection permits respondents who do not have Internet access to provide the information to the U.S. embassy or consulate by fax, mail or in person.

Dated: December 10, 2012.

Michelle Bernier-Toth,

Managing Director, Bureau of Consular Affairs, Overseas Citizen Services, Department of State.

[FR Doc. 2013–00251 Filed 1–8–13; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice 8146]

Culturally Significant Objects Imported for Exhibition; Determinations: ''Impressionism, Fashion, and Modernity''

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 ''Impressionism, Fashion, and Modernity,'' 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 Metropolitan Museum of Art, New York, New York, from on or about February 26, 2013, until on or about May 27, 2013, the Art Institute of Chicago, Chicago, Illinois, from on or about June 25, 2013, until on or about September 23, 2013, 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: January 2, 2013.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–00246 Filed 1–8–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Commercial Space Transportation Advisory Committee—Public Teleconference

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Commercial Space Transportation Advisory Committee Teleconference.

SUMMARY: Pursuant to the Federal Advisory Committee Act, notice is hereby given of a teleconference of the Business/Legal Working Group (BLWG) of the Commercial Space Transportation Advisory Committee (COMSTAC).

DATES: The teleconference will take place on Friday, January 25, 2013, from 11 a.m. to 12 p.m. U.S. Eastern Standard Time.

ADDRESSES: The teleconference call-in number and passcode will be posted by approximately one week prior to the teleconference date at the following Web site link: *http://www.faa.gov/about/office_org/headquarters_offices/ast/advisory_committee/*. Individuals who participate in the teleconference should contact Paul Eckert, Designated Federal Officer (DFO), by email approximately 15 minutes before the call begins, using the email address provided in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Paul Eckert, Office of Commercial Space Transportation (AST), 800 Independence Avenue SW., Room 331, Washington, DC 20591, telephone (202) 267–8055; Email *paul.eckert@faa.gov.*

SUPPLEMENTARY INFORMATION: The purpose of this call is to discuss how to respond to a request to COMSTAC by the FAA Office of Commercial Space Transportation (FAA/AST), regarding how best to conduct a review of the Office's methodology for calculation of Maximum Probable Loss (MPL). The FAA/AST request to COMSTAC took place following a 2012 Government Accountability Office (GAO) report titled ''Commercial Space Launches—FAA Should Update How It Assesses Federal Liability Risk.'' This report included a recommendation calling for FAA/AST to carry out periodic reviews of its MPL methodology. GAO further stated that FAA/AST should consider using external experts in the course of an MPL review.

The MPL represents an estimate of the maximum probable cost of damage to life and property, in the event of a launch mishap. MPL calculation has considerable significance, because the figure is used to determine the financial responsibility requirements of each launch license or experimental permit holder. While AST believes its current MPL methodology has been effective, GAO's recommendation to conduct a review of the methodology is prudent given the growth of the commercial space transportation industry and the amount of time that has passed since MPL modification.

In addition to or in lieu of teleconference participation, interested members of the public may submit relevant written statements for COMSTAC to consider, in compliance with advisory committee procedures. Statements may address the issues mentioned above or additional issues that may be relevant for the U.S. commercial space transportation industry. Interested parties wishing to submit written statements regarding the January 25, 2013 teleconference should contact Paul Eckert, DFO (the Contact Person listed below) in writing (i.e., by mail or email) by January 18, 2013. Written statements should be supplied in the following formats: one hard copy with original signature or one electronic copy via email.

Individuals who plan to participate and need special assistance should inform the Contact Person listed below in advance of the meeting.

Complete information regarding COMSTAC is available on the FAA Web site at: *http://www.faa.gov/about/office_org/headquarters_offices/ast/advisory_committee/.*

Issued in Washington, DC, on January 2, 2013.

George C. Nield,

Associate Administrator for Commercial Space Transportation.

[FR Doc. 2013–00279 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2013–0001]

Agency Information Collection Activities: Request for Comments for a New Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice and request for comments.

SUMMARY: FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for a new information collection, which is summarized below under **SUPPLEMENTARY INFORMATION.** We published a **Federal Register** Notice with a 60-day public comment period on this information collection on June 28, 2012. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by February 8, 2013.

ADDRESSES: You may send comments within 30 days to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention DOT Desk Officer. You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burden; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. All comments should include the Docket number FHWA 2013–0001.

FOR FURTHER INFORMATION CONTACT: James A. Cheatham, *james.cheatham@dot.gov*, 202–366–6221, Office of Planning, Environment, and Realty, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Assessment of Transportation Planning Agency Needs, Capabilities, and Capacity.

Background: FHWA will collect information on the current state of the practice, data, methods, and systems used by state, metropolitan, regional, local, and tribal transportation planning entities to support their required planning process in accordance with Title 23 United States Code 134 and 135. This includes, but is not limited to, information to support transportation research, capacity building, data collection, planning, travel modeling, and performance management. This also includes information about how data is shared between planning agencies and how it is processed and used in the planning context. Questionnaires will be sent to State DOT headquarters and districts, Metropolitan Planning Organizations, Regional Planning Organizations, and Tribal Governments. FHWA anticipates that one representative from each agency will take approximately 30 minutes to complete up to 4 questionnaires each

year. The questionnaires will be administered via the Internet and invitations to participate in the questionnaire will be distributed via email.

This information, once compiled, will allow the FHWA to better understand the existing capabilities that agencies across the country have in support of the planning process and the readiness they possess to handle new and ongoing challenges. As a result of the collected information, FHWA will focus its efforts and resources on providing targeted and meaningful support for planning and readiness nationwide. Additionally, FHWA will ensure that excellent planning practices are identified will be shared broadly across the country.

Respondents: Respondents are representatives of State DOT headquarters and districts, Metropolitan Planning Organizations, Regional Planning Organizations, and Tribal Governments.

Respondents: 950 respondents annually.

Frequency: 4 per year for 3 years.

Estimated Average Burden per Response: Approximately 30 minutes.

Estimated Total Annual Burden Hours: Up to 1,900 hours annually.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burden; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of computer technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued on: January 4, 2013.

Michael Howell,

Information Collection Officer.

[FR Doc. 2013–00240 Filed 1–8–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2012–0126]

Public-Private Partnerships Public Meeting and Request for Comment

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Public meeting notice; request for comment.

SUMMARY: The USDOT/FHWA is tasked by MAP–21 to develop ''standard public-private partnership transaction model contracts for the most popular types of public-private partnerships for the development, financing, construction and operation of transportation facilities.'' We invite the public to provide ideas and comments on what should be included or excluded from such model public-private partnership (P3) contracts. The comments can be made to the docket or at a Listening Session in the District of Columbia.

DATES: Comments must be received on or before May 31, 2013. Late comments will be considered to the extent practicable. The Listening Session will be conducted on Wednesday, January 16, 2013, from 12:00 p.m. to 4:00 p.m., e.t.

ADDRESSES:

Comment Submission:

Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, or fax comments to (202) 493–2251. Alternatively, comments may be submitted via the Federal eRulemaking Portal at *http://www.regulations.gov* (follow the on-line instructions for submitting comments). All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. All comments received into any docket may be searched in electronic format by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). Persons making comments may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Pages 19477–78).

Listening Session Location:

The listening session will be held at the U.S. Department of Transportation located at 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: For further information regarding this notice please contact Prabhat Diksit via email at *Prabhat.diksit@dot.gov* or via telephone at (720) 963–3202.

SUPPLEMENTARY INFORMATION:

I. Background

Public-private partnerships are contractual arrangements between public and private sector entities that allow for greater participation by the private sector in the delivery of surface transportation projects and services. Generally, in addition to designing or building a project, which is traditional, a private partner in a P3 may be involved in designing, constructing, financing, operating and maintaining the project. By transferring certain risks and responsibilities to the private partner, P3s can result in more efficient and effective project delivery. However, P3 contracts are complex and are of much longer duration than traditional construction contracts. Their terms and conditions address many requirements not covered by traditional construction contracts such as financing arrangements and performance during a concession period, among others. Public agencies generally acquire special expertise to ensure that they can successfully negotiate P3 agreements. Congress, recognizing both the growing interest in this delivery option, as well as the inherent complexities in P3 agreements, tasked the USDOT, via the Moving Ahead for Progress in the 21st Century Act (MAP–21), to develop ''standard public-private partnership model contracts'' and to ''encourage states, public transportation agencies and other public officials to use the model contracts as a base template''.

II. Purpose of This Notice

Section 1534(d) of MAP–21, enacted October 1, 2012, requires the USDOT to develop model P3 contracts that could serve as a base template and guide States and other public transportation providers in developing their own P3 contracts. The legislation states:

(d) STANDARD TRANSACTION CONTRACTS.—

(1) DEVELOPMENT.—Not later than 18 months after the date of enactment of this Act, the Secretary shall develop standard public-private partnership transaction model contracts for the most popular types of public-private partnerships for the development, financing, construction, and operation of transportation facilities.

(2) USE.—The Secretary shall encourage States, public transportation agencies, and other public officials to use the model contracts as a base template when developing their own public-private partnership agreements for the development, financing, construction, and operation of transportation facilities.

The USDOT, prior to undertaking this effort, wishes to engage in a dialogue and canvass the opinion of interested parties—including, among others, public project sponsors, and their consultants, advisers, and attorneys; private sector designers, builders, operators, contractors and other engineering and construction firms; banks, lenders, funds, and other financing institutions involved in P3s; unions and their representatives; concessionaires and other organizations involved in project development; and members of the general public. Interested parties are asked to provide comments to the docket regarding the development and use of the standard public-private partnerships transaction model contracts mentioned above in the legislation. Interested parties are also invited to provide input at a Listening Session at USDOT Headquarters in Washington, DC, on January 16, 2013.

Listening Session

The Listening Session will be 4 hours in length and will be structured around the legislative requirements of Section 1534(d) specified above. Some of the topics that may be considered at this listening session include:

(a) The design of the model contract template (for example, should it provide options or recommendations?);

(b) The scope of the model contract (for example, should it include public protections?);

(c) The specific provisions included in the model contract (for example, which public protections should be addressed?); and

(d) The model contracts that should be delivered first (for example, should the initial set of templates include P3 availability payment concessions for managed lanes?).

Listening Session Information

Email comments can be provided to the docket at *www.regulations.gov*.

The Listening Session will be held on January 16, 2013, from 12:00 p.m. to 4:00 p.m., e.t., at the U.S. Department of Transportation building at 1200 New Jersey Ave. SE., Washington, DC 20590. Because access to the DOT building is controlled, all visitors must sign in with the security staff at the West Building entrance, present valid picture identification, be escorted and wear a visitor's badge at all times while in the building.

Due to security procedures and space limitations, individuals who wish to attend the listening session must pre-register online by 5:00 p.m., e.t., on January 14, 2013, to gain admittance to the building. Space is limited to the first 250 registrants. The link for the registration is: *http://152.122.41.186/registration/p3listening.aspx.* Anyone with difficulties registering should contact Terrance Regan, at this telephone number: (617) 494–3628.

Attendees are encouraged to arrive early for processing through security. All participants and attendees must enter through the New Jersey Avenue entrance (West Building—at the corner of New Jersey Avenue and M Street SE.). Photo identification is required and Foreign National attendees must bring their passports with them. Participants or attendees who have Federal government identification will still need to register to attend. To facilitate security screening, all participants and attendees are encouraged to limit the bags and other items (laptops, cameras, etc.) they bring into the building. Anyone exiting the building for any reason will be required to re-enter through the security checkpoint at the New Jersey Avenue entrance.

The DOT does not offer visitor parking; we suggest that attendees consider using alternative means of transportation to the building. DOT Headquarters is served by Metrorail (Navy Yard station), Metrobus, DC Circulator, and taxi service. There are a number of private parking lots near the DOT buildings, but the DOT cannot guarantee the availability of parking spaces.

For information on facilities or services for persons with disabilities, or to request special assistance at the meeting, contact Prabhat Diksit (720) 963–3202 as soon as possible.

Issued on: January 2, 2013.

Victor M. Mendez,

Administrator.

[FR Doc. 2013–00219 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Sunshine Act Meetings; Unified Carrier Registration Plan Board of Directors

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of Unified Carrier Registration Plan Board of Directors Meeting.

TIME AND DATE: The meeting will be held on January 14, 2013, from 8:00 a.m. to 5:00 p.m., Central Daylight Time.

PLACE: This meeting will take place at the Hyatt French Quarter; 800 Iberville Street, New Orleans, LA 70112.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Board of Directors (the Board) will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement and to that end, may consider matters properly before the Board.

FOR FURTHER INFORMATION CONTACT: Mr. Avelino Gutierrez, Chair, Unified Carrier Registration Board of Directors at (505) 827–4565.

Issued on: December 28, 2012.

Larry W. Minor,

Associate Administrator, Office of Policy, Federal Motor Carrier Safety Administration.

[FR Doc. 2013–00314 Filed 1–7–13; 11:15 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0339]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemptions; request for comments.

SUMMARY: FMCSA announces receipt of applications from 14 individuals for exemption from the vision requirement in the Federal Motor Carrier Safety Regulations. They are unable to meet the vision requirement in one eye for various reasons. The exemptions will enable these individuals to operate commercial motor vehicles (CMVs) in interstate commerce without meeting the prescribed vision requirement in one eye. If granted, the exemptions would enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce.

DATES: Comments must be received on or before February 8, 2013.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2012–0339 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200

New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

• *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on December 29, 2010 (75 FR 82132) at *http://www.gpo.gov/fdsys/pkg/FR-2010-12-29/pdf/2010-32876.pdf.*

FOR FURTHER INFORMATION CONTACT:

Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' FMCSA can renew exemptions at the end of each 2-year period. The 14 individuals listed in this notice have each requested such an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting an exemption will achieve the required level of safety mandated by statute.

Qualifications of Applicants

Benny L. Bailey

Mr. Bailey, age 56, has had central scotoma in his right eye due to a traumatic incident 20 years ago. The best corrected visual acuity in his right eye is 20/400, and in his left eye, 20/25. Following an examination in 2012, his optometrist noted, ''In my medical opinion I believe that Mr. Bailey has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Bailey reported that he has driven straight trucks for 10 years, accumulating 852,000 miles. He holds a Class B Commercial Driver's License (CDL) from Tennessee. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Bobby R. Carter, Sr.

Mr. Carter, 65, has had a branch retinal vein occlusion in his left eye since 1995. The visual acuity in his right eye is 20/20, and in his left eye, hand motion. Following an examination in 2012, his optometrist noted, ''He has the ability to perform commercial driving tasks as he has been doing for many years.'' Mr. Carter reported that he has driven tractor-trailer combinations for 20 years, accumulating 1.5 million miles. He holds a Class C CDL from Michigan. His driving record for the last 3 years shows one crash, for which he was not cited, and no convictions for moving violations in a CMV.

Brent Coleman

Mr. Coleman, 50, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/20, and in his left eye, 20/40. Following an examination in 2012, his ophthalmologist noted, ''If his perimetry tests are normal and he is not required to have binocular vision, then he has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Coleman reported that he has driven tractor-trailer combinations for 12.5 years, accumulating 1.5 million miles. He holds a Class A CDL from Texas. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Adan Cortes-Juarez

Mr. Cortes-Juarez, 54, has had hyperopia with amblyopia in his left eye since childhood. The best corrected visual acuity in his right eye is 20/25, and in his left eye, 20/60. Following an examination in 2012, his ophthalmologist noted, ''I certify that Adan Cortes-Juarez can operate a commercial vehicle safely on the basis of his visual acuity.'' Mr. Cortes-Juarez reported that he has driven tractor-trailer combinations for 31 years, accumulating 1.86 million miles. He holds a Class A CDL from Washington. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Lisa M. Durey

Ms. Durey, 44, has had amblyopia in her left eye since childhood. The best corrected visual acuity in her right eye is 20/20, and in her left eye, 20/80. Following an examination in 2012, her optometrist noted, ''In my opinion, Lisa has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Ms. Durey reported that she has driven straight trucks for 12 years, accumulating 200,000 miles, and tractor-trailer combinations for 3 months, accumulating 300 miles. She holds a Class B CDL from Illinois. Her driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

David P. Elliott

Mr. Elliott, 59, has had amblyopia in his left eye since birth. The best corrected visual acuity in his right eye is 20/20, and in his left eye, 20/70. Following an examination in 2012, his optometrist noted, ''It is in my medical opinion that there is sufficient vision to operate a commercial vehicle.'' Mr. Elliott reported that he has driven straight trucks for 20 years, accumulating 1 million miles, and tractor-trailer combinations for 10 years, accumulating 1.25 million miles. He holds a Class B CDL from Ohio. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Matthew T. Eggers

Mr. Eggers, 44, has had amblyopia in his right eye since birth. The best corrected visual acuity in his right eye is 20/200, and in his left eye, 20/20. Following an examination in 2012, his ophthalmologist noted, ''The patient's visual function should be adequate to operate a commercial vehicle.'' Mr. Eggers reported that he has driven straight trucks for 13 years,

accumulating 260,000 miles, and tractor-trailer combinations for 12 years, accumulating 24,000 miles. He holds a Class A CDL from Iowa. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Jerry Hall

Mr. Hall, 51, has had amblyopia in his left eye since childhood. The best corrected visual acuity in his right eye is 20/20, and in his left eye, 20/50. Following an examination in 2012, his ophthalmologist noted, ''Mr. Hall's diagnosis is amblyopia OS which is stable and non-progressive. With these findings he should be able to operate a motor vehicle commercially.'' Mr. Hall reported that he has driven straight trucks for 7 years, accumulating 84,000 miles, and tractor-trailer combinations for 6 months, accumulating 8,000 miles. He holds a Class D CDL from Kentucky. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Jerry L. Parker

Mr. Parker, 57, has had a mature cataract in his right eye due to a traumatic incident during childhood. The best corrected visual acuity in his right eye is hand motion, and in his left eye, 20/20. Following an examination in 2012, his optometrist noted, ''Since he received this injury as a child, he has adapted well with head movements to safely drive a commercial vehicle.'' Mr. Parker reported that he has driven straight trucks for 30 years, accumulating 375,000 miles. He holds an operator's license from New Mexico. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Colin Passmore

Mr. Passmore, 43, has had complete loss of vision in his left eye due to a traumatic incident at age 15. The best corrected visual acuity in his right eye is 20/20. Following an examination in 2012, his optometrist noted, ''In my professional opinion, Colin can safely operate a commercial vehicle. His acuity and visual field are excellent and with the duration of the deficiency he is fully adapted.'' Mr. Passmore reported that he has driven straight trucks for 4 years, accumulating 200,000 miles. He holds a Class B CDL from Minnesota. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Dennis W. Pevey

Mr. Pevey, 56, has had amblyopia in his left eye since childhood. The best corrected visual acuity in his right eye is 20/40, and in his left eye, 20/60. Following an examination in 2012, his ophthalmologist noted, ''In my option, this person has sufficient vision to operate a commercial motor vehicle safely.'' Mr. Pevey reported that he has driven tractor-trailer combinations for 29 years, accumulating 2.32 million miles. He holds a Class A CDL from Georgia. His driving record for the last 3 years shows no crashes and one conviction for speeding in a CMV; he exceeded the speed limit by 10 mph.

Charles D. Reddick

Mr. Reddick, 32, has had amblyopia in his left eye since birth. The visual acuity in his right eye is 20/20, and in his left eye, 20/70. Following an examination in 2012, his optometrist noted, ''It is my professional opinion that Mr. Charles Reddick has sufficient vision to perform the driving of a commercial vehicle.'' Mr. Reddick reported that he has driven tractor-trailer combinations for 7 years, accumulating 875,000 miles. He holds a Class A CDL from Georgia. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Frank Santak

Mr. Santak, 56, has had refractive amblyopia in his right eye since childhood. The best corrected visual acuity in his right eye is 20/50, and in his left eye, 20/20. Following an examination in 2012, his optometrist noted, ''In my opinion, I believe that Mr. Santak has sufficient vision to perform the driving tasks required to operate a commercial vehicle at this time.'' Mr. Santak reported that he has driven straight trucks for 27 years, accumulating 202,500 miles. He holds a Class C CDL from Delaware. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Curtis E. Way

Mr. Way, 53, has had complete loss of vision in his left eye due to complications during surgery eight years ago. The best corrected visual acuity in his right eye is 20/20. Following an examination in 2012, his optometrist noted, ''He has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Way reported that he has driven straight trucks for 15 years, accumulating 18,000 miles, and tractor-trailer combinations for 10 years, accumulating 1.4 million miles. He holds a Class A CDL from Texas. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. The Agency will consider all comments received before the close of business February 8, 2013. Comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. The Agency will file comments received after the comment closing date in the public docket, and will consider them to the extent practicable.

In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should monitor the public docket for new material.

Issued on: December 28, 2012.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–00231 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0039]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemptions; request for comments.

SUMMARY: FMCSA announces receipt of applications from 13 individuals for exemption from the vision requirement in the Federal Motor Carrier Safety Regulations. If granted, the exemptions would enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce without meeting the Federal vision requirement.

DATES: Comments must be received on or before February 8, 2013.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2012–0039 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

• *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

• *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

• *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' FMCSA can renew exemptions at the end of each 2-year period. The 13 individuals listed in this notice have each requested such an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting an exemption will achieve the required level of safety mandated by statute.

Qualifications of Applicants

Juan Castanon

Mr. Castanon, age 46, has complete loss of vision in his right due to a traumatic injury sustained at age 9. The visual acuity in his left eye is 20/20. Following an examination in 2011, his optometrist noted, ''I feel that Mr. Castanon is able to drive a commercial vehicle without glasses safely.'' Mr. Castanon reported that he has driven straight trucks for 6 years, accumulating 2,304 miles. He holds a Class D operator's license from New Mexico. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a Commercial Motor Vehicle (CMV).

Donald F. Erke

Mr. Erke, 70, has had amblyopia in his right eye since childhood. The best corrected visual acuity in his right eye is 20/200, and in his left eye, 20/20. Following an examination in 2011, his optometrist noted, ''It is my medical opinion that Mr. Erke has sufficient vision to perform any and all driving tasks required to operate a commercial vehicle.'' Mr. Erke reported that he has driven straight trucks for 17 years, accumulating 1.5 million miles and tractor-trailer combinations for 25 years, accumulating 2.3 million miles. He holds a Class A CDL from Michigan. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Ronald D. Flanery

Mr. Flanery, 44, has had amblyopia in his left eye since childhood. The best corrected visual acuity in his right eye is 20/20, and in his left eye, 20/100. Following an examination in 2011, his ophthalmologist noted, ''Based upon my findings and medical expertise, I Daniel Ewen, MD hereby certify Ronald Flanery to be visually able to safely operate a commercial motor vehicle.'' Mr. Flanery reported that he has driven straight trucks for 15 years, accumulating 465,000 miles and tractor-trailer combinations for 5 years, accumulating 1,250 miles. He holds a Class A CDL from Kentucky. His driving record for the last 3 years shows one crash, for which he was not cited and no convictions for moving violations in a CMV.

Mark G. Kleinheider

Mr. Kleinheider, 48, has a detached retina in his left due to a traumatic injury sustained in 1989. The best corrected visual acuity in his right eye is 20/20. Following an examination in 2011, his ophthalmologist noted, ''It is my medical opinion that Mark has sufficient vision to perform the driving tasks required to operate a commercial motor vehicle.'' Mr. Kleinheider reported that he has driven straight trucks for 3 years, accumulating 60,000 miles and tractor-trailer combinations for 3 years, accumulating 15,000 miles. He holds a Class A CDL from Missouri. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Joseph C. Powell

Mr. Powell, 57, has complete loss of vision in his right due to a traumatic injury sustained 10 years ago. The visual acuity in his left eye is 20/20. Following an examination in 2011, his optometrist noted, ''I certify that, in my medical opinion, Mr. Powell has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Powell reported that he has driven straight trucks for 15 years, accumulating 150,000 miles and tractor-trailer combinations for 35 years, accumulating 1.12 million miles. He holds a Class A CDL from Virginia. His driving record for the last 3 years shows no crashes but one conviction for speeding in a CMV; he exceeded the speed limit by 12 mph.

David L. Schachle

Mr. Schachle, 40, has a prosthetic right eye due to a traumatic injury sustained at 8 months old. The best corrected visual acuity in his left eye is 20/20. Mr. Schachle reported that he has driven straight trucks for 4 years, accumulating 120,000 miles. He holds a Class A CDL from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a Commercial Motor Vehicle (CMV).

Michael E. See

Mr. See, 55, has complete loss of vision in his right due to a traumatic injury sustained at age 3. The best

corrected visual acuity in his left eye is 20/15. Following an examination in 2011, his optometrist noted, ''I believe you have sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. See reported that he has driven straight trucks for 30 years, accumulating 1.2 million miles. He holds a Class B CDL from New York. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

James A. Settlemyre

Mr. Settlemyre, 59, has had esotropia in his left eye since childhood. The best corrected visual acuity in his right eye is 20/20, and in his left eye, 20/60. Following an examination in 2011, his optometrist noted, ''In my medical opinion, I feel James Settlemyre has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Settlemyre reported that he has driven straight trucks for 8 years, accumulating 1 million miles. He holds a chauffeur's license from Indiana. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Steven K. Simone

Mr. Simone, 61, has had keratoconus in his left eye for 30 years. The best corrected visual acuity in his right eye is 20/40, and in his left eye 20/400. Following an examination in 2011, his optometrist noted, ''I feel Steve is sufficient to perform the driving tasks required to operate a commercial vehicle.'' Mr. Simone reported that he has driven straight trucks for 42 years, accumulating 3.4 million miles. He holds a Class C operator's license from Kansas. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Mark J. Sobczyk

Mr. Sobczyk, 25, has had amblyopia in his left eye since childhood. The best corrected visual acuity in his right eye is 20/20, and in his left eye, 20/200. Following an examination in 2011, his ophthalmologist noted, ''I certify that Mark Sobczyk's ocular condition is satisfactory for operating commercial vehicles.'' Mr. Sobczyk reported that he has driven straight trucks for 5½ years, accumulating 206,000 miles. He holds a Class A CDL from Wisconsin. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Richard D. Sparkman

Mr. Sparkman, 62, has complete loss of vision in his right due to a traumatic injury sustained as a child. The best corrected visual acuity in his left eye is 20/20. Following an examination in 2011, his ophthalmologist noted, ''Based on the above information, I believe the patient has sufficient vision to perform the driving tasks required by his current commercial vehicle.'' Mr. Sparkman reported that he has driven straight trucks for 10 years, accumulating 520,000 miles. He holds a Class A CDL from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Joshua A. Wheaton

Mr. Wheaton, 30, has a detached retina in his left due to a traumatic injury sustained in 1997. The visual acuity in his right eye is 20/20, and in his left eye, no light perception. Following an examination in 2011, his optometrist noted, ''I feel that Joshua has more than adequate vision to perform any driving tasks required to operate a commercial vehicle.'' Mr. Wheaton reported that he has driven straight trucks for 5 years, accumulating 225,000 miles. He holds a Class C operator's license from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

John K. Wright

Mr. Wright, 47, has had amblyopia in his right eye since birth. The best corrected visual acuity in his right eye is 20/400, and in his left eye, 20/20. Following an examination in 2011, his optometrist noted, ''This meets the vision requirement to perform the driving tasks required to operate a commercial vehicle.'' Mr. Wright reported that he has driven straight trucks for 3½ years, accumulating 105,000 miles and tractor-trailer combinations for 6 months, accumulating 30,000 miles. He holds a Class A CDL from Montana. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. The Agency will consider all comments received before the close of business February 8, 2013. Comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. The Agency will file comments received after the comment closing date in the public docket, and will consider them to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should monitor the public docket for new material.

Issued on: December 28, 2012.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–00229 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0350]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice of applications for exemption from the diabetes mellitus requirement; request for comments.

SUMMARY: FMCSA announces receipt of applications from 16 individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before February 8, 2013.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2012–0350 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any

personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on December 29, 2010 (75 FR 82132) at *http://www.gpo.gov/fdsys/pkg/FR-2010-12-29/pdf/2010-32876.pdf.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 16 individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statutes.

Qualifications of Applicants

Shawn J. Ball

Mr. Ball, 38, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Ball understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ball meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Idaho.

Buck H. Bowers

Mr. Bowers, 39, has had ITDM since 2008. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bowers understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bowers meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Ohio.

Jeffrey S. Bublitz

Mr. Bublitz, 57, has had ITDM since 1990. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bublitz understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bublitz meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class D operator's license from Wisconsin.

Ira Scott Chamberlin

Mr. Chamberlin, 58, has had ITDM since 1991. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Chamberlin understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Chamberlin meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Maine.

Victor W. Dannenbrink

Mr. Dannenbrink, 64, has had ITDM since 2005. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Dannenbrink understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Dannenbrink meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class B CDL from Iowa.

James K. Dowden

Mr. Dowden, 55, has had ITDM since 2007. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Dowden understands diabetes management and monitoring, has stable control of his diabetes using

insulin, and is able to drive a CMV safely. Mr. Dowden meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Minnesota.

Myron P. Egbert

Mr. Egbert, 54, has had ITDM since 2000. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Egbert understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Egbert meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Utah.

Michael T. Evans

Mr. Evans, 30, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Evans understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Evans meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Ohio.

Stephen P. Honen

Mr. Honen, 50, has had ITDM since 2009. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Honen understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Honen meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Ohio.

Charles E. Johnston

Mr. Johnston, 49, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Johnston understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Johnston meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Mississippi.

Steve A. Rau

Mr. Rau, 56, has had ITDM since 2006. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Rau understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Rau meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from North Dakota.

Jack M. Sipich

Mr. Sipich, 34, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Sipich understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Sipich meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

Roger N. Stauffer

Mr. Stauffer, 33, has had ITDM since 2009. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Stauffer understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Stauffer meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Michigan.

Tyrone Taylor

Mr. Taylor, 54, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Taylor understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Taylor meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Carolina.

Michael E. Westley

Mr. Westley, 56, has had ITDM since 2010. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Westley understands

diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Westley meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Florida.

Travis M. Whitt

Mr. Whitt, 36, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Whitt understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Whitt meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from California.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441).[1] The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 U.S.C. 31136(e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary.

The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: December 28, 2012.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–00225 Filed 1–8–13; 8:45 am]

BILLING CODE P

[1] Section 4129(a) refers to the 2003 notice as a ''final rule.'' However, the 2003 notice did not issue a ''final rule'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–2012–0347]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 12 individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions are effective January 9, 2013. The exemptions expire on January 9, 2015.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Room W64–224, Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov*.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on December 29, 2010 (75 FR 82132) at *http://www.gpo.gov/fdsys/pkg/FR–2010–12–29/pdf/2010–32876.pdf*.

Background

On October 31, 2012, FMCSA published a notice of receipt of Federal diabetes exemption applications from 12 individuals and requested comments from the public (77 FR 65931). The public comment period closed on November 30, 2012, and no comments were received.

FMCSA has evaluated the eligibility of the 12 applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current requirement for diabetes in 1970 because several risk studies indicated that drivers with diabetes had a higher rate of crash involvement than the general population. The diabetes rule provides that ''A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control'' (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the

Agency's July 2000 study entitled ''A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century.'' The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible. The September 3, 2003 (68 FR 52441), **Federal Register** notice in conjunction with the November 8, 2005 (70 FR 67777), **Federal Register** notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These 12 applicants have had ITDM over a range of 1 to 26 years. These applicants report no severe hypoglycemic reactions resulting in loss of consciousness or seizure, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning symptoms, in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the past 5 years. In each case, an endocrinologist verified that the driver has demonstrated a willingness to properly monitor and manage his/her diabetes mellitus, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision requirement at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the October 31, 2012, **Federal Register** notice and they will not be repeated in this notice.

Discussion of Comments

FMCSA received no comments in this proceeding.

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes requirement in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologists' medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that in each case exempting these applicants from the diabetes requirement in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Conclusion

Based upon its evaluation of the 12 exemption applications, FMCSA exempts Jamie J. Duncan (MO), Thomas L. Graber (PA), Aubrey W. Heath (TX), Jeremiah S. Johnson (OR), Stephanie A. Kaczynski (PA), Henry P. Musgrove, Jr. (WA), Henry W. Rutschow (OH), Michael L. Sabin (IL), Patrick E. Snyder (NY), Daniel C. Tow (WA), Donald P. Wells (KS), and Odell Williams (NC) from the ITDM requirement in 49 CFR 391.41(b)(3), subject to the conditions listed under ''Conditions and Requirements'' above.

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption will be valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the 1/exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: December 28, 2012.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–00228 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0351]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice of applications for exemption from the diabetes mellitus requirement; request for comments.

SUMMARY: FMCSA announces receipt of applications from 20 individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before February 8, 2013.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2012–0351 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or

comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on December 29, 2010 (75 FR 82132).

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 20 individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statutes.

Qualifications of Applicants

Angel Bergendale

Mr. Bergendale, 33, has had ITDM since 2010. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bergendale understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bergendale meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Massachusetts.

Sean P. Borsky

Mr. Borsky, 41, has had ITDM since 2006. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Borsky understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.Mr. Borsky meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class E operator's license from Florida.

Uvena Shirley Brown

Ms. Brown, 68, has had ITDM since 2011. Her endocrinologist examined her in 2012 and certified that she has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. Her endocrinologist certifies that Ms. Brown understands diabetes management and monitoring, has stable control of her diabetes using insulin, and is able to drive a CMV safely. Ms. Brown meets the vision requirements of 49 CFR 391.41(b)(10). Her ophthalmologist examined her in 2012 and certified that she has stable proliferative diabetic retinopathy. She holds an operator's license from Indiana.

Cody R. Floerchinger

Mr. Floerchinger, 22, has had ITDM since 2008. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Floerchinger understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Floerchinger meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Massachusetts.

Sean P. Glynn

Mr. Glynn, 47, has had ITDM since 2008. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Glynn understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Glynn meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Wisconsin.

Spiro J. Jonovich

Mr. Jonovich, 36, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Jonovich understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Jonovich meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have

diabetic retinopathy. He holds a Class A CDL from Arizona.

Jaron L. Lindell

Mr. Lindell, 24, has had ITDM since 2003. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Lindell understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Lindell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Georgia.

Travis J. Martinez

Mr. Martinez, 24, has had ITDM since 2002. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Martinez understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Martinez meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from North Carolina.

Victor D. Mayberry

Mr. Mayberry, 50, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Mayberry understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Mayberry meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Tennessee.

Larry Lee McDaniel

Mr. McDaniel, 47, has had ITDM since 2004. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. McDaniel understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. McDaniel meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Oklahoma.

Barry C. McKay

Mr. McKay, 59, has had ITDM since 2007. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. McKay understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. McKay meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Minnesota.

Robert B. McKendry

Mr. McKendry, 53, has had ITDM since 2005. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. McKendry understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. McKendry meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Illinois.

Jamie W. Moore

Mr. Moore, 30, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Moore understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Moore meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from North Carolina.

William L. Phelps

Mr. Phelps, 59, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Phelps understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Phelps meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Indiana.

Raby L. Ratliff

Mr. Ratliff, 58, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Ratliff understands diabetes management and monitoring, has stable control of his diabetes using

insulin, and is able to drive a CMV safely. Mr. Ratliff meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he has stable proliferative diabetic retinopathy. He holds a Class A CDL from Texas.

Richard J. Rembisz

Mr. Rembisz, 62, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Rembisz understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Rembisz meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from New York.

Richard L. Smith

Mr. Smith, 63, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Smith understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Smith meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Georgia.

Darrin L. Stoneberg

Mr. Stoneberg, 32, has had ITDM since 2004. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Stoneberg understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Stoneberg meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Minnesota.

Gary J. Tricarico

Mr. Tricarico, 64, has had ITDM since 2010. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Tricarico understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Tricarico meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Connecticut.

Lacy I. Wallace, Jr.

Mr. Wallace, 65, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Wallace understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Wallace meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Carolina.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441).[1] The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 U.S.C. 31136 (e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary.

The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: December 28, 2012.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–00227 Filed 1–8–13; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA 2013–0002–N–1]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation.

[1] Section 4129(a) refers to the 2003 notice as a ''final rule.'' However, the 2003 notice did not issue a ''final rule'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, the Federal Railroad Administration (FRA) hereby announces that it is seeking renewal of the following currently approved information collection activities. Before submitting these information collection requirements (ICRs) for clearance by the Office of Management and Budget (OMB), FRA is soliciting public comment on specific aspects of the activities identified below.

DATES: Comments must be received no later than March 11, 2013.

ADDRESSES: Submit written comments on any or all of the following proposed activities by mail to either: Mr. Robert Brogan, Office of Safety, Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 25, Washington, DC 20590, or Ms. Kimberly Toone, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 35, Washington, DC 20590. Commenters requesting FRA to acknowledge receipt of their respective comments must include a self-addressed stamped postcard stating, ''Comments on OMB control number 2130–____.'' Alternatively, comments may be transmitted via facsimile to (202) 493–6216 or (202) 493–6497, or via email to Mr. Brogan at *Robert.Brogan@dot.gov,* or to Ms. Toone at *Kimberly.Toone@dot.gov.* Please refer to the assigned OMB control number in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 25, Washington, DC 20590 (telephone: (202) 493–6292) or Ms. Kimberly Toone, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 35, Washington, DC 20590 (telephone: (202) 493–6132). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, § 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60-days notice to the public for comment on information collection activities before seeking approval for reinstatement or renewal by OMB. 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1), 1320.10(e)(1), 1320.12(a). Specifically, FRA invites interested respondents to comment on the following summary of proposed information collection activities regarding (i) whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (ii) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (iii) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (iv) ways for FRA to minimize the burden of information collection activities on the public by automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses). *See* 44 U.S.C. 3506(c)(2)(A)(I)–(iv); 5 CFR 1320.8(d)(1)(I)–(iv). FRA believes that soliciting public comment will promote its efforts to reduce the administrative and paperwork burdens associated with the collection of information mandated by Federal regulations. In summary, FRA reasons that comments received will advance three objectives: (i) Reduce reporting burdens; (ii) ensure that it organizes information collection requirements in a ''user friendly'' format to improve the use of such information; and (iii) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

Below is a brief summary of the currently approved ICRs that FRA will submit for clearance by OMB as required under the PRA:

Title: Passenger Equipment Safety Standards.

OMB Control Number: 2130–0544.

Abstract: The information gained from daily inspections is used to detect and correct equipment problems so as to prevent collisions, derailments, and other occurrences involving railroad passenger equipment that cause injury or death to railroad employees, railroad passengers, or to the general public; and to mitigate the consequences of any such occurrences, to the extent that they cannot be prevented. The information provided promotes passenger train safety by ensuring requirements are met for railroad equipment design and performance; fire safety; emergency systems; the inspection, testing, and maintenance of passenger equipment; and other provisions for the safe operation of railroad passenger equipment.

Affected Public: Businesses.

Respondent Universe: 27 railroads.

Frequency of Submission: On occasion; annually.

REPORTING BURDEN

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
229.47: Emergency Brake Valve—Stenciling Locomotives	27 railroads	30 stencillings	1 minute	1
Stenciling: DMU, MU, Cab Control Locomotives.	27 railroads	5 stencillings	1 minute	.08
238.7 Waivers	27 railroads	5 waivers	2 hours	10
238.15: Movement of Passenger Equip. w/power brake defects: Limitations on movement found during Class I/IA Brake Test	27 railroads	1,000 tags/cards	3 minutes	50
Limitations on movement of passenger equip. in passenger service that becomes defective en route after Class I/IA brake test.	27 railroads	288 tags/cards	3 minutes	14
Conditional Requirement: Notifications	27 railroads	144 Notifications	3 minutes	7

REPORTING BURDEN—Continued

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
238.17: Movement of Passenger Equip. w/Other than Power Brake Defects: Defects Developed En Route	27 railroads	200 tags/cards	3 minutes	10
Special Requisites For Movement of Equipment w/Safety Appliance Defects.	27 railroads	76 tags/cards	3 minutes	4
Notifications	22 railroads	38 notifications	30 seconds	.32
238.21: Special Approval Procedure: Petitions For Alternative Std.	27 railroads	1 petition	16 hours	16
Petitions For Alternative Compl.	27 railroads	1 petition	120 hours	120
238.21: Petitions For Special Approval of Pre-Revenue Service Acceptance Plan	27 railroads	10 petitions	40 hours	400
Comments	Public/RR Industry	4 comments	1 hour	4
238.103: Fire Safety: Fire Safety Analysis: New Railroads—New Equipment	2 New Railroads	2 fire safety analyses	150 hours	300
Existing Equipment: Fire Safety Analysis	27 railroads	1 analysis	40 hours	40
Equipment Transferred to New Service: Fire Safety Analysis.	27 railroads	3 analyses	20 hours	60
238.107: Inspection, Testing, and Maintenance Plan: Annual Reviews	27 railroads	12 reviews	60 hours	720
238.109: Training, Qualification, and Designation Prog.—Training Employees Who Perform Mechanical Insp.	7,500 employees; 100 trainers.	2,500 employees trained/100 instructors.	1.33 hours	3,458
Recordkeeping	27 railroads	2,500 records	3 minutes	125
238.111: Pre-Revenue Service Acceptance Testing Plan: Equipment Previously Used in Revenue Service	9 equipment manufacturers.	2 plans	16 hours	32
Equipment Not Previously Used in Revenue Service.	9 equipment manufacturers.	2 plans	192 hours	384
Subsequent Orders	9 equipment manufacturers.	2 plans	60 hours	120
238.213: Corner Posts—Plan in lieu of meeting requirements of section (b) of this provision	27 railroads	10 plans	40 hours	400
238.229: Welded Safety Appliances—List identifying each piece of equipment w/a welded safety bracket/support	27 railroads	27 lists	60 minutes	27
List of passenger equipment placed into service prior to Jan. 1, 2007, with a welded safety appliance.	27 railroads	27 lists	60 minutes	27
Tagging defective welded safety appliance	27 railroads	4 tags	3 minutes	20
Notification to crewmembers of movement of defective equipment.	27 railroads	2 notifications	1 minutes	.0333
Written safety appliance inspection plan to FRA.	27 railroads	27 plans	16 hours	432
Training of RR inspection personnel	27 railroads	54 tr. Employees	4 hours	216
Remedial action: Record	27 railroads	1 record	2.25 hour	2
Petition for Special Approval of Alternative Compliance pursuant to section 238.21.	27 railroads	15 petitions	4 hours	60
Record of inspection/repair of welded safety appliance brackets/supports.	27 railroads	3,054 records	12 minutes	611
238.230: Safety Appliances: New Equipment—Inspection/Record of welded safety appliance brackets/supports	27 railroads	100 records	6 minutes	10
Documentation to FRA of Other welded safety appliances & safety appliance brackets/supports.	27 railroads	15 documents	4 hours	60
238.231: RR Procedure to secure unattended locomotive required to have a hand brake or parking brake applied	27 railroads	27 procedures	2 hours	54
238.237: Automated Monitoring—Documentation for setting alerter or deadman control	27 railroads	3 documents	2 hours	6
Tagging defective alerter or deadman control in locomotive cab.	27 railroads	25 tags	3 minutes	1
238.303: Exterior Calendar Day Inspection of Equip.	27 railroads	25 notices	2 minutes	1
Defective Dynamic Brakes on MU Locomotive.	27 railroads	50 tags/cards	3 minutes	3
Defective Dynamic Brakes on Conventional Locos.	27 railroads	50 tags/cards	3 minutes	3
MU equipment with inoperative/or ineffective air compressor: documentation of train safety.	27 railroads	4 documents	2 hours	8

REPORTING BURDEN—Continued

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
Notice to train crew of number of units with inoperative or ineffective air compressors.	27 railroads	100 notices	3 minutes	5
Record of inoperative or ineffective air compressor.	27 railroads	100 records	2 minutes	3
Record of each exterior calendar day mechanical inspection.	27 railroads	2,376,920 records	1 minute	435,769
238.305: Interior Calendar Day Mechanical Insp.: Tagging Req.	27 railroads	540 tags	1 minute	9
Inspection and Records	27 railroads	1,968,980 inspect/records.	5 minutes + 1 minute	196,898
238.307: Periodic Mechanical Inspection of Pass. Cars: Notification of Alternative Intervals	27 railroads	2 notifications	5 hours	10
Non-Complying Conditions	27 railroads	200 notices	2 minutes	7
Inspections and Records of Insp.	27 railroads	19,284 inspections/records.	200 hours + 2 minutes	3,857,443
Reliability Assessments Concerning Alt. Inspection Interval.	27 railroads	5 documents	100 hours	500
238.311: Single Car Test: Movement to Nest Forward Location	27 railroads	50 tags	3 minutes	3
238.313: Class I Brake Test—Records	27 railroads	15,600 records	30 minutes	7,800
238.315: Class IA Brake Test	27 railroads	18,250 verbal notices	5 seconds	25
Communication Signal Tests	22 railroads	365,000 tests	15 seconds	1,521
238.317: Class II Brake Test: Communication Signal System Test	27 railroads	365,000 tests	15 seconds	1,521
238.321: Out-of-service credit	27 railroads	1,250 notations	2 minutes	42
238.445: Automated Monitoring	1 railroad	10,000 alerts/alarms	10 seconds	28
Self-Tests: Notific	1 railroad	21,900 notifications	20 seconds	122
238.503/505: FRA approval of written inspection, testing, and maintenance program for Tier II passenger equipment prior to implementation of program & use of equipment in passenger operation	27 railroads	1 program/plan	1,200 hours	1,200
Comments on program	Public/Interested Rail Parties.	3 comments	3 hours	9

Total Responses: 5,151,727.

Estiamated Total Annual Burden: 4,510,711 hours.

Status: Regular Review.

Title: Designation of Qualified Persons.

OMB Control Number: 2130–0511.

Type of Request: Extension of a currently approved collection.

Affected Public: Businesses.

Form(s): N/A.

Abstract: The collection of information is used to prevent the unsafe movement of defective freight cars. Railroads are required to inspect freight cars for compliance and to determine restrictions on the movements of defective cars.

Annual Estimated Burden: 40 hours.

Status: Regular Review.

Pursuant to 44 U.S.C. 3507(a) and 5 CFR 1320.5(b), 1320.8(b)(3)(vi), FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Issued in Washington, DC, on January 3, 2013.

Rebecca Pennington,

Chief Financial Officer, Federal Railroad Administration.

[FR Doc. 2013–00221 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2001–10215]

Petition for Waiver of Compliance

In accordance with part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a document dated November 1, 2012, the Finger Lakes Railway Corp. (FGLK) has petitioned the Federal Railroad Administration (FRA) to seek an extension of an existing waiver of compliance from certain provisions contained at 49 CFR Part 223–Safety Glazing Standards–Locomotives, Passenger Cars and Cabooses for six cars. The car numbers of those six cars are: FGLK 7201, FGLK 7202, FGLK 7601, FGLK7602, FGLK 1642, and FGLK 1643.

In support of an extension of the existing waiver, the FGLK petition states that the cars subject to this request are in all aspects still operating in the same service environment with no changes to speed or line segments. FGLK is following the conditions stipulated in the existing waiver. FGLK states that glass replacement continues to be an extremely high cost for an excursion operation and would jeopardize any chance of profitability for such operation for quite some time.

Additionally, the frequency of excursion services offered by FGLK has decreased by nearly 75 percent in the past 2 years as freight movements have taken precedence. This would further hamper the ability to justify any costs associated with replacing noncompliant window glass with Part 223-compliant glazing. Since the last waiver request was granted by FRA, FGLK replaced 22 pieces of noncompliant glass in 2009 at a cost of nearly $9,000.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at

the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov/.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by February 25, 2013 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the 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), or online at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on January 2, 2013.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2013–00222 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2002–11669]

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a document dated March 26, 2012, the Southern Indiana Railway (SIND) of Sellersburg, IN, has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 223 (Safety Glazing Standards—Locomotives, Passenger Cars and Cabooses). FRA assigned the petition Docket Number FRA–2002–11669.

SIND has petitioned for a permanent waiver of compliance for two locomotives, SIND 103 and SIND 104, from the requirements of 49 CFR 223.11—*Requirements for existing locomotives,* which requires FRA Type I material in the forward and rearward end-facing glazing locations of the locomotive cab windshields as well as FRA Type II material in all side-facing windows of the locomotive cabs. Each locomotive is a Model S–3, built by the American Locomotive Company in 1950. Both locomotives were rebuilt in 1988. SIND states that it operates one train per day, over a 5-mile-long single track through mostly rural or lightly populated areas, to interchange with CSX Transportation and the Louisville and Indiana Railway for inbounds and outbounds. SIND further states that it has never had any employee injuries caused by broken locomotive glass. SIND describes the current glazing as single-pane safety plate glass in good condition. SIND is requesting this relief on account of the absence of history of any previous glazing-related accidents or injuries.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov/.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by February 25, 2013 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the 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), or online at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on January 2, 2013

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2013–00224 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2012–0091]

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a letter dated November 15, 2012, BNSF Railway (BNSF), has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 232—Brake System Safety Standards for Freight and

Other Non-Passenger Trains and Equipment; End-of-Train Devices. FRA assigned the petition Docket Number FRA–2012–0091.

BNSF seeks relief with respect to the application of certain provisions of 49 CFR part 232. Specifically, BNSF seeks relief from 49 CFR Sections 232.205(c)(1)—*Class I brake test-initial terminal inspection* and 232.207(b)(1)—*Class IA brake tests—1,000-mile inspection* for trains operating in distributive power mode. BNSF requests to extend the maximum allowable brake pipe air flow from the present rule of 60 cubic feet per minute (CFM) to 90 CFM for distributed power-equipped trains under specified operating conditions.

Canadian railroads have operated with the higher air flow of 90 CFM on distributed power trains for the past 2 years. Recently, BNSF conducted demonstration testing in Great Falls, MT, for air flows between 60 and 90 CFM; a summary of which has been submitted to this docket. BNSF states that these tests confirmed brake propagation rates comparable to the rates achieved by Canadian Pacific Railway and Canadian National Railway in their experience operating high CFM air flow trains. Based upon the successful outcome of its test, and the operational experience of the Canadian railroads, BNSF petitions FRA to permit operation at higher air flow levels for trains operating in distributive power mode under the operating conditions specified in its petition.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov/.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by February 25, 2013 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the 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), or online at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC, on December 17, 2012.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2013–00223 Filed 1–8–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 33 (Sub-No. 306X); Docket No. AB 1091X]

Union Pacific Railroad Company—Abandonment and Discontinuance Exemption—in Cameron County, TX; Brownsville and Matamoras Bridge Company—Abandonment Exemption—in Cameron County, TX

On December 20, 2012, Union Pacific Railroad Company (UP) and Brownsville and Matamoras Bridge Company (B&M) (collectively, Petitioners) jointly filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to permit: (1) UP to abandon and discontinue the portion of UP's Brownsville Subdivision from milepost 7.4 at Olmito Junction to milepost 0.22 at Brownsville, Tex. (UP's Brownsville Subdivision); and (2) B&M to abandon its 0.8 mile line from its connection to UP's Brownsville Subdivision near UP milepost 0.41 to the international border with Mexico located near the center-point of B&M's bridge at Brownsville (B&M Bridge Line), a total distance of 7.98 miles in Cameron County, Tex. (collectively, the Line). The Line traverses United States Postal Service Zip Code 78520 and includes no stations.

In addition to an exemption from the prior approval requirements of 49 U.S.C. 10903, Petitioners seek an exemption from 49 U.S.C. 10904 (offer of financial assistance procedures) and 10905 (public use provisions). In support, Petitioners state that no shippers are served by the Line and that there is an agreement in principle that, following abandonment, UP's Brownsville Subdivision will be transferred to Cameron County, Tex., and/or the City of Brownsville, Tex., for interim trail use. B&M asserts that the .08 mile B&M Bridge Line is unsuitable for both public use and interim trail use. B&M states that the B&M Bridge will remain under ownership of B&M, and the B&M Bridge may play some future role in the movement of motor vehicle traffic across the border between Mexico and the United States. These requests will be addressed in the final decision.

Petitioners state that the Line does not contain Federally granted rights-of-way. Any documentation in Petitioners' possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, In Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

By issuing this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by April 9, 2013.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,600 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the Line, the Line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than January 29, 2013. Each trail use request must be accompanied by a $250 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to Docket Nos. AB 33 (Sub-No. 306X) and AB 1091X, and must be sent to: (1) Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001; and (2) Mack H. Shumate, Jr., 101 North Wacker Drive, #1920, Chicago, IL 60606. Replies to the joint petition are due on or before January 29, 2013.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by OEA will be served upon all parties of record and upon any agencies or other persons who comment during its preparation. Other interested persons may contact OEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally bewithin 30 days of its service.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: January 3, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Derrick A. Gardner,

Clearance Clerk.

[FR Doc. 2013–00243 Filed 1–8–13; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 30186]

Tongue River Railroad Company, Inc.—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT

AGENCY: Surface Transportation Board.

ACTION: Notice of Supplemental Application for Construction and Operation Authority and Board Acceptance.

SUMMARY: Tongue River Railroad Company, Inc. (TRRC) seeks a Board license under 49 U.S.C. 10901 to construct and operate a rail line in southeast Montana. The purpose of the proposed line is to transport low sulfur sub-bituminous coal from mine sites in the Otter Creek and Ashland, Mont., area. TRRC had filed a revised application for its construction authority on October 16, 2012, but modified the project in a December 17, 2012 supplemental application that supersedes the October 16 revised application. As discussed in the supplemental application, TRRC's preferred routing for the proposed line would be the Colstrip Alignment between Colstrip, Mont., and Ashland/Otter Creek, Mont., the southern portion of which was approved previously by the Interstate Commerce Commission (ICC).

The Board here gives notice that it is accepting the supplemental application. The Board has already established a service list for this proceeding in a notice served on September 20, 2012, and a procedural schedule for filings on the transportation merits in a decision served on November 1, 2012. Under that schedule, filings concerning whether the supplemental application meets the criteria of 49 U.S.C. 10901 are due by March 1, 2013, and any reply comment from TRRC is due by April 15, 2013. As indicated below, any entity that is not currently on the service list that submits a filing by March 1 will be added to the service list.

DATES: This notice is effective on January 13, 2013. Pleadings must be filed in accordance with the procedural schedule that the Board has established in this case. All filings must be served concurrently on all parties of record and must be accompanied by a certificate of service.

ADDRESSES: Any filing submitted in this proceeding must be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board's Web site at ''*www.stb.dot.gov*'' at the ''E–FILING'' link. Any person submitting a filing in the traditional paper format should send an original and 10 paper copies of the filing (and also an electronic version) to: Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, one copy of each filing in this proceeding must be sent (and may be sent by email only if service by email is acceptable to the recipient) to each of the following: (1) David H. Coburn, Steptoe & Johnson LLP, 1330 Connecticut Ave. NW., Washington, DC 20036; and (2) any other person designated as a party of record on this proceeding's service list.

FOR FURTHER INFORMATION CONTACT: Marc A. Lerner, (202) 245–0390. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: 1–800–877–8339].

SUPPLEMENTARY INFORMATION: In 1986, the ICC authorized TRRC to construct an approximately 89-mile rail line between Miles City, Mont., and Ashland and Otter Creek, Mont., in a proceeding known as *Tongue River I.*[1] In 1996, the Board authorized TRRC to build a contiguous 41-mile line from Ashland to Decker, Mont., in *Tongue River II.*[2] In 2007, the Board authorized TRRC to build and operate the Western Alignment, a 17.3-mile alternative route for a portion of the route already approved in *Tongue River II,* in a proceeding known as *Tongue River III.*[3]

Petitions for review of *Tongue River II* and *Tongue River III* were filed in the United States Court of Appeals for the Ninth Circuit, and, in 2011, the court affirmed in part, and reversed and remanded in part, those decisions for additional Board review. *N. Plains Res. Council v. STB,* 668 F.3d 1067 (9th Cir. 2011). The court's decision implicitly required the Board to revisit the environmental analysis for *Tongue River I* (as well as *Tongue River II* and *Tongue River III*), because the agency had conducted a cumulative impacts analysis for the entire line in *Tongue River III,* and not just the portion of the line at issue in *Tongue River III,* and had made the resulting mitigation conditions applicable to the entire line in its *Tongue River III* decision. On April 19, 2012, TRRC informed the Board that it no longer intended to build the *Tongue River II* and *Tongue River III* portions of the railroad.

In a decision served on June 18, 2012, the Board dismissed *Tongue River II* and *Tongue River III* and reopened *Tongue*

[1] *Tongue River R.R.—Rail Constr. and Operation—In Custer, Powder River and Rosebud Cntys., Mont.* (*Tongue River I*), FD 30186 (ICC served Sept. 4, 1985), *modified* (ICC served May 9, 1986), *pet. for judicial review dismissed, N. Plains Res. Council* v. *ICC,* 817 F.2d 758 (9th Cir.), *cert. denied,* 484 U.S. 976 (1987).

[2] *Tongue River R.R.—Rail Constr. and Operation—Ashland to Decker, Mont.,* 1 S.T.B. 809 (1996), *pet. for reconsid. denied* (STB served Dec. 31, 1996).

[3] *Tongue River R.R.—Rail Constr. and Operation—Western Alignment,* FD 30186 (Sub-No. 3) (STB served Oct. 9, 2007), *pet. for reconsid. denied* (STB served March 13, 2008).

River I.[4] As explained in more detail in that decision, the Board required TRRC to file a revised application that would present the its current plans to build a rail line between Miles City and Ashland. In addition, the Board announced that it would conduct a new environmental review, rather than a supplemental environmental review based on the three prior environmental reviews conducted in *Tongue River I, Tongue River II,* and *Tongue River III.*

In its revised application filed on October 16, 2012, TRRC proposed to go forward with the *Tongue River I* project, although in modified form.[5] After reviewing the submission, the Board, in a decision served on November 1, 2012, clarified that the Board's review in this proceeding would include not only the new environmental review of the entire construction project, but also an examination of the transportation merits supporting the entire *Tongue River I* line.[6] The November 1 decision also directed TRRC to supplement the revised application to provide a sufficient record for the Board's review, including additional evidence and argument in support of the transportation merits. Finally, the decision established a new procedural schedule for filings on the transportation merits appropriate for this proceeding and required that TRRC publish notices consistent with that decision.

On December 17, 2012, TRRC filed a supplemental application intended to supersede the October 16 filing. TRRC explained that, in its October 16 application, it had proposed the construction of a line between Miles City, Mont., and Ashland/Otter Creek, Mont., following a line similar to that approved by the ICC in 1986. However, TRRC now proposes a different routing, known as the Colstrip Alignment, as its preferred alignment.[7]

According to TRRC, it would construct the line, and the line would be operated solely by BNSF Railway Company (BNSF), which owns a one-third interest in TRRC's parent company, Tongue River Holding Company, LLC. TRRC states that, if selected as the preferred route, the 42-mile Colstrip Alignment would provide rail transportation for low sulfur, sub-bituminous coal from proposed mines in Rosebud and Powder River Counties, Mont., to an existing BNSF line, and consequently to the rest of the national rail network. Specifically, the line would connect at the north end with an existing and lightly used BNSF line known as the Colstrip Subdivision, which currently connects with the Forsyth Subdivision at Nichols Wye, a point approximately 6 miles west of Forsyth and approximately 50 miles west of Miles City. At its southern end, the Colstrip Alignment would have the same two termini south of Ashland as those proposed by TRRC in its October 16 filing. Terminus Point 1 would, therefore, be at the previously proposed Montco Mine location, and Terminus Point 2 would lie along the Otter Creek drainage. TRRC claims that the Colstrip Alignment offers the shortest, most cost effective, and least environmentally impactful routing for the proposed line.

Comments on the transportation aspects of TRRC's supplemental application may be filed on or before March 1, 2013. Interested persons need not be on the service list to file comments on TRRC's supplemental application, but they must serve a copy of their filing on TRRC and those on the service list. At that point, the commenting party will be added to the service list. TRRC may file a reply to the comments on or before April 15, 2013.

The Board's environmental review for this rail construction project is proceeding separately from our review of its transportation merits. Because the construction and operation of this project has the potential to result in significant environmental impacts, the Board's Office of Environmental Analysis (OEA) has determined that the preparation of an Environmental Impact Statement (EIS) is appropriate. OEA issued a notice to stakeholders and the public on October 22, 2012, announcing its intent to prepare the EIS and requesting comments on a draft scope of study. In November, OEA held scoping meetings in the project area to assist in defining the range of issues and alternatives to be considered in the EIS. Comments on the scope of the EIS must be submitted to OEA by January 11, 2013. Subsequently, OEA will issue a final scope of study for the EIS. Following the completion of scoping, OEA will prepare and issue a Draft EIS for public review and comment. The comments received will be addressed in a Final EIS. The Draft and Final EISs (including the public comments) will serve as the basis for OEA's recommendations to the Board regarding whether, from an environmental perspective, TRRC's supplemental application should be granted, granted with environmental conditions, or denied.

The Board's decision on TRRC's supplemental application then will take into consideration both the transportation merits and the environmental impacts of constructing and operating the proposed line.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

Board decisions and notices are available on our Web site at *www.stb.dot.gov*.

Decided: January 4, 2013.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2013–00242 Filed 1–8–13; 8:45 am]

BILLING CODE 4915–01–P

[4] *See Tongue River R.R.—Rail Constr. and Operation—In Custer, Powder River and Rosebud Cntys., Mont.,* FD 30186, *et al.,* slip op. at 2 (STB served June 18, 2012).

[5] Although the decision granting *Tongue River I* authorized the construction of an 89-mile line, TRRC described the line in its October 16 filing as being approximately 83 miles in length, based on refinements that would straighten and shorten the alignment.

[6] The Board's review of construction applications is governed by 49 U.S.C. 10901, its regulations at 49 CFR 1150.1–1150.10, and the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321–4370f (and related environmental laws).

[7] The ICC had examined a variation on the Colstrip Alignment as a potential route in *Tongue River I.*

DEPARTMENT OF THE TREASURY

Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to comment on a currently approved information collection that is due for extension approval by the Office of Management and Budget. The Terrorism Risk Insurance Program Office within the Department of the Treasury is soliciting comments concerning the Record Keeping Requirements set forth in 31 CFR part 50.8.

DATES: Written comments must be received on or before March 11, 2013.

ADDRESSES: Submit comments by email to *triacomments@do.treas.gov* or by mail (if hard copy, preferably an original and two copies) to: Terrorism Risk Insurance Program, Public Comment Record, Suite 2100, Department of the Treasury, 1425 New York Ave. NW., Washington, DC 20220. Because paper mail in the Washington DC area may be subject to delay, it is recommended that comments be submitted electronically.

All comments should be captioned with ''PRA Comments—Recoupment Procedures of the Terrorism Risk Insurance Act (TRIA)''. Please include your name, affiliation, address, email address and telephone number in your comment. Comments will be available for public inspection by appointment only at the Reading Room of the Treasury Library. To makes appointments, call (202) 622–0990 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to: Terrorism Risk Insurance Program Office at (202) 622–6770 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

OMB Number: 1505–0190.

Title: Terrorism Risk Insurance Program-Conflict of Interest Rebuttal Procedures of the Terrorism Risk Insurance Act.

Abstract: Sections 103 (a) and 104 of the Terrorism Risk Insurance Act of 2002 (Pub. L. 107–297) (as extended by the Terrorism Risk Insurance Extension Act of 2005 (Pub.L. 109–144) and the Terrorism Risk Insurance Program Reauthorization Act of 2007 (Pub.L. 110–160) authorize the Department of the Treasury to administer and implement the Terrorism Risk Insurance Program established by the Act. Section 102 (2) of the Terrorism Risk Insurance Act of 2002 defines an ''affiliate'' with respect to an insurer as ''* * * any entity that controls, is controlled by, or is under common control with the insurer''. Section 102 (3) of the Act defines ''Control''. Section 102(6) defines ''insurer'' to include '' * * * any affiliate thereof''. Taken together these definitions comprise one element in calculating costs and payments to the insurer under the Program. As such, there could be questions as to whether an affiliate relation exists between specific insurers. The referenced Regulation sets forth information which, if provided by an insurer on its initiative, could rebut presumptions that, if not refuted, would lead to a determination that an affiliate relationship exists. This clearance action is for the data submission specified in 31 CFR 50.8.

Type of Review: Extension of a currently approved data collection.

Affected Public: Business/Financial Institutions.

Estimated Number of Respondents: 10

Estimated Average Time per Respondent: 4 hours.

Estimated Total Annual Burden Hours: 400 hours.

Request for Comments: 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. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collections; (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; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Jeffrey S. Bragg,

Director, Terrorism Risk Insurance Program.

[FR Doc. 2013–00234 Filed 1–8–13; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of One Individual and One Entity Blocked Pursuant to Executive Order 13315 of August 28, 2003

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is removing the names of 1 individual and 1 entity whose property and interests in property were blocked pursuant to Executive Order 13315 of August 28, 2003, ''Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members, and Taking Certain Other Actions'' from the list of Specially Designated Nationals and Blocked Persons (''SDN List'').

DATES: The removal of the individual and entity from the SDN List is effective as of January 3, 2013.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2490.

SUPPLEMTARY IMFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, tel.: 202/622–0077.

Background

On August 28, 2003, the President issued Executive Order 13315 (the ''Order'') pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.,* the National Emergencies Act, 50 U.S.C. 1601 *et seq.,* section 5 of the United Nations Participation Act, as amended, 22 U.S.C. 287c, section 301 of title 3, United States Code, and in view of United Nations Security Council Resolution 1483 of May 22, 2003. In the Order, the President expanded the scope of the national emergency declared in Executive Order 13303 of May 22, 2003, to address the unusual and extraordinary threat to the national security and foreign policy of the United States posed by obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in that country, and the development of political, administrative, and economic institutions in Iraq. The Order blocks the property and interests in property of, *inter alia,* persons listed on the Annex to the Order.

On July 30, 2004, the President issued Executive Order 13350, which, inter alia, replaced the Annex to Executive Order 13315 with a new Annex that included the names of individuals and entities, including individuals and entities that had previously been designated under Executive Order 12722 and related authorities.

The Department of the Treasury's Office of Foreign Assets Control has determined that the following individual and entity should be removed from the SDN List:

Individual

1. SPECKMAN, Jeanine, United Kingdom (individual) [IRAQ2].

Entity

1. EUROMAC EUROPEAN MANUFACTURER CENTER SRL, Via Ampere 5, Monza 20052, Italy [IRAQ2].

The removal of the individual's and entity's names from the SDN List is effective as of January 3, 2013. All property and interests in property of the individual and entity that are in or hereafter come within the United States or the possession or control of United States persons are now unblocked.

Dated: January 3, 2013.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2013–00236 Filed 1–8–13; 8:45 am]

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Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 18

Marine Mammals; Incidental Take During Specified Activities; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 18

[Docket No. FWS–R7–ES–2012–0043; FF07CAMM00–FXFR133707PB000]

RIN 1018–AY67

Marine Mammals; Incidental Take During Specified Activities

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; availability of draft environmental assessment; request for comments.

SUMMARY: In accordance with the Marine Mammal Protection Act of 1972, as amended (MMPA), and its implementing regulations, we, the U.S. Fish and Wildlife Service (Service or we), propose regulations that authorize the nonlethal, incidental, unintentional take of small numbers of Pacific walruses (*Odobenus rosmarus divergens*) and polar bears (*Ursus maritimus*) during oil and gas industry (Industry) exploration activities in the Chukchi Sea and adjacent western coast of Alaska. If adopted as proposed, this rule would be effective for 5 years from the date of issuance of the final rule.

We propose a finding that the total expected takings of Pacific walruses (walruses) and polar bears during Industry exploration activities will impact small numbers of animals, will have a negligible impact on these species, and will not have an unmitigable adverse impact on the availability of these species for subsistence use by Alaska Natives. The proposed regulations include: Permissible methods of nonlethal taking; measures to ensure that Industry activities will have the least practicable adverse impact on the species and their habitat, and on the availability of these species for subsistence uses; and requirements for monitoring and reporting of any incidental takings which may occur, to the Service. If this rule is made final, the Service will issue Letters of Authorization (LOAs), upon request, for activities proposed to be conducted in accordance with the regulations.

DATES: We will consider comments we receive on or before February 8, 2013.

ADDRESSES:

Document Availability: You can view this proposed rule and the associated draft environmental assessment (EA) on *http://www.regulations.gov* under Docket No. FWS–R7–ES–2012–0043.

Written Comments: You may submit comments on the proposed rule and associated draft EA by one of the following methods:

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS–R7–ES–2012–0043, Division of Policy and Directives Management, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, MS 2042–PDM, Arlington, VA 22203.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments to Docket No. FWS–R7–ES–2012–0043.

Please indicate to which document, the proposed rule or the draft EA, your comments apply. 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: Craig Perham, Marine Mammals Management Office, U.S. Fish and Wildlife Service, Region 7, 1011 East Tudor Road, Anchorage, AK 99503; telephone 907–786–3800. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why We Need To Publish a Proposed Rule

Incidental take regulations (ITRs), under section 101(a)(5)(A) of the MMPA, allow for incidental, but not intentional, take of small numbers of marine mammals that may occur during the conduct of otherwise lawful activities within a specific geographical region. Prior to issuing ITRs, if requested to do so by the public, the Service must first determine that the total of such taking during each 5-year (or less) period concerned will have a negligible impact on marine mammals and will not have an unmitigable adverse impact on the availability of marine mammals for taking for subsistence uses by Alaska Natives. The Service has considered a request from the oil and gas industry to issue ITRs in the Chukchi Sea for a 5-year period to allow for the nonlethal, incidental taking of polar bears or walruses during their open water oil and gas exploration activities. The Service is proposing issuance of ITRs based on our considerations of potential impacts to polar bears and Pacific walrus as well as potential impacts to subsistence use of polar bears and Pacific walruses.

What is the effect of this proposed rule?

The ITRs provide a mechanism for the Service to work with Industry to minimize the effects of Industry activity on marine mammals through appropriate mitigation and monitoring measures, which provide important information on marine mammal distribution, behavior, movements, and interactions with Industry.

The Basis for Our Action

Based upon our review of the nature, scope, and timing of the proposed oil and gas exploration activities and mitigation measures, and in consideration of the best available scientific information, it is our determination that the proposed activities will have a negligible impact on walruses and on polar bears and will not have an unmitigable adverse impact on the availability of marine mammals for taking for subsistence uses by Alaska Natives.

Public Comments

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by email or fax, or to an address not listed 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. 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. We will post all hardcopy comments on *http://www.regulations.gov.*

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 U.S. Fish and Wildlife Service, Marine Mammals Management Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 101(a)(5)(A) of the Marine Mammal Protection Act (MMPA) (16

U.S.C. 1371(a)(5)(A)) gives the Secretary of the Interior (Secretary), through the Director of the Service, the authority to allow the incidental, but not intentional, taking of small numbers of marine mammals, in response to requests by U.S. citizens [as defined in 50 CFR 18.27(c)] engaged in a specified activity (other than commercial fishing) in a specified geographic region. According to the MMPA, the Service shall allow this incidental taking if (1) we make a finding that the total of such taking for the 5-year timeframe of the regulations will have no more than a negligible impact on these species and will not have an unmitigable adverse impact on the availability of these species for taking for subsistence use by Alaska Natives, and (2) we issue regulations that set forth (i) permissible methods of taking, (ii) means of effecting the least practicable adverse impact on the species and their habitat and on the availability of the species for subsistence uses, and (iii) requirements for monitoring and reporting. If we issue regulations allowing such incidental taking, we can issue Letters of Authorization (LOAs) to conduct activities under the provisions of these regulations when requested by citizens of the United States.

The term ''take,'' as defined by the MMPA, means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. Harassment, as defined by the MMPA, for activities other than military readiness activities or scientific research conducted by or on behalf of the Federal Government, means ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild'' [the MMPA calls this Level A harassment] ''or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering'' [the MMPA calls this Level B harassment] (16 U.S.C. 1362).

The terms ''negligible impact'' and ''unmitigable adverse impact'' are defined at 50 CFR 18.27 (i.e., regulations governing small takes of marine mammals incidental to specified activities) as follows. ''Negligible impact'' is ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' ''Unmitigable adverse impact'' means ''an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.'' The term ''small numbers'' is also defined in the regulations, but we do not rely on that definition here as it conflates the ''small numbers'' and ''negligible impact'' requirements, which we recognize as two separate and distinct requirements for promulgating ITRs under the MMPA. Instead, in our small numbers determination, we evaluate whether small numbers of marine mammals are relative to the overall population.

Industry conducts activities, such as oil and gas exploration, in marine mammal habitat that could result in the incidental taking of marine mammals. Although Industry is under no legal requirement under the MMPA to obtain incidental take authorization, since 1991, Industry has requested, and we have issued regulations for, incidental take authorization for conducting activities in areas of walrus and polar bear habitat. We issued incidental take regulations for walruses and polar bears in the Chukchi Sea for the period 1991 to 1996 (56 FR 27443; June 14, 1991) and 2008 to 2013 (73 FR 33212; June 11, 2008). These regulations are at 50 CFR part 18, subpart I (§§ 18.111 to 18.119). In the Beaufort Sea, incidental take regulations have been issued from 1993 to present: November 16, 1993 (58 FR 60402); August 17, 1995 (60 FR 42805); January 28, 1999 (64 FR 4328); February 3, 2000 (65 FR 5275); March 30, 2000 (65 FR 16828); November 28, 2003 (68 FR 66744); August 2, 2006 (71 FR 43926), and August 3, 2011 (76 FR 47010). These regulations are at 50 CFR part 18, subpart J (§§ 18.121 to 18.129).

Summary of Current Request

On January 31, 2012, the Alaska Oil and Gas Association (AOGA), on behalf of its members, and ConocoPhillips, Alaska, Inc. (CPAI), a participating party, requested that the Service promulgate regulations to allow the nonlethal, incidental take of small numbers of walruses and polar bears in the Chukchi Sea and the adjacent western coast of Alaska. AOGA requested that the regulations would be applicable to all persons conducting activities associated with oil and gas exploration as described in its Petition for a period of 5 years. AOGA is a private, nonprofit trade association representing companies active in the Alaskan oil and gas industry. AOGA's members include: Alyeska Pipeline Service Company, Apache Corporation, BP Exploration (Alaska) Inc., Chevron, Eni Petroleum, ExxonMobil Production Company, Flint Hills Resources, Inc., Hilcorp Alaska, LLC, Marathon Oil Company, Petro Star Inc., Pioneer Natural Resources Alaska, Inc., Repsol, Shell Gulf of Mexico, Inc., Statoil, Tesoro Alaska Company, and XTO Energy, Inc.

The request is for regulations to allow the incidental, nonlethal take of small numbers of walruses and polar bears in association with oil and gas activities in the Chukchi Sea and adjacent coastline for the period from June 11, 2013, to June 11, 2018. The information provided by the petitioners indicates that projected oil and gas activities over this timeframe will be limited to exploration activities. Development and production activities were not considered in the request. Within that time, oil and gas exploration activities could occur during any month of the year, depending on the type of activity. Most offshore activities, such as exploration drilling, seismic surveys, and shallow hazards surveys, are expected to occur only during the open water season (July–November). Onshore activities may occur during winter (e.g., geotechnical studies), spring (e.g., hydrological studies), or summer-fall (e.g., various fish and wildlife surveys). The petitioners have also specifically requested that these regulations be issued for nonlethal take. The petitioners have indicated that, through the implementation of appropriate mitigation measures, they are confident that no lethal take would occur.

Prior to issuing regulations in response to this request, we must evaluate the level of industrial activities, their associated potential impacts to walruses and polar bears, and their effects on the availability of these species for subsistence use. The Service is tasked with analyzing the impact that lawful oil and gas industry activities would have on polar bears and walruses during normal operating procedures.

All projected exploration activities described by CPAI and AOGA (on behalf of its members) in their petition, as well as projections of reasonably likely activities for the period 2013 to 2018, were considered in our analysis. The activities and geographic region specified in the request, and considered in these regulations, are described in the ensuing sections titled ''Description of

Geographic Region'' and ''Description of Activities.''

Description of Proposed Regulations

The regulations that we propose to issue include: Permissible methods of nonlethal taking; measures to ensure the least practicable adverse impact on the species and the availability of these species for subsistence uses; and requirements for monitoring and reporting. These regulations would not authorize, or ''permit,'' the actual activities associated with oil and gas exploration, e.g., seismic testing, drilling, or sea floor mapping. Rather, they would authorize the nonlethal, incidental, unintentional take of small numbers of polar bears and walruses associated with those activities based on standards set forth in the MMPA. The Bureau of Ocean Energy Management (BOEM), the Bureau of Safety and Environmental Enforcement (BSEE), the U.S. Army Corps of Engineers (COE), and the Bureau of Land Management (BLM) are responsible for permitting activities associated with oil and gas activities in Federal waters and on Federal lands. The State of Alaska is responsible for permitting activities on State lands and in State waters.

If we finalize these regulations, persons seeking taking authorization for particular projects would be able to apply for an LOA to the Service for the incidental, nonlethal take associated with exploration activities pursuant to the regulations. Each group or individual conducting an oil and gas industry-related activity within the area covered by these regulations would be able to request an LOA. Applicants for LOAs would have to submit an Operations Plan for the activity, a marine mammal (Pacific walrus and polar bear) interaction plan, and a site specific marine mammal monitoring and mitigation plan to monitor any effects of authorized activities on walruses and polar bears. An after-action report on exploration activities and marine mammal monitoring activities would have to be submitted to the Service within 90 days after completion of the activity. Details of monitoring and reporting requirements are further described in ''Potential Effects of Oil and Gas Industry Activities on Pacific Walruses and Polar Bears.''

Applicants would also have to include a Plan of Cooperation (POC) describing the availability of these species for subsistence use by Alaska Native Communities and how that availability may be affected by Industry operations. The purpose of the POC is to ensure that oil and gas activities would not have an unmitigable adverse impact on the availability of the species or the stock for subsistence uses. The POC must provide the procedures on how Industry will work with the affected Alaska Native Communities, including a description of the necessary actions that will be taken to: (1) Avoid or minimize interference with subsistence hunting of polar bears and walruses; and (2) ensure continued availability of the species for subsistence use. The POC is further described in ''Potential Effects of Oil and Gas Industry Activities on Subsistence Uses of Pacific Walruses and Polar Bears.''

If these proposed regulations are implemented, we would evaluate each request for an LOA based on the specific activity and specific location, and may condition the LOA depending on specific circumstances for that activity and location. More information on applying for and receiving an LOA can be found at 50 CFR 18.27(f).

Description of Geographic Region

These regulations would allow Industry operators to incidentally take small numbers of walruses and polar bears within the same area, hereafter referred to as the Chukchi Sea Region (Figure 1; see Proposed Regulation Promulgation section). The geographic area covered by the request is the Outer Continental Shelf (OCS) of the Arctic Ocean adjacent to western Alaska. This area includes the waters (State of Alaska and OCS waters) and seabed of the Chukchi Sea, which encompasses all waters north and west of Point Hope (68°20′20″ N, -166°50′40″ W, BGN 1947) to the U.S.-Russia Convention Line of 1867, west of a north-south line through Point Barrow (71°23′29″ N, -156°28′30″ W, BGN 1944), and up to 200 miles north of Point Barrow. The region includes that area defined as the BOEM/BSEE OCS oil and gas Lease Sale 193 in the Chukchi Sea Planning Area. The Region also includes the terrestrial coastal land 25 miles inland between the western boundary of the south National Petroleum Reserve-Alaska (NPR–A) near Icy Cape (70°20′00″ -148°12′00″) and the north–south line from Point Barrow. The specified geographic region encompasses an area of approximately 240,000 square kilometers (km) (approximately 92,644 square miles). This terrestrial region encompasses a portion (i.e., approximately 10,000 km^2 (3,861 mi^2)) of the Northwest and South Planning Areas of the National Petroleum Reserve-Alaska (NPR–A). It is noteworthy that the north-south line at Point Barrow is the western border of the geographic region in the Beaufort Sea incidental take regulations (August 3, 2011; 76 FR 47010).

Description of Activities

These proposed ITRs examine exploratory drilling, seismic surveys, geotechnical surveys, and shallow hazards surveys to be conducted in the Chukchi Sea from June 11, 2013, to June 11, 2018. This time period includes the entire open water seasons of 2013 through 2017, when activities such as exploration drilling, seismic surveys, geotechnical surveys, and shallow hazards surveys are likely to occur, but terminates before the start of the 2018 open water season.

This section reviews the types and scale of oil and gas activities projected to occur in the Chukchi Sea Region over the specified time period (2013 to 2018). Activities covered in these regulations include Industry exploration operations of oil and gas reserves, as well as environmental monitoring associated with these activities, on the western coast of Alaska and the Outer Continental Shelf of the Chukchi Sea. This information is based upon activity descriptions provided by the petitioners (sections 2.2 and 2.3 of the AOGA *Petition for Incidental Take Regulations for Oil and Gas Activities in the Chukchi Sea and Adjacent Lands in 2013 to 2018,* January 31, 2012). If LOAs are requested for activities that exceed the scope of activities analyzed under these proposed regulations, the LOAs would not be issued, and the Service would reevaluate its findings before further LOAs are issued.

The ITRs requested are for the period from June 11, 2013, to June 11, 2018. Within that time, oil and gas exploration activities could occur during any month of the year, depending on the type of activity. Most offshore activities, such as exploration drilling, seismic surveys, and shallow hazards surveys, are expected to occur only during the open-water season (July–November). Onshore activities may occur during winter (e.g., geotechnical studies), spring (e.g., hydrological studies), or summer-fall (e.g., various fish and wildlife surveys).

The Service does not know the specific locations where oil and gas exploration would occur over the proposed timeframe of the regulations. The location and scope of specific activities would be determined based on a variety of factors, including the outcome of future Federal and State oil and gas lease sales and information gathered through subsequent rounds of exploration discovery. The information provided by the petitioners indicates that offshore exploration activities

would be carried out during the open water season to avoid seasonal pack ice. Onshore activities would be limited and are not expected to occur in the vicinity of known polar bear denning areas or coastal walrus haulouts.

These ITRs would not authorize the execution, placement, or location of Industry activities; they could only authorize incidental, nonlethal take of walruses and polar bears. Authorizing the activity at particular locations is part of the permitting process that is authorized by the lead permitting agency, such as BOEM/BSEE, the COE, or BLM. The specific dates and durations of the individual operations and their geographic locations would be provided to the Service in detail when requests for LOAs are submitted.

Oil and gas activities anticipated and considered in our analysis of the proposed incidental take regulations include: (1) Offshore exploration drilling; (2) offshore 3D and 2D seismic surveys; (3) shallow hazards surveys; (4) other geophysical surveys, such as ice gouge, strudel scour, and bathymetry surveys; (5) geotechnical surveys; (6) onshore and offshore environmental studies; and (7) associated support activities for the afore-mentioned activities. Of these, offshore drilling and seismic surveys are expected to have the greatest effects on Pacific walruses, polar bears, and subsistence. A summary description of the anticipated activities follows, while detailed descriptions provided by the petitioners are available on the Service's Marine Mammals Management Web page at: *http://alaska.fws.gov/fisheries/mmm/itr.htm.*

Offshore Exploration Drilling

Offshore exploration drilling would be conducted from either a floating drilling unit, such as a drillship or conical drilling unit, or a jack-up drilling platform. Exploration drilling with these types of drilling units would occur during the open water season, generally July through November, when the presence of ice is at a minimum. Petitioners indicate that bottom-founded platforms would not be used during exploration activities due to water depths greater than 30 meters (m) (100 feet [ft]) and possible pack ice incursions. Drilling operations are expected to range between 30 and 90 days at individual well sites, depending on the depth to the target formation, and difficulties during drilling. The drilling units and any support vessels would enter the Chukchi Sea at the beginning of the season and exit the sea at the end of the season. Drillships are generally self-propelled, whereas jack-up rigs must be towed to the drill site. These drilling units are largely self-contained with accommodations for the crew, including quarters, galleys, and sanitation facilities. The operating season is expected to be limited to the open water season from July 1 to November 30.

Drilling operations would include multiple support vessels in addition to the drillship or platform, including ice management vessels, survey vessels, and on and offshore support facilities. For example, each drillship is likely to be supported by one to two ice breakers, a barge and tug, one to two helicopter flights per day, and one to two supply ships per week. Ice management is expected to be required for only a small portion of the drilling season, if at all, given the lack of sea ice observed over most current lease holdings in the Chukchi Sea Region in recent years. Most ice management would consist of actively pushing the ice off its trajectory with the bow of the ice management vessel, but some icebreaking could be required. One or more ice management vessels (ice breakers) generally support drillships to ensure ice does not encroach on operations. Geophysical surveys referred to as vertical seismic profiles (VSPs) will likely be conducted at many of the Chukchi Sea Region drill sites where and when an exploration well is being drilled. The purpose of the survey is to ground truth existing seismic data with geological information from the wellbore. A small airgun array is deployed at a location near or adjacent to the drilling unit, and receivers are placed (temporarily anchored) in the wellbore. Exploration drilling programs may entail both onshore support facilities for air support where aircraft serving crew changes, search and rescue, and/or re-supply functions where support facilities would be housed and marine support where vessels may access the shoreline. For offshore support purposes, a barge and tug typically accompany the vessels to provide a standby safety vessel, oil spill response capabilities, and refueling support. Most supplies (including fuel) necessary to complete drilling activities are stored on the drillship and support vessels. Helicopter servicing of drillships can occur as frequently as one to two times per day.

Since 1989, five exploration wells have been drilled in the Chukchi Sea. Based upon information provided by the petitioners, we estimate that up to three operators would drill a total of three to eight wells per year in the Chukchi Sea Region during the 5-year timeframe of these proposed regulations (June 2013 to June 2018).

Offshore 2D and 3D Seismic Surveys

Seismic survey equipment includes sound energy sources (airguns) and receivers (hydrophones/geophones). The airguns store compressed air that upon release forms a bubble that expands and contracts in a predictable pattern, emitting sound waves. The sound energy from the source penetrates the seafloor and is reflected back to the surface where it is recorded and analyzed to produce graphic images of the subsurface features. Differences in the properties of the various rock layers found at different depths reflect the sound energy at different positions and times. This reflected energy is received by the hydrophones housed in submerged streamers towed behind the survey vessel.

The two general types of offshore seismic surveys, 2D and 3D surveys, use similar technology but differ in survey transect patterns, number of transects, number of sound sources and receptors, and data analysis. For both types, a group of air guns is usually deployed in an array to produce a downward focused sound signal. Air gun array volumes for both 2D and 3D seismic surveys are expected to range from 49,161 to 65,548 cm^3 (3,000 to 4,000 in^3) operated at about 2,000 pounds per square inch (psi) (13,789.5 kilopascal [kPa]). The air guns are fired at short, regular intervals, so the arrays emit pulsed rather than continuous sound. While most of the energy is focused downward and the short duration of each pulse limits the total energy into the water column, the sound can propagate horizontally for several kilometers.

Marine streamer 2D surveys use similar geophysical survey techniques as 3D surveys, but both the mode of operation and general vessel type used are different. The primary difference between the two survey types is that a 3D survey has a denser grid for the transect pattern. The 2D surveys provide a less detailed subsurface image because the survey lines are spaced farther apart, but they are generally designed to cover wider areas to image geologic structure on more of a regional basis. Large prospects are easily identified on 2D seismic data, but detailed images of the prospective areas within a large prospect can only be seen using 3D data. The 2D seismic survey vessels generally are smaller than 3D survey vessels, although larger 3D survey vessels are also capable of conducting 2D surveys. The 2D source array typically consists of three or more sub-arrays of six to eight air gun sources each. The sound source level (zero-to-peak) associated with 2D

marine seismic surveys are the same as 3D marine seismic surveys (233 to 240 dB re 1 μPa at 1 m). Typically, a single hydrophone streamer cable approximately 8 to 12 km (~5 to 7.5 mi) long is towed behind the survey vessel. The 2D surveys acquire data along single track lines that are spread more widely apart (usually several km) than are track lines for 3D surveys (usually several hundred meters).

A 3D source array typically consists of two to three sub-arrays of six to nine air guns each, and is about 12.5 to 18 m (41 to 59 ft) long and 16 to 36 m (52.5 to 118 ft) wide. The size of the source array can vary during the seismic survey to optimize the resolution of the geophysical data collected at any particular site. Most 3D operations use a single source vessel; however, in a few instances, more than one source vessel may be used. The sound source level (zero-to-peak) associated with typical 3D seismic surveys ranges between 233 and 240 decibels (dB) at 1 m (dB re 1 μPa at 1 m).

The receiving arrays could include multiple (4 to 16) streamer receiver cables towed behind the source array. The survey vessel may tow up to 12 cables, or streamers, of up to 8.0 km (5.0 mi) in length, spaced 50 to 150 m (164 to 492 ft) apart. Streamer cables contain numerous hydrophone elements at fixed distances within each cable. Each streamer can be 3 to 8 km (2 to 5 mi) long with an overall array width of up to 1,500 m (1,640 yards) between outermost streamer cables. The wide extent of this towed equipment limits both the turning speed and the area a vessel covers with a single pass over a geologic target. It is, therefore, common practice to acquire data using an offset racetrack pattern. Adjacent transit lines for a survey generally are spaced several hundred meters apart and are parallel to each other across the survey area. Seismic surveys are conducted day and night when ocean conditions are favorable, and one survey effort may continue for weeks or months throughout the open water season, depending on the size of the survey. Data acquisition is affected by the arrays towed by the survey vessel and weather conditions. Typically, data are only collected between 25 and 30 percent of the time (or 6 to 8 hours a day) because of equipment or weather problems. In addition to downtime due to weather, sea conditions, turning between lines, and equipment maintenance, surveys could be suspended to avoid interactions with biological resources. In the past, BOEM/BSEE has estimated that individual surveys could last between 20 to 30 days (with downtime) to cover a 322-km^2 (200-mi^2) area.

Both 3D and 2D seismic surveys require a largely ice-free environment to allow effective operation and maneuvering of the air gun arrays and long streamers. In the Chukchi Sea Region, the timing and areas of the surveys would be dictated by ice conditions. Given optimal conditions, the data acquisition season in the Chukchi Sea could start sometime in July and end sometime in early November. Even during the short summer season, there are periodic incursions of sea ice; hence there is no guarantee that any given location will be ice-free throughout the survey.

In our analysis of the previous 5-year Chukchi Sea regulations (2008–2013), we estimated that up to three seismic programs operating annually, totaling up to 15 surveys over the span of the regulations, would have negligible effects on small numbers of animals. Since 2006, only seven seismic surveys have been actually conducted in total in the Chukchi Sea. During the 2006 open water season, three seismic surveys were conducted, while only one seismic survey was conducted during the 2007, 2008, 2010, and 2011 open water seasons, respectively. For the 5-year time period of the regulations proposed here (2013 to 2018), based upon information provided by the petitioners, the Service estimates that, in any given year during the specified time period of the proposed regulations (2013 to 2018), one seismic survey program (2D or 3D) could operate in the Chukchi Sea Region during the open water season. We estimate that each seismic survey vessel would be accompanied or serviced by one to three support vessels. Helicopters may also be used, when available, for vessel support and crew changes.

Shallow Hazards Surveys

Shallow hazards surveys in the Chukchi Sea Region are expected to be conducted for all OCS leases in the Chukchi Sea Planning Area. Shallow hazards surveys, also known as site clearance or high resolution surveys, are conducted to collect bathymetric data and information on the shallow geology down to depths of about 450 m (1,500 ft) below the seafloor at areas identified as potential drill sites. Detailed maps of the seafloor surface and shallow sub-surface are produced with the resulting data in order to identify potential hazards in the area. Shallow hazards surveys must be conducted at all exploration drill sites in the OCS before drilling can be approved by BOEM/BSEE. Specific requirements for these shallow hazards surveys are presented in BOEM/BSEE's Notice to Lessee (NTL) 05–A01. Potential hazards may include: Shallow faults; shallow gas; permafrost; hydrates; and/or archaeological features, such as shipwrecks. Drilling permits will only be issued by the BOEM/BSEE for locations that avoid or minimize any risks of encountering these types of features.

Equipment used in past surveys included sub-bottom profilers, multi-beam bathymetric sonar, side scan sonar, high resolution seismic (airgun array or sparker), and magnetometers. Equipment to be used in future surveys in 2013 to 2018 would be expected to be these and similar types of equipment as required by the BOEM/BSEE NTLs.

Shallow hazards surveys are conducted from vessels during the summer or open water season along a series of transects, with different line spacing depending on the proximity to the proposed drill site and geophysical equipment to be used. Generally, a single vessel is required to conduct the survey, but in the Chukchi Sea an additional vessel is often used as a marine mammal monitoring platform. The geophysical equipment is either hull mounted or towed behind the vessel, and sometimes is located on an autonomous underwater vehicle (AUV). Small airgun arrays with a total volume of 258 cm^3 (40 in^3) and pressured to about 2,000 psi (13,789.5 kPa) have been used as the energy source for past high resolution seismic surveys and would be expected to be used in future surveys in 2013 to 2018, but larger or smaller airguns under more or lesser pressure may be used. Sparkers have also been used in the Chukchi Sea in the past and may be used in the future. The magnetometer is used to locate and identify any human-made ferrous objects that might be on the seafloor.

From the beginning of the previous regulations (2008 to 2012), four shallow hazards and site clearance surveys were actually conducted. Based upon information provided by the petitioners, we estimate that during the timeframe of the proposed regulations (2013 to 2018), up to two operators would conduct from four to seven shallow hazards surveys annually.

Marine Geophysical Surveys

Other types of geophysical surveys are expected to occur during the proposed regulatory timeframe from 2013 to 2018. These include ice gouge surveys, strudel scours surveys, and other bathymetric surveys (e.g., platform and pipeline surveys). These surveys use the same types of remote sensing geophysical equipment used in shallow hazards

surveys, but they are conducted for different purposes in different areas and often lack a seismic (airgun) component. Each of these types of surveys is briefly described below.

Ice Gouge Surveys

Ice gouging is the creation of troughs and ridges on the seafloor caused by the contact of the keels of moving ice floes with unconsolidated sediments on the seafloor. Oil and gas operators conduct these surveys to gain an understanding of the distribution, frequency, size, and orientation of ice gouging in their areas of interest in order to predict the location, size, and frequency of future ice gouging. The surveys may be conducted from June through October when the area is sufficiently clear of ice and weather permits. Equipment to be used in ice gouge surveys during this time may include, but may not be limited to, sub-bottom profilers, multi-beam bathymetric sonar, and side scan sonar.

Strudel Scour Surveys

Strudel scours are formed in the seafloor during a brief period in the spring when river discharge commences the breakup of the sea ice. The ice is bottom fast, with the river discharge flowing over the top of the ice. The overflow spreads offshore and drains through the ice sheet at tidal cracks, thermal cracks, stress cracks, and seal breathing holes reaching the seafloor with enough force to generate distinctive erosion patterns. Oil and gas operators conduct surveys to identify locations where this phenomenon occurs and to understand the process. Nearshore areas (State waters) by the larger rivers are first surveyed from the air with a helicopter at the time when rivers are discharging on to the sea ice (typically in May), to identify any locations where the discharge is moving through the ice. The identified areas are revisited by vessel during the open water season (typically July to October), and bathymetric surveys are conducted along a series of transects over the identified areas. Equipment to be used in the surveys in 2013 to 2018 would likely include, but may not be limited to, multi-beam bathymetric sonar, side scan sonar, and single beam bathymetric sonar.

Bathymetry Surveys

Some surveys would be conducted to determine the feasibility of future development. This effort would include siting such things as pipeline and platform surveys. These surveys use geophysical equipment to delineate the bathymetry/seafloor relief and characteristics of the surficial seafloor sediments. The surveys are conducted from vessels along a series of transects. Equipment deployed on the vessel for these surveys would likely include, but may not be limited to, sub-bottom profilers, multi-beam bathymetric sonar, side scan sonar, and magnetometers.

Based upon information provided by the petitioners, we estimate that up to two operators would conduct as many as two geophysical surveys, including ice gouge, strudel scour, and bathymetry surveys, in any given year during the 5-year timeframe of the proposed regulations (2013 to 2018).

Geotechnical Surveys

Geotechnical surveys expected to occur within the Chukchi Sea Region would take place offshore on leases in federal waters of the OCS and adjacent onshore areas. Geotechnical site investigations are performed to collect detailed data about seafloor sediments, onshore soil, and shallow geologic structures. During site investigations, boreholes are drilled to depths sufficient to characterize the soils within the zone of influence. The borings, cores, or cone penetrometer data collected at the site define the stratigraphy and geotechnical properties at that specific location. These data are analyzed and used in determining optimal facility locations. Site investigations that include archaeological, biological, and ecological data assist in the development of foundation design criteria for any planned structure. Methodology for geotechnical surveys may vary between those conducted offshore and onshore. Onshore geotechnical surveys would likely be conducted in winter when the tundra is frozen. Rotary drilling equipment would be wheeled, tracked, or sled mounted. Offshore geotechnical studies would be conducted from dedicated vessels or support vessels associated with other operations such as drilling.

Based upon information provided by the petitioners, we estimate that as many as two operators would conduct up to two geotechnical surveys in any given year during the 5-year timeframe of the proposed regulations (2013 to 2018).

Offshore Environmental Studies

Offshore environmental studies are likely to include: Ecological surveys of the benthos, plankton, fish, bird, and marine mammal communities and use of Chukchi Sea waters; acoustical studies of marine mammals; sediment and water quality analysis; and physical oceanographic investigations of sea ice movement, currents, and meteorology. Most bird and marine mammal surveys would be conducted from vessels. The vessels would travel along series of transects at slow speeds while observers on the vessels identify the number and species of animals. Ecological sampling and marine mammal surveys would also be conducted from fixed wing aircraft as part of the mandatory marine mammal monitoring programs associated with seismic surveys and exploration drilling. Various types of buoys would likely be deployed in the Chukchi Sea for data collection.

Onshore Environmental Studies

Various types of environmental studies would likely be conducted onshore in the Chukchi Sea Region in 2013 to 2018, in support of offshore oil and gas exploration. These could include, but may not be limited to, hydrology studies; habitat assessments; fish and wildlife surveys; and archaeological resource surveys. These studies would generally be conducted by small teams of scientists that would base their operations in Chukchi Sea communities and travel to study sites by helicopter. Most surveys would be conducted on foot or from the air. Small boats may be used for hydrology studies, fish surveys, and other studies in aquatic environments.

During the last 5-year time period of the regulations (2008–2012), a total of six environmental studies were conducted, with one to two conducted per year. Based upon information provided by the petitioners, we estimate that as many as two environmental studies may be conducted in any given year during the 5-year timeframe of the proposed regulations (2013 to 2018).

Additional Onshore Activities

Additional onshore activities may occur as well. The North Slope Borough (NSB) operates the Barrow Gas Fields located south and east of the city of Barrow. The Barrow Gas Fields include the Walakpa, South, and East Gas Fields. The East Barrow Gas Field is accessible via exiting gravel roads. The Walakpa Gas Field operation is currently accessed by helicopter and/or a rolligon trail. The South Gas Field is accessible by gravel road or dirt trail depending on the individual well. Access to this field during the winter would require ice road construction. Ice/snow road access and ice pads are proposed where needed. The Walakpa Gas Field and a portion of the South Gas Field are located within the boundaries of the Chukchi Sea geographical region. In 2007, ConocoPhillips conducted an exploration program south of Barrow near the Walakpa Gas Field. The NSB

conducted drilling activities in 2007, including drilling new gas wells, and plugged and abandoned depleted wells in the Barrow Gas Fields. During the 5-year timeframe of the proposed regulations (2013 to 2018), we expect the NSB to maintain an active presence in the gas fields with the potential for additional maintenance of the fields.

Biological Information

Pacific Walrus (Odobenus rosmarus divergens)

The Pacific walrus is the largest pinniped species (aquatic carnivorous mammals with all four limbs modified into flippers) in the Arctic. Walruses are readily distinguished from other Arctic pinnipeds by their enlarged upper canine teeth, which form prominent tusks. Males, which have relatively larger tusks than females, also tend to have broader skulls (Fay 1982).

Two modern subspecies of walruses are generally recognized (Wozencraft 2005, p. 525; Integrated Taxonomic Information System, 2010): The Atlantic walrus (*O. r. rosmarus*), which ranges from the central Canadian Arctic eastward to the Kara Sea (Reeves 1978) and the Pacific walrus (*O. r. divergens*), which ranges across the Bering and Chukchi seas (Fay 1982). The small, geographically isolated population of walruses in the Laptev Sea (Heptner *et al.* 1976; Vishnevskaia and Bychkov 1990; Andersen *et al.* 1998; Wozencraft 2005; Jefferson *et al.* 2008), which was previously known as the Laptev walrus (Lindqvist *et al.* 2009), is now considered part of the Pacific walrus population. Atlantic and Pacific walruses are genetically and morphologically distinct from each other (Cronin *et al.* 1994), likely because of range fragmentation and differentiation during glacial phases of extensive Arctic sea ice cover (Harington 2008).

Stock Definition, Range, and Abundance

Pacific walrus are represented by a single stock of animals that inhabit the shallow continental shelf waters of the Bering and Chukchi seas (Sease and Chapman 1988). Though some heterogeneity in the populations has been documented by Jay *et al.* (2008) from differences in the ratio of trace elements in the teeth, Scribner *et al.* (1997) found no difference in mitochondrial or nuclear DNA among Pacific walruses sampled from different breeding areas. The population ranges across the international boundaries of the United States and Russian Federation, and both nations share common interests with respect to the conservation and management of this species. Pacific walruses are identified and managed in the United States and the Russian Federation as a single population (Service 2010).

Pacific walruses range across the continental shelf waters of the northern Bering Sea and Chukchi Sea, relying principally on broken pack ice habitat to access feeding areas of high benthic productivity (Fay 1982). Pacific walruses migrate up to 1,500 km (932 mi) between summer foraging areas in the Arctic (primarily the offshore continental shelf of the Chukchi Sea) and highly productive, seasonally ice covered waters in the sub-Arctic (northern Bering Sea) in winter. Although many adult male Pacific walruses remain in the Bering Sea during the ice free season, where they forage from coastal haulouts, most of the population migrates north in summer and south in winter following seasonal patterns of ice advance and retreat. Walruses are rarely spotted south of the Aleutian archipelago; however, migrant animals (mostly males) are occasionally reported in the North Pacific. Pacific walruses are presently identified and managed as a single panmictic population (Service 2010, unpublished data).

Fossil evidence suggests that walruses occurred in the northwest Pacific during the last glacial maximum (20,000 YBP) with specimens recovered as far south as northern California (Gingras *et al.* 2007; Harrington 2008). More recently, commercial harvest records indicate that Pacific walruses were hunted along the southern coast of the Russian Federation in the Sea of Okhotsk and near Unimak Pass (Aleutian Islands) and the Shumigan Islands (Alaska Peninsula) of Alaska during the 17th Century (Elliott 1882).

Pacific walruses are highly mobile, and their distribution varies markedly in response to seasonal and annual variations in sea ice cover. During the January to March breeding season, walruses congregate in the Bering Sea pack ice in areas where open leads (fractures in sea ice caused by wind drift or ocean currents), polynyas (enclosed areas of unfrozen water surrounded by ice) or thin ice allow access to water (Fay 1982; Fay *et al.* 1984). The specific location of winter breeding aggregations varies annually depending upon the distribution and extent of ice. Breeding aggregations have been reported southwest of St. Lawrence Island, Alaska; south of Nunivak Island, Alaska; and south of the Chukotka Peninsula in the Gulf of Anadyr, Russian Federation (Fay 1982; Mymrin *et al.* 1990; Figure 1 in Garlich-Miller *et al.* 2011a).

In spring, as the Bering Sea pack ice deteriorates, most of the population migrates northward through the Bering Strait to summer feeding areas over the continental shelf in the Chukchi Sea. However, several thousand animals, primarily adult males, remain in the Bering Sea during the summer months, foraging from coastal haulouts in the Gulf of Anadyr, Russian Federation, and in Bristol Bay, Alaska (Figure 1 in Garlich-Miller *et al.* 2011a).

Summer distributions (both males and females) in the Chukchi Sea vary annually, depending upon the extent of sea ice. When broken sea ice is abundant, walruses are typically found in patchy aggregations over continental shelf waters. Individual groups may range from fewer than 10 to more than 1,000 animals (Gilbert 1999; Ray *et al.* 2006). Summer concentrations have been reported in loose pack ice off the northwestern coast of Alaska, between Icy Cape and Point Barrow, and along the coast of Chukotka, Russian Federation, and Wrangel Island (Fay 1982; Gilbert *et al.* 1992; Belikov *et al.* 1996). In years of low ice concentrations in the Chukchi Sea, some animals range east of Point Barrow into the Beaufort Sea; walruses have also been observed in the Eastern Siberian Sea in late summer (Fay 1982; Belikov *et al.* 1996). The pack ice of the Chukchi Sea usually reaches its minimum extent in September. In years when the sea ice retreats north beyond the continental shelf, walruses congregate in large numbers (up to several tens of thousands of animals in some locations) at terrestrial haulouts on Wrangel Island and other sites along the northern coast of the Chukotka Peninsula, Russian Federation, and northwestern Alaska (Fay 1982; Belikov *et al.* 1996; Kochnev 2004; Ovsyanikov *et al.* 2007; Kavry *et al.* 2008; MacCracken 2012).

In late September and October, walruses that summered in the Chukchi Sea typically begin moving south in advance of the developing sea ice. Satellite telemetry data indicate that male walruses that summered at coastal haulouts in the Bering Sea also begin to move northward towards winter breeding areas in November (Jay and Hills 2005). The male walruses' northward movement appears to be driven primarily by the presence of females at that time of year (Freitas *et al.* 2009).

Distribution in the Chukchi Sea

During the summer months, walruses are widely distributed across the shallow continental shelf waters of the Chukchi Sea. Significant summer concentrations include near Wrangel

and Herald Islands in Russian waters and at Hanna Shoal (northwest of Point Barrow) in U.S. waters (Jay *et al.* 2012). As the ice edge advances southward in the fall, walruses reverse their migration and re-group on the Bering Sea pack ice.

The distribution of walruses in the eastern Chukchi Sea where exploration activities would occur is influenced primarily by the distribution and extent of seasonal pack ice. In June and July, scattered groups of walruses are typically found in loose pack ice habitats between Icy Cape and Point Barrow (Fay 1982; Gilbert *et al.* 1992). Recent telemetry studies investigating foraging patterns in the eastern Chukchi Sea suggest that many walruses focus foraging efforts near Hanna Shoal, northwest of Point Barrow (Jay *et al.* in press). In August and September, concentrations of animals tend to be in areas of unconsolidated pack ice, usually within 100 km of the leading edge of the ice pack (Gilbert 1999). Individual groups occupying unconsolidated pack ice typically range from fewer than 10 to more than 1,000 animals. (Gilbert 1999; Ray *et al.* 2006). In August and September, the edge of the pack ice generally retreats northward to about 71° N latitude; however in light ice years, the edge can retreat north beyond the continental shelf (Douglas 2010). Sea ice normally reaches its minimum (northern) extent sometime in September, and ice begins to reform rapidly in October and November. Walruses typically migrate out of the eastern Chukchi Sea in October in advance of the developing sea ice (Fay 1982l; Jay *et al.* in press).

Population Status

The size of the Pacific walrus population has never been known with certainty. Based on large sustained harvests in the 18th and 19th centuries, Fay (1982) speculated that the pre-exploitation population was represented by a minimum of 200,000 animals. Since that time, population size is believed to have fluctuated in response to varying levels of human exploitation. Large scale commercial harvests are believed to have reduced the population to 50,000 to 100,000 animals by the mid-1950s (Fay *et al.* 1997). The population apparently increased rapidly in size during the 1960s and 1970s in response to harvest regulations that limited the take of females (Fay *et al.* 1989). Between 1975 and 1990, visual aerial surveys jointly conducted by the United States and Soviet Union at 5-year intervals produced population estimates ranging from 201,039 to 246,360 (Table 1). Efforts to survey the Pacific walrus population were suspended by both countries after 1990, due to unresolved problems with survey methods that produced population estimates with unknown bias and unknown, but presumably large, variances that severely limited their utility (Speckman *et al.* 2012).

In 2006, a joint United States-Russian Federation survey was conducted in the pack ice of the Bering Sea, using thermal imaging systems to detect walruses hauled out on sea ice and satellite transmitters to account for walruses in the water (Speckman *et al.* 2012). The number of walruses within the surveyed area was estimated at 129,000, with a 95 percent confidence interval of 55,000 to 507,000 individuals. This is a conservative minimum estimate, as weather conditions forced termination of the survey before much of the southwest Bering Sea was surveyed; animals were observed in that region as the surveyors returned to Anchorage, Alaska. Table 1 provides a summary of survey results.

TABLE 1—ESTIMATES OF PACIFIC WALRUS POPULATION SIZE, 1975 TO 2006

Year	Population size [a] (95% confidence interval)	Reference
1975	214,687 (−20,000 to 480,000) [b]	Udevitz *et al.* 2001.
1980	246,360 (−20,000 to 540,000)	Johnson *et al.* 1982; Fedoseev 1984.
1985	242,366 (−20,000 to 510,000)	Udevitz *et al.* 2001.
1990	201,039 (−19,000 to 460,000)	Gilbert *et al.* 1992.
2006	129,000 (55,000 to 507,000)	Speckman *et al.* 2011.

[a] due to differences in methods, comparisons of estimates across years (population trends) are subject to several caveats and not reliable.
[b] 95 percent confidence intervals for 1975 to 1990 are from Fig. 1 in Hills and Gilbert (1994).

These survey results suggest that the walrus population has declined; however, discrepancies among the survey methods and large confidence intervals that in some cases overlap zero do not support such a definitive conclusion. Resource managers in the Russian Federation have concluded that the population has declined and have reduced harvest quotas in recent years accordingly (Kochnev 2004; Kochnev 2005; Kochnev 2010, pers. comm.), based in part on the lower abundance estimate generated from the 2006 survey. However, past survey results are not directly comparable due to differences in survey methods, timing of surveys, segments of the population surveyed, and incomplete coverage of areas where walruses may have been present (Fay *et al.* 1997); thus, these results do not provide a basis for determining trends in population size (Hills and Gilbert 1994; Gilbert 1999). Whether prior estimates are biased low or high is unknown, because of problems with detecting individual animals on ice or land, and in open water, and difficulties counting animals in large, dense groups (Speckman *et al.* 2011). In addition, no survey has ever been completed within a time frame that could account for the redistribution of individuals (leading to double counting or undercounting), or before weather conditions either delayed the effort or completely terminated the survey before the entire area of potentially occupied habitat had been covered (Speckman *et al.* 2011). Due to these problems, as well as seasonal differences among surveys (fall or spring) and despite technological advancements that correct for some problems, we do not believe the survey results provide a reliable basis for estimating a population trend.

Changes in the walrus population have also been investigated by examining changes in biological parameters over time. Based on evidence of changes in abundance, distributions, condition indices, pregnancy rates, and minimum breeding age, Fay *et al.* (1989) and Fay *et al.* (1997) concluded that the Pacific walrus population increased greatly in size during the 1960s and 1970s, and postulated that the population was near, or had exceeded, the carrying capacity (K) of its environment by the early 1980s. We would expect the population to decline if K is exceeded. In addition, harvests increased in the 1980s. Changes in the size, composition, and productivity of the sampled walrus harvest in the Bering Strait Region of

Alaska over this time frame are consistent with this hypothesis (Garlich-Miller *et al.* 2006; MacCracken 2012). Harvest levels declined sharply in the early 1990s, and increased reproductive rates and earlier maturation in females occurred, suggesting that density dependent regulatory mechanisms had been relaxed and the population was likely below K (Garlich-Miller *et al.* 2006; MacCracken 2012). However, Garlich-Miller *et al.* (2006) also noted that there are no data concerning the trend in abundance of the walrus population or the status of its prey to verify this hypothesis, and that whether density dependent changes in life-history parameters might have been mediated by changes in population abundance or changes in the carrying capacity of the environment is unknown.

Habitat

The Pacific walrus is an ice-dependent species that relies on sea ice for many aspects of its life history. Unlike other pinnipeds, walruses are not adapted for a pelagic existence and must haul out on ice or land regularly. Floating pack ice serves as a substrate for resting between feeding dives (Ray *et al.* 2006), breeding behavior (Fay *et al.* 1984), giving birth (Fay 1982), and nursing and care of young (Kelly 2001). Sea ice provides access to offshore feeding areas over the continental shelf of the Bering and Chukchi seas, passive transportation to new feeding areas (Richard 1990; Ray *et al.* 2006), and isolation from terrestrial predators (Richard 1990; Kochnev 2004; Ovsyanikov *et al.* 2007). Sea ice provides an extensive substrate upon which the risk of predation and hunting is greatly reduced (Kelly 2001; Fay 1982).

Sea ice in the Northern Hemisphere is comprised of first year sea ice that formed in the most recent autumn/winter period, and multi-year ice that has survived at least one summer melt season. Sea ice habitats for walruses include openings or leads that provide access to the water and to food resources. Walruses generally do not use multi-year ice or highly compacted first year ice in which there is an absence of persistent leads or polynyas (Richard 1990). Expansive areas of heavy ice cover are thought to play a restrictive role in walrus distributions across the Arctic and serve as a barrier to the mixing of populations (Fay 1982; Dyke *et al.* 1999; Harington 2008). Walruses generally do not occur farther south than the maximum extent of the winter pack ice, possibly due to their reliance on sea ice for breeding and rearing young (Fay *et al.* 1984) and isolation from terrestrial predators (Kochnev 2004; Ovsyanikov *et al.* 2007), or because of the higher densities of benthic invertebrates in northern waters (Grebmeier *et al.* 2006a).

Walruses may utilize ice that is greater than 20 cm (~8 in), but generally require ice thicknesses of 50 cm (~20 in) or more to support their weight, and are not found in areas of extensive, unbroken ice (Fay 1982; Richard 1990). Thus, in winter they concentrate in areas of broken pack ice associated with divergent ice flow or along the margins of persistent polynyas (Burns *et al.* 1981; Fay *et al.* 1984; Richard 1990) in areas with abundant food resources (Ray *et al.* 2006). Females with young generally spend the summer months in pack ice habitats of the Chukchi Sea. Some authors have suggested that the size and topography of individual ice floes are important features in the selection of ice haulouts, noting that some animals have been observed returning to the same ice floe between feeding bouts (Ray *et al.* 2006). Conversely, walruses can and will exploit a broad range of ice types and ice concentrations in order to stay in preferred foraging or breeding areas (Freitas *et al.* 2009; Jay *et al.* 2010a; Ray *et al.* 2010). Walruses tend to make shorter foraging excursions when they are using sea ice rather than land haulouts (Udevitz *et al.* 2009), suggesting that it is more energetically efficient for them to haulout on ice than forage from shore. Fay (1982) notes that several authors reported that when walruses had the choice of ice or land for a resting place, ice was always selected. However, walrus occupancy of an area can be somewhat independent of ice conditions. Many walruses will stay over productive feeding areas even to the point when the ice completely melts out. It appears that adult females and younger animals can remain at sea for a week or two before coming to shore to rest.

When suitable sea ice is not available, walruses haul out on land to rest. A wide variety of substrates, ranging from sand to boulders, are used. Isolated islands, points, spits, and headlands are occupied most frequently. The primary consideration for a terrestrial haulout site appears to be isolation from disturbances and predators, although social factors, learned behavior, protection from strong winds and surf, and proximity to food resources also likely influence the choice of terrestrial haulout sites (Richard 1990). Walruses tend to use established haulout sites repeatedly and exhibit some degree of fidelity to these sites (Jay and Hills 2005), although the use of coastal haulouts appears to fluctuate over time, possibly due to localized prey depletion (Garlich-Miller and Jay 2000). Human disturbance is also thought to influence the choice of haulout sites; many historic haulouts in the Bering Sea were abandoned in the early 1900s when the Pacific walrus population was subjected to high levels of exploitation (Fay 1982; Fay *et al.* 1984).

Adult male walruses use land-based haulouts more than females or young, and consequently, have a greater geographical distribution through the ice-free season. Many adult males remain in the Bering Sea throughout the ice-free season, making foraging trips from coastal haulouts in Bristol Bay, Alaska, and the Gulf of Anadyr, Russian Federation (Figure 1 in Garlich-Miller *et al.* 2011a), while females and juvenile animals generally stay with the drifting ice pack throughout the year (Fay 1982). Females with dependent young may prefer sea ice habitats because coastal haulouts pose greater risk from trampling injuries and predation (Fay and Kelly 1980; Ovsyanikov *et al.* 1994; Kochnev 2004; Ovsyanikov *et al.* 2007; Kavry *et al.* 2008; Mulcahy *et al.* 2009). Females may also prefer sea ice habitats because they may have difficulty feeding while caring for a young calf that has limited swimming range (Cooper *et al.* 2006; Jay and Fischbach 2008).

The numbers of male walruses using coastal haulouts in the Bering Sea during the summer months, and the relative uses of different coastal haulout sites in the Bering Sea, have varied over the past century. Harvest records indicate that walrus herds were once common at coastal haulouts along the Alaska Peninsula and the islands of northern Bristol Bay (Fay *et al.* 1984). By the early 1950s, most of the traditional haulout areas in the Southern Bering Sea had been abandoned, presumably due to hunting pressure. During the 1950s and 1960s, Round Island was the only regularly used haulout in Bristol Bay, Alaska. In 1960, the State of Alaska established the Walrus Islands State Game Sanctuary, which closed Round Island to hunting. Peak counts of walruses at Round Island increased from 1,000 to 2,000 animals in the late 1950s (Frost *et al.* 1983) to more than 10,000 animals in the early 1980s (Sell and Weiss 2010), but subsequently declined to 2,000 to 5,000 over the past decade (Sell and Weiss 2010). General observations indicate that declining walrus counts at Round Island may, in part, reflect a redistribution of animals to other coastal sites in the Bristol Bay region. For example, walruses have been

observed increasingly regularly at the Cape Seniavin haulout on the Alaska Peninsula since the 1970s, and at Cape Pierce and Cape Newenham in northwest Bristol Bay since the early 1980s (Jay and Hills 2005; Winfree 2010; Figure 1 in Garlich-Miller *et al.* 2011a), and more recently at Hagemeister Island.

Traditional male summer haulouts along the Bering Sea coast of the Russian Federation include sites along the Kamchatka Peninsula, the Gulf of Anadyr (most notably Rudder and Meechkin spits), and Arakamchechen Island (Garlich-Miller and Jay 2000; Figure 1 in Garlich-Miller *et al.* 2011a). Walruses have not occupied several of the southernmost haulouts along the coast of Kamchatka in recent years, and the number of animals in the Gulf of Anadyr has also declined in recent years (Kochnev 2005). Factors influencing abundance at Bering Sea haulouts are poorly understood, but may include changes in prey densities near the haulouts, changes in population size, disturbance levels, and changing seasonal distributions (Jay and Hills 2005) (presumably mediated by sea ice coverage or temperature).

Historically, coastal haulouts along the Arctic (Chukchi Sea) coast have been used less consistently during the summer months than those in the Bering Sea because of the presence of pack ice for much of the year in the Chukchi Sea. Since the mid-1990s, reductions of summer sea ice coincided with a marked increase in the use of coastal haulouts along the Chukchi Sea coast of the Russian Federation during the summer months (Kochnev 2004; Kavry *et al.* 2008). Large, mixed (composed of various age and sex groups) herds of walruses, up to several tens of thousands of animals, began to use coastal haulouts on Wrangel Island, Russian Federation, in the early 1990s, and several coastal haulouts along the northern Chukotka coastline of the Russian Federation have emerged in recent years, likely as a result of reductions in summer sea ice in the Chukchi Sea (Kochnev 2004; Ovsyanikov *et al.* 2007; Kavry *et al.* 2008; Figure 1 in Garlich-Miller *et al.* 2011a).

In 2007, 2009, 2010, and 2011, walruses were also observed hauling out in large numbers with mixed sex and age groups along the Chukchi Sea coast of Alaska in late August, September, and October (Thomas *et al.* 2009; Service 2010, unpublished data; Garlich-Miller *et al.* 2011b; MacCracken 2012). Monitoring studies conducted in association with oil and gas exploration suggest that the use of coastal haulouts along the Arctic coast of Alaska during the summer months is dependent upon the availability of sea ice. For example, in 2006 and 2008, walruses foraging off the Chukchi Sea coast of Alaska remained with the ice pack over the continental shelf during the months of August, September, and October. However in 2007 and 2009, the pack ice retreated beyond the continental shelf and large numbers of walruses hauled out on land at several locations between Point Barrow and Cape Lisburne, Alaska (Ireland *et al.* 2009; Thomas *et al.* 2009; Service 2010, unpublished data; Figure 1 in Garlich-Miller *et al.* 2011a), and in 2010 and 2011, at least 20,000 to 30,000 walruses were observed hauled out approximately 4.8 km (3 miles[mi]) north of the Native Village of Point Lay, Alaska (Garlich-Miller *et al.* 2011b).

Transitory coastal haulouts have also been reported in late fall (October to November) along the southern Chukchi Sea coast, coinciding with the southern migration. Mixed herds of walruses frequently come to shore to rest for a few days to weeks along the coast before continuing on their migration to the Bering Sea. Cape Lisburne, Alaska, and Capes Serdtse-Kamen' and Dezhnev, Russian Federation, are the most consistently used haulouts in the Chukchi Sea at this time of year (Garlich-Miller and Jay 2000). Large mixed herds of walruses have also been reported in late fall and early winter at coastal haulouts in the northern Bering Sea at the Punuk Islands and Saint Lawrence Island, Alaska; Big Diomede Island, Russian Federation; and King Island, Alaska, prior to the formation of sea ice in offshore breeding and feeding areas (Fay and Kelly 1980; Garlich-Miller and Jay 2000; Figure 1 in Garlich-Miller *et al.* 2011a).

Life History

Walruses are long-lived animals with low rates of reproduction, much lower than other pinniped species. Walruses may live 35 to 40 years and some may remain reproductively active until relatively late in life (Garlich-Miller *et al.* 2006). Females give birth to one calf every 2 or more years. Breeding occurs between January and March in the pack ice of the Bering Sea. Calves are usually born in late April or May the following year during the northward migration from the Bering Sea to the Chukchi Sea. Calving areas in the Chukchi Sea extend from the Bering Strait to latitude 70°N (Fay *et al.* 1984).

At birth, walrus calves are approximately 65 kg (143 lb) and 113 cm (44.5 in) long (Fay 1982). Calves are capable of entering the water shortly after birth, but tend to haulout frequently, until their swimming ability and blubber layer are well developed. Females tend newborn calves closely and accompany their mother from birth until weaned after 2 years or more. Cows brood neonates to aid in their thermoregulation (Fay and Ray 1968), and carry them on their back or under their flipper while in the water (Gehnrich 1984). Females with newborns often join to form large ''nursery herds'' (Burns 1970). Summer distribution of females and young walruses is related to the movements of the pack ice relative to feeding areas.

After the first 7 years of life, the growth rate of female walruses declines rapidly, and they reach a maximum body size by approximately 10 years of age. Females reach sexual maturity at 4 to 9 years of age. Adult females can reach lengths of up to 3 m (9.8 ft) and weigh up to 1,100 kg (2,425 lb). Male walrus tend to grow faster and for a longer period than females. Males become fertile at 5 to 7 years of age; however, they are usually unable to compete for mates until they reach full adult body size at 15 to 16 years of age. Adult males can reach lengths of 3.5 m (11.5 ft) and can weigh more than 2,000 kg (4,409 lb) (Fay 1982).

Behavior

Walruses are social and gregarious animals. They tend to travel in groups and haul out of the water to rest on ice or land in densely packed groups. On land or ice, in any season, walruses tend to lie in close physical contact with each other. Young animals often lie on top of adults. Group size can range from a few individuals up to several thousand animals (Gilbert 1999; Kastelein 2002; Jefferson *et al.* 2008). At any time of the year, when groups are disturbed, stampedes from a haulout can result in injuries and mortalities. Calves and young animals are particularly vulnerable to trampling injuries (Fay 1980; Fay and Kelly 1980). The reaction of walruses to disturbance ranges from no reaction to escape into the water, depending on the circumstances (Fay *et al.* 1984). Many factors play into the severity of the response, including the age and sex of the animals, the size and location of the group (on ice, in water, Fay *et al.* 1984). Females with calves appear to be most sensitive to disturbance, and animals on shore are more sensitive than those on ice (Fay *et al.* 1984). A fright response caused by disturbance can cause stampedes on a haulout, resulting in injuries and mortalities (Fay and Kelly 1980).

Mating occurs primarily in January and February in broken pack ice habitat

in the Bering Sea. Breeding bulls follow herds of females and compete for access to groups of females hauled out onto sea ice. Males perform visual and acoustical displays in the water to attract females and defend a breeding territory. Sub-dominant males remain on the periphery of these aggregations and apparently do not display. Intruders into display areas are met with threat displays and physical attacks. Individual females leave the resting herd to join a male in the water where copulation occurs (Fay *et al.* 1984; Sjare and Stirling 1996).

The social bond between the mother and calf is very strong, and it is unusual for a cow to become separated from her calf (Fay 1982). The calf normally remains with its mother for at least 2 years, sometimes longer, if not supplanted by a new calf (Fay 1982). After separation from their mother, young females tend to remain with groups of adult females, whereas young males gradually separate from the females and begin to associate with groups of other males. Walruses appear to base their individual social status on a combination of body size, tusk size, and aggressiveness. Individuals do not necessarily associate with the same group of animals and must continually reaffirm their social status in each new aggregation (Fay 1982; NAMMCO 2004).

Walruses produce a variety of sounds (barks, knocks, grunts, rasps, clicks, whistles, contact calls, etc.; Miller 1985; Stirling *et al.* 1987), which range in frequency from 0.1 to 4000 Hz (Miller 1985; Richardson *et al.* 1995). Airborne vocalizations accompany nearly every social interaction that occurs on land or ice (Miller 1985; Charrier *et al.* 2011) and facilitate kin recognition, male breeding displays, recognition of conspecifics, and female mate choice (Insley *et al.* 2003; Charrier *et al.* 2011). Miller (1985) indicated that barks and other calls were used to promote group cohesion and prompted herd members to attend to young distressed animals. Walruses also vocalize extensively while underwater, which has been used to track movements, study behavior, and infer relative abundance (Stirling *et al.* 1983; Hannay *et al.* 2012, Mouy *et al.* 2012). The purposes of underwater vocalizations are not explicitly known but are associated with breeding (Ray and Watkins 1975; Stirling *et al.* 1987; Sjare *et al.* 2003), swimming, and diving (Hannay *et al.* 2012). Stirling *et al.* (1987) suggested that variation among individuals in stereotyped underwater calls may be used to identify individuals. Mouy *et al.* (2012) opined that knocks made while diving may be used to locate the bottom and identify bottom substrates associated with prey. Underwater vocalizations may also be used to communicate with other walruses.

Because of walrus grouping behavior, all vocal communications occur within a short distance (Miller 1985). Walrus' underwater vocalizations can be detected for only a few kilometers (Mouy *et al.* 2012) and likely do not act as long distance communication.

Prey

Walruses consume mostly benthic (region at the bottom of a body of water) invertebrates and are highly adapted to obtain bivalves (Fay 1982; Bowen and Siniff 1999; Born *et al.* 2003; Dehn *et al.* 2007; Boveng *et al.* 2008; Sheffield and Grebmeier 2009). Fish and other vertebrates have occasionally been found in their stomachs (Fay 1982; Sheffield and Grebmeier 2009). Walruses root in the bottom sediment with their muzzles and use their whiskers to locate prey items. They use their fore flippers, nose, and jets of water to extract prey buried up to 32 cm (12.6 in) (Fay 1982; Oliver *et al.* 1983; Kastelein 2002; Levermann *et al.* 2003). The foraging behavior of walruses is thought to have a major impact on benthic communities in the Bering and Chukchi seas (Oliver *et al.* 1983; Klaus *et al.* 1990). Ray *et al.* (2006) estimate that walruses consume approximately 3 million metric tons (3,307 tons) of benthic biomass annually, and that the area affected by walrus foraging is in the order of thousands of square (sq) km (thousands of sq mi) annually. Consequently, walruses play a major role in benthic ecosystem structure and function, which Ray *et al.* (2006) suggested increased nutrient flux and productivity.

The earliest studies of food habits were based on examination of stomachs from walruses killed by hunters. These reports indicated that walruses were primarily feeding on bivalves (clams), and that non-bivalve prey was only incidentally ingested (Fay 1982; Sheffield *et al.* 2001). However, these early studies did not take into account the differential rate of digestion of prey items (Sheffield *et al.* 2001). Additional research indicates that stomach contents include over 100 taxa of benthic invertebrates from all major phyla (Fay 1982; Sheffield and Grebmeier 2009), and while bivalves remain the primary component, walruses are not adapted to a diet solely of clams. Other prey items have similar energetic benefits (Wacasey and Atkinson 1987). Based on analysis of the contents from fresh stomachs of Pacific walruses collected between 1975 and 1985 in the Bering Sea and Chukchi Sea, prey consumption likely reflects benthic invertebrate composition (Sheffield and Grebmeier 2009). Of the large number of different types of prey, statistically significant differences between males and females from the Bering Sea were found in the occurrence of only two prey items, and there were no statistically significant differences in results for males and females from the Chukchi Sea (Sheffield and Grebmeier 2009). Although these data are for Pacific walrus stomachs collected 25 to 35 years ago, we have no reason to believe there has been a change in the general pattern of prey use described here.

Walruses typically swallow invertebrates without shells in their entirety (Fay 1982). Walruses remove the soft parts of mollusks from their shells by suction, and discard the shells (Fay 1982). Born *et al.* (2003) reported that Atlantic walruses consumed an average of 53.2 bivalves (range 34 to 89) per dive. Based on caloric need and observations of captive walruses, walruses require approximately 29 to 74 kg (64 to 174 lbs) of food per day (Fay 1982). Adult males forage little during the breeding period (Fay 1982; Ray *et al.* 2006), while lactating females may eat two to three times that of non-pregnant, non-lactating females (Fay 1982). Calves up to 1 year of age depend primarily on their mother's milk (Fay 1982) and are gradually weaned in their second year (Fisher and Stewart 1997).

Although walruses are capable of diving to depths of more than 250 m (820 ft) (Born *et al.*), they usually forage in waters of 80 m (262 ft) or less (Fay and Burns 1988, Born *et al.* 2003; Kovacs and Lydersen 2008), presumably because of higher productivity of their benthic foods in shallow waters (Fay and Burns 1988; Carey 1991; Jay *et al.* 2001; Grebmeier *et al.* 2006b; Grebmeier *et al.* 2006a). Walruses make foraging trips from land or ice haulouts that range from a few hours up to several days and up to 100 km (60 mi) (Jay *et al.* 2001; Born *et al.* 2003; Ray *et al.* 2006; Udevitz *et al.* 2009). Walruses tend to make shorter and more frequent foraging trips when sea ice is used as a foraging platform compared to terrestrial haulouts (Udevitz *et al.* 2009). Satellite telemetry data for walruses in the Bering Sea in April of 2004, 2005, and 2006 showed they spent an average of 46 hours in the water between resting bouts on ice, which averaged 9 hours (Udevitz *et al.* 2009). Because females and young travel with the retreating pack ice in the spring and summer, they are passively transported northward over feeding grounds across the continental shelves of the Bering and Chukchi seas. Male

walruses appear to have greater endurance than females, with foraging excursions from land haulouts that can last up to 142 hours (about 6 days) (Jay *et al.* 2001).

Mortality

Polar bears are known to prey on walrus calves, and killer whales (*Orcinus orca*) have been known to take all age classes of walruses. Predation levels are thought to be highest near terrestrial haulout sites where large aggregations of walruses can be found; however, few observations exist for offshore environs. Pacific walruses have been hunted by coastal Natives in Alaska and Chukotka for thousands of years. Exploitation of the Pacific walrus population by Europeans has also occurred in varying degrees since the late 17th century. Currently only Native Alaskans and Chukotkans can hunt Pacific walruses to meet subsistence needs. The Service, in partnership with the Eskimo Walrus Commission (EWC) and the Association of Traditional Marine Mammal Hunters of Chukotka, administered subsistence harvest monitoring programs in Alaska and Chukotka in 2000 to 2005. Harvests from 2006–2010 averaged 4,854 walruses per year (Service, unpubl. data). These mortality estimates include corrections for under-reported harvest and struck and lost animals.

Intra-specific trauma is also a known source of injury and mortality. Disturbance events can cause walruses to stampede into the water and have been known to result in hundreds to thousands of injuries and mortalities. The risk of stampede-related injuries increases with the number of animals hauled out. Calves and young animals at the perimeter of these herds are particularly vulnerable to trampling injuries.

Polar Bears (Ursus maritimus)

Stock Definition and Range

Polar bears are circumpolar in their distribution in the northern hemisphere. In Alaska, polar bears have historically been observed as far south in the Bering Sea as St. Matthew Island and the Pribilof Islands (Ray 1971). Two subpopulations, or stocks, occur in Alaska: The Chukchi/Bering seas stock (CS), and the Southern Beaufort Sea stock (SBS). This proposed rule primarily discusses the CS stock. A detailed description of the CS and SBS polar bear stocks can be found in the Polar Bear (*Ursus maritimus*) Stock Assessment Reports at *http://alaska.fws.gov/fisheries/mmm/stock/final_sbs_polar_bear_sar.pdf* and *http://alaska.fws.gov/fisheries/mmm/stock/final_cbs_polar_bear_sar.pdf*. A summary of the CS polar bear stock is described below.

The CS stock is widely distributed on the pack ice in the Chukchi Sea and northern Bering Sea and adjacent coastal areas in Alaska, United States and Chukotka, Russian Federation. The northeastern boundary of the Chukchi/Bering seas stock is near the Colville Delta in the central Beaufort Sea (Garner *et al.*1990; Amstrup 1995; Amstrup *et al.* 2005), and the western boundary is near Chauniskaya Bay in the Eastern Siberian Sea. The stock's southern boundary is determined by the extent of annual sea ice. It is important to note that the eastern boundary of the CS stock constitutes a large overlap zone with bears in the SBS stock (Amstrup *et al.* 2004). In this large overlap zone, roughly north of Barrow, Alaska, it is thought that polar bears are approximately 50 percent from the CS stock and 50 percent from the SBS stock (Amstrup *et al.* 2004; Obbard *et al.* 2010). Currently, capture-based studies are being conducted by the Service in the U.S. portion of the Chukchi Sea to provide updated information on population delineation and habitat use.

Distribution in the Chukchi Sea

Polar bears are common in the Chukchi Sea and their distribution is influenced by the movement of the seasonal pack ice. Polar bears in the Chukchi Sea migrate seasonally with the pack ice but are typically dispersed throughout the region anywhere sea ice and prey may be found (Garner *et al.* 1990; Amstrup 2003). The distance between the northern and southern extremes of the seasonal pack ice in the Chukchi/Bearing seas is approximately 1,300 km (~807 mi). There may be, however, significant differences year to year. Sea ice throughout the Arctic is changing rapidly and dramatically due to climate change (Douglas 2010). In May and June, polar bears are likely to be encountered over relatively shallow continental shelf waters associated with ice as they move northward from the northern Bering Sea, through the Bering Strait into the southern Chukchi Sea. During the fall and early winter period polar bears are likely to be encountered in the Chukchi Sea during their southward migration in late October and November. Polar bears are dependent upon the sea ice for foraging, and the most productive areas seem to be near the ice edge, leads, or polynyas where the ocean depth is minimal (Durner *et al.* 2004). In addition, polar bears may be present along the shoreline in this area, as they will opportunistically scavenge on marine mammal carcasses washed up along the shoreline (Kalxdorff and Fischbach 1998).

Population Status

The global population estimate of polar bears is approximately 20,000 to 25,000 individuals (Obbard *et al.* 2010). Polar bears typically occur at low densities throughout their circumpolar range (DeMaster and Stirling 1981). The CS stock likely increased after the level of harvest in the United States was reduced subsequent to passage of the MMPA in 1972; however, its status is now considered uncertain (Obbard *et al.* 2010). Polar bears in the CS stock are classified as depleted under the MMPA and listed as threatened under the Endangered Species Act of 1973, as amended (ESA) (16 U.S.C. 1531 et seq.). It has been difficult to obtain a reliable population estimate for this stock due to the vast and inaccessible nature of the habitat, movement of bears across international boundaries, logistical constraints of conducting studies in Russian Federation territory, and budget limitations (Amstrup and DeMaster 1988; Garner *et al.* 1992; Garner *et al.* 1998; Evans *et al.* 2003). The recent estimate of the CS stock is approximately 2,000 animals, based on extrapolation of aerial den surveys (Lunn *et al.* 2002). Past estimates of the stock have been derived from observations of dens and aerial surveys (Chelintsev 1977; Stishov 1991a; Stishov 1991b; Stishov *et al.* 1991); however, these estimates have wide confidence intervals, are considered to be of little value for management, and cannot be used to evaluate status and trends for this stock. Reliable estimates of population size based upon traditional wildlife research methods such as capture-recapture or aerial surveys are not available for this region, and measuring the population size remains a research challenge (Evans *et al.* 2003). Current and new research studies in the United States and Russian Federation are aimed at monitoring population status via ecological indicators (e.g., recruitment rates and body condition) and reducing uncertainty associated with estimates of survival and population size.

Habitat

Polar bears depend on the sea-ice-dominated ecosystem for survival. Polar bears of the Chukchi Sea are subject to the movements and coverage of the pack ice and annual ice as they are dependent on the ice as a platform for hunting, feeding, and mating. Historically, polar bears of the Chukchi Sea have spent most of their time on the

annual ice in near-shore, shallow waters over the productive continental shelf, which is associated with the shear zone and the active ice adjacent to the shear zone. Sea ice and food availability are two important factors affecting the distribution of polar bears and their use of habitat. During the ice-covered season, bears use the extent of the annual ice. The most extensive north–south movements of polar bears are associated with the spring and fall ice movement. For example, during the 2006 ice-covered season, six bears radio-collared in the Beaufort Sea were located in the Chukchi and Bering Seas as far south as 59° latitude, which was the farthest extent of the annual ice during 2006. In addition, a small number of bears sometimes remains on the Russian and Alaskan coasts during the initial stages of ice retreat in the spring.

Polar bear distribution during the open-water season in the Chukchi Sea, where maximum open water occurs in September, is dependent upon the location of the ice edge as well. The summer ice pack can be unconsolidated, and segments move great distances by wind, carrying polar bears with them. Recent telemetry movement data are lacking for bears in the Chukchi Sea; however, an increased trend by polar bears to use coastal habitats in the fall during open-water and freeze-up conditions has been noted by researchers since 1992. Recently, during the minimum sea ice extents, which occurred in 2005 and 2007, polar bears exhibited this coastal movement pattern as observations from Russian biologists and satellite telemetry data of bears in the Beaufort Sea indicated that bears were found on the sea ice or along the Chukotka coast during the open-water period.

Changes in sea ice are occurring in the Chukchi Sea because of climate change (Service 2010). With sea ice decreasing, scientists are observing effects of climate change on polar bear habitat, such as an increased amount of open water for longer periods; a reduction in the stable, multi-year ice; and a retraction of sea ice away from productive continental shelf areas (Service 2010). Polar bears using the Chukchi Sea are currently experiencing the initial effects of changes in the sea-ice conditions (Rode and Regehr *et al.* 2007) and would be vulnerable to seasonal changes in sea ice that could limit their access to prey.

As a measure to protect polar bears and their habitat from the effects of climate change, the Service designated critical habitat for polar bear populations in the United States effective January 6, 2011 (75 FR 76086; December 7, 2010). Critical habitat identifies geographic areas that contain features essential for the conservation of an endangered or threatened species, and that may require special management or protection.

The Service designated critical habitat in three areas or units: Barrier island habitat, sea ice habitat (both described in geographic terms), and terrestrial denning habitat (a functional determination). Barrier island habitat includes coastal barrier islands and spits along Alaska's coast, and is used for denning, refuge from human disturbance, access to maternal dens and feeding habitat, and travel along the coast. Sea ice habitat is located over the continental shelf, and includes water 300 m (~984 ft) or less in depth. Terrestrial denning habitat includes lands within 32 km (~20 mi) of the northern coast of Alaska between the Canadian border and the Kavik River, and within 8 km (~5 mi) between the Kavik River and Barrow. The total area designated covers approximately 484,734 sq km (~187,157 sq mi), and is entirely within the lands and waters of the United States.

Polar bear habitat is described in detail in the final rule that designated polar bear critical habitat (75 FR 76086; December 7, 2010). A detailed description of polar bear habitat can be found at *http://alaska.fws.gov/fisheries/mmm/polarbear/pdf/federal_register_notice.pdf.*

Life History

Polar bears are specially adapted for life in the Arctic and are distributed throughout most ice-covered seas of the circumpolar Northern Hemisphere (Amstrup 2003). They are generally limited to areas where the sea is ice-covered for much of the year; however, polar bears are not evenly distributed throughout their range. They are most abundant near the shore in shallow water areas, and in other areas where currents and ocean upwelling increase marine productivity and maintain some open water during the ice covered season (Stirling and Smith 1975; Stirling *et al.* 1981; Amstrup and DeMaster 1988; Stirling 1990; Stirling and Øritsland 1995; Stirling and Lunn 1997; Amstrup *et al.* 2000; Amstrup 2003). Over most of their range, polar bears remain on the sea ice year-round, or spend only short periods on land (Amstrup 2003).

Denning and Reproduction

Female polar bears without dependent cubs breed in the spring. Females can produce their first litter of cubs at 5 to 6 years of age (Stirling *et al.* 1976; Stirling *et al.* 1977; Lentfer and Hensel 1980; Lentfer *et al.* 1980; Ramsay and Stirling 1982, 1988; Furnell and Schweinsburg 1984; Amstrup 2003). Pregnant females typically enter maternity dens from November through December, and the young are usually born in late December or early January (Lentfer and Hensel 1980; Amstrup 2003). Only pregnant females den for an extended period during the winter; other polar bears may excavate temporary dens to escape harsh winter conditions, but otherwise remain active year-round (Amstrup 2003). Each pregnancy can result in up to three cubs, an average pregnancy results in two cubs being born. The average reproductive interval for a polar bear is 3 to 4 years, and a female polar bear can produce about 8 to 10 cubs in her lifetime. In healthy populations, 50 to 60 percent of the cubs may survive through their first year of life after leaving the den (Amstrup 2003). In late March or early April, the female and cubs emerge from their den. Polar bears have extended maternal care and most dependent young remain with their mother for approximately 2.3 years (Amstrup 2003). If the mother moves young cubs from the den before they can walk or withstand the cold, mortality of the cubs may result. Therefore, it is thought that successful denning, birthing, and rearing activities require a relatively undisturbed environment. Amstrup (2003), however, observed that polar bear females in a den can display remarkable tolerance for a variety of human disturbance.

Radio and satellite telemetry studies indicate that denning can occur in multi-year pack ice and on land. Recent studies of the SBS indicate that the proportion of dens on pack ice have declined from approximately 60 percent from 1985 to 1994, to 40 percent from 1998 to 2004 (Fischbach *et al.* 2007). In Alaska, areas of maternal polar bear dens of both the CS and SBS stocks appear to be less concentrated than stocks located in Canada and the Russian Federation. Though some variations in denning occurs among polar bears from various stocks, there are significant similarities. A common trait of polar bear denning habitat is topographic features that accumulate enough drifted snow for females to excavate a den (Amstrup 2003; Durner *et al.* 2003; Durner *et al.* 2006). Certain areas, such as barrier islands (linear features of low elevation land adjacent to the main coastline that are separated from the mainland by bodies of water), river bank drainages, much of the North

Slope coastal plain, and coastal bluffs that occur at the interface of mainland and marine habitat receive proportionally greater use for denning than other areas by bears from the SBS stock (Durner *et al.* 2003; Durner *et al.* 2006). Maternal denning occurs on tundra-bearing barrier islands along the Beaufort Sea and in the large river deltas, such as the Colville and Canning Rivers. Denning of bears from the CS stock occurs primarily on Wrangel and Herald Islands, and on the Chukotka coast in the Russian Federation. Maternal denning on land for the U.S. portion of the CS stock is rare, though anecdotal reports and traditional knowledge of Alaska Natives indicate that it does happen.

Prey

Ringed seals (*Pusa hispida*) are the primary prey of polar bears in most areas. Bearded seals (*Erignathus barbatus*) are also common prey for polar bears in the CS stock. Pacific walrus calves are hunted occasionally, and walrus carcasses are scavenged at haulouts where trampling occurs. Polar bears will occasionally feed on bowhead whale (*Balaena mysticetus*) carcasses opportunistically wherever they may wash ashore and at Point Barrow, Cross, and Barter islands, which are areas where bowhead whales are harvested for subsistence purposes. There are also reports of polar bears killing beluga whales (*Delphinapterus leucas*) trapped in the ice.

Utilization of sea ice is a vital component of polar bear predatory behavior. Polar bears use sea ice as a platform to hunt seals, travel, seek mates, and rest, among other things. They may hunt along leads, polynyas, and other areas of open water associated with sea ice. Polar bears employ a diverse range of methods and tactics to hunt prey. They may wait motionless for extended periods at a seal breathing hole, or may use scent to locate a seal lair then break through the roof; seal lairs are excavated in snow drifts on top of the ice. Polar bears may ambush seals along an ice edge from the ice or from the water. Polar bears also stalk seals hauled out on the ice during warmer weather in the spring. These are just few examples of the predatory methods of polar bears. The common factor is the presence of sea ice in order for polar bears to access prey. Due to changing sea ice conditions, the area and time period of open water and proportion of marginal ice has increased. On average, ice in the Chukchi Sea is melting sooner and retreating farther north each year, and re-forming later. The annual period of time that sea ice is over the shallow, productive waters of the continental shelf is also diminishing. These effects may limit the availability of seals to polar bears, as the most productive areas for seals appear to be over the shallow waters of the continental shelf.

Mortality

Natural causes of mortality among polar bears are not well understood (Amstrup 2003). Polar bears are long-lived (up to 30 years in captivity); have no natural predators, except other polar bears; and do not appear prone to death by diseases or parasites (Amstrup 2003). Accidents and injuries incurred in the dynamic and harsh sea ice environment, injuries incurred while fighting other bears, starvation (usually during extreme youth or old age), freezing (also more common during extreme youth or old age), and drowning are all known natural causes of polar bear mortality (Derocher and Stirling 1996; Amstrup 2003). Cannibalism by adult males on cubs and other adult bears is also known to occur; however, it is not thought that this is a common or significant cause of mortality. After natural causes and old age, the most significant source of polar bear mortality is from humans hunting polar bears (Amstrup 2003). Other sources of polar bear mortality related to human activities, though few and very rare, include research activities, euthanasia of sick or injured bears, and defense of life kills by non-Natives (Brower *et al.* 2002).

Subsistence Use and Harvest Patterns of Pacific Walruses and Polar Bears

The Alaska Native communities most likely to be impacted by oil and gas activities projected to occur in the Chukchi Sea during the 5-year timeframe of the proposed regulations are: Barrow, Wainwright, Point Lay, Point Hope, Kivalina, Kotzebue, Shishmaref, Little Diomede, Gambell, and Savoonga. However, all communities that harvest Pacific walruses or polar bears in the Chukchi Sea region could be affected by Industry activities. Pacific walruses and polar bears are harvested by Alaska Natives for subsistence purposes. The harvest of these species plays an important role in the culture and economy of many villages throughout northern and western coastal Alaska. Walrus meat is consumed by humans while the ivory is used to manufacture traditional handicrafts. Alaska Natives hunt polar bears primarily for their fur, which is used to manufacture cold weather clothing and handicrafts, but also for their meat.

Under section 101(b) of the MMPA, Alaska Natives who reside in Alaska and dwell on the coast of the North Pacific Ocean or the Arctic Ocean are allowed to harvest walruses and polar bears if such harvest is for subsistence purposes or for purposes of creating and selling authentic Native articles of handicrafts and clothing, as long as the harvest is not done in a wasteful manner. Additionally, and similar to the exemption under the MMPA, section 10(e) of the ESA allows for the continued harvest of species listed as endangered or threatened in Alaska for subsistence purposes.

The sale of handmade clothing and handicrafts made of walrus or polar bear parts is an important source of income in these remote Alaska Native communities. Fundamentally, the production of handicrafts is not a commercial activity, but rather a continuation and adaptation to a market economy of an ancient Alaska Native tradition of making and then bartering handicrafts and clothing for other needed items. The limited cash that Alaska Native villagers can make from handmade clothing and handicrafts is vital to sustain their subsistence hunting and fishing way of life (Pungowiyi 2000).

The Service collects information on the subsistence harvest of Pacific walruses and polar bears in Alaska through the Walrus Harvest Monitor Program (WHMP) and the Marking, Tagging and Reporting Program (MTRP). The WHMP is an observer-based program focused on the harvest of Pacific walruses from the St. Lawrence Island communities Gambell and Savoonga. The MTRP program is administered through a network of ''taggers'' employed in subsistence hunting communities. The marking and tagging rule requires that hunters report harvested walruses and polar bears to MTRP taggers within 30 days of the harvest. Taggers also certify (tag) specified parts (ivory tusks for walruses, hide and skull for polar bears) to help control illegal take and trade. The MTRP reports are thought to underestimate total U.S. Pacific walrus and polar bear subsistence harvest. Harvest levels of polar bears and walruses can vary considerably between years, presumably in response to differences in animal distribution, sea ice conditions, and hunter effort.

In 2010, the Native Villages of Gambell and Savoonga adopted local ordinances that limit the number of walruses harvested to four and five per hunting trip, respectively, which likely influences the total number of animals harvested each year. No Chukchi Sea

villages have adopted anything similar, but they harvest comparatively few walruses. Information on subsistence harvests of walruses and polar bears in selected communities derived from MTRP harvest reports from 2007 to 2011 is summarized in Table 2.

TABLE 2—NUMBER OF PACIFIC WALRUSES AND POLAR BEARS HARVESTED FROM 2007 TO 2011 IN 12 ALASKA COMMUNITIES, AS REPORTED THROUGH THE U.S. FISH AND WILDLIFE SERVICE (SERVICE) MTRP

[Walrus harvest numbers presented here are not corrected for MTRP compliance rates or struck-and-lost estimates]

	Pacific walrus	Polar bear
Barrow	24	49
Gambell	3,069	9
Kivalina	4	3
Kotzebue	2	3
Little Diomede	166	14
Nome	24	1
Point Hope	25	51
Point Lay	10	2
Savoonga	2,918	16
Shishmaref	52	6
Wainwright	71	4
Wales	41	5

Pacific Walrus

Barrow

Barrow is the northernmost community within the geographical region of the proposed regulations. Most walrus hunting from Barrow occurs in June and July when the landfast ice breaks up and hunters can access walruses by boat as they migrate north on the retreating pack ice. Walrus hunters from Barrow sometimes range up to 60 miles from shore; however, most harvests reported through the MTRP have occurred within 30 miles of the community.

Wainwright

Wainwright hunters have typically harvested more walruses than other mainland coastal subsistence communities on the North Slope. Walruses are thought to represent approximately 40 percent of this communities' annual subsistence diet of marine mammals. Wainwright residents hunt walruses from June through August as the ice retreats northward. Walruses can be plentiful in the pack ice near the village this time of year. Most of the harvest from Wainwright occurs in June and July. Most walrus hunting is thought to occur within 20 miles of the community, in all seaward directions.

Point Hope

Point Hope hunters typically begin their walrus hunt in late May and early June as walruses migrate north into the Chukchi Sea. The sea ice is usually well off shore of Point Hope by July and does not bring animals back into the range of hunters until late August and September. Most of the reported walrus harvest at Point Hope occurs in the months of June and September. Point Hope harvest occurs mostly within 5 miles of the coast, or near coastal haulout sites at Cape Lisburne.

Point Lay

Point Lay walrus hunting peaks in June and July. Historically, harvests have occurred primarily within 40 miles north and south along the coast from Point Lay and approximately 30 miles offshore. Beginning in 2010, walruses started hauling out on the barrier island about 4 miles north of Point Lay in August and remain there until late September to early October. This provides Point Lay hunters with new opportunities to harvest walrus, and reports indicate that from two to five animals are harvested at that time of year. Hunters harvest during the early stages of haulout formation and as the haulout begins to dissipate to avoid creating a disturbance resulting in a large stampede.

St. Lawrence Island

St. Lawrence Island is located in the Bering Sea south of the Bering Strait. The two communities on the island are Gambell, on western tip, and Savoonga on the north central shore. These two subsistence hunting communities account for the majority of the Pacific walrus harvest in Alaska. Most of the walrus harvest from Gambell and Savoonga takes place in the spring, but some harvest also takes place in the fall and winter, depending on ice and weather conditions. Hunters from Gambell typically use areas north and east of the island while hunters from Savoonga traditionally utilize areas north, west, and south of the island. St. Lawrence Island hunters will typically travel from 40 to 60 miles, and as much as 90 miles, out to sea to find walruses. The consumption of traditional subsistence foods, such as marine mammals, and the economic value of marine mammal parts, such as walrus ivory, is thought to be more significant in Gambell and Savoonga than in communities on the mainland coast of Alaska.

Polar Bears

Polar bears are harvested by Alaska Natives for subsistence and handicraft purposes. This species plays an important role in the culture and economy of many villages throughout western and northern coastal Alaska, where the polar bear figures prominently in Alaska Native stories, art, traditions, and cultural activities. In these northern and western coastal Alaskan Native villages, the taking and use of the polar bear is a fundamental part of Alaska Native culture. For Alaska Natives engaged in subsistence uses, the very acts of hunting, fishing, and gathering, coupled with the seasonal cycle of these activities and the sharing and celebrations that accompany them, are intricately woven into the fabric of their social, psychological, and religious life (Pungowiyi 2000).

Polar Bear Harvest Patterns in Alaska

The following summary is excerpted from the *Report of the Scientific working group to the US-Russian Federation Polar Bear Commission (May 2010),* which describes the history of the polar bear harvest during the last century. A more detailed description can be found at: *http://alaska.fws.gov/fisheries/mmm/polarbear/bilateral.htm:*

Prior to the 20th century Alaska's polar bears were hunted primarily by Alaska Natives for subsistence purposes although commercial sales of hides occurred primarily as a result of Yankee whaling and arctic exploration ventures. During the 20th century, polar bears were harvested for subsistence, handicrafts, and recreational sport hunting. Based on records of skins shipped from Alaska for 1925 to 1953, the estimated annual statewide harvest averaged 120 bears and this take was primarily by Native hunters. Recreational hunting by non-Native sport hunters using aircraft became popular from 1951 to 1972, increasing the statewide annual harvest to 150 during 1951 to 1960 and to 260 during 1960 to 1972 (Amstrup *et al.* 1986). During the late 1960s and 1970s the size of the Beaufort Sea stock declined substantially (Amstrup *et al.* 1986) due to excessive sport harvest. Hunting by non-Natives was prohibited in 1973 when provisions of the Marine Mammal Protection Act (MMPA) went into effect. The prohibition of non-Native sport hunting led to a reduction in the annual harvest of polar bears from the Alaska-Chukotka population from 189 ± 50 bears/year for the period 1961 to 1972 to 80 ± 54 bears/year for the period 1973 to 1984 (Amstrup *et al.* 1986; Fig. 1). According to Service harvest records, from 1980 through the present, harvest of the Alaska-Chukotka population in the U.S. portion has declined. Reasons for a decline in the Alaska native subsistence harvest are currently unknown, but are currently being investigated. Possible causes include decreased hunter effort, decreased polar bear numbers, changes in polar bear distribution, and environmental conditions that make polar bears less available to hunters.

As stated previously, harvest levels of polar bears can vary considerably between years for a variety of reasons, including annual variations in animal distribution, sea ice conditions, and hunter effort. Table 2 summarizes MTRP harvest reports for polar bears for selected western Alaska communities from 2007 to 2011, the most recent five-year period for which complete data are available. The harvest information in Table 2 provides an insight into the level of polar bear harvest by western Alaska communities during the previous five-year period of Chukchi Sea ITRs. Average polar bear harvest levels in Alaska have remained relatively stable over the past 20 years in the Southern Beaufort Sea, but have declined in the Chukchi/Bering seas. Over these past 20 years, six communities (Barrow, Point Hope, Savoonga, Gambell, Little Diomede, and Wainwright) consistently account for the majority of all polar bears harvested in Alaska. The reason for the decline in harvest in western Alaska is unknown, but could be a result of reduced hunter effort, changing distribution of bears, and/or a decline in the number of bears in the population.

Polar bears are harvested throughout the calendar year, depending on availability. Hunters in western Alaska, from Point Lay to St. Lawrence Island, usually harvest bears after December, since bears moving southward with advancing pack ice are not available in this area until later in the season. The number of polar bears harvested from Barrow is thought to be influenced by ice conditions and the number of people out on the ice. Most polar bear harvests reported by Barrow occurred in February and March. Polar bears are harvested from Wainwright throughout much of the year, with peak harvests reported in May and December within 10 miles of the community. Polar bears are typically harvested from Point Hope from January to April within 10 miles of the community; however, Point Hope hunters reported taking polar bears as far away as Cape Thompson and Cape Lisburne.

Although few people are thought to hunt specifically for polar bears, those that do hunt primarily between October and March. Polar bears are often harvested coincidentally with beluga and bowhead whale harvests. Hunting areas for polar bears overlap strongly with areas of bowhead subsistence hunting, particularly the area from Point Barrow South to Walakpa Lagoon where walrus and whale carcasses are known to concentrate polar bears.

Harvest Management of Polar Bears in Alaska

The Service works through existing co-management agreements with Alaska Natives to address future actions that affect polar bears and polar bear hunting. This includes working with the Alaska Nanuuq Commission (ANC), the NSB and its Native-to-Native Agreement with the Inuvialuit Game Council of Canada (Beaufort Sea region), and the Joint Commission formed with the Russian Federation under the Bilateral Agreement (Chukchi/Bering seas region).

The ANC was formed in 1994, to represent the villages in North and Northwest Alaska on matters concerning the conservation and sustainable subsistence use of the polar bear. The mission of ANC is to ''conserve Nanuuq and the Arctic ecosystem for present and future generations of Arctic Alaska Natives.'' The tribal council of each member village has passed a resolution to become a member and to authorize the ANC to represent them on matters concerning the polar bear at regional and international levels. Fifteen villages are currently members: Barrow; Wainwright; Kotzebue; Nuiqsut; Savoonga; Kaktovik; Point Lay; Point Hope; Brevig Mission; Shishmaref; Gambell; King Island; Wales; Little Diomede; and Kivalina.

Polar bears harvested from the communities of Barrow, Nuiqsut, Kaktovik, Wainwright, and Atqasuk are currently considered part of the SBS stock and thus are subject to the terms of the Inuvialuit-Inupiat Polar Bear Management Agreement (Inuvialuit-Inupiat Agreement).

The Inuvialuit-Inupiat Agreement establishes quotas and recommendations concerning protection of denning females, family groups, and methods of harvest. Adherence to the quota is voluntary in the United States, and it has generally been followed since implementation of the Inuvialuit-Inupiat Agreement (Brower *et al.* 2002). Under the Inuvialuit-Inupiat Agreement, quotas are recommended by technical advisors based on estimates of population size and age specific estimates of survival and recruitment. The current quota of 70 total bears per year was established in July 2010, and represents a decrease from the previous quota of 80 total bears per year (Brower *et al.* 2002). The quota is allocated to Canadian Inuvialuit and to Alaskan Inupiat, with 35 bears each. The Inuvialuit-Inupiat Agreement and its quotas are voluntary between the Inupiat and Inuvialuit, and are not enforceable by any law or authority of the governments of the United States or Canada.

The ''*Agreement Between the Government of the United States of America and the Government of the Russian Federation on the Conservation and Management of the Alaska–Chukotka Polar Bear Population,*'' signed in Washington, DC, on October 16, 2000 (the 2000 Agreement), provides legal protections for the population of polar bears found in the Chukchi—Northern Bering Sea. The 2000 Agreement is implemented in the United States through Title V of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 et seq.) and builds upon those protections already provided to this population of polar bears through the ''Agreement on the Conservation of Polar Bears,'' executed in Oslo, Norway on November 13, 1973 (the 1973 Agreement), which was a significant early step in the international conservation of polar bears.

The 1973 Agreement is a multilateral treaty to which the United States and Russia are parties with other polar bear range states: Norway, Canada, and Denmark. While the 1973 Agreement provides authority for the maintenance of a subsistence harvest of polar bears and provides for habitat conservation, the 2000 Agreement specifically establishes a common legal, scientific, and administrative framework for the conservation and management of the Alaska—Chukotka polar bear population between the United States and Russia.

The 2000 Agreement requires the United States and the Russian Federation to manage and conserve polar bears based on reliable science and to provide for subsistence harvest by native peoples. The U.S.—Russian Federation Polar Bear Commission (Commission), which functions as the bilateral managing authority, consists of a Native and Federal representative of each country. The Commission is advised by a 16-member Scientific Working Group (SWG), including experts on ice habitat, bear ecology and population dynamics, and traditional ecological knowledge.

Meetings of the Commission have occurred yearly since 2009. At the fourth meeting of the Commission, which took place from June 25 through 27, 2012, in Anchorage, Alaska, United States, the Commission, based on the recommendation of the SWG, agreed that no change was necessary to the sustainable harvest level identified in 2010. In 2012, the Commission adopted a 5-year sustainable harvest level of 290 polar bears with no more than one third

to be female, with the requirements that the 5-year sustainable harvest level be allocated over the 5-year period using methods recognized by the SWG as biologically sound, and that these methods include the identification of annual sustainable harvest levels, for consideration by the Commission in setting annual taking limits. This cooperative management regime for the subsistence harvest of bears is key to both providing for the long term viability of the population as well as addressing the social, cultural, and subsistence interests of Alaska Natives and the native people of Chukotka.

Potential Effects of Oil and Gas Industry Activities on Pacific Walruses and Polar Bears

Industry activities can affect individual walruses and polar bears in numerous ways. The petitioners in sections 6.1 and 6.2 of the AOGA Petition describe anticipated impacts *for Incidental Take Regulations for Oil and Gas Activities in the Chukchi Sea and Adjacent Lands in 2013 to 2018,* January 31, 2012. Potential effects, detailed below, from Industry activities could include: (1) Disturbance due to noise; (2) physical obstructions; (3) human encounters; and (4) effects on prey.

A thorough discussion of the impacts of Industry activities in the Chukchi Sea on marine mammals is found in the Chukchi Sea Final Environmental Impact Statement (EIS) at *http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Environment/Environmental_Analysis/2007-026-Vol%20I.pdf* and the Chukchi Sea Final Supplemental EIS, Chukchi Sea Planning Area, Oil and Gas Lease Sale 193 at *http://www.boem.gov/About-BOEM/BOEM-Regions/Alaska-Region/Environment/Environmental-Analysis/OCS-EIS/EA-BOEMRE-2011-041.aspx.*

Pacific Walruses

Proposed oil and gas exploration activities in the Chukchi Sea Region include the operation of seismic survey vessels, drillships, icebreakers, supply boats, fixed wing aircrafts, and helicopters. These activities could disturb walruses. Walruses that are disturbed may experience insufficient rest, increased stress and energy expenditure, interference with feeding, and masking of communication. Cows with calves that experience disturbance may alter their care of calves, such as staying in the water longer or nursing less frequently. Calves that experience disturbance could spend an increased amount of time in the water, affecting their thermoregulation. Prolonged or repeated disturbances could potentially displace individuals or herds from preferred feeding or resting areas. Disturbance events could cause walrus groups to abandon land or ice haulouts.

The response of walruses to disturbance stimuli is highly variable. Observations by walrus hunters and researchers suggest that males tend to be more tolerant of disturbances than females and individuals tend to react less than groups. Females with dependent calves are considered the least tolerant of disturbances. Hearing sensitivity is assumed to be within the 13 Hz and 1,200 Hz range of their own vocalizations. Walrus hunters and researchers have noted that walruses tend to react to the presence of humans and machines at greater distances from upwind approaches than from downwind approaches, suggesting that odor is also a stimulus for a flight response. The visual acuity of walruses is thought to be less than for other species of pinnipeds (Kastelein et al. 1993).

Walruses must periodically haul out onto ice or land to rest between feeding bouts. Aerial surveys in the eastern Chukchi Sea found that 80 to 96 percent of walruses were closely associated with sea ice and that the number of walruses observed in open water decreased significantly with distance from the pack ice. Under minimal or no ice conditions, walruses either follow the ice out of the region, or relocate to coastal haulouts where their foraging trips are usually restricted to near shore habitats. However, in 2010 and 2011, more than 20,000 walruses hauled out near Point Lay and many traveled to the Hanna Shoal area to feed, returning to Point Lay. Therefore, in evaluating the potential impacts of exploration activities on walruses, the presence or absence of pack ice serves as one indicator of whether or not walruses are likely to be found in the area. In addition, if walruses are using coastal haulouts near Point Lay, or farther north, many walruses could be encountered in the water over or near Hannah Shoal as well as between the haul out area and Hanna Shoal (Jay *et al.* 2012; Delarue *et al.* 2012). Activities occurring in or near sea ice habitats or areas of high benthic productivity have the greatest potential for affecting walruses. Activities occurring during the open water period away from known feeding areas are expected to affect relatively small numbers of animals except as described above in regards to walruses moving between coastal haulouts and offshore feeding areas.

1. Disturbance From Noise

Noise generated by Industry activities, whether stationary or mobile, has the potential to disturb walruses. Potential impacts of Industry-generated noise include displacement from preferred foraging areas, increased stress and energy expenditure, interference with feeding, and masking of communications. Most impacts of Industry noise on walruses are likely to be limited to a few groups or individuals rather than the population due to their geographic range and seasonal distribution within the geographic region. Reactions of marine mammals to noise sources, particularly mobile sources such as marine vessels, vary. Reactions depend on the individuals' prior exposure to the disturbance source, their need or desire to be in the particular habitat or area where they are exposed to the noise, and visual presence of the disturbance sources.

Unobserved impacts to walruses due to aquatic and airborne noises may occur, but cannot be estimated. Airborne noises have the greatest potential to impact walruses occurring in large numbers at coastal haulouts or on ice floes near industry activities. However, restrictions on aircraft altitude and offset distances, as well as the 25-mile coastal exclusion zone enacted by BOEM, adequately mitigate this potential impact of Industry activities when walruses are on land. A detailed discussion of noise disturbance in the marine environment follows.

A. Stationary Sources

An exploratory drill rig is an example of a stationary source of sounds, odors, and visual stimuli. In estimating impacts, it is difficult to separate those stimuli. However, walruses appear to rely primarily on auditory and olfactory senses, and then sight when responding to potential predators or other stimuli (Kastelein *et al.* 1993). Industrial ambient noise associated with the drilling operations, such as generators and other equipment, is expected. Walruses may respond to sound sources by either avoidance or tolerance. Typically, walruses will avoid a disturbance by moving away.

In one reported observation in 1989 by Shell Western E & P, Inc., a single walrus actually entered the moon pool of a stationary drillship several times during a drilling operation. A moon pool is the opening to the sea on a drillship for a marine drill apparatus. The drill apparatus protrudes from the ship through the moon pool to the sea floor. Eventually, the walrus had to be

removed from the ship for its own safety. During the same time period, Shell Western E & P, Inc., also reported encountering multiple walruses close to their drillship during offshore drilling operations in the Chukchi Sea.

B. Mobile Sources

Seismic operations are expected to add significant levels of noise into the marine environment. Although the hearing sensitivity of walruses is poorly known, source levels associated with Marine 3D and 2D seismic surveys are thought to be high enough to cause temporary hearing loss in other pinniped species. Therefore, walruses found near source levels within the 180-decibel (dB re 1 μPa at 1 m) safety radius described by Industry for seismic activities could potentially suffer shifts in hearing thresholds and temporary hearing loss. Seismic survey vessels would be required to ramp up airguns slowly to allow marine mammals the opportunity to move away from potentially injurious sound sources. Marine mammal monitors would also be required to monitor seismic safety zones and call for the power down or shutdown of airgun arrays if any marine mammals are detected within the prescribed safety zone.

Geotechnical seismic surveys and high resolution site clearance seismic surveys are expected to occur primarily in open water conditions, at a sufficient distance from the pack ice and large concentrations of walruses to avoid most disturbances. Although most walruses are expected to be closely associated with sea ice or coastal haulouts during offshore exploration activities, animals may be encountered in open water conditions. Walruses swimming in open water would likely be able to detect seismic airgun pulses up to several kilometers from a seismic source vessel. The most likely response of walruses to noise generated by seismic surveys would be to move away from the source of the disturbance. Because of the transitory nature of the proposed seismic surveys, impacts to walruses exposed to seismic survey operations would are expected to be temporary in nature and have little or no effects on survival or recruitment.

Although concentrations of walruses in open water environments are expected to be low, groups of foraging or migrating animals transiting through the area may be encountered. Adaptive mitigation measures (e.g., avoidance distance guidelines, seismic airgun shutdowns) based upon monitoring information would be implemented to mitigate potential impacts to walrus groups feeding or traveling in offshore locations and ensure that these impacts would be limited to small numbers of animals.

C. Vessel Traffic

Offshore drilling exploration activities are expected to occur primarily in areas of open water some distance from the pack ice; however, support vessels and/or aircraft may occasionally encounter aggregations of walruses hauled out onto sea ice. The sight, sound, or smell of humans and machines could potentially displace these animals from ice haulouts. The reaction of walruses to vessel traffic is dependent upon vessel type, distance, speed, and previous exposure to disturbances. Generally, walruses react to vessels by leaving the area, but we are aware of at least one occasion where an adult walrus used a vessel as a haulout platform in 2009. Walruses in the water appear to be less readily disturbed by vessels than walruses hauled out on land or sea ice, and it appears that low frequency diesel engines cause less of a disturbance than high frequency outboard engines. In addition, walrus densities within their normal distribution are highest along the edge of the pack ice, and Industry vessels typically avoid these areas. Furthermore, barges and vessels associated with Industry activities travel in open water and avoid large ice floes or land where walruses will be found.

Monitoring programs associated with exploratory drilling operations in the Chukchi Sea in 1989 and 1990 noted that 25 to 60 percent, respectively, of walrus groups encountered in the pack ice during icebreaking responded by ''escaping'' (Brueggeman *et al.* 1990, 1991). Escape was not defined, but we assume that walruses escaped by abandoning the ice and swimming away. Ice management operations are expected to have the greatest potential for disturbances since these operations typically require vessels to accelerate, reverse direction, and turn rapidly, activities that maximize propeller cavitations and resulting noise levels. Previous studies (Brueggeman *et al.* 1990, 1991) suggest that icebreaking activities can displace some walrus groups up to several miles away; however, most groups of walruses resting on the ice showed little reaction when they were beyond 805 m (0.5 mi) from the activity.

When walruses are present, underwater noise from any vessel traffic in the Chukchi Sea may ''mask'' ordinary communication between individuals and prevent them from locating each other. It may also prevent walruses from using potential habitats in the Chukchi Sea and may have the potential to impede movement. Vessel traffic would likely increase if offshore Industry expands and may increase if warming waters and seasonally reduced sea ice cover alter northern shipping lanes.

Impacts associated with transiting support vessels and aircrafts are likely to be widely distributed throughout the area. Therefore, noise and disturbance from aircraft and vessel traffic associated with exploration projects are expected to have localized, short-term effects. Nevertheless, the potential for disturbance events resulting in injuries, mortalities, or cow-calf separations is of concern. The potential for injuries, though unlikely, is expected to increase with the size of affected walrus aggregations. Adaptive mitigation measures (e.g., distance restrictions, reduced vessel speeds) designed to separate Industry activities from walrus aggregations at coastal haulouts and in sea ice habitats are expected to reduce the potential for animal injuries, mortalities, and cow-calf separations.

While drilling operations are expected to occur during open water conditions, the dynamic movements of sea ice could transport walruses hauled out on ice within range of drilling operations. Any potential disturbance to walrus in this condition would be through ice management practices, where ice management may displace walruses from ice in order to prevent displacement of the drill rig. Mitigation measures specified in an LOA may include: requirements for ice scouting; surveys for walruses and polar bears near active drilling operations and ice breaking activities; requirements for marine mammal observers onboard drillships and ice breakers; and operational restrictions near walrus and polar bear aggregations. These measures are expected to reduce the potential for interactions between walruses and drilling operations.

Ice floes that threaten drilling operations may have to be intercepted and moved with a vessel, and those floes could be occupied by resting walruses. Observations by icebreaker operators suggest that most walruses will abandon drifting ice floes long before they reach drilling rigs and before ice management vessels need to intercept a floe that has to be deflected or broken. Ice management activities that cause walruses to flush from or abandon ice would be considered as intentional takes by the Service. Given the observations from previous operations (Brueggeman *et al.* 1990, 1991), we expect this to be a rare event and involve only small numbers of animals. In addition, Industry has

developed an adaptive ice management procedure that requires case-by-case approval by Service officials prior to managing ice occupied by walruses. If ice threatening drilling operations is too large and thick to be moved, drilling operations would be suspended, the well would be capped, and the drill vessel would be moved until the ice passes.

D. Aircraft Traffic

Aircraft overflights may disturb walruses. Reactions to aircraft vary with range, aircraft type, and flight pattern, as well as walrus age, sex, and group size. Adult females, calves, and immature walruses tend to be more sensitive to aircraft disturbance. Fixed wing aircraft are less likely to elicit a response than are helicopters. Walruses are particularly sensitive to changes in engine, propeller, or rotor noise and are more likely to stampede when aircraft turn sharply while accelerating or fly low overhead. Researchers conducting aerial surveys for walruses in sea ice habitats have observed less reaction to fixed wing aircraft above 457 m (1,500 ft) (Service unpubl. data). Although the intensity of the reaction to noise is variable, walruses are probably most susceptible to disturbance by fast-moving and low-flying aircraft, with helicopters usually causing the strongest reactions.

2. Physical Obstructions

It is unlikely that walrus movements would be displaced by offshore stationary facilities, such as an exploratory drill rig. Vessel traffic could temporarily interrupt the movement of walruses, or displace some animals when vessels pass through an area. This displacement would probably have minimal or no effect on animals and would last no more than a few hours.

3. Human Encounters

Human encounters with walruses could occur during Industry operations. These types of encounters would most likely be associated with support activities in the coastal environments near walrus coastal haulouts. Disturbance events could result in trampling injuries or cow-calf separations, both of which are potentially fatal. Calves and young animals at the perimeter of the herds appear particularly vulnerable to trampling injuries. Mortalities from trampling are most severe when large numbers of walruses resting on land are disturbed and flee *en masse* to the ocean. In 2007, more than 3,000 calves died along the Chukotka coast due to stampedes caused by humans and polar bears. Since then, mortalities in the Russian Federation and the United States have been less than 700 per year. This type of disturbance from Industry activity is considered highly unlikely. Areas where and when walrus coastal haulouts form in the United States would be protected with additional mitigation measures, such as activity exclusion zones, airspace restrictions, and close monitoring.

4. Effect on Prey Species

Walruses feed primarily on immobile benthic invertebrates. The effect of Industry activities on benthic invertebrates most likely would be from oil discharged into the environment. Oil has the potential to impact walrus prey species in a variety of ways including, but not limited to, mortality due to smothering or toxicity, perturbations in the composition of the benthic community, and altered metabolic and growth rates. The low likelihood of an oil spill large enough to affect prey populations (see analysis in the section titled Potential Impacts of Waste Product Discharge and Oil Spills on Pacific Walruses and Polar Bears, Pacific Walrus subsection) indicates that Industry activities would likely have limited effects on walruses through effects on prey species.

Evaluation of Anticipated Effects on Walruses

Based on our review of the proposed activities; existing and proposed operating conditions and mitigation measures; information on the biology, ecology, and habitat use patterns of walruses in the Chukchi Sea; information on potential effects of oil and gas activities on walruses; and the results of previous monitoring efforts associated with Industry activity in the Chukchi as well as the Beaufort Sea, we conclude that, while the incidental take (by harassment) of walruses is reasonably likely to or reasonably expected to occur as a result of the proposed activities, most of the anticipated takes would be limited to minor behavioral modifications due to temporary, nonlethal disturbances. These behavioral changes are not outside the subspecies' normal range of activity and are not reasonably expected to, or likely to, affect rates of overall population recruitment or survival. Our review of the nature and scope of the proposed activities, when considered in light of the observed impacts of past exploration activities by Industry, indicates that it is unlikely that there would be any lethal take of walruses associated with these activities or any impacts on survival or reproduction.

Polar Bears

In the Chukchi Sea, polar bears will have a limited presence during the open water season associated with Industry operations. This is because most bears move with the ice to the northern portion of the Chukchi Sea and distribute along the pack ice during this time, which is outside of the geographic region of the proposed regulations. Additionally, they are found more frequently along the Chukotka coastline in the Russian Federation. This would limit the probability of major impacts on polar bears from offshore Industry activities in the Alaskan portion of the Chukchi Sea. Although polar bears have been observed in open water, miles from the ice edge or ice floes, this has been a relatively rare occurrence.

Polar bears will be present in the region of activity in limited numbers and, therefore, oil and gas activities could affect polar bears in various ways during both offshore and onshore activities. (1) Impacts from offshore activities; (2) impacts from onshore activities; (3) impacts from human encounters; (4) effects on prey species; and (5) effects on polar bear critical habitat are described below.

1. Offshore Activities

In the open water season, Industry activities would be limited to vessel-based exploration activities, such as exploratory drilling and seismic surveys. These activities avoid ice floes and the multi-year ice edge; however, they could contact a limited number of bears in open water and on ice floes.

A. Vessel Activities

Vessel-based activities, including operational support vessels, such as barges, supply vessels, oil spill response, and ice management vessels, in the Chukchi Sea could affect polar bears in a number of ways. Seismic ships, icebreakers, or the drilling rig may become physical obstructions to polar bear movements, although these impacts would be short-term and localized. Likewise, noise, sights, and smells produced by exploration activities could disrupt their natural behavior by repelling or attracting bears to human activities.

Polar bears are curious and tend to investigate novel sights, smells, and noises. If bears are present, noise produced by offshore activities could elicit several different responses in individual polar bears. Noise may act as a deterrent to bears entering the area of operation, or the noise could potentially attract curious bears.

In general, little is known about the potential for seismic survey sounds to

cause auditory impairment or other physical effects in polar bears. Researchers have studied the hearing sensitivity of polar bears to understand how noise can affect polar bears, but additional research is necessary to elaborate on potential negative effects of noise. Available data suggest that such effects, if they occur at all, would be limited to short distances from the sound source and probably to projects involving large airgun arrays. Polar bears swim predominantly with their heads above the surface, where underwater noises are weak or undetectable, and this behavior may naturally limit noise exposure to polar bears. There is no evidence that airgun pulses can cause serious injury or death to bears, even in the case of large airgun arrays. Additionally, the planned monitoring and mitigation measures include shutdowns of the airguns, which would reduce any such effects that might otherwise occur if polar bears are observed in the ensonification zones. Thus, it is doubtful that any single bear would be exposed to strong underwater seismic sounds long enough for significant disturbance, such as an auditory injury, to occur.

Though polar bears are known to be extremely curious and may approach sounds and objects to investigate, they are also known to move away from sources of noise and the sight of vessels, icebreakers, aircraft, and helicopters. The effects of retreating from vessels or aircraft may be minimal if the event is short and the animal is otherwise unstressed. For example, retreating from an active icebreaker may produce minimal effects for a healthy animal on a cool day; however, on a warm spring or summer day, a short run may be enough to overheat a well-insulated polar bear.

As already stated, polar bears spend the majority of their time on pack ice during the open water season in the Chukchi Sea or along the Chukotka coast, which limits the potential of impacts from human and Industry activities in the geographic region. In recent years, the Chukchi Sea pack ice has receded over the Continental Shelf during the open water season. Although this poses potential foraging ramifications, by its nature the exposed open water creates a barrier between the majority of the ice-pack-bound bear population and human activity occurring in open water, thereby limiting potential disturbance.

Bears in water may be in a stressed state if found near Industry sites. Researchers have recently documented that bears occasionally swim long distances during the open water period seeking either ice or land. They suspect that the bears may not swim constantly, but find solitary icebergs or remnants to haulout on and rest. The movement is becoming more common, but highlights the ice-free environment that bears are being increasingly exposed to that requires increased energy demands. In one study (between 2004 through 2009), researchers noted that 52 bears embarked on long-distance swim events. In addition, they documented 50 swims that had an average length of 96 miles. They noted that long-distance swim events are still uncommon, but 38 percent of collared bears took at least one long-distance swim.

The majority of vessels, such as seismic boats and barges, associated with Industry activities travel in open water and avoid large ice floes. Some, such as ice management vessels, operate in close proximity to the ice edge and unconsolidated ice during open-water activities. Vessel traffic could encounter an occasional bear swimming in the open water. However, the most likely habitat where bears would be encountered during the open-water season is on the pack ice edge or on ice floes in open water. During baseline studies conducted in the Chukchi Sea between 2008 and 2010, 14 of 16 polar bears encountered by a research vessel were observed on the ice, while the remaining two bears were observed in the water swimming (Service unpublished data).

If there is an encounter between a vessel and a polar bear, it would most likely result in temporary behavioral disturbance only. In open water, vessel traffic could result in short-term behavioral responses to swimming polar bears through ambient noise produced by the vessels, such as underwater propeller cavitation, or activities associated with them, such as on-board machinery, where a bear would most likely swim away from the vessel. Indeed, observations from monitoring programs report that when bears are encountered in open water swimming, bears have been observed retreating from the vessel as it passes (Service unpublished data).

Polar bears could be encountered if a vessel is operating in ice or near ice floes, where the response of bears on ice to vessels is varied. Bears on ice have been observed retreating from vessels; exhibiting few reactions, such as a cessation in activity or turning their head to watch the vessel; and exhibiting no perceived reaction at all to the vessel. Bears have also been observed approaching vessels in the ice.

B. Aircraft

Routine, commercial aircraft traffic flying at high altitudes (approximately 10,000 to 30,000 feet above ground level (AGL)) appears to have little to no effect on polar bears; however, extensive or repeated over-flights of fixed wing aircraft or helicopters could disturb polar bears. A minimum altitude requirement of 1,500 feet for aircraft associated with Industry activity would help mitigate disturbance to polar bears. Behavioral reactions of polar bears are expected to be limited to short-term changes in behavior that would have no long-term impact on individuals and no identifiable impacts on the polar bear population.

In summary, while offshore, open water seismic exploration activities could encounter polar bears in the Chukchi Sea during the latter part of the operational period, it is unlikely that exploration activities or other geophysical surveys during the open water season would result in more than temporary behavioral disturbance to polar bears. Any disturbance would be visual and auditory in nature, and likely limited to deflecting bears from their route. Seismic surveys are unlikely to cause serious impacts to polar bears as they normally swim with their heads above the surface, where noises produced underwater are weak, and polar bears rarely dive below the surface. Ice management activities in support of the drilling operation have the greatest potential to disturb bears by flushing bears off ice floes when moving ice out of the path of the drill rig.

Monitoring and mitigation measures required for open water, offshore activities would include, but would not be limited to: (1) A 0.5-mile operational exclusion zone around polar bear(s) on land, ice, or swimming; (2) marine mammal observers (MMOs) on board all vessels; (3) requirements for ice scouting; (4) surveys for polar bears in the vicinity of active operations and ice breaking activities; and (5) operational restrictions near polar bear aggregations. We expect these mitigation measures would further reduce the potential for interactions between polar bears and offshore operations.

2. Onshore Activities

While no large exploratory programs, such as drilling or seismic surveys, are currently being developed for onshore sites in the Chukchi Sea geographic area, land-based support facilities, maintenance of the Barrow Gas Fields, and onshore baseline studies may contact polar bears. Bear-human interactions at onshore activities are

expected to occur mainly during the fall and ice-covered season when bears come ashore to feed, den, or travel. Noise produced by Industry activities during the open water and ice-covered seasons could potentially result in takes of polar bears at onshore sites. Noise disturbance could originate from either stationary or mobile sources. Stationary sources include support facilities. Mobile sources can include vehicle and aircraft traffic in association with Industry activities, such as ice road construction. The effects for these sources are described below.

A. Noise

Noise produced by onshore Industry activities could elicit several different responses in polar bears. The noise may act as a deterrent to bears entering the area, or the noise could potentially attract bears. Noise attracting bears to Industry activities, especially activities in the coastal or nearshore environment, could result in bear-human interactions, which could result in unintentional harassment, deterrence (under a separate authorization), or lethal take of the bear. Unintentional harassment would most likely be infrequent, short-term, and temporary by either attracting a curious bear to the noise or causing a bear to move away. Deterrence by non-lethal harassment to move a bear away from humans would be much less likely, infrequent, short-term, and temporary. Lethal take of a polar bear from bear-human interaction related to Industry activity is extremely unlikely (discussed in the *Analysis of Impacts of the Oil and Gas Industry on Pacific Walruses and Polar Bears in the Chukchi Sea*).

During the ice-covered season, noise from onshore activities could deter females from denning in the surrounding area, given the appropriate conditions, although a few polar bears have been known to den in proximity to industrial activity. Only a minimal amount of denning by polar bears has been recorded on the western coast of Alaska; however, onshore activities could affect potential den habitat and den site selection if they were located near facilities. However, with limited onshore denning, proposed activities impacts to onshore denning are expected to be minimal.

Known polar bear dens around the oil and gas activities are monitored by the Service, when practicable. Only a small percentage of the total active den locations are known in any year. Industry routinely coordinates with the Service to determine the location of Industry's activities relative to known dens and den habitat. Implementation of mitigation measures, such as the one-mile operational exclusion area around known dens or the temporary cessation of Industry activities, would ensure that disturbance is minimized.

B. Aircraft

As with offshore activities, routine high altitude aircraft traffic would likely have little to no effect on polar bears; however, extensive or repeated low altitude over-flights of fixed wing aircraft for monitoring purposes or helicopters used for re-supply of Industry operations could disturb polar bears on shore. Behavioral reactions of non-denning polar bears are expected to be limited to short-term changes in behavior and would have no long-term impact on individuals and no impacts on the polar bear population. Mitigation measures, such as minimum flight elevations over polar bears or areas of concern and flight restrictions around known polar bear dens, would be required, as appropriate, to reduce the likelihood that bears are disturbed by aircraft.

3. Human Encounters

While more polar bears transit through the coastal areas than inland, we do not anticipate many bear-human interactions due to the limited amount of human activity that has occurred on the western coast of Alaska. Near-shore activities could potentially increase the rate of bear-human interactions, which could result in increased incidents of harassment of bears. Industry currently implements company policies, implements interaction plans, and conducts employee training to reduce and mitigate such encounters under the guidance of the Service. The history of the effective application of interaction plans has shown reduced interactions between polar bears and humans and no injuries or deaths to humans since the implementation of incidental take regulations.

Industry has developed and uses devices to aid in detecting polar bears, including human bear monitors, remote cameras, motion and infrared detection systems, and closed circuit TV systems. Industry also takes steps to actively prevent bears from accessing facilities using safety gates and fences. The types of detection and exclusion systems are implemented on a case-by-case basis with guidance from the Service.

Bear-human interactions would be mitigated through conditions in LOAs, which require the applicant to develop a polar bear interaction plan for each operation. These plans outline the steps the applicant would take, such as garbage disposal, attractant management, and snow management procedures, to minimize impacts to polar bears by reducing the attraction of Industry activities to polar bears. Interaction plans also outline the chain of command for responding to a polar bear sighting.

4. Effect on Prey Species

Ringed seals are the primary prey of polar bears and bearded seals are a secondary prey source. Both species are managed by the U.S. National Marine Fisheries Service (NMFS), which will evaluate the potential impacts of oil and gas exploration activities in the Chukchi Sea through their appropriate authorization process and will identify appropriate mitigation measures for those species, if a negligible impact finding is appropriate. Industry would mainly have an effect on seals through the potential for industrial noise disturbance and contamination (oil spills). The Service does not expect prey availability to be significantly changed due to Industry activities. Mitigation measures for pinnipeds required by BOEM and NMFS would reduce the impact of Industry activities on ringed and bearded seals. A detailed description of potential Industry effects on pinnipeds in the Chukchi Sea can be found in the NMFS biological opinion, ''*Endangered Species Act—Section 7 Consultation, Biological Opinion; Issuance of Incidental Harassment Authorization Under Section 101(a)(5)(a) of the Marine Mammal Protection Act to Shell Offshore, Inc. for Exploratory Drilling in the Alaskan Chukchi Sea in 2012*'' (*http://www.nmfs.noaa.gov/pr/pdfs/permits/shell_chukchi_opinion.pdf*).

5. Polar Bear Critical Habitat

Industry activities could also have potential impacts to polar bear habitat, which in some cases could lead to impacts to bears. The proposed regulations may only authorize incidental take within a specified geographic area (Figure 1). The geographic area covered by the proposed regulations includes polar bear critical habitat. The discussion of potential impacts to polar bear habitat is therefore focused on areas identified as polar bear critical habitat. In the final rule that established polar bear critical habitat (75 FR 76086; December 7, 2010), the Service identified three critical habitat units for polar bear critical habitat, these are: (1) Sea ice, used for feeding, breeding, denning, and movements; (2) barrier island habitat, used for denning, refuge from human disturbance, and transit corridors; and (3) terrestrial denning habitat for

denning. Industry activities may affect this described habitat as discussed below.

A. Sea Ice Habitat

The proposed regulations would only allow exploratory oil and gas activities to occur during the open water season. However, support activities can occur throughout the year and may interact with sea ice habitat on a limited basis. Ice reconnaissance flights to survey ice characteristics and ice management operations using vessels to deflect ice floes from drill rigs are two types of activities that have the potential to affect sea ice. Support activities outside of the open water season would be limited in scope and would likely have limited effects on sea ice habitat during the ice-covered seasons within the timeframe of the proposed regulations (2013 to 2018).

B. Barrier Island Habitat

Proposed support activities near communities, such as Wainwright and Point Lay, for seismic, shallow hazard surveys; open water marine survey; or terrestrial environmental studies are the types of exploration activities requested that may affect polar bear barrier island habitat. Vessels associated with marine activities operating in the Chukchi Sea may use barrier island habitat to ''wait out a storm.'' Bears using the islands to rest and travel may encounter temporarily beached vessels. Past observations reported to the Service indicate that bears will walk by such vessels, but may not rest near them. This is a temporary effect associated with the beached vessel and once the vessel is removed from the beach, the bears return to travelling or resting on the beach.

Aerial transport activities in support of Industry programs may also encounter barrier island habitat while transiting to and from communities. Air operations would have regulatory flight restrictions, but in certain circumstances, such as emergencies, flights could displace bears from barrier island habitat. Established mitigation measures described in the proposed regulations, such as minimum altitude restrictions, wildlife observers and adherence to company polar bear interaction plans, would further limit potential disturbances.

C. Terrestrial Denning Habitat

In western Alaska, mainland support facilities for offshore activities may occur within designated coastal polar bear critical habitat. Staging activities, remote camps, construction of ice roads, and aerial transport to support projects all have the potential to occur in coastal areas in or near denning habitat. If necessary, proactive and reactive mitigation measures set forth in the proposed regulations would minimize disturbance impacts within designated critical habitat and/or impacts to denning habitat. The Service encourages that all transit routes occur outside of critical habitat and may require den detection surveys in areas of denning habitat. At times, Industry may have to place ice roads or staging activities in coastal denning areas. Mitigation measures to minimize potential impacts include establishment of the 1-mile exclusion zone around known maternal dens, and the reduction of activity levels until the natural departure of the bears. Currently, what little is known about the denning habits of the Chukchi-Bering Sea population suggests that the majority of maternal dens occur in the Russian Federation, predominantly on Wrangel Island (DeBruyn *et al.* 2010). While denning habitat exists in western Alaska, no confirmed polar bear dens have been recorded in western Alaska since 2006 (Durner *et al.* 2010). A more detailed description of den detection techniques required by the Service and employed by exploration activities to limit disturbance and minimize impacts to maternal polar bear den sites has been discussed in the Service's Beaufort Sea regulations (76 FR 47010; August 3, 2011). The Service would implement these techniques if active polar bear dens are recorded during Industry activities.

Although Industry activities may temporarily reduce site-specific availability of small portions of polar bear critical habitat primary constituent elements (PCEs) for feeding, mating, movements, denning, and access to prey, these actions would be temporary and not result in long-term effects on the PCE's capabilities to support biological functions of polar bears. Based on the information provided by the petitioners, the Service concludes that effects from Industry activity to polar bear critical habitat and the associated PCEs would be insignificant, due to the limited magnitude and temporary nature of the proposed activities.

Evaluation of Anticipated Effects on Polar Bears

The Service anticipates that potential impacts of seismic noise, physical obstructions, human encounters, changes in distribution or numbers of prey species in the offshore and onshore environments on polar bears would be limited to short-term changes in behavior that would have no long-term impact on individuals or identifiable impacts to the polar bear population during the 5-year timeframe of the proposed regulations. Individual polar bears may be observed in the open water during offshore activities in Alaska waters, but the vast majority of the bear populations will be found on the pack ice or along the Chukotka coastline in the Russian Federation during this time of year. Onshore encounters with polar bears are expected to be minimal due to the limited activity planned along the coastline of Alaska during the timeframe of the regulations. We do not anticipate any lethal take due to Industry activities during the 5-year time period of the proposed regulations. We expect that specific mitigation measures, such as education of Industry personnel, would minimize bear-human interactions that could lead to lethal take of polar bears. Our experience in the Beaufort Sea similarly suggests that it is unlikely there would be any lethal take of bears due to Industry activity within the 5-year time period of the proposed regulations.

Potential impacts to bears would be mitigated through various requirements stipulated within LOAs. Mitigation measures that would be required for all projects include a polar bear interaction plan and a record of communication with affected villages that may serve as the precursor to a POC with the village to mitigate effects of the project on subsistence activities. Examples of mitigation measures that would be used on a case-by-case basis include: The use of trained marine mammal observers associated with offshore activities; bear monitors for onshore activities; and seismic shutdown procedures in ensonification zones. The Service implements an adaptive management approach where certain mitigation measures are based on need and effectiveness for specific activities based largely on timing and location. For example, the Service would implement different mitigation measures for an onshore baseline study 20 miles inland, than for an offshore drilling project. Based on past monitoring information, bears are more prevalent in the coastal areas than 20 miles inland. Therefore, the monitoring and mitigation measures that the Service deems appropriate must be implemented to limit the disturbance to bears, and the measures deemed necessary to limit bear-human interactions may differ depending on location and the timing of the activity.

Furthermore, mitigation measures imposed through BOEM/BSEE lease stipulations are designed to avoid Level A harassment (injury), reduce Level B

harassment, reduce the potential for population level significant adverse effects on polar bears, and avoid an unmitigable adverse impact on their availability for subsistence purposes. Additional measures described in the these incidental take regulations would help reduce the level of Industry impacts to polar bears during the exploration activities, and the issuance of LOAs with site specific operating restrictions and monitoring requirements would provide mitigation and protection for polar bears. Therefore, we conclude that the proposed exploration activities, as mitigated through the regulatory process, would impact small numbers of animals, are not expected to have more than negligible impacts on polar bears in the Chukchi Sea and would not have an unmitigable, adverse impact on the availability of polar bears for subsistence uses.

Potential Impacts of Waste Product Discharge and Oil Spills on Pacific Walruses and Polar Bears

In this section, we discuss the potential effects of oil spills from Industry activities on Pacific walruses and polar bears. We recognize that a wide range of potential effects from oil spills on these species could occur, from minimal effects to potentially substantial ones. We emphasize, however, that the only types of spills that could have significant effects on these species are large spills. Based on projections from BOEM/BSEE, the likelihood of large spills from Industry exploration activities are extremely remote, and thus, we consider impacts from such spills to be highly unlikely. Nevertheless, we provide a full discussion of oil spill risks and possible effects from oil spills, in the extremely unlikely event that such as spill could occur.

Effects of Waste Discharge and Potential Oil Spills on Pacific Walrus

The possibility of oil and waste product spills from Industry exploration activities and the subsequent impacts on walruses are a concern. Little is known about the effects of either on walruses as no studies have been conducted and no documented spills have occurred affecting walruses in their habitat. Depending on the extent of an oil spill, adult walruses may not be severely affected through direct contact, but they will be extremely sensitive to any disturbances created by spill response activities. In addition, due to the gregarious nature of walruses, a release of contaminants would most likely affect multiple individuals if it occurred in an area occupied by walruses. Walruses may repeatedly expose themselves to waste or oil that has accumulated at the edge of a shoreline or ice lead as they enter and exit the water.

Damage to the skin of pinnipeds can occur from contact with oil because some of the oil penetrates into the skin, causing inflammation and death of some tissue. The dead tissue is discarded, leaving behind an ulcer. While these skin lesions have only rarely been found on oiled seals, the effects on walruses may be greater because of a lack of hair to protect the skin. Like other pinnipeds, walruses are susceptible to oil contamination in their eyes. Direct exposure to oil could also result in conjunctivitis. Continuous exposure to oil would quickly cause permanent eye damage.

Inhalation of hydrocarbon fumes presents another threat to marine mammals. In studies conducted on pinnipeds, pulmonary hemorrhage, inflammation, congestion, and nerve damage resulted after exposure to concentrated hydrocarbon fumes for a period of 24 hours. If the walruses were also under stress from molting, pregnancy, etc., the increased heart rate associated with the stress would circulate the hydrocarbons more quickly, lowering the tolerance threshold for ingestion or inhalation.

Adult and sub-adult walruses have thick skin and blubber layers for insulation and very little hair. Thus, they exhibit no grooming behavior, which lessens their chance of ingesting oil. Heat loss is regulated by control of peripheral blood flow through the animal's skin and blubber. Direct exposure of adult walruses to oil is not believed to have any effect on the insulating capacity of their skin and blubber, although it is unknown if oil could affect their peripheral blood flow.

Walrus calves are also likely to suffer from the effects of oil contamination. Walrus calves can swim almost immediately after birth and will often join their mother in the water, increasing their risk of being oiled. However, calves have not yet developed enough insulating blubber to spend as much time in the water as adults. It is possible, but unknown, that oiled walrus calves may not be able to regulate heat loss and may be more susceptible to hypothermia. Another possibility is an oiled calf that is unable to swim away from the contamination and a cow that would not leave without the calf, resulting in the potential exposure of both animals. However, it is also possible that an oiled calf would be unrecognizable to its mother either by sight or by smell, and be abandoned.

Walruses are benthic feeders, and the fate of benthic prey contaminated by an oil spill is difficult to predict. In general, benthic invertebrates preferred by walruses (bivalves, gastropods, and polychaetes) may either decline or increase as the result of a spill (Sanders *et al.* 1980; Jacobs 1980; Elmgren *et al.* 1983; Jewett *et al.* 1999). Impacts vary among spills and species within a spill, but in general, benthic communities move through several successive stages of temporal change until the communities approach pre-disturbance conditions (Dauvin 1998), which may take 20 years. Much of the benthic prey contaminated by an oil spill or gas release, such as methane, may be killed immediately. Bivalve mollusks, a favorite prey species of the walrus, are not effective at processing hydrocarbon compounds, resulting in highly concentrated accumulations and long-term retention of the contamination within the organism. In addition, because walruses feed primarily on mollusks, they may be highly vulnerable to a loss of this prey species. However, epifaunal bivalves were one of the benthic community classes that increased following the *Exxon Valdez* spill in Alaska (Jewett *et al.* 1999).

Depending on the location and timing, oil spills could affect walruses in a number of ways. An offshore spill during open water may only affect a few walruses swimming through the affected area. However, spilled oil present along ice edges and ice leads in fall or spring during formation or breakup of ice presents a greater risk because of both the difficulties associated with cleaning oil in mixed, broken ice, and the presence of wildlife in prime feeding areas over the continental shelf during this period. Oil spills affecting areas where walruses and polar bears are concentrated, such as along off-shore leads, polynyas, preferred feeding areas, and terrestrial habitat used for denning or haul-outs would affect more animals than spills in other areas.

The potential impacts to Pacific walruses from a spill could be significant, particularly if subsequent cleanup efforts are ineffective. These potential impacts would be greatest when walrus are aggregated at coastal haulouts. For example, walruses would be most vulnerable to the effects of an oil spill at coastal haulouts if the oil comes within 60 km of the coast (Garlich-Miller *et al.* 2010, p. 87). Spilled oil during the ice-covered season not cleaned up could become part of the ice substrate and be eventually released back into the

environment during the following open-water season. During spring melt, oil would be collected by spill response activities, but it could eventually contact a limited number of walruses.

In the unlikely event there is an oil spill and walruses are in the same area, mitigation measures, especially those to deflect and deter animals from spilled areas, may minimize the associated risks. Fueling crews have personnel that are trained to handle operational spills and contain them. If a small offshore spill occurs, spill response vessels are stationed in close proximity and are required to respond immediately. A detailed discussion of oil spill prevention and response for walruses can be found at the following Web site: *http://www.fws.gov/Contaminants/FWS_OSCP_05/FWSContingencyTOC.htm.*

Although fuel and oil spills have the potential to cause adverse impacts to walruses and possibly some prey species, operational spills associated with the proposed exploration activities are not considered a major threat. Operational spills would likely be of a relatively small volume, and occur in areas of open water where walrus densities are expected to be low. Furthermore, blowout prevention technology would be required for all exploratory drilling operations in the Chukchi Sea by the permitting agencies, and the BOEM/BSEE considers the likelihood of a blowout occurring during exploratory drilling in the Chukchi Sea as negligible (OCS EIS/EA MMS 2007–026). The BOEM/BSEE operating stipulations, including oil spill prevention and response plans, reduce both the risk and scale of potential spills. For these reasons, any impacts associated with an operational spill are expected to be limited to a small number of animals.

Effects of Waste Discharge and Potential Oil Spills on Polar Bear

Individual polar bears can potentially be affected by Industry activities through waste product discharge and oil spills. In 1980, Canadian scientists performed experiments that studied the effects to polar bears of exposure to oil. Effects on experimentally oiled polar bears (where bears were forced to remain in oil for prolonged periods) included acute inflammation of the nasal passages, marked epidermal responses, anemia, anorexia, and biochemical changes indicative of stress, renal impairment, and death. Many effects did not become evident until several weeks after the experiment (Øritsland *et al.* 1981).

Oiling of the pelt causes significant thermoregulatory problems by reducing the insulation value. Irritation or damage to the skin by oil may further contribute to impaired thermoregulation. Experiments on live polar bears and pelts showed that the thermal value of the fur decreased significantly after oiling, and oiled bears showed increased metabolic rates and elevated skin temperature. Oiled bears are also likely to ingest oil as they groom to restore the insulation value of the oiled fur.

Oil ingestion by polar bears through consumption of contaminated prey, and by grooming or nursing, could have pathological effects, depending on the amount of oil ingested and the individual's physiological state. Death could occur if a large amount of oil is ingested or if volatile components of oil were aspirated into the lungs. Indeed, two of three bears died in the Canadian experiment, and it was suspected that the ingestion of oil was a contributing factor to the deaths. Experimentally oiled bears ingested much oil through grooming. Much of it was eliminated by vomiting and in the feces; some was absorbed and later found in body fluids and tissues.

Ingestion of sub-lethal amounts of oil can have various physiological effects on a polar bear, depending on whether the animal is able to excrete or detoxify the hydrocarbons. Petroleum hydrocarbons irritate or destroy epithelial cells lining the stomach and intestine, thereby affecting motility, digestion, and absorption.

Polar bears swimming in, or walking adjacent to, an oil spill could inhale petroleum vapors. Vapor inhalation by polar bears could result in damage to various systems, such as the respiratory and the central nervous systems, depending on the amount of exposure.

Oil may also affect food sources of polar bears. Seals that die because of an oil spill could be scavenged by polar bears. This would increase exposure of the bears to hydrocarbons and could result in lethal impact or reduced survival to individual bears. A local reduction in ringed seal numbers because of direct or indirect effects of oil could temporarily affect the local distribution of polar bears. A reduction in density of seals as a direct result of mortality from contact with spilled oil could result in polar bears not using a particular area for hunting. Possible impacts from the loss of a food source could reduce recruitment and/or survival.

The persistence of toxic subsurface oil and chronic exposures, even at sub-lethal levels, can have long-term effects on wildlife (Peterson *et al.* 2003). Although it may be true that small numbers of bears may be affected by an oil spill initially, the long-term impact could be much greater. Long-term oil effects could be substantial through interactions between natural environmental stressors and compromised health of exposed animals, and through chronic, toxic exposure because of bioaccumulation. Polar bears are biological sinks for pollutants because they are the apical predator of the Arctic ecosystem and are opportunistic scavengers of other marine mammals. Additionally, their diet is composed mostly of high-fat sealskin and blubber (Norstrom *et al.* 1988). The highest concentrations of persistent organic pollutants in Arctic marine mammals have been found in polar bears and seal-eating walruses near Svalbard (Norstrom *et al.* 1988; Andersen *et al.* 2001; Muir *et al.* 1999). As such, polar bears would be susceptible to the effects of bioaccumulation of contaminants associated with spilled oil, which could affect the bears' reproduction, survival, and immune systems. Sub-lethal, chronic effects of any oil spill may further suppress the recovery of polar bear populations due to reduced fitness of surviving animals.

In addition, subadult polar bears are more vulnerable than adults are to environmental effects (Taylor *et al.* 1987). Subadult polar bears would be most prone to the lethal and sub-lethal effects of an oil spill due to their proclivity for scavenging (thus increasing their exposure to oiled marine mammals) and their inexperience in hunting. Indeed, grizzly bear researchers in Katmai National Park suspected that oil ingestion contributed to the death of two yearling grizzly bears in 1989, after the *Exxon Valdez* oil spill. They detected levels of naphthalene and phenathrene in the bile of one of the bears. Because of the greater maternal investment a weaned subadult represents, reduced survival rates of subadult polar bears have a greater impact on population growth rate and sustainable harvest than reduced litter production rates (Taylor *et al.* 1987).

During the open water season (July to October), bears in the open water or on land may encounter and be affected by any such oil spill; however, given the seasonal nature of the Industry activities, the potential for direct negative impacts to polar bears would be minimized. During the ice-covered season (November to May), onshore Industry activities would have the greatest likelihood of exposing

transiting polar bears to potential oil spills. Although the majority of the Chukchi Sea polar bear population spends a large amount of time offshore on the annual or multi-year pack ice and along the Chukotka coastline, some bears could encounter oil from a spill regardless of the season and location.

Small spills of oil or waste products throughout the year by Industry activities on land could potentially affect small numbers of bears. The effects of fouling fur or ingesting oil or wastes, depending on the amount of oil or wastes involved, could be short-term or result in death. For example, in April 1988, a dead polar bear was found on Leavitt Island, in the Beaufort Sea, approximately 9.3 km (5 nautical miles) northeast of Oliktok Point. The cause of death was determined to be poisoning by a mixture that included ethylene glycol and Rhodamine B dye. While industrial in origin, the source of the mixture was unknown.

The major concern regarding large oil spills is the impact a spill would have on the survival and recruitment of the Chukchi Sea and southern Beaufort Sea polar bear populations that use the region. Currently, the Southern Beaufort Seas bear population is approximately 1,500 bears, and the Chukchi Sea bear population estimate is 2,000. These populations may be able to sustain the additional mortality caused by a large oil spill if a small number of bears are killed; however, the additive effect of numerous bear deaths due to the direct or indirect effects from a large oil spill are more likely to reduce population recruitment and survival. Indirect effects may occur through a local reduction in seal productivity or scavenging of oiled seal carcasses and other potential impacts, both natural and human-induced. The removal of a large number of bears from either population would exceed sustainable levels, potentially causing a decline in bear populations and affecting bear productivity and subsistence use.

The time of greatest impact from an oil spill to polar bears is most likely during the ice-covered season when bears use the ice. To access ringed and bearded seals, polar bears concentrate in shallow waters less that 300 m deep over the continental shelf and in areas with greater than 50 percent ice cover (Durner *et al.* 2004). At this time, bears may be exposed to any remnant oil from the previous open water season. Spilled oil also can concentrate and accumulate in leads and openings that occur during spring break-up and autumn freeze-up periods. Such a concentration of spilled oil would increase the chance that polar bears and their principal prey would be oiled.

Potential impacts of Industry waste products and oil spills suggest that individual bears could be impacted by this type of disturbance were it to occur. Depending on the amount of oil or wastes involved, and the timing and location of a spill, impacts could be short-term, chronic, or lethal. In order for bear population reproduction or survival to be impacted, a large-volume oil spill would have to take place. According to BOEM/BSEE, during exploratory activities, the probability of a large oil spill (defined as ≥ 1,000 barrels [bbls]) occurring throughout the duration of these proposed regulations (5 years) is very small. In addition, protocols for controlling waste products in project permits would limit exposure of bears to the waste products. Current management practices by Industry, such as requiring the proper use, storage, and disposal of hazardous materials, minimize the potential occurrence of such incidents. In the event of an oil spill, it is also likely that polar bears would be intentionally hazed to keep them away from the area, further reducing the likelihood of affecting the population. Oil spill contingency plans are authorized by project permitting agencies and, if necessary, would limit the exposure of bears to oil.

Description of Waste Product Discharge and Oil Spills

Waste products are substances that can be accidently introduced into the environment by Industry activities. Examples include ethyl glycol, drilling muds, or treated water. Generally, they are released in small amounts. Oil spills are releases of oil or petroleum products. In accordance with the National Pollutant Discharge Elimination System Permit Program, all oil companies must submit an oil spill contingency plan with their projects. It is illegal to discharge oil into the environment, and a reporting system requires operators to report even small spills. BOEM/BSEE classifies oil spills as either small (< 1,000 barrels [bbls]) or large (≥ 1,000 bbls). A volume of oil of 1,000 bbl equals 42,000 U.S. gallons (gal), or 158,987 liters (L). Reported small spills are those that have occurred during standard Industry operations. Examples include oil, gas, or hydraulic fluid spills from mechanized equipment or spills from pipelines or facilities. While oil spills are unplanned events, large spills are associated with oil platforms, such as drill rigs or pads and pipelines. There is generally some form of human error combined with faulty equipment, such as pipeline degradation, that causes a large spill.

Most regional oil spill information comes from the Beaufort Sea area, where oil and gas production has already been established. According to BOEM/BSEE, on the Beaufort and Chukchi OCS, Industry has drilled 35 exploratory wells, five of which occurred in the Chukchi Sea. The most recent drilling operation in the Chukchi Sea occurred in 1991. BOEM's most current data suggest that between 1977 and 1999, an average of 70 oil and 234 waste product spills occurred annually on the North Slope oil fields in the terrestrial and marine environment. Although most spills have been small (less than 50 bbl, 2,100 gal, or 7,950 L) by Industry standards, larger spills accounted for much of the annual volume. Historically, Industry has had 35 small spills totaling 26.7 bbl (1,121 gal, 4,245 L) in the Beaufort and Chukchi OCS. Of the 26.7 bbl spilled, approximately 24 bbl (1,008 gal, 3,816 L) were recovered or cleaned up. Seven large, terrestrial oil spills occurred between 1985 and 2009 on the Beaufort Sea North Slope. The largest oil spill occurred in the spring of 2006, where approximately 5,714 bbl (260,000 gal, 908,500 L) leaked from flow lines near a gathering center. In November 2009, a 1,095 bbl (46,000 gal, 174,129 L) oil spill occurred as well. Both of these spills occurred at production sites. More recently, in 2012, a gas blowout occurred at an exploration well where approximately 1,000 bbl (42,000 gal, 159,987 L) of drilling mud and an unknown amount of natural gas was expelled. These spills were terrestrial and posed minimal harm to polar bears and walruses. To date, no major exploratory offshore-related oil spills have occurred on the North Slope in either the Beaufort or Chukchi seas.

Historical large spills (≥ 1,000 bbl, 42,000 gal, or 159,987 L) associated with Alaskan oil and gas activities on the North Slope have been production-related, and have occurred at production facilities or pipelines connecting wells to the Trans-Alaska Pipeline System. The BOEM/BSEE estimates the chance of a large (> 1,000 bbl, 42,000 gal, or 159,987 L) oil spill from exploratory activities in the Chukchi Sea to be low based on the types of spills recorded in the Beaufort Sea. The greatest risk potential for oil spills from exploration activities likely occurs with the marine vessels. From past experiences, BOEM/BSEE believes these would most likely be localized and relatively small. Spills in the offshore or onshore environments classified as small could occur during normal operations (e.g., transfer of fuel,

handling of lubricants and liquid products, and general maintenance of equipment). The likelihood of small spills occurring is higher than large spills. However, because small spills would likely be contained and remediated quickly, their potential impacts on walruses and polar bears are expected to be low. There is a greater potential for large spills in the Chukchi Sea region from drilling platforms. Exploratory drilling platforms are required to have containment ability in case of a blowout as part of their oil spill contingency plans, where the likelihood of a large release during the 5-year timeframe of the proposed regulations remains minimal.

Our analysis of oil and gas development potential and subsequent risks was based on the BOEM/BSEE analysis that they conducted for the Chukchi Sea lease sale (MMS 2007 and BOEMRE 2011), which is the best available information. Due to the *Deepwater Horizon* (DWH) incident in the Gulf of Mexico, offshore oil and gas activities are under increased scrutiny. As such, BOEM/BSEE developed a very large oil spill analysis (BOEMRE 2011–041; *http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Environment/Environmental_Analysis/2011-041v1.pdf*), where the potential impacts of a very large oil spill to polar bears and Pacific walruses are described (sections IV.E.8 and IV.E.11, respectively).

Of the several potential impacts to Pacific walruses and polar bears from Industry activity in the Chukchi Sea, a very large oil spill is of the most concern during the duration of the proposed regulations. While not analyzed as part of standard operating conditions, we have addressed the analysis of a very large oil spill due to the potential that a spill of this magnitude could significantly impact Pacific walruses and polar bears. During the next 5 years, offshore exploratory drilling would be the predominant source of a very large oil spill in the unlikely event one occurred.

Multiple factors have been examined to compare and contrast an oil spill in the Arctic to that of *Deepwater Horizon.* In the event of a spill in the Chukchi Sea favorable factors that could limit the impact of a spill could include the drilling depth and the well pressures. The *Deepwater Horizon* blowout occurred in 5,000 ft (1,524 m) of water with well pressures of approximately 15,000 psi (approximately 103,421 kPa). (Schmidt 2012). The Chukchi Sea sites are calculated to have drilling depths of approximately 150 ft (46 m) and well pressures not to exceed 3,000 to 4,000 psi (approximately 20,684 to 27,579 kPa). With lower drilling depths and well pressures, well sites in the Chukchi Sea will be more accessible in the event of a spill. However, spill response and cleanup of an oil spill in the Arctic has not been fully vetted to the point where major concerns no longer remain.

The BOEM/BSEE has acknowledged difficulties in effectively responding to oil spills in broken ice conditions, and The National Academy of Sciences has determined that ''no current cleanup methods remove more than a small fraction of oil spilled in marine waters, especially in the presence of broken ice'' (NRC 2003). Current oil spill responses in the Chukchi Sea include three main response mechanisms, blowout prevention, *in-situ* burning, and chemical dispersants (*http://www.bsee.gov/OSRP/Shell-Chukchi-OSRP.aspx*.). Each response has associated strengths and weaknesses, where the success would be mostly dependent on weather conditions. The BOEM/BSEE advocates the use of non-mechanical methods of spill response, such as *in-situ* burning, during periods when broken ice would hamper an effective mechanical response (MMS 2008). An *in-situ* burn has the potential to rapidly remove large quantities of oil and can be employed when broken-ice conditions may preclude mechanical response. However, oil spill cleanup in the broken ice and open water conditions that characterize Arctic waters continues to be problematic.

In addition to the BOEM/BSEE analysis (BOEMRE 2011), policy and management changes have occurred within the Department of the Interior that are designed to increase the effectiveness of oversight activities and further reduce the probability and effects of an accidental oil spill (USDOI 2010). As a result, based on projections from BOEM/BSEE, we anticipate that the potential for a significant oil spill would remain small at the exploration stage; however, we recognize that should a large spill occur, effective strategies for oil spill cleanup in the broken ice and open-water conditions that characterize walrus and polar bear habitat in the Chukchi Sea are limited.

In the event of a large oil spill, Service-approved response strategies are in place to reduce the impact of a spill on walrus and polar bear populations. Service response efforts will be conducted under a 3-tier approach characterized as: (1) Primary response, involving containment, dispersion, burning, or cleanup of oil; (2) secondary response, involving hazing, herding, preventative capture/relocation, or additional methods to remove or deter wildlife from affected or potentially affected areas; and (3) tertiary response, involving capture, cleaning, treatment, and release of wildlife. If the decision is made to conduct response activities, primary and secondary response options will be most applicable, as little evidence exists that tertiary methods would be effective for cleaning oiled walruses or polar bears.

In 2012, the Service and representatives from oil companies operating in the Arctic conducted tests on polar bear fur to evaluate appropriate oil cleaning techniques specific to oil grades extracted from local Alaskan oil fields. The analysis is ongoing and will be reported in the future. In addition, capturing and handling of adult walruses is difficult and risky, as walruses do not react well to anesthesia, and calves have little probability of survival in the wild following capture and rehabilitation. In addition, many Alaska Native organizations are opposed to releasing rehabilitated marine mammals into the wild due to the potential for disease transmission.

All Industry projects would have project specific oil spill contingency plans that would be approved by the appropriate permitting agencies prior to the issuance of an LOA. The contingency plans have a wildlife component, which outlines protocols to minimize wildlife exposure, including exposure of polar bears and walruses, to oil spills. Operators in the OCS are advised to review the Service's *Oil Spill Response Plan for Polar Bears in Alaska* and the Pacific Walrus Response Plan at *http://www.fws.gov/Contaminants/FWS_OSCP_05/FWSContingencyTOC.htm* when developing spill-response tactics. Multiple factors will be considered when responding to an oil spill, including: The location of the spill; the magnitude of the spill; oil viscosity and thickness; accessibility to spill site; spill trajectory; time of year; weather conditions (i.e., wind, temperature, precipitation); environmental conditions (i.e., presence and thickness of ice); number, age, and sex of walruses and polar bears that are (or are likely to be) affected; degree of contact; importance of affected habitat; cleanup proposal; and likelihood of animal-human interactions.

As discussed above, large oil spills from Industry activities in the Chukchi and Beaufort seas and coastal regions that would impact walruses and polar bears have not yet occurred, although the exploration of oil and gas has increased the potential for large offshore oil spills. With limited background

information available regarding oil spills in the Arctic environment, the outcome of such a spill is uncertain. For example, the extent of impacts of a large oil spill as well as the types of equipment needed and potential for effective cleanup would be greatly influenced by seasonal weather and sea conditions, including temperature, winds, wave action, and currents. Based on the experiences of cleanup efforts following the *Deepwater Horizon* and *Exxon Valdez* oil spills, where logistical support was readily available and wildlife resources were nevertheless affected, spill response may be largely unsuccessful in open-water conditions. Arctic conditions and the remoteness of exploration activities would greatly complicate any spill response.

While it is extremely unlikely that a significant amount of oil would be discharged into the environment by an exploratory program during the proposed regulatory period, the Service is aware of the risk that hydrocarbon exploration entails and that a large spill could occur in the development and production of oil fields in the future, where multiple operations incorporating pads and pipelines would increase the possibility of oil spills and impacts to walruses and polar bears. The Service will continue to work to minimize impacts to walruses and polar bears from Industry activities, including reducing impacts of oil spills.

Potential Effects of Oil and Gas Industry Activities on Subsistence Uses of Pacific Walruses and Polar Bears

The open-water season for oil and gas exploration activities coincides with peak walrus hunting activities in the Chukchi Sea region. The subsistence harvest of polar bears can occur year-round in the Chukchi Sea, depending on ice conditions, with peaks usually occurring in spring and fall. Effects to subsistence harvests would be addressed in Industry POCs. The POCs are discussed in detail later in this section.

Noise and disturbances associated with oil and gas exploration activities have the potential to adversely impact subsistence harvests of walruses and polar bears by displacing animals beyond the hunting range (60 to 100 mi [96.5 to 161 km] from the coast) of these communities. Disturbances associated with exploration activities could also heighten the sensitivity of animals to humans with potential impacts to hunting success. Little information is available to predict the effects of exploration activities on the subsistence harvest of walruses and polar bears. Hunting success varies considerably from year to year because of variable ice and weather conditions. Changing walrus distributions due to declining sea ice and accelerated sea ice melt are currently affecting hunting opportunities.

Measures to mitigate potential effects of oil and gas exploration activities on marine mammal resources and subsistence use of those resources were identified and developed through previous BOEM/BSEE Lease Sale National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.) review and analysis processes. The Final Lease Stipulations for the Oil and Gas Lease Sale 193 in the Chukchi Sea identify several existing measures designed to mitigate potential effects of oil and gas exploration activities on marine mammal resources and subsistence use of those resources (*http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/Regional_Leasing/Alaska_Region/Alaska_Lease_Sales/Sale_193/Stips.pdf*).

Seven lease stipulations were selected by the Secretary of the Interior in the Final Notice of Sale for Lease 193. These are: Stipulation (1) Protection of Biological Resources; Stipulation (2) Orientation Program; Stipulation (3) Transportation of Hydrocarbons; Stipulation (4) Industry Site Specific Monitoring Program for Marine Mammal Subsistence Resources; Stipulation (5) Conflict Avoidance Mechanisms to Protect Subsistence Whaling and Other Marine Mammal Subsistence Harvesting Activities; Stipulation (6) Pre-Booming Requirements for Fuel Transfers; and Stipulation (7) Measures to Minimize Effects to Spectacled and Steller's Eiders during Exploration Activities.

Lease stipulations that would directly support minimizing impacts to walruses, polar bears and the subsistence use of those animals include Stipulations 1, 2, 4, 5, and 6. Stipulation 1 allows BOEM/BSEE to require the lessee to conduct biological surveys for previously unidentified biological populations or habitats to determine the extent and composition of the population or habitat. Stipulation 2 requires that an orientation program be developed by the lessee to inform individuals working on the project of the importance of environmental, social, and cultural resources, including how to avoid disturbing marine mammals and endangered species. Stipulation 4 provides for site-specific monitoring programs, which will provide information about the seasonal distributions of walruses and polar bears. The information can be used to improve evaluations of the threat of harm to the species and provides immediate information about their activities, and their response to specific events, where this stipulation applies specifically to the communities of Barrow, Wainwright, Point Lay, and Point Hope. This stipulation is expected to reduce the potential effects of exploration activities on walruses, polar bears, and the subsistence use of these resources. This stipulation also contributes important information to ongoing walrus and polar bear research and monitoring efforts.

Stipulation 5 will help reduce potential conflicts between subsistence hunters and proposed oil and gas exploration activities. This stipulation is meant to help reduce noise and disturbance conflicts from oil and gas operations during specific periods, such as peak hunting seasons. It requires that the lessee meet with local communities and subsistence groups to resolve potential conflicts. The consultations required by this stipulation ensure that the lessee, including contractors, consult and coordinate both the timing and sighting of events with subsistence users. The intent of these consultations is to identify any potential conflicts between proposed exploration activities and subsistence hunting opportunities in the coastal communities. Where potential conflicts are identified, BOEM/BSEE may require additional mitigation measures as identified by NMFS and the Service through MMPA authorizations. Finally, stipulation 6 will limit the potential of fuel spill into the environment by requiring the fuel barge to be surrounded by an oil spill containment boom during fuel transfer.

The BOEM/BSEE lease sale stipulations and mitigation measures will be applied to all exploration activities in the Chukchi Lease Sale Planning Area and the geographic region of the ITRs. The Service has incorporated these BOEM/BSEE lease sale stipulations into their analysis of impacts to walruses and polar bears in the Chukchi Sea.

In addition to the existing BOEM/BSEE Final Lease Stipulations described above, the Service has also developed additional mitigation measures that would be implemented through these ITRs. These stipulations are currently in place under our regulations published on June 11, 2008 (73 FR 33212), and will also apply if we adopt these proposed regulations. The following LOA stipulations, which would mitigate potential impacts to subsistence walrus and polar bear hunting from the proposed activities, apply to all incidental take authorizations:

(1) Prior to receipt of an LOA, applicants must contact and consult with the communities of Point Hope, Point Lay, Wainwright, and Barrow through their local government organizations to identify any additional measures to be taken to minimize adverse impacts to subsistence hunters in these communities. A POC will be developed if there is a general concern from the community that the proposed activities will impact subsistence uses of walruses or polar bears. The POC must address how applicants will work with the affected Native communities and what actions will be taken to avoid interference with subsistence hunting of walruses and polar bears. The Service will review the POC prior to issuance of the LOA to ensure that any potential adverse effects on the availability of the animals are minimized.

(2) Authorization will not be issued by the Service for activities in the marine environment that occur within a 40-mile (64 km) radius of Barrow, Wainwright, Point Hope, or Point Lay, unless expressly authorized by these communities through consultations or through a POC. This condition is intended to limit potential interactions between Industry activities and subsistence hunting in near shore environments.

(3) Offshore exploration activities will be authorized only during the open water season, which will not exceed the period of July 1 to November 30. This condition is intended to allow communities the opportunity to participate in subsistence hunts without interference and to minimize impacts to walruses during the spring migration. Exemption waivers to this operating condition may be issued by the Service on a case-by-case basis, based upon a review of seasonal ice conditions and available information on walrus and polar bear distributions in the area of interest.

(4) A 15-mile (24-km) separation must be maintained between all active seismic survey vessels and/or drilling rigs/vessels/platforms to mitigate cumulative impacts to resting, feeding, and migrating walruses.

Plan of Cooperation (POC)

As a condition of incidental take authorization, and to ensure that Industry activities do not impact subsistence opportunities for communities within the geographic region covered by the proposed regulations, any applicant requesting an LOA is required to present a record of communication that reflects discussions with the Alaska Native communities most likely affected by the activities. Prior to issuance of an LOA, Industry must provide evidence to the Service that an adequate POC has been coordinated with any affected subsistence community (or, as appropriate, with the EWC, the ANC, and the NSB) if, after community consultations, Industry and the community conclude that increased mitigation and monitoring is necessary to minimize impacts to subsistence resources. Where relevant, a POC will describe measures to be taken to mitigate potential conflicts between the proposed activity and subsistence hunting. If requested by Industry or the affected subsistence community, the Service will review these plans and provide guidance. The Service will reject POCs if they do not provide adequate safeguards to ensure that any taking by Industry would not have an unmitigable adverse impact on the availability of polar bears and walruses for taking for subsistence uses.

Included as part of the POC process and the overall State and Federal permitting process of Industry activities, Industry engages the Alaska Native communities in numerous informational meetings. During these community meetings, Industry must ascertain if community responses indicate that impact to subsistence uses would occur as a result of activities in the requested LOA. If community concerns suggest that Industry activities may have an impact on the subsistence uses of these species, the POC must provide the procedures on how Industry will work with the affected Native communities and what actions will be taken to avoid interfering with the availability of polar bears and walruses for subsistence harvest.

In making this finding, we considered the following: (1) Historical data regarding the timing and location of harvests; (2) effectiveness of mitigation measures stipulated by BOEM/BSEE-issued operational permits; (3) Service regulations proposed to be codified at 50 CFR 18.118 for obtaining an LOA, which include requirements for community consultations and POCs, as appropriate, between the applicants and affected Native communities; (4) effectiveness of mitigation measures stipulated by Service-issued LOAs; and (5) anticipated effects of the applicants' proposed activities on the distribution and abundance of walruses and polar bears. Based on the best scientific information available and the results of harvest data, including affected villages, the number of animals harvested, the season of the harvests, and the location of hunting areas, we find that the effects of the proposed exploration activities in the Chukchi Sea region would not have an unmitigable adverse impact on the availability of walruses and polar bears for taking for subsistence uses during the 5-year timeframe of the proposed regulations.

Analysis of Impacts of the Oil and Gas Industry on Pacific Walruses and Polar Bears in the Chukchi Sea

Pacific Walrus

Recent offshore activities in the Chukchi and Beaufort seas from the 1980s to the present highlight the type of documented impacts offshore activities can have on walruses. More oil and gas activity has occurred in the Beaufort Sea OCS than in the Chukchi Sea OCS. Many offshore activities required ice management (icebreaking), helicopter traffic, fixed wing aircraft monitoring, other support vessels, and stand-by barges. Although Industry has encountered walruses while conducting exploratory activities in the Beaufort and Chukchi seas, to date, no walruses are known to have been killed due to encounters associated with Industry activities.

1. Reported Observations

Aerial surveys and vessel based observations of walruses were carried out in 1989 and 1990, to examine the responses of walruses to drilling operations at three Chukchi Sea drill prospects (Brueggeman *et al.* 1990, 1991). Aerial surveys documented several thousand walruses in the vicinity of the drilling prospects; most of the animals (> 90 percent) were closely associated with sea ice. The observations demonstrated that: (1) Walrus distributions were closely linked with pack ice; (2) pack ice was near active drill prospects for short time periods; and (3) ice passing near active prospects contained relatively few animals. Thus, the effects of the drilling operations on walruses were short-term, temporary, and in a discrete area near the drilling operations, and the portion of the walrus population affected was small.

Between 2006 and 2011, monitoring by Industry during seismic surveys in the Chukchi Sea resulted in 1,801 observed encounters involving approximately 11,125 individual walruses (Table 3). We classified the behavior of walruses associated with these encounters as: (1) No reaction; (2) attention (watched vessel); (3) approach (moved toward vessel); (4) avoidance (moved away from vessel at normal speed); (5) escape or flee (moved away from vessel at high rate of speed); and (6) unknown. These classifications were

based on MMO on-site determinations or their detailed notes on walrus reactions that accompanied the observation. Data typically included the behavior of an animal or group when initially spotted by the MMO and any subsequent change in behavior associated with the approach and passing of the vessel. This monitoring protocol was designed to detect walruses far from the vessel and avoid and mitigate take, not to estimate the long-term impacts of the encounters on individual animals.

TABLE 3—SUMMARY OF PACIFIC WALRUS RESPONSES TO ENCOUNTERS WITH SEISMIC SURVEY VESSELS IN THE CHUKCHI SEA OIL AND GAS LEASE SALE AREA 193 IN 2006–2010 AS RECORDED BY ON-BOARD MARINE MAMMAL OBSERVERS

Walrus reaction	Number of encounters	Number of individuals	Mean (SE) individuals/ encounter	Mean (SE [a]) meters from vessel
None	955	7,310	8 (1.7)	710 (24)
Attention	285	1,419	5 (1.9)	446 (29)
Approach	47	89	2 (0.3)	395 (50)
Avoidance	435	940	2 (0.1)	440 (26)
Flee	47	170	4 (0.9)	382 (56)
Unknown	32	1,197	37 (29.0)	558 (78)
Total or overall mean	1,801	11,125	6 (1.1)	582 (15)

[a] Standard error.

Nonetheless, the data do provide insight as to the short-term responses of walruses to vessel encounters.

Descriptive statistics were estimated based on both the number of encounters and number of individuals involved (Table 3). For both metrics (encounters and individuals), the most prevalent behavioral response was no response (53 and 66 percent, respectively) (Table 3); followed by attention or avoidance (8 and 24 percent combined, respectively), with the fewest animals exhibiting a flight response (3 and 2 percent, respectively). Based on these observation data, it is likely that relatively few animals were encountered during these operations each year (less than 2 percent of a minimum population of 129,000) and that of those encountered, walrus responses to vessel encounters were minimal. The most vigorous observed reactions of walruses to the vessels was a flight response, which is within their normal range of activity. Walruses vigorously flee predators such as killer whales and polar bears. However, unlike a passing ship, those encounters are likely to last for some time causing more stress as predators often spend time pursuing, testing, and manipulating potential prey before initiating an attack. As most observed animals exhibited minimal responses to Industry activity and relatively few animals exhibited a flight response we do not anticipate that interactions would impact survival or reproduction of walrus at the individual or population level.

We do not know the length of time or distance traveled by walruses that approached, avoided, or fled from the vessels before resuming normal activities. However, it is likely that those responses lasted less than 30 minutes and covered less than 805 m (0.5 mi).

MMO data collected in 2012 for 48 walrus observations indicate that walrus encounter times ranged from less than 1 to 31 minutes, averaging 3 minutes. The shortest duration encounters usually involved single animals that did not react to the vessel or dove and were not seen again. The longest duration encounter occurred when a vessel was moving through broken ice and encountered several groups of walruses in rapid succession. These data indicate that most encounters were of single animals where behavioral response times were limited to short durations.

During 2006–2011, observations from Industry activities in the Beaufort Sea indicate that, in most cases, walruses appeared undisturbed by human interactions. Walrus have hauled out on the armor of offshore drilling islands or coastal facilities and exhibited mild reactions (raise head and observe) to helicopter noise. There is no evidence that there were any physical effects or impacts to these individual walruses based on the observed interactions with Industry. A more detailed account of Industry-generated noise effects can be found in the *Potential Effects of Oil and Gas Industry Activities on Pacific Walruses and Polar Bears, Pacific Walrus, 1. Disturbance from Noise* section.

2. Cumulative Impacts

The Status of the Pacific Walrus (*Odobenus rosmarus divergens*) (Garlich-Miller *et al.* 2011) prepared by the Service (*http://alaska.fws.gov/fisheries/mmm/walrus/pdf/review_2011.pdf*) and Jay *et al.* (2012) describe natural and human factors that could contribute to cumulative effects that could impact walruses into the future. Factors other than oil and gas activities that could affect walruses within the 5-year period of these proposed regulations include climate change, harvest, and increased shipping, all of which are discussed below.

A. Climate Change

Analysis of long-term environmental data sets indicates that substantial reductions in both the extent and thickness of the Arctic sea ice cover have occurred over the past 40 years. The record minimum sea ice extent occurred in September 2012 with 2002, 2005, 2007, 2009, 2010, and 2011 ice extent close to the record low and substantially below the 20-year mean (NSIDC 2012). Walruses rely on suitable sea ice as a substrate for resting between foraging bouts, calving, molting, isolation from predators, and protection from storm events. The juxtaposition of sea ice over shallow shelf habitat suitable for benthic feeding is important to walruses. Recent trends in the Chukchi Sea have resulted in seasonal sea ice retreat off the continental shelf and over deep Arctic Ocean waters, presenting significant adaptive challenges to walruses in the region. Observed impacts to walruses as a result of diminishing sea ice cover include: A northward shift in range and declines in Bering Sea haulout use; an increase in the speed of the spring migration; earlier formation and longer duration of Chukchi Sea coastal haulouts; and increased vulnerability to predation and disturbance while at Chukchi Sea coastal haulouts, resulting in increased mortality rates among younger animals. Postulated effects include: Premature separation of females and dependent calves; reductions in the prey base;

declines in animal health and condition; increased interactions with development activities; population decline; and the potential for the harvest to become unsustainable. Future studies investigating walrus distributions, population status and trends, harvest sustainability, and habitat use patterns in the Chukchi Sea are important for responding to walrus conservation and management issues associated with environmental and habitat changes.

B. Harvest

Walruses have an intrinsically low rate of reproduction and are thus limited in their capacity to respond to exploitation. In the late 19th century, American whalers intensively harvested walruses in the northern Bering and southern Chukchi seas. Between 1869 and 1879, catches averaged more than 10,000 per year, with many more animals struck and lost. The population was substantially depleted by the end of the century, and the commercial hunting industry collapsed in the early 1900s. Since 1930, the combined walrus harvests of the United States and Russian Federation have ranged from 2,300 to 9,500 animals per year. Notable harvest peaks occurred during 1930 to 1960 (4,500 to 9,500 per year) and in the 1980s (7,000 to 16,000 per year). Commercial hunting continued in the Russian Federation until 1991, under a quota system of up to 3,000 animals per year. Since 1992, the harvest of walruses has been limited to the subsistence catch of coastal communities in Alaska and Chukotka. Harvest levels through the 1990s ranged from approximately 4,100 to 7,600 animals per year and 3,800 to 6,800 in the 2000s. As described in detail earlier in the Subsistence Use and Harvest Patterns of Pacific Walruses and Polar Bears section, recent harvest levels are lower than historic highs. The Service is currently working to assess population size and sustainable harvest rates.

C. Commercial Fishing and Marine Vessel Traffic

Available data suggest that walruses rarely interact with commercial fishing and marine vessel traffic. Walruses are normally closely associated with sea ice, which limits their interactions with fishing vessels and barge traffic. However, as previously noted, the temporal and seasonal extent of the sea ice is projected to diminish in the future. Commercial shipping through the Northwest Passage and Northern Sea Route may increase in coming decades. Commercial fishing opportunities may also expand should the sea ice continue to diminish. The result could be increased temporal and spatial overlap between fishing and shipping operations and walrus habitat use and increased interactions between walruses and marine vessels.

Hunting pressure, declining sea ice due to climate change, and the expansion of commercial activities into walrus habitat all have potential to impact walruses. Combined, these factors are expected to present significant challenges to future walrus conservation and management efforts. The success of future management efforts will rely in part on continued investments in research investigating population status and trends and habitat use patterns. Research by the U.S. Geological Survey (USGS) and the Chukotka Branch of the Pacific Fisheries Research Center examining walrus habitat use patterns in the Chukchi Sea is beginning to provide useable results (Jay 2012, pers. comm.). In addition, the Service is beginning to develop and test some methods for a genetic mark-recapture project to estimate walrus population size and trends and demographic parameters. The effectiveness of various mitigation measures and management actions will also need to be continually evaluated through monitoring programs and adjusted as necessary. The decline in sea ice is of particular concern, and will be considered in the evaluation of future proposed activities and as more information on walrus population status becomes available.

Evaluation of Documented Impacts to Pacific Walrus

The proposed projects, including the most extensive activities, such as seismic surveys and exploratory drilling operations, identified by the petitioners are likely to result in some incremental cumulative effects to walruses through the potential exclusion or avoidance of walruses from feeding or resting areas and the disruption of associated biological behaviors. However, based on the habitat use patterns of walruses in the Chukchi Sea and their close association with seasonal pack ice, relatively small numbers of walruses are likely to be encountered in the open sea conditions where most of the proposed activities are expected to occur, with the exception of the Hanna Shoal area, where we can reliably predict that many walruses will remain even after the ice melts. Industry activities that occur near coastal haulouts, near Hanna Shoal, or intersect travel corridors between haulouts and Hanna Shoal would require close monitoring and additional special mitigation procedures, such as seasonal exclusions (e.g., July to September) of Industry activities from Hanna Shoal and routing vessel traffic and aircraft flights around walrus travel corridors. Required monitoring and mitigation measures, designed to minimize interactions between authorized projects and concentrations of resting or feeding walruses, are expected to limit interactions and trigger real time consultations if needed. Therefore, we conclude that the proposed exploration activities, especially as mitigated through the regulatory process, are not at this time expected to add significantly to the cumulative impacts on the walrus population from past, present, and future activities that are reasonably likely to occur within the 5-year period covered by these proposed regulations.

Polar Bear

Information regarding interactions between oil and gas activities and polar bears in the Chukchi and Beaufort seas has been collected for several decades. This analysis concentrates on the Chukchi Sea information collected through regulatory requirements and is useful in predicting how polar bears are likely to be affected by the proposed activities.

To date, most impacts to polar bears from Industry operations in the Chukchi Sea have been temporary disturbance events, some of which have led to deterrence events. Monitoring efforts by Industry required under previous regulations for the incidental take of polar bears documented various types of interactions between polar bears and Industry.

1. Reported Observations

From 1989 to 1991, Shell Western E&P conducted drilling operations in the Chukchi Sea. A total of 110 polar bears were recorded from aerial surveys and from support and ice management vessels during the 3 years. In 1989, 18 bears were sighted in the pack ice during the monitoring programs associated with the drilling program. In 1990, a total of 25 polar bears were observed on the pack ice in the Chukchi Sea between June 29 and August 11, 1990. Seventeen bears were encountered by the support vessel, *Robert LeMeur,* during an ice reconnaissance survey before drilling began at the prospects. During drilling operations, four bears were observed near (<9 km or 5.5 mi) active prospects, and the remainder were considerably beyond the drilling operation (15 to 40 km or 9.3 to 24.8 mi). These bears responded to the drilling or icebreaking operations by approaching (two bears), watching (nine bears), slowly moving away (seven

bears), or ignoring (five bears) the activities; response was not evaluated for two bears. During the 1991 drilling program, 64 polar bears were observed on the pack ice, and one was observed swimming south of the ice edge. The researchers of the 1990 monitoring program for the Shell exploration concluded that: (1) Polar bear distributions were closely linked to the pack ice; (2) the pack ice was near the active prospects for a brief time; and (3) the ice passing near active prospects contained few animals. These data were collected when sea ice in the region was more prevalent than today, and we anticipate that current and future operations will observe fewer bears; however, we expect that behaviorally the bears observed will react similarly.

Between 2006 and 2011, 16 offshore projects were issued incidental take authority for polar bears: Seven seismic surveys; four shallow hazards and site clearance surveys; and five environmental studies, including ice observation flights and onshore and offshore environmental baseline surveys. Observers associated with these 16 projects documented 62 individual bears in 47 different observations. These observations and bear responses are discussed below.

The majority of the bears were observed on land (50 percent; 31 of 62 polar bears). Twenty-one bears (34 percent) were recorded on the ice, mainly in unconsolidated ice on ice floes, and 10 bears (16 percent) were observed swimming in the water. Fifty-seven percent of the polar bears (35 of 62 bears) were observed from vessels, while 35 percent (22 of 62 bears) were sighted from aerial surveys and 8 percent (5 of 62 bears) were observed from the ground.

Of the 62 polar bears documented, 32 percent (20 of 62 bears) of the observations were recorded as Level B harassment takes, where the bears exhibited short-term, temporary reactions to the conveyance, vessel, plane, or vehicle, such as moving away from the conveyance. No polar bears were intentionally deterred. Sixty-five percent of the bears (40 of 62 bears) exhibited no behavioral reactions to the conveyance, while the reactions of 3 percent of the bears (2 of 62 bears) were unknown (not observed or not recorded).

Most polar bears were observed during secondary or support activities, such as aerial surveys or transiting between project areas. These activities were associated with a primary project, such as a seismic operation. No polar bears were observed during active seismic operations.

Additionally, other activities have occurred in the Chukchi Sea region that have resulted in reports of polar bear sightings to the Service. Five polar bear observations (11 individuals) were recorded during the University of Texas at Austin's marine geophysical survey performed by the U.S. Coast Guard (USCG) Cutter *Healy* in 2006. All bears were observed on the ice between July 21 and August 19. The closest point of approach distances of bears from the *Healy* ranged from 780 m to 2.5 km (853 yards [yd] to 1.5 mi). One bear was observed approximately 575 m (628.8 yd) from a helicopter conducting ice reconnaissance. Four of the groups exhibited possible reactions to the helicopter or vessel, suggesting that disturbances from offshore vessel operations when they occur are short-term and limited to minor changes in behavior.

In 2007, a female bear and her cub were observed approximately 100 meters (110 yd) from a drill pad at the Intrepid exploration drilling site, located on the Chukchi Sea coast south of Barrow. The bear did not appear concerned about the activity and eventually the female changed her direction of movement and left the area.

Additional information exists on Industry and polar bear encounters from the Beaufort Sea (76 FR 47010; August 3, 2011). Documented impacts on polar bears by Industry in the Beaufort Sea during the past 30 years appear minimal. Polar bears spend time on land, coming ashore to feed, den, or move to other areas. Recent studies suggest that bears are spending more time on land than they have in the past in response to changing ice conditions.

Annual monitoring reports from Industry activities and community observations in the Beaufort Sea indicate that fall storms, combined with reduced sea ice, force bears to concentrate along the coastline (between August to October) where bears remain until the ice returns. For this reason, polar bears have been encountered at or near most coastal and offshore production facilities, or along the roads and causeways that link these facilities to the mainland. During those periods, the likelihood of interactions between polar bears and Industry activities increases. During 2011, in the Beaufort Sea region, companies observed 237 polar bears in 140 sightings on land and in the nearshore marine environment. Of the 237 bears observed in 2011, 44 bears (19 percent of the total observed) were recorded as Level B takes as they were deterred (hazed) away from facilities and people. Industry monitoring reports indicate that most bears are observed within a mile of the coastline. Similarly, we expect intermittent periods with high concentrations of bears to occur along the Chukchi Sea coastline as 50 percent of the bear encounters between 2006 and 2011 were documented in the onshore habitat.

While no lethal take of polar bears has occurred in the Chukchi Sea, a lethal take associated with Industry occurred at the Beaufort Sea Endicott facility in 2011, when a security guard mistakenly used a crackershell in place of a bean bag deterrent round and killed the bear during a deterrence action. Prior to issuance of regulations, lethal takes by Industry were rare. Since 1968, there have been two documented cases, one in the winter of 1968–1969, and one in 1990, of lethal take of polar bears associated with oil and gas activities; in both of these instances, the lethal take was reported to be in defense of human life.

2. Cumulative Impacts

Cumulative impacts of oil and gas activities are assessed, in part, through the information we gain in monitoring reports, which are a required component of each operator's LOA under the authorizations. We have over 20 years of monitoring reports, and the information on all incidental and intentional polar bear interactions provides a comprehensive history of past effects of Industry activities on polar bears. We use the information on previous impacts to evaluate potential impacts from existing and future Industry activities and facilities. Additional information used in our cumulative effects assessment includes: Service, USGS, and other polar bear research and data; traditional knowledge of polar bear habitat use; anecdotal observations; and professional judgment.

While the number of LOAs being requested does not represent the potential for direct impact to polar bears, they do offer an index as to the effort and type of Industry activity that is currently being conducted. LOA trend data also help the Service track progress on various projects as they move through the stages of oil field development. An increase in Industry projects across the Arctic has the ability to increase bear-human interactions.

The Polar Bear Status Review describes cumulative effects of oil and gas development on polar bears in Alaska (see pages 175 to 181 of the status review). This document can be found at: *http://alaska.fws.gov/fisheries/mmm/polarbear/issues.htm*. The status review concentrated on oil and gas

development in the Beaufort Sea because of the established presence of Industry in the Beaufort Sea. The Service believes the conclusions of the status review would apply to Industry activities in the Chukchi Sea during the 5-year timeframe of the proposed regulations as the exploratory activities in the Beaufort Sea are similar to those being conducted and proposed in the Chukchi Sea.

In addition, in 2003, the National Research Council published a description of the cumulative effects that oil and gas development would have on polar bears and seals in Alaska. They concluded that:

(1) ''Industrial activity in the marine waters of the Beaufort Sea has been limited and sporadic and likely has not caused serious cumulative effects to ringed seals or polar bears.'' Industry activity in the Chukchi Sea during the timeframe of the proposed regulations would be limited to exploration activities, such as seismic, drilling, and support activities.

(2) ''Careful mitigation can help to reduce the effects of oil and gas development and their accumulation, especially if there is no major oil spill.'' The Service would use mitigation measures similar to those established in the Beaufort Sea to limit impacts of polar bears in the Chukchi Sea. ''However, the effects of full scale industrial development off the North Slope would accumulate through the displacement of polar bears and ringed seals from their habitats, increased mortality, and decreased reproductive success.'' Full-scale development of this nature would not occur during the prescribed timeframe of the proposed regulations in the Chukchi Sea.

(3) ''A major Beaufort Sea oil spill would have major effects on polar bears and ringed seals.'' One of the concerns for future oil and gas development is for those activities that occur in the marine environment due to the chance for oil spills to impact polar bears or their habitats. No production activities are planned for the Chukchi Sea during the duration of these proposed regulations. Oil spills as a result of exploratory drilling activity could occur in the Chukchi Sea; however, the probability of a large spill is expected to be minimal.

(4) ''Climatic warming at predicted rates in the Beaufort and Chukchi seas region is likely to have serious consequences for ringed seals and polar bears, and those effects will accumulate with the effects of oil and gas activities in the region.'' The Service is currently working to minimize the impacts of climate change on its trust species. The implementation of incidental take regulations is one effective way to address and minimize impacts to polar bears.

(5) ''Unless studies to address the potential accumulation of effects on North Slope polar bears or ringed seals are designed, funded, and conducted over long periods of time, it will be impossible to verify whether such effects occur, to measure them, or to explain their causes.'' Current studies in the Chukchi Sea are examining polar bear habitat use and distribution, reproduction, and survival relative to a changing sea ice environment.

Climate change, predominantly through sea ice decline, will alter polar bear habitat because seasonal changes, such as extended duration of open water, will preclude sea ice habitat use by restricting some bears to coastal areas. Biological effects on polar bears are expected to include increased movements or travel, changes in bear distribution throughout their range, changes to the access and allocation of denning areas, and increased open water swimming. Demographic effects that may be influenced by climate change include changes in prey availability to polar bears, a potential reduction in the access to prey, and changes in seal productivity.

In the Chukchi Sea, it is expected that the reduction of sea ice extent will affect the timing of polar bear seasonal movements between the coastal regions and the pack ice. If the sea ice continues to recede as predicted, the Service anticipates that there may be an increased use of terrestrial habitat in the fall period by polar bears on the western coast of Alaska and an increased use of terrestrial habitat by denning bears in the same area, which may expose bears to Industry activity. Mitigation measures would be effective in minimizing any additional effects attributed to seasonal shifts in distributions of denning polar bears during the 5-year timeframe of the proposed regulations. It is likely that, due to potential seasonal changes in abundance and distribution of polar bears during the fall, more frequent encounters may occur and that Industry may have to implement mitigation measures more often, for example, increasing polar bear deterrence events. As with the Beaufort Sea, the challenge in the Chukchi Sea will be predicting changes in ice habitat and coastal habitats in relation to changes in polar bear distribution and use of habitat.

A detailed description of climate change and its potential effects on polar bears by the Service can be found in the documents supporting the decision to list the polar bear as a threatened species under the ESA at: *http://alaska.fws.gov/fisheries/mmm/polarbear/esa.htm#listing.* Additional detailed information by the USGS regarding the status of the SBS stock in relation to decreasing sea ice due to increasing temperatures in the Arctic, projections of habitat and populations, and forecasts of rangewide status can be found at: *http://www.usgs.gov/newsroom/special/polar_bears.*

The proposed activities (drilling operations, seismic surveys, and support operations) identified by the petitioners are likely to result in some incremental cumulative effects to polar bears during the 5-year timeframe of the proposed regulations. This could occur through the potential exclusion or avoidance of polar bears from feeding, resting, or denning areas and disruption of associated biological behaviors. However, the level of cumulative effects, including those of climate change, during the 5-year timeframe of the proposed regulations would result in negligible effects on the bear population.

Evaluation of Documented Impacts on Polar Bears

Monitoring results from Industry, analyzed by the Service, indicate that little to no short-term impacts on polar bears have resulted from oil and gas activities. We evaluated both subtle and acute impacts likely to occur from industrial activity, and we determined that all direct and indirect effects, including cumulative effects, of industrial activities have not adversely affected the species through effects on rates of recruitment or survival. Based on past monitoring reports, the level of interaction between Industry and polar bears has been minimal. Additional information, such as subsistence harvest levels and incidental observations of polar bears near shore, provides evidence that these populations have not been adversely affected. For the 5-year timeframe of the proposed regulations, we anticipate the level of oil and gas Industry interactions with polar bears would likely increase in response to more bears on shore and more activity along the coast; however we do not anticipate significant impacts on bears to occur.

Summary of Take Estimates for Pacific Walruses and Polar Bears

Small Numbers Determination

As discussed in the ''Biological Information'' section, the dynamic nature of sea ice habitats influences seasonal and annual distribution and abundance of polar bears and walruses

in the specified geographical region (eastern Chukchi Sea). The following analysis demonstrates that, if we adopt the regulations as proposed, only small numbers of walruses and polar bears are likely to be taken incidental to the described Industry activities. This analysis is based upon known distribution patterns and habitat use of walruses and polar bears.

Pacific Walrus

The Service has based its small numbers determination on an examination of the best available information concerning the range of this species and its habitat use patterns (see Biological Information for additional details); information regarding the siting, timing, scope, and footprint of proposed activities (see Description of Activities for additional details); information regarding monitoring requirements and mitigation measures designed to avoid and mitigate incidental take of walruses during authorized activities (see Section 18.118 Mitigation, Monitoring, and Reporting Requirements in the Proposed Regulation Promulgation section for additional details); and the 193 lease sale stipulations by the Mineral Management Service (now BOEM in February 2008 regarding protection of biological resources. The objective of this analysis is to determine whether or not the proposed Industry activities described in the ITR petition are likely to impact small numbers of individual animals.

The specified geographic region covered by this request includes the waters (State of Alaska and OCS) and bed of the Chukchi Sea, as well as terrestrial habitat up to 40 km (25 mi) inland (Figure 1). The marine environment and terrestrial coastal haulouts are considered walrus habitat for this analysis. The petition specifies that offshore exploration activities would be limited to the July 1 to November 30 open-water season to avoid seasonal pack ice. Furthermore, the petition specifies that onshore or near shore activities would not occur in the vicinity of coastal walrus haulouts. Oil and gas activities anticipated and considered in our analysis include: (1) Offshore exploration drilling; (2) offshore 3D and 2D seismic surveys; (3) shallow hazards surveys; (4) other geophysical surveys, such as ice gouge, strudel scour, and bathymetry surveys; (5) geotechnical surveys; (6) onshore and offshore environmental studies; and (7) associated support activities for the aforementioned activities. A full description of these activities can be found in this document in the Description of Activities section.

Distribution of Walruses During the Open Water Season

During the July to November open-water season, the Pacific walrus population ranges well beyond the boundaries of the specified geographic region (Figure 1). Based on population surveys, haulout monitoring studies, and satellite tracking studies, the population generally occurs in three areas: The majority of males remain in the Bering Sea outside of the specified geographic region, and juveniles, adult females, and calves are distributed both in the western Chukchi Sea in the vicinity of Wrangel and Herald Islands in Russian waters, and another subset of females and young are in the eastern Chukchi Sea, which includes the specified geographic region, with high densities in the Hanna Shoal area (Fay 1982; Jay *et al.* 2012; Jay *et al.* pers. comm.). Therefore, the animals in the northeast Chukchi Sea that could potentially be influenced by Industry activities represent only a portion of the overall population.

Though the specified geographic region of these regulations (Figure 1) includes areas of potential walrus habitat, the actual area of Industry activities occurring within this region would be relatively small. The entire Chukchi Sea is approximately 600,000 km^2 (231,660 mi^2). The area of the specified geographic region (Figure 1) is approximately 240,000 km^2 (92,664 mi^2), and the area covered by Lease Sale 193 offered in 2006 was approximately 138,000 km^2 (53,282 mi^2), with currently active leases covering approximately 11,163 km^2 (4,310 mi^2). The Chukchi Sea is only a portion of the overall Pacific walrus range, and though most of it contains suitable walrus habitat, some portions are not suitable (e.g., where water depths exceed 100 m). However, if we assume that the entire 600,000 km^2 (231,660 mi^2) of the Chukchi Sea is utilized by walruses, then the specified geographic region (Figure 1) covers approximately 40 percent, Lease Sale 193 area covers approximately 23 percent, and current active leases cover approximately 2 percent of the Chukchi Sea, respectively. In any single year, and over the 5-year period of the proposed regulations, Industry activity would only occur on a portion of the active lease area. For example, AOGA indicates in its petition that one seismic survey would occur each year during the 5-year period of the proposed regulations. AOGA further estimates that a typical marine 3D seismic survey is expected to ensonify approximately 1680 km^2 (649 mi^2) of sea floor. This equates to roughly 15 percent of the active lease area, 0.7 percent of the specified geographic region (Figure 1), and 0.28 percent of the Chukchi Sea per year, respectively.

We anticipate that Industry activities would impact a relatively small proportion of the potential walrus habitat in the specified geographical region at any given time, whether or not the habitat is occupied by walruses. The narrow scope and footprint of activities that would occur in any given year limits the potential for Industry to interact with the subset of the walruses that may be distributed in the eastern Chukchi Sea during the open water season.

Habitat Use Patterns in the Specified Geographic Region

The subset of the overall walrus population residing in the eastern Chukchi Sea can be widespread and abundant depending on ice conditions and distribution. Walruses typically migrate into the region in early June along lead systems that form along the coast. Walruses summering in the eastern Chukchi Sea exhibit strong selection for sea ice habitats. Previous aerial survey efforts in the area found that 80 to 96 percent of walruses were closely associated with sea ice habitats, and that the number of walruses observed in open water habitats decreased significantly with distance from the pack ice (Gilbert 1999).

The distribution of the subset of the walrus population that occurs in the specified geographic region (Figure 1) each year is primarily influenced by the distribution and extent of seasonal pack ice, which is expected to vary substantially both seasonally and annually. In June and July, scattered groups of walruses are typically associated with loose pack ice habitats between Icy Cape and Point Barrow (Fay 1982; Gilbert et al. 1992). Recent walrus telemetry studies investigating foraging patterns suggest that many walruses focus foraging efforts near Hanna Shoal in the eastern Chukchi Sea, northwest of Point Barrow (Jay *et al.* pers. comm.). Recent walrus telemetry studies investigating foraging patterns suggest that many walruses focus foraging efforts near Hanna Shoal in the eastern Chukchi Sea, northwest of Point Barrow (Jay *et al.* pers. comm.). In August and September, concentrations of animals tend to be in areas of unconsolidated pack ice, usually within 100 km (62 mi) of the leading edge of the ice pack (Gilbert 1999). Individual groups occupying unconsolidated pack ice

typically range from fewer than 10 to more than 1,000 animals (Gilbert 1999; Ray et al. 2006). In August and September, the edge of the pack ice generally retreats north to approximately 71° N latitude (the majority of active lease blocks are between 71 and 72° N), but in light ice years can retreat north of the continental shelf (Douglas 2010), about 73 to 75° N. Sea ice normally reaches its minimum (northern) extent in September, and ice begins to reform rapidly in October and November. Walruses typically migrate out of the eastern Chukchi Sea in October in advance of the developing sea ice (Fay 1982; Jay et al. pers. comm.).

Sea ice has historically persisted in the Chukchi Sea region through the entire year although the extent of sea ice cover over continental shelf areas during the summer and fall has been highly variable. Over the past decade, sea ice has begun to retreat beyond shallow continental shelf waters in late summer. For example, in 5 of the last 8 years (2004 to 2012), the continental shelf waters of the eastern Chukchi Sea have become ice free in late summer, for a period ranging from a few weeks up to 2 months. Climate-based models suggest that the observed trend of rapid ice loss from continental shelf regions of the Chukchi Sea is expected to persist, and perhaps accelerate in the future (Douglas 2010).

Based on telemetry studies, during periods of minimal or no-ice cover over continental shelf regions of the eastern Chukchi Sea, we expect that most walruses in that subset of the population will either migrate out of the region beyond the scope of Industry activities in pursuit of more favorable ice habitats (i.e., the western Chukchi Sea), or relocate to coastal haulouts where they can rest on land between foraging excursions (Jay *et al.* pers. comm.*)*. Walruses occupying coastal haulouts along the Chukchi Sea coast tend to aggregate in large dense groups, which are vulnerable to disturbances that can result in trampling injuries and mortalities (Garlich-Miller *et al.* 2011). The AOGA petition specifically notes that Industry activities would not occur near coastal walrus haulouts. In addition, OCS Lease Sale Area 193 excluded a 40-km (25-mi) coastal buffer zone from the lease area to protect sensitive coastal habitats and mitigate potential interactions with subsistence hunting activities along the coast. We expect that a similar coastal buffer zone would be included in future lease sales in the region. Moreover, required mitigation measures for authorized activities pursuant to the proposed ITRs expressly forbid operating near coastal walrus haulouts (see mitigation measures below). For example, all support vessels and aircraft would be required to maintain a 1-mile buffer area around groups of walruses hauled out on land. Because of these limitations on authorized activities near coastal walrus haulouts, we do not expect that any takes would occur at coastal haulouts from Industry activities.

We expect that the density of walruses in offshore, open water environments, where most exploration activities are expected to occur, will be relatively low. Based on previous aerial survey efforts in the region (Gilbert 1999) and satellite tracking of walrus distributions and movement patterns in the region (Jay *et al.* pers. comm.), we expect that most walruses in the subset of the overall population in the specified geographic region will be closely associated with broken pack ice during the open water season. This would limit the exposure of walruses to seismic surveys and exploratory drilling operations, where we expect them to avoid these areas of broken ice cover in order to avoid damaging their equipment. Furthermore, during the open water season, walruses could also occupy coastal haulouts when ice concentrations are low in offshore regions.

Telemetry studies investigating the foraging behavior of walruses at coastal haulouts indicate that most animals forage within 30 to 60 km (19 to 37 mi) of coastal haulouts (Fischbach et al. 2010), primarily within the 40-km (25-mi) coastal buffer, which is closed to seismic surveys and drilling. However, some animals appear to make long foraging excursions from coastal haulouts to offshore feeding areas near Hanna Shoal (about 180 km, 112 mi from Point Lay, AK) (Jay et al. pers. comm.). This movement pattern is also apparent based on walrus vocalizations recorded at buoys placed throughout the area in 2010 (Delarue et al. 2012). Given this observed behavior, we expect that the density of walruses in the Hanna Shoal region could be relatively high compared with other offshore regions, even during periods of minimal sea ice cover. Most of the lease sale blocks in the Hanna Shoal region are currently not leased. Based on the significant biological value of Hanna Shoal to walrus foraging, and the likelihood of encountering large groups of foraging walruses in that area through September, we do not anticipate issuing any LOAs for seismic or drilling activity in the Hanna Shoal region during the 5-year span of these proposed regulations. In recognition of the biological significance of Hanna Shoal, BOEM has funded an environmental study of the area to better understand the resources available there. The BOEM study will be used, in part, by BOEM to determine if it would be appropriate to include or exclude areas within Hanna Shoal in future lease sales.

Authorized Industry activities occurring near Hanna Shoal could potentially encounter groups of walruses moving from other areas, including coastal haulouts. The timing and movement routes between coastal haulouts and offshore foraging areas are not known, and are likely to vary from year to year. Although it is difficult to predict where groups of moving or feeding walruses are likely to be encountered in offshore open water environments, monitoring requirements and adaptive mitigation measures are expected to limit interactions with groups of walruses encountered in open water habitats. For example, all authorized support vessels must employ MMOs to monitor for the presence of walruses and other marine mammals. Vessel operators are required to take every precaution to avoid interactions with concentrations of feeding or moving walruses, and must maintain a minimum 805-m (0.5-mi) operational exclusion zone around walrus groups encountered in open water. Although monitoring requirements and adaptive mitigation measures are not expected to completely eliminate interactions with walruses in open water habitats, they are expected to limit takes to relatively small numbers of animals.

In summary, based upon scientific knowledge of the habitat use patterns of walruses in the specified region, we expect the number of animals using pelagic waters during the operating season to be small relative to the number of animals using habitats preferred by and more favorable to walruses (i.e., pack ice habitats and/or coastal haulouts and near-shore environments). Industry would not be operating in areas with extensive ice cover due to their own operating limitations, and therefore Industry activities would avoid preferred walrus habitats. Further regulatory restrictions, such as stipulations on activities near haulouts, would insure that Industry activities would not occur in or near those preferred walrus habitat areas. Moreover, we do not anticipate issuing any LOAs for seismic and drilling activities in the Hanna Shoal area.

Most of the proposed oil and gas exploration activity is projected to occur in offshore areas under open water conditions where densities of walruses are expected to be low. Support vessels

and aircraft transiting through areas of broken ice habitat where densities of walruses may be higher would be required to employ monitoring and adaptive mitigation measures intended to reduce interactions with walruses. Accordingly, in consideration of the habitat characteristics where most exploration activities are expected to occur (open-water environments) and specific mitigation measures designed to reduce potential interactions with walruses and other marine mammals, we expect that interactions would be limited to relatively small numbers of animals compared to the number of walruses in the specified geographic region as well as the overall population.

The Use of Monitoring Requirements and Mitigation Measures

Holders of a LOA must use methods and conduct activities in a manner that minimizes adverse impacts on walruses to the greatest extent practicable. Monitoring programs are required to inform operators of the presence of marine mammals and sea ice. Adaptive management responses based on real-time monitoring information (described in these proposed regulations) would be used to avoid or minimize interactions with walruses. Adaptive management approaches, such as temporal or spatial limitations in response to the presence of walruses in a particular place or time, or in response to the occurrence of walruses engaged in a particularly sensitive activity, such as feeding, would be used to avoid or minimize interactions with walruses. A full description of the mitigation, monitoring, and reporting requirements associated with LOAs under these proposed regulations can be found in Section 18.118 Mitigation, Monitoring, and Reporting Requirements in the Proposed Regulation Promulgation section. Some of the mitigation measures expected to limit interactions with walruses would include:

1. Industry operations are not permitted in the geographic region until July 1. This condition is intended to allow walruses the opportunity to disperse from the confines of the spring lead system and minimize Industry interactions with subsistence walrus hunters.

2. Vessels must be staffed with MMOs to alert crew of the presence of walruses and initiate adaptive mitigation responses when walruses are encountered.

3. Vessels should take all practical measures (i.e., reduce speed, change course heading) to maintain a minimum 805-m (0.5-mi) operational exclusion zone around groups of 12 or more walruses encountered in the water. Vessels may not be operated in such a way as to separate members of a group of walruses.

4. Set back distances have been established between walruses and vessels to minimize impacts and limit disturbance, 805 m (0.5 mi) when walruses are observed on ice and in the water; 1,610 m (1 mi) when observed on land.

5. Set back distances have been established between walruses and aircraft to minimize impacts and limit disturbance. No fixed-wing aircraft may operate at an altitude lower than 457 m (1,500 ft) within 805 m of walrus groups observed on ice, or within 1,610 m (1 mi) of walrus groups observed on land. No rotary winged aircraft (helicopter) may operate at an altitude lower than 914 m (3,000 ft) elevation within a lateral distance of 1,610 m (1 mi) of walrus groups observed on land. These operating conditions are intended to avoid and mitigate the potential for walruses to be flushed from ice floes or land based haulouts.

6. Operators must maintain a minimum spacing of 24 km (15 mi) between all active seismic-source vessels and/or exploratory drilling operations to avoid significant synergistic or cumulative effects from multiple oil and gas exploration activities on foraging or migrating walruses.

7. Any offshore exploration activity expected to include the production of downward-directed, pulsed underwater sounds with sound source levels ≥160 dB re 1 μPa will be required to establish and monitor acoustic exclusion and disturbance zones.

8. Trained MMOs must establish acoustically verified exclusion zones for walruses surrounding seismic airgun arrays where the received level would be ≥ 180 dB re 1 μPa and ≥ 160 dB re 1 μPa in order to monitor incidental take.

9. Whenever 12 or more walruses are detected within the acoustically verified 160-dB re 1 μPa disturbance zone ahead of or perpendicular to the seismic vessel track, operators must immediately power down or shut down the seismic airgun array and/or other acoustic sources to ensure sound pressure levels at the shortest distance to the aggregation do not exceed 160-dB re 1 μPa, and operators cannot begin powering up the seismic airgun array until it can be established that there are no walrus aggregations within the 160-dB disturbance zone based upon ship course, direction to walruses, and distance from last sighting.

These proposed monitoring requirements and mitigation measures are not expected to completely eliminate the potential for walruses to be taken incidental to proposed Industry activities in the region; however, they are expected to significantly reduce the number of takes and the number of walruses affected. By substantially limiting the season of operation and by requiring buffer areas around groups of walruses on land, ice, and in open water areas, we conclude that mitigation measures would significantly reduce the number of walruses incidentally taken by Industry activities.

Pacific Walrus Small Number Conclusion

Based upon our review of the best scientific information available, we conclude that proposed Industry activities described in the AOGA petition would impact a relatively small number of walruses both within the specified geographical region and at the broader population scale. The information available includes the range, distribution, and habitat use patterns of Pacific walruses during the operating season, the relatively small footprint and scope of authorized projects both within the specified geographic region and on a broader scale within the known range of this species during the open water season, and consideration of monitoring requirements and adaptive mitigation measures intended to avoid and limit the number of takes to walruses encountered through the course of authorized activities.

Polar Bears

Distribution of Polar Bears During the Open Water Season

The number of polar bears occupying the specified geographical region during the open water exploration season, when the majority of Industry activities are anticipated to occur, is expected to be smaller than the number of animals distributed throughout their range. Polar bears range well beyond the boundaries of the proposed geographic region of the ITRs and the Chukchi Sea Lease Sale area. Even though they are naturally widely distributed throughout their range, a relatively large proportion of bears from the CS population utilize the western Chukchi Sea region of the Russian Federation during the open-water season. Concurrently, polar bears from the SBS population predominantly utilize the central Beaufort Sea region of the Alaskan and Canadian Arctic during this period. These areas are well outside of the geographic region of these

proposed regulations. Movement data and habitat use analysis of bears from the CS and SBS populations suggest that they utilize the ice habitat as a platform to survive, by feeding and resting. As the ice recedes, the majority of the bears ''move'' with it. A small portion of bears can be associated with the coast during the open-water season. In addition, open water is not selected habitat for polar bears and bears observed in the water likely try to move to a more stable habitat platform, such as sea ice or land.

As stated earlier, though the specified geographic region described for these proposed regulations (Figure 1) includes areas of potential polar bear habitat, the actual area of Industry activity occurring within this region would be relatively small. The entire Chukchi Sea is approximately 600,000 km² (231,660 mi²). The area of the specified geographic region (Figure 1) is approximately 240,000 km² (92,664 mi²), the lease sale 193 area offered for leases was approximately 138,000 km² (53,282 mi²) with active leases of approximately 11,163 km² (4,310 mi²). The Chukchi Sea is only a portion of the overall polar bear range and though most of it contains suitable polar bear habitat, some portions are not suitable. However, if we conservatively assume that the entire approximately 600,000 km² (231,660 mi²) of the Chukchi Sea is utilized by polar bears, then the specified geographic region (Figure 1) covers approximately 40 percent, the lease sale 193 area approximately 23 percent, and current active leases are approximately 2 percent of that area, respectively. In any single year, and over the 5-year period of the proposed regulations, Industry activity would occur only on a portion of the active lease area. Additionally, polar bear critical habitat encompasses 519,401 km² (200,541 mi²) of offshore and onshore habitat in the Chukchi Sea and Beaufort Sea regions. The area of individual marine activities is expected to comprise a small percentage of the lease area. Vessel operations would be operating in habitats where polar bear densities are expected to be lowest, that is, open water. Although it is impossible to predict with certainty the number of polar bears that might be present in the offshore environment of the lease sale area in a given year, or in a specific project area during the open water season, based on habitat characteristics where most exploration activities would occur (open-water environments) and based on scientific knowledge and observation of the species, only small numbers of polar bears are expected to contact Industry operations, and of those, only a small percentage will exhibit behavioral responses constituting take.

Likewise, the number of polar bears expected to be incidentally taken by Industry activities is a small proportion of the species' abundance. The estimate for Level B incidental take of polar bears is based on the past monitoring data from 2006 to 2011; the timing (open-water season) of the primary, off-shore Industry activities in the Chukchi Sea region; and the limited use of the pelagic environment by polar bears during the open water season. The estimated total Level B incidental take for polar bears is expected to be no more than 25 animals per year. This is a conservative estimate which takes into account that between 2006 to 2011, only 20 polar bears of the 62 polar bears documented by Industry exhibited behavioral responses equivalent to Level B harassment takes (3.3 Level B takes of bears/year). In addition, this number is less than 1 percent of the estimated combined populations of the CS and SBS polar bear stocks (approximately 2,000 and 1,500, respectively). This estimate reflects the low densities of polar bears occurring in the Alaska region of the Chukchi Sea during the open water period. The majority of interactions between polar bears and Industry are expected to occur near the pack ice edge habitat and in the terrestrial environment, where this estimate anticipates a potential increase of bears interacting with terrestrial facilities through the duration of the proposed regulatory period (2013 to 2018).

Habitat Use Patterns in the Specified Geographic Region

Within the specified geographic region, the number of polar bears utilizing open water habitats, where the primary activity (offshore exploration operations) would occur, is expected to be small relative to the number of animals utilizing pack ice habitats or coastal areas. Polar bears are capable of swimming long distances across open water (Pagano *et al.* 2012). However, polar bears remain closely associated with primarily sea ice (where food availability is high) during the open water season (Durner *et al.* 2004). A limited number of bears could also be found in coastal areas. We expect the number of polar bears using pelagic waters during proposed open water exploration activities to be very small relative to the number of animals exploiting more favorable habitats in the region (i.e., pack ice habitats and/or coastal haulouts and near shore environments).

In addition, a small portion of terrestrial habitat used by polar bears may be exposed to Industry activities. As detailed in the section, ''Description of Geographic Region,'' terrestrial habitat encompasses approximately 10,000 km² (3,861 mi²) of the NPR–A. Bears can use the terrestrial habitat to travel and possibly den and a smaller portion of this habitat situated along the coast could be potential polar bear denning habitat. However, the majority of coastal denning for the Chukchi Sea bears occurs along the Chukotka coast in the Russian Federation, outside of the geographic region. Hence, Industry activities operating on the Alaskan coast have the potential to impact only a small number of bears. Additionally, where terrestrial activities may occur in coastal areas of Alaska in polar bear denning habitat, specific mitigation measures would be required to minimize Industry impacts.

The Use of Monitoring Requirements and Mitigation Measures

Holders of an LOA must adopt monitoring requirements and mitigation measures designed to reduce potential impacts of their operations on polar bears. Restrictions on the season of operation (July to November) for marine activities are intended to limit operations to ice-free conditions when polar bear densities are expected to be low in the proposed area of Industry operation. Additional mitigation measures could also occur near areas important to polar bears, such as certain critical habitat. Specific aircraft or vessel traffic patterns would be implemented when appropriate to minimize potential impacts to animals. Monitoring programs are required to inform operators of the presence of marine mammals and sea ice incursions. Adaptive management responses based on real-time monitoring information (described in these proposed regulations) would be used to avoid or minimize interactions with polar bears. For example, in Industry activities in terrestrial environments where denning polar bears may be a factor, mitigation measures would require that den detection surveys be conducted and Industry will maintain at least a 1-mile distance from any known polar bear den. A full description of the required Industry mitigation, monitoring, and reporting requirements associated with an LOA can be found in 50 CFR 18.118. While these regulations describe a suite of general requirements, additional mitigation measures could be developed at the project level given site-specific parameters or techniques developed in the future that could be more

appropriate to minimize Industry impacts.

Polar Bear Small Number Conclusion

We anticipate a low number of polar bears at any given time in the areas the Service anticipates Industry operations to occur, and given the size of the operations and the mitigation factors anticipated, the likelihood of impacting individual animals is low. We anticipate that the type of take would be similar to that observed in 2006 to 2011, i.e., nonlethal, minor, short-term behavioral changes that would not cause a disruption in normal behavioral patterns of polar bears. In addition, these takes are unlikely to have cumulative effects from year to year as the response of bears would be short-lived, behavioral or physiological responses, and the same individuals are unlikely to be exposed in subsequent years. Overall, these takes (25 annually) are not expected to, or not likely to, result in adverse effects that would influence population-level reproduction, recruitment, or survival.

Small Number Summary and Conclusion

To summarize, relative to species abundance, only a small number of the Pacific walrus population and the Chukchi/Bering Sea and Southern Beaufort Sea polar bear populations would be impacted by the proposed Industry activities. This statement can be made with a high level of confidence because:

(1) Pacific walruses and polar bears are expected to remain closely associated with either sea ice or coastal zones, predominantly the Russian Federation coast, where food availability is high and not in open water where the proposed activity will occur.

(2) Vessel observations from 2006 to 2011 recorded encountering 11,125 walruses, which is a small percentage of the overall walrus population. Of this small percentage of walruses observed, only 2,448 individuals appeared to have exhibited mild forms of behavioral response, such as being attentive to the vessel. During the same 6-year period, 62 polar bears were observed, which is a small percentage of the overall Alaskan population. Of this small percentage of observed polar bears, only 20 individuals exhibited mild forms of behavioral response.

(3) The restrictive monitoring and mitigation measures that would be placed on Industry activity would further reduce the number of animals encountered and minimize any potential impacts to those individuals encountered.

(4) The continued predicted decline in sea ice extent as the result of climate change is anticipated to further reduce the number of polar bears and walruses occurring in the specified geographic area during Industry activities because neither species prefers using the open water environment. This would further reduce the potential for interactions with Industry activities during the open-water season.

In conclusion, given the spatial distribution, habitat requirements, and applicable data, the number of animals interacting with Industry activities would be small compared to the total Pacific walrus and the Chukchi and Southern Beaufort Sea polar bear populations. Moreover, not all interactions would result in a taking as defined under the MMPA, which will reduce the numbers even further.

Negligible Effects Determination

Based upon our review of the nature, scope, and timing of the proposed Industry activities and mitigation measures, and in consideration of the best available scientific information, it is our determination that the proposed activities would have a negligible impact on walruses and on polar bears. We considered multiple factors in our negligible effects determination.

The predicted impacts of proposed activities on walruses and polar bears would be nonlethal, temporary passive takes of animals. The documented impacts of previous similar Industry activities on walruses and polar bears, taking into consideration cumulative effects, provides direct information that the Industry activities analyzed for this proposed rule are likely to have minimal effects on individual polar bears and Pacific walruses. All anticipated effects would be short-term, temporary behavioral changes, such as avoiding the activity and/or moving away from the activity. Any minor displacement would not result in more than negligible impacts because habitats of similar value are not limited to the area of immediate activity and are abundantly available within the region. The Service does not anticipate that these impacts would cause disruptions in normal behavioral patterns of affected animals. The Service predicts the impacts of Industry activities on walruses and polar bears would be infrequent, sporadic, and of short duration. Additionally, impacts would involve passive forms of take and are not likely to adversely affect overall population reproduction, recruitment, or survival. The potential effects of Industry activities are discussed in detail in the section ''Potential Effects of Oil and Gas Industry Activities on Pacific Walruses and Polar Bears.''

A review of similar Industry activities and associated impacts in 2006 to 2011 in the Chukchi Sea, where the majority of the proposed activities will occur, help us predict the type of impacts and their effects that would likely occur during the timeframe of these proposed regulations. Vessel-based monitors reported 11,125 walrus sightings during Industry seismic activity from 2006 to 2011. Approximately 7,310 animals exhibited no response to the vessels while 2,448 of the walruses sighted exhibited some form of behavioral response to stimuli (auditory or visual) originating from the vessels, primarily exhibiting attentiveness, approach, avoidance, or fleeing. Again, other than a short-term change in behavior, no negative impacts were noted, and the numbers of animals demonstrating a change in behavior was small in comparison to those observed in the area.

During the same time, polar bears documented during Industry activities in the Chukchi Sea were observed on land, on ice, and in the water. Bears reacted to the human presence, whether the conveyance was marine, aerial, or ground-based, by distancing themselves from the conveyance. In addition, polar bear reactions recorded during activities suggested that 65 percent of the bears (45 of 62 individual bears) observed elicited no reaction at all to the human presence. Thirty-two percent of the bears exhibited temporary, minor changes in behavior.

Mitigation measures would limit potential effects of Industry activities. As described in the Small Numbers Determination, holders of an LOA must adopt monitoring requirements and mitigation measures designed to reduce potential impacts of their operations on walruses and polar bears. Seasonal restrictions, required monitoring programs to inform operators of the presence of marine mammals and sea ice incursions, den detection surveys for polar bears, and adaptive management responses based on real-time monitoring information (described in these proposed regulations) would all be used to avoid or minimize interactions with walruses and polar bears and therefore limit Industry effects on these animals. First, restricting Industry activities to the open water season (July to November) would insure that walruses reach preferred summering areas without interference and polar bears are able to exploit sea ice habitats in active lease sale areas. Second, MMOs on all

vessels would inform the bridge when animals are observed; identify their location and distance; and identify situations when seismic survey shutdowns, course changes, and speed reductions are needed to maintain specified separation distances designed to avoid take. Third, the data collected by MMOs about encounters would be used to refine mitigation measures, if needed. Fourth, standard operation procedures for aircraft (altitude requirements and lateral distance separation) are also designed to avoid disturbance of walruses and polar bears.

We conclude that any incidental take reasonably likely to occur as a result of carrying out any of the activities described under these proposed regulations would have no more than negligible impacts on walruses and polar bears in the Chukchi Sea region, and we do not expect any resulting disturbances to negatively impact the rates of recruitment or survival for the Pacific walrus and polar bear populations. As described in detail previously, we expect that only small numbers of Pacific walruses and polar bears would be exposed to Industry activities. We expect that individual Pacific walruses and polar bears that are exposed to Industry activity would experience only short-term, temporary, and minimal changes to their normal behavior. These proposed regulations would not authorize lethal take, and we do not anticipate any lethal take would occur.

Findings

We propose the following findings regarding this action:

Small Numbers

The Service finds that any incidental take reasonably likely to result from the effects of the proposed activities, as mitigated through this proposed regulatory process, would be limited to small numbers of walruses and polar bears relative to species abundance. In making this finding the Service developed a ''small numbers'' analysis based on: (a) The seasonal distributions and habitat use patterns of walruses and polar bears in the Chukchi Sea; (b) the timing, scale, and habitats associated with the proposed Industry activities and the limited potential area of impact in open water habitats, and (c) monitoring requirements and mitigation measures designed to limit interactions with, and impacts to, polar bears and walruses. We concluded that only a subset of the overall walrus population would occur in the specified geographic region and that a small proportion of that subset would encounter Industry operations. In addition, only a small proportion of the relevant stocks of polar bear and Pacific walruses will would likely be impacted by any individual project because: (1) The proportion of walruses and polar bears in the U.S. portion of the Chukchi Sea during the open water season is relatively small compared to numbers of walruses and polar bears found outside the region; (2) within the specified geographical region, only small numbers of walruses or polar bears will occur in the open water habitat where proposed marine Industry activities would occur; (3) within the specified geographical region, the scope of marine operations is a small percentage of the open water habitat in the region; (4) based on monitoring information, only a portion of the animals in the vicinity of the industrial activities are likely to be affected; and (5) the required monitoring requirements and mitigation measures described below would further reduce impacts.

The number of animals likely to be affected is small, because: (1) A small proportion of the Pacific walrus population or the Chukchi Sea and Southern Beaufort Sea polar bear populations will be present in the area of proposed Industry activities; (2) of that portion, a small percentage would come in contact with Industry activities; and (3) of those individuals that may come in contact with Industry activities, less than one-third are anticipated to exhibit a behavioral response that may rise to the level of harassment as defined by the MMPA.

Negligible Effects

The Service finds that any incidental take reasonably likely to result from the effects of oil and gas related exploration activities during the period of this proposed rule in the Chukchi Sea and adjacent western coast of Alaska would have no more than a negligible effect, if any, on Pacific walruses and polar bears. We make this finding based on the best scientific information available including: (1) The results of monitoring data from our previous regulations (19 years of monitoring and reporting data); (2) the review of the information generated by the listing of the polar bear as a threatened species and the designation of polar bear critical habitat; (3) the analysis of the listing of the Pacific walrus as a candidate species under the ESA, and the status of the population; (4) the biological and behavioral characteristics of the species, which is expected to limit the amount of interactions between walruses, polar bears, and Industry; (5) the nature of proposed oil and gas Industry activities; (6) the potential effects of Industry activities on the species, which would not impact the rates of recruitment and survival of polar bears and walruses in the Chukchi Sea Region; (7) the documented impacts of Industry activities on the species, where nonlethal, temporary, passive takes of animals occur, taking into consideration cumulative effects; (8) potential impacts of declining sea ice due to climate change, where both walruses and polar bears can potentially be redistributed to locations outside the areas of Industry activity due to their fidelity to sea ice; (9) mitigation measures that would minimize Industry impacts through adaptive management; and (10) other data provided by monitoring activities through the incidental take program in the Beaufort Sea (1993 to 2011) and in the Chukchi Sea (1989 to 1996 and 2006 to 2011).

In making these findings, we considered the following:

(1) The distribution of the species (through 10 years of aerial surveys and studies of feeding ecology, and analysis of pack ice position and Pacific walrus and polar bear distribution);

(2) The biological characteristics of the species (through harvest data, biopsy information, and radio telemetry data);

(3) The nature of oil and gas Industry activities;

(4) The potential effects of Industry activities and potential oil spills on the species;

(5) The probability of oil spills occurring;

(6) The documented impacts of Industry activities on the species taking into consideration cumulative effects;

(7) The potential impacts of climate change, where both walruses and polar bears can potentially be displaced from preferred habitat;

(8) Mitigation measures designed to minimize Industry impacts through adaptive management; and

(9) Other data provided by Industry monitoring programs in the Beaufort and Chukchi seas.

We also considered the specific Congressional direction in balancing the potential for a significant impact with the likelihood of that event occurring. The specific Congressional direction that justifies balancing probabilities with impacts follows:

> If potential effects of a specified activity are conjectural or speculative, a finding of negligible impact may be appropriate. A finding of negligible impact may also be appropriate if the probability of occurrence is low but the potential effects may be significant. In this case, the probability of occurrence of impacts must be balanced with

the potential severity of harm to the species or stock when determining negligible impact. In applying this balancing test, the Service will thoroughly evaluate the risks involved and the potential impacts on marine mammal populations. Such a determination will be made based on the best available scientific information [53 FR 8474, March 15, 1988; 132 Cong. Rec. S 16305 (October 15, 1986)].

We reviewed the effects of the oil and gas Industry activities on polar bears and walruses, including impacts from noise, physical obstructions, human encounters, and oil spills. Based on our review of these potential impacts, past LOA monitoring reports, and the biology and natural history of walruses and polar bears, we conclude that any incidental take reasonably likely to or reasonably expected to occur as a result of proposed activities would have a negligible impact on polar bear and Pacific walrus populations. Furthermore, we do not expect these disturbances to affect the annual rates of recruitment or survival for the walrus and polar bear populations. These proposed regulations would not authorize lethal take, and we do not anticipate any lethal take would occur.

The probability of an exploratory oil spill that would cause significant impacts to walruses and polar bears appears to be extremely low during the 5-year timeframe of the proposed regulations. In the unlikely event of a catastrophic spill, we will take immediate action to minimize the impacts to these species and reconsider the appropriateness of authorizations for incidental taking through section 101(a)(5)(A) of the MMPA.

Our finding of ''negligible impact'' applies to incidental take associated with the petitioner's oil and gas exploration activities as mitigated through the regulatory process. The regulations establish monitoring and reporting requirements to evaluate the potential impacts of authorized activities, as well as mitigation measures designed to minimize interactions with and impacts to walruses and polar bears. We would evaluate each request for an LOA based on the specific activity and the specific geographic location where the proposed activities are projected to occur to ensure that the level of activity and potential take is consistent with our finding of negligible impact. Depending on the results of the evaluation, we may grant the authorization, add further operating restrictions, or deny the authorization.

Conditions are attached to each LOA. These conditions minimize interference with normal breeding, feeding, and possible migration patterns to ensure that the effects to the species remain negligible. A complete list and description of conditions attached to all LOAs is found at the end of this document in the proposed changes to 50 CFR 18.118. Examples of conditions include, but are not limited to: (1) These regulations would not authorize intentional taking of polar bear or walruses or lethal incidental take; (2) for the protection of pregnant polar bears during denning activities (den selection, birthing, and maturation of cubs) in known denning areas, Industry activities may be restricted in specific locations during specified times of the year; and (3) each activity covered by an LOA requires a site specific plan of operation and a site specific polar bear and walrus interaction plan. We may add additional measures depending upon site specific and species specific concerns. We will analyze the required plan of operation and interaction plans to ensure that the level of activity and possible take are consistent with our finding that total incidental takes will have a negligible impact on polar bear and walruses and, where relevant, will not have an unmitigable adverse impact on the availability of these species for subsistence uses.

We have evaluated climate change in regard to polar bears and walruses. Although climate change is a worldwide phenomenon, it was analyzed as a contributing effect that could alter polar bear and walrus habitat and behavior. Climate change could alter walrus and polar bear habitat because seasonal changes, such as extended duration of open water, may preclude sea ice habitat use and restrict some animals to coastal areas. The reduction of sea ice extent, caused by climate change, may also affect the timing of walrus and polar bear seasonal movements between the coastal regions and the pack ice. If the sea ice continues to recede as predicted, it is hypothesized that polar bears may spend more time on land rather than on sea ice similar to what has been recorded in Hudson Bay, Canada. Climate change could also alter terrestrial denning habitat through coastal erosion brought about by accelerated wave action. The challenge will be predicting changes in ice habitat, barrier islands, and coastal habitats in relation to changes in polar bear and walrus distribution and use of habitat.

Climate change over time continues to be a major concern to the Service, and we are currently involved in the collection of baseline data to help us understand how the effects of climate change will be manifested in the Chukchi Sea walrus and polar bear populations. As we gain a better understanding of climate change effects on the Chukchi Sea population, we will incorporate the information in future actions. Ongoing studies include those led by the Service and the USGS Alaska Science Center to examine polar bear and walrus habitat use, reproduction, and survival relative to a changing sea ice environment. Specific objectives of the project include: An enhanced understanding of walrus and polar bear habitat availability and quality influenced by ongoing climate changes and the response by polar bears and walruses; the effects of walrus and polar bear responses to climate-induced changes to the sea ice environment on body condition of adults, numbers and sizes of offspring, and survival of offspring to weaning (recruitment); and population age structure.

Impact on Subsistence Take

Based on the best scientific information available and the results of harvest data, including affected villages, the number of animals harvested, the season of the harvests, and the location of hunting areas, we find that the effects of the proposed exploration activities in the Chukchi Sea region would not have an unmitigable adverse impact on the availability of walruses and polar bears for taking for subsistence uses during the period of the proposed rule. In making this finding, we considered the following: (1) Historical data regarding the timing and location of harvests; (2) effectiveness of mitigation measures stipulated by Service regulations for obtaining an LOA at 50 CFR 18.118, which includes requirements for community consultations and POCs, as appropriate, between the applicants and affected Native communities; (3) the BOEM/BSEE issued operational permits; (4) records on subsistence harvest from the Service's Marking, Tagging, and Reporting Program; (5) community consultations; (6) effectiveness of the POC process between Industry and affected Native communities; and (7) anticipated 5-year effects of proposed Industry activities on subsistence hunting.

Applicants must use methods and conduct activities identified in their LOAs in a manner that minimizes to the greatest extent practicable adverse impacts on walruses and polar bears, their habitat, and on the availability of these marine mammals for subsistence uses. Prior to receipt of an LOA, Industry must provide evidence to us that community consultations have occurred and that an adequate POC has been presented to the subsistence communities. Industry would be required to contact subsistence

communities that may be affected by its activities to discuss potential conflicts caused by location, timing, and methods of proposed operations. Industry must make reasonable efforts to ensure that activities do not interfere with subsistence hunting and that adverse effects on the availability of polar bear or walruses are minimized. Documentation of all consultations must be included in LOA applications. Documentation must include meeting minutes, a summary of any concerns identified by community members, and the applicant's responses to identified concerns. If community concerns suggest that the proposed activities could have an adverse impact on the subsistence uses of these species, conflict avoidance issues must be addressed through a POC. The POC would help ensure that oil and gas activities would continue not to have an unmitigable adverse impact on the availability of the species or stock for subsistence uses.

Where prescribed, holders of LOAs must have a POC on file with the Service and on site. The POC must address how applicants will work with potentially affected Native communities and what actions will be taken to avoid interference with subsistence hunting opportunities for walruses and polar bears. The POC must include:

1. A description of the procedures by which the holder of the LOA will work and consult with potentially affected subsistence hunters.

2. A description of specific measures that have been or will be taken to avoid or minimize interference with subsistence hunting of walruses and polar bears, and to ensure continued availability of the species for subsistence use.

The Service will review the POC to ensure any potential adverse effects on the availability of the animals are minimized. The Service will reject POCs if they do not provide adequate safeguards to ensure that marine mammals will remain available for subsistence use.

The Service has not received any reports and is aware of no information that indicates that polar bears or walruses are being or will be deflected from hunting areas or impacted in any way that diminishes their availability for subsistence use by the expected level of the proposed oil and gas activity. If there is evidence during the 5-year period of the proposed regulations that oil and gas activities are affecting the availability of walruses or polar bears for take for subsistence uses, we would reevaluate our findings regarding permissible limits of take and the measures required to ensure continued subsistence hunting opportunities.

Monitoring and Reporting

The purpose of monitoring requirements is to assess the effects of industrial activities on polar bears and walruses, to ensure that take is consistent with that anticipated in the negligible impact and subsistence use analyses, and to detect any unanticipated effects on the species. Monitoring plans document when and how bears and walruses are encountered, the number of bears and walruses, and their behavior during the encounter. This information allows the Service to measure encounter rates and trends of bear and walrus activity in the industrial areas (such as numbers and gender, activity, seasonal use) and to estimate numbers of animals potentially affected by Industry. Monitoring plans are site-specific and dependent on the proximity of the activity to important habitat areas, such as den sites, travel corridors, and food sources; however, all activities are required to report all sightings of polar bears and walruses. To the extent possible, monitors would record group size, age, sex, reaction, duration of interaction, and closest approach to Industry. Activities within the coast of the geographic region may incorporate daily watch logs as well, which record 24-hour animal observations throughout the duration of the project. Polar bear monitors would be incorporated into the monitoring plan if bears are known to frequent the area or known polar bear dens are present in the area. At offshore Industry sites, systematic monitoring protocols would be implemented to statistically monitor observation trends of walruses or polar bears in the nearshore areas where they usually occur.

Monitoring activities are summarized and reported in a formal report each year. The applicant must submit an annual monitoring and reporting plan at least 90 days prior to the initiation of a proposed activity, and the applicant must submit a final monitoring report to us no later than 90 days after the completion of the activity. We base each year's monitoring objective on the previous year's monitoring results.

We require an approved plan for monitoring and reporting the effects of oil and gas Industry exploration, development, and production activities on polar bears and walruses prior to issuance of an LOA. Since production activities are continuous and long-term, upon approval, LOAs and their required monitoring and reporting plans will be issued for the life of the activity or until the expiration of the regulations, whichever occurs first. Each year, prior to January 15, we require that the operator submit development and production activity monitoring results of the previous year's activity. We require approval of the monitoring results for continued operation under the LOA.

Treaty Obligations

The regulations are consistent with the Bilateral Agreement for the Conservation and Management of the Polar Bear between the United States and the Russian Federation. Article II of the Polar Bear Agreement lists three obligations of the Parties in protecting polar bear habitat:

(1) ''Take appropriate action to protect the ecosystem of which polar bears are a part;''

(2) ''Give special attention to habitat components such as denning and feeding sites and migration patterns;'' and

(3) ''Manage polar bear populations in accordance with sound conservation practices based on the best available scientific data.''

This proposed rule is also consistent with the Service's treaty obligations because it incorporates mitigation measures that ensure the protection of polar bear habitat. LOAs for industrial activities are conditioned to include area or seasonal timing limitations or prohibitions, such as placing 1-mile avoidance buffers around known or observed dens (which halts or limits activity until the bear naturally leaves the den), building roads perpendicular to the coast to allow for polar bear movements along the coast, and monitoring the effects of the activities on polar bears. Available denning habitat maps are provided by the USGS.

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 numbers of the sections or paragraphs that are unclearly

written, which sections or sentences are too long, the sections where you feel tables would be useful, etc.

Required Determinations

National Environmental Policy Act (NEPA) Considerations

We have prepared a draft EA in conjunction with this proposed rulemaking. Subsequent to closure of the comment period for this proposed rule, we will decide whether this rulemaking is a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the NEPA of 1969. For a copy of the EA, go to *http://www.regulations.gov* and search for Docket No. FWS–R7–ES–2012–0043 or contact the individual identified above in the section **FOR FURTHER INFORMATION CONTACT.**

Endangered Species Act (ESA)

On May 15, 2008, the Service listed the polar bear as a threatened species under the ESA (73 FR 28212), and on December 7, 2010 (75 FR 76086), the Service designated critical habitat for polar bear populations in the United States, effective January 6, 2011. Sections 7(a)(1) and 7(a)(2) of the ESA (16 U.S.C. 1536(a)(1) and (2)) direct the Service to review its programs and to utilize such programs in the furtherance of the purposes of the ESA and to ensure that a proposed action is not likely to jeopardize the continued existence of an ESA-listed species or result in the destruction or adverse modification of critical habitat. In addition, the status of walruses rangewide was reviewed for potential listing under the ESA. The listing of walruses was found to be warranted, but precluded due to higher priority listing actions (i.e., walrus is a candidate species) on February 10, 2011 (76 FR 7634). Consistent with our statutory obligations, the Service's Marine Mammal Management Office has initiated an intra-Service section 7 consultation regarding the effects of these proposed regulations on the polar bear with the Service's Fairbanks' Ecological Services Field Office. Consistent with established agency policy, we will also conduct a conference regarding the effects of these proposed regulations on the Pacific walrus. We will complete the consultation and conference prior to finalizing these proposed regulations.

Regulatory Planning and Review (Executive Order 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainly, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Expenses would be related to, but not necessarily limited to, the development of applications for LOAs, monitoring, recordkeeping, and reporting activities conducted during Industry oil and gas operations, development of polar bear interaction plans, and coordination with Alaska Natives to minimize effects of operations on subsistence hunting. Compliance with the rule, if adopted, is not expected to result in additional costs to Industry that it has not already been subjected to for the previous 7 years. Realistically, these costs are minimal in comparison to those related to actual oil and gas exploration, development, and production operations. The actual costs to Industry to develop the petition for promulgation of regulations and LOA requests probably does not exceed $500,000 per year, short of the ''major rule'' threshold that would require preparation of a regulatory impact analysis.

Small Business Regulatory Enforcement Fairness Act

We have determined that this rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule is not likely to result in a major increase in costs or prices for consumers, individual industries, or government agencies or have significant adverse effects on competition, employment, productivity, innovation, or on the ability of U.S. based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

We have also determined that this rule would not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. Oil companies and their contractors conducting exploration, development, and production activities in Alaska have been identified as the only likely applicants under the proposed regulations. Therefore, a Regulatory Flexibility Analysis is not required. In addition, these potential applicants have not been identified as small businesses and, therefore, a Small Entity Compliance Guide is not required. The proposed analysis for this rule is available from the individual identified above in the section **FOR FURTHER INFORMATION CONTACT**.

Takings Implications

This rule does not have takings implications under Executive Order 12630 because it proposes to authorize the nonlethal, incidental, but not intentional, take of walruses and polar bears by oil and gas Industry companies and thereby would exempt these companies from civil and criminal liability as long as they operate in compliance with the terms of their LOAs. Therefore, a takings implications assessment is not required.

Federalism Effects

This rule does not contain policies with Federalism implications sufficient to warrant preparation of a federalism impact summary statement under Executive Order 13132. The MMPA gives the Service the authority and responsibility to protect walruses and polar bears.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, et seq.), this rule would not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. The Service has determined and certifies pursuant to the Unfunded Mandates Reform Act that this proposed rulemaking would not impose a cost of $100 million or more in any given year on local or State governments or private entities. This rule would not produce a Federal mandate of $100 million or greater in any year, i.e., it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, Secretarial Order 3225,

and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a Government-to-Government basis. In accordance with Secretarial Order 3225 of January 19, 2001 [Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order 3206)], Department of the Interior Memorandum of January 18, 2001 (Alaska Government-to-Government Policy), Department of the Interior Secretarial Order 3317 of December 1, 2011 (Tribal Consultation and Policy), and the Native American Policy of the U.S. Fish and Wildlife Service, June 28, 1994, we acknowledge our responsibilities to work directly with Alaska Natives in developing programs for healthy ecosystems, to seek their full and meaningful participation in evaluating and addressing conservation concerns for listed species, to remain sensitive to Alaska Native culture, and to make information available to Tribes. We have evaluated possible effects on federally recognized Alaska Native tribes. Through the LOA process identified in the proposed regulations, Industry presents a communication process, culminating in a POC, if warranted, with the Native communities most likely to be affected and engages these communities in numerous informational meetings.

To facilitate co-management activities, cooperative agreements have been completed by the Service, the Alaska Nanuuq Commission (ANC), the Eskimo Walrus Commission (EWC), and Qayassiq Walrus Commission (QWC). The cooperative agreements fund a wide variety of management issues, including: Commission co-management operations; biological sampling programs; harvest monitoring; collection of Native knowledge in management; international coordination on management issues; cooperative enforcement of the MMPA; and development of local conservation plans. To help realize mutual management goals, the Service, ANC, QWC, and EWC regularly hold meetings to discuss future expectations and outline a shared vision of co-management.

The Service also has ongoing cooperative relationships with the NSB and the Inupiat-Inuvialuit Game Commission where we work cooperatively to ensure that data collected from harvest and research are used to ensure that polar bears are available for harvest in the future; provide information to co-management partners that allows them to evaluate harvest relative to their management agreements and objectives; and provide information that allows evaluation of the status, trends, and health of polar bear populations.

Civil Justice Reform

The Departmental Solicitor's Office has determined that these proposed regulations do not unduly burden the judicial system and meet the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

This rule contains information collection requirements. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The Information collection requirements included in this proposed rule are approved by the OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). The OMB control number assigned to these information collection requirements is 1018–0070, which expires on January 31, 2014. This control number covers the information collection, recordkeeping, and reporting requirements in 50 CFR 18, subpart I, which are associated with the development and issuance of specific regulations and LOAs.

Energy Effects

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule would provide exceptions from the taking prohibitions of the MMPA for entities engaged in the exploration of oil and gas in the Chukchi Sea and adjacent coast of Alaska. By providing certainty regarding compliance with the MMPA, this rule would have a positive effect on Industry and its activities. Although the rule would require Industry to take a number of actions, these actions have been undertaken by Industry for many years as part of similar past regulations. Therefore, this rule is not expected to significantly affect energy supplies, distribution, or use and does not constitute a significant energy action. No Statement of Energy Effects is required.

References

A list of the references cited in this rule is available on the Federal eRulemaking portal (*http://www.regulations.gov*) under Docket No. FWS–R7–ES–2012–0043.

List of Subjects in 50 CFR Part 18

Administrative practice and procedure, Alaska, Imports, Indians, Marine mammals, Oil and gas exploration, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

For the reasons set forth in the preamble, the Service proposes to amend part 18, subchapter B of chapter 1, title 50 of the Code of Federal Regulations to be effective June 11, 2013, to June 11, 2018, as set forth below.

PART 18—MARINE MAMMALS

■ 1. The authority citation of 50 CFR part 18 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Amend part 18 by adding a new subpart I to read as follows:

Subpart I—Nonlethal Taking of Pacific Walruses and Polar Bears Incidental to Oil and Gas Exploration Activities in the Chukchi Sea and Adjacent Coast of Alaska

Sec.
18.111 What specified activities does this subpart cover?
18.112 In what specified geographic region does this subpart apply?
18.113 When is this subpart effective?
18.114 How do I obtain a Letter of Authorization?
18.115 What criteria does the Service use to evaluate Letter of Authorization requests?
18.116 What does a Letter of Authorization allow?
18.117 What activities are prohibited?
18.118 What are the mitigation, monitoring, and reporting requirements?
18.119 What are the information collection requirements?

Subpart I—Nonlethal Taking of Pacific Walruses and Polar Bears Incidental to Oil and Gas Exploration Activities in the Chukchi Sea and Adjacent Coast of Alaska

§ 18.111 What specified activities does this subpart cover?

Regulations in this subpart apply to the nonlethal incidental, but not intentional, take of small numbers of Pacific walruses and polar bears by you (U.S. citizens as defined in § 18.27(c)) while engaged in oil and gas exploration activities in the Chukchi Sea and adjacent western coast of Alaska.

§ 18.112 In what specified geographic region does this subpart apply?

This subpart applies to the specified geographic region defined as the continental shelf of the Arctic Ocean adjacent to western Alaska. This area

includes the waters (State of Alaska and Outer Continental Shelf waters) and seabed of the Chukchi Sea, which encompasses all waters north and west of Point Hope (68°20′20″ N, −166°50′40 W, BGN 1947) to the U.S.–Russia Convention Line of 1867, west of a north–south line through Point Barrow (71°23′29″ N, −156°28′30 W, BGN 1944), and up to 200 miles north of Point Barrow. The region also includes the terrestrial coastal land 25 miles inland between the western boundary of the south National Petroleum Reserve–Alaska (NPR–A) near Icy Cape (70°20′00″ N, −148°12′00 W) and the north–south line from Point Barrow. This terrestrial region encompasses a portion of the Northwest and South Planning Areas of the NPR–A. Figure 1 shows the area where this subpart applies.

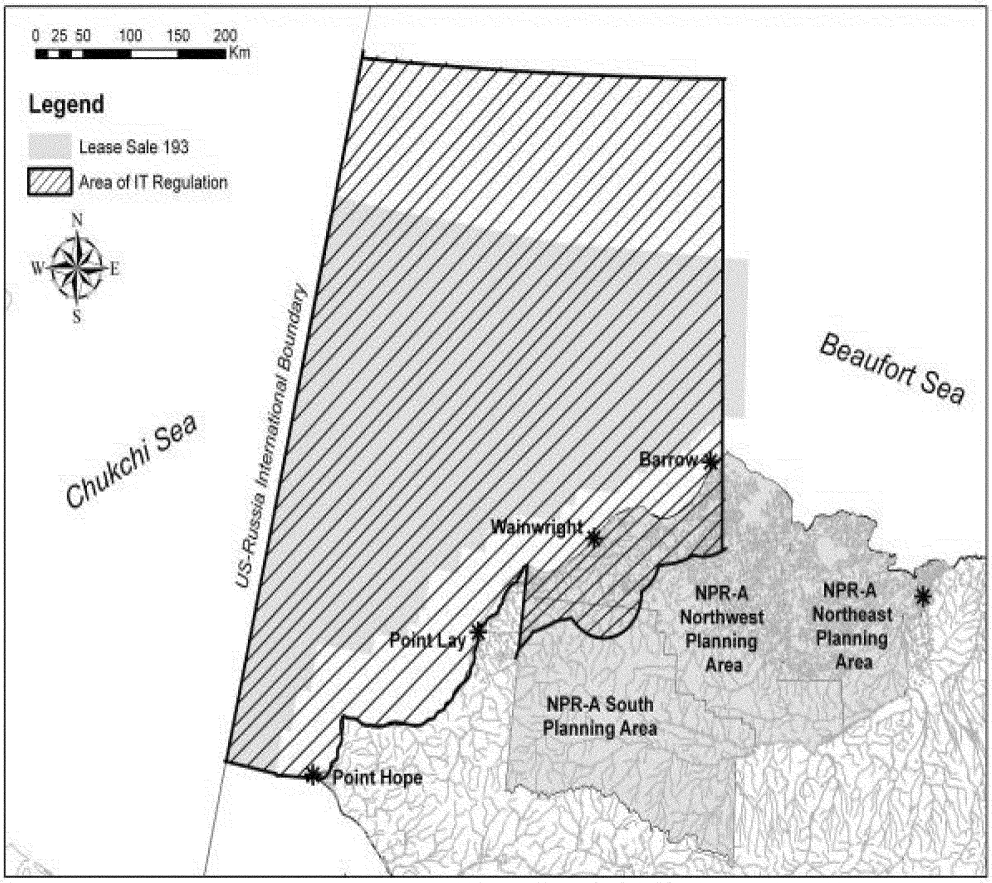

Figure 1: The geographic area of the Chukchi Sea and onshore coastal areas covered by the incidental take regulations.

§ 18.113 When is this subpart effective?

Regulations in this subpart are effective from [*effective date of the final rule*] through [*date 5 years from the effective date of the final rule*] for year-round oil and gas exploration activities.

§ 18.114 How do I obtain a Letter of Authorization?

(a) You must be a U.S. citizen as defined in § 18.27(c).

(b) If you are conducting an oil and gas exploration activity in the specified geographic region described in § 18.112 that may cause the taking of Pacific walruses (walruses) or polar bears and you want nonlethal incidental take authorization under this rule, you must apply for a Letter of Authorization for each exploration activity. You must submit the application for authorization to our Alaska Regional Director (see 50 CFR 2.2 for address) at least 90 days prior to the start of the proposed activity.

(c) Your application for a Letter of Authorization must include the following information:

(1) A description of the activity, the dates and duration of the activity, the specific location, and the estimated area affected by that activity, i.e., a plan of operation.

(2) A site-specific plan to monitor and mitigate the effects of the activity on polar bears and Pacific walruses that may be present during the ongoing activities (i.e., marine mammal monitoring and mitigation plan). Your monitoring program must document the effects to these marine mammals and estimate the actual level and type of

take. The monitoring requirements provided by the Service will vary depending on the activity, the location, and the time of year.

(3) A site-specific polar bear and/or walrus awareness and interaction plan. An interaction plan for each operation will outline the steps the applicant will take to limit animal-human interactions, increase site safety, and minimize impacts to marine mammals.

(4) A record of community consultation or a Plan of Cooperation (POC) to mitigate potential conflicts between the proposed activity and subsistence hunting, when necessary. Applicants must consult with potentially affected subsistence communities along the Chukchi Sea coast (Point Hope, Point Lay, Wainwright, and Barrow) and appropriate subsistence user organizations (the Eskimo Walrus Commission and the Alaska Nanuuq Commission) to discuss the location, timing, and methods of proposed operations and support activities and to identify any potential conflicts with subsistence walrus and polar bear hunting activities in the communities. Applications for Letters of Authorization must include documentation of all consultations with potentially affected user groups and a record of community consultation. Documentation must include a summary of any concerns identified by community members and hunter organizations, and the applicant's responses to identified concerns. Mitigation measures are described in § 18.118.

§ 18.115 What criteria does the Service use to evaluate Letter of Authorization requests?

(a) We will evaluate each request for a Letter of Authorization based on the specific activity and the specific geographic location. We will determine whether the level of activity identified in the request exceeds that analyzed by us in considering the number of animals likely to be taken and evaluating whether there will be a negligible impact on the species or adverse impact on the availability of the species for subsistence uses. If the level of activity is greater, we will reevaluate our findings to determine if those findings continue to be appropriate based on the greater level of activity that you have requested. Depending on the results of the evaluation, we may grant the authorization, add further conditions, or deny the authorization.

(b) In accordance with § 18.27(f)(5), we will make decisions concerning withdrawals of Letters of Authorization, either on an individual or class basis, only after notice and opportunity for public comment.

(c) The requirement for notice and public comment in paragraph (b) of this section will not apply if we determine that an emergency exists that poses a significant risk to the well-being of species or stocks of Pacific walruses or polar bears.

§ 18.116 What does a Letter of Authorization allow?

(a) Your Letter of Authorization may allow the nonlethal incidental, but not intentional, take of walruses and polar bears when you are carrying out one or more of the following activities:

(1) Conducting geological and geophysical surveys and associated activities;

(2) Drilling exploratory wells and associated activities; or

(3) Conducting environmental monitoring activities associated with exploration activities to determine specific impacts of each activity.

(b) Each Letter of Authorization will identify conditions or methods that are specific to the activity and location.

§ 18.117 What activities are prohibited?

(a) Intentional take and lethal incidental take of walruses or polar bears; and

(b) Any take that fails to comply with this part or with the terms and conditions of your Letter of Authorization.

§ 18.118 What are the mitigation, monitoring, and reporting requirements?

(a) *Mitigation.* Holders of a Letter of Authorization must use methods and conduct activities in a manner that minimizes to the greatest extent practicable adverse impacts on walruses and polar bears, their habitat, and on the availability of these marine mammals for subsistence uses. Dynamic management approaches, such as temporal or spatial limitations in response to the presence of marine mammals in a particular place or time or the occurrence of marine mammals engaged in a particularly sensitive activity (such as feeding), must be used to avoid or minimize interactions with polar bears, walruses, and subsistence users of these resources.

(1) *All applicants.*

(i) We require holders of Letters of Authorization to cooperate with us and other designated Federal, State, and local agencies to monitor the impacts of oil and gas exploration activities on polar bears and Pacific walruses.

(ii) Holders of Letters of Authorization must designate a qualified individual or individuals to observe, record, and report on the effects of their activities on polar bears and Pacific walruses.

(iii) Holders of Letters of Authorization must have an approved polar bear and/or walrus interaction plan on file with the Service and onsite, and polar bear awareness training will be required of certain personnel. Interaction plans must include:

(A) The type of activity and where and when the activity will occur, i.e., a plan of operation;

(B) A food and waste management plan;

(C) Personnel training materials and procedures;

(D) Site at-risk locations and situations;

(E) Walrus and bear observation and reporting procedures; and

(F) Bear and walrus avoidance and encounter procedures.

(iv) All applicants for a Letter of Authorization must contact affected subsistence communities to discuss potential conflicts caused by location, timing, and methods of proposed operations and submit to us a record of communication that documents these discussions. If appropriate, the applicant for a Letter of Authorization must also submit to us a POC that ensures that activities will not interfere with subsistence hunting and that adverse effects on the availability of polar bear or Pacific walruses are minimized (see § 18.114(c)(4)).

(v) If deemed appropriate by the Service, holders of a Letter of Authorization will be required to hire and train polar bear monitors to alert crew of the presence of polar bears and initiate adaptive mitigation responses.

(2) *Operating conditions for operational and support vessels.*

(i) Operational and support vessels must be staffed with dedicated marine mammal observers to alert crew of the presence of walruses and polar bears and initiate adaptive mitigation responses.

(ii) At all times, vessels must maintain the maximum distance possible from concentrations of walruses or polar bears. Under no circumstances, other than an emergency, should any vessel approach within an 805-m (0.5-mi) radius of walruses or polar bears observed on ice. Under no circumstances, other than an emergency, should any vessel approach within 1,610 m (1 mi) of groups of walruses observed on land or within an 805-m (0.5-mi) radius of polar bears observed on land.

(iii) Vessel operators must take every precaution to avoid harassment of concentrations of feeding walruses

when a vessel is operating near these animals. Vessels should reduce speed and maintain a minimum 805-m (0.5-mi) operational exclusion zone around groups of 12 or more walruses encountered in the water. Vessels may not be operated in such a way as to separate members of a group of walruses from other members of the group. When weather conditions require, such as when visibility drops, vessels should adjust speed accordingly to avoid the likelihood of injury to walruses.

(iv) The transit of operational and support vessels through the specified geographic region is not authorized prior to July 1. This operating condition is intended to allow walruses the opportunity to disperse from the confines of the spring lead system and minimize interactions with subsistence walrus hunters. Exemption waivers to this operating condition may be issued by the Service on a case-by-case basis, based upon a review of seasonal ice conditions and available information on walrus and polar bear distributions in the area of interest.

(v) All vessels must avoid areas of active or anticipated subsistence hunting for walrus or polar bear as determined through community consultations.

(vi) We may require a monitor on the site of the activity or on board drillships, drill rigs, aircraft, icebreakers, or other support vessels or vehicles to monitor the impacts of Industry's activity on polar bear and Pacific walruses.

(3) *Operating conditions for aircraft.*

(i) Operators of support aircraft should, at all times, conduct their activities at the maximum distance possible from concentrations of walruses or polar bears.

(ii) Under no circumstances, other than an emergency, should fixed wing aircraft operate at an altitude lower than 457 m (1,500 ft) within 805 m (0.5 mi) of walrus groups observed on ice, or within 1,610 m (1 mi) of walrus groups observed on land. Under no circumstances, other than an emergency, should rotary winged aircraft (helicopters) operate at an altitude lower than 914 m (3,000 ft) within 1,610 m (1 mi) of walrus groups observed on land. Under no circumstances, other than an emergency, should aircraft operate at an altitude lower than 457 m (1,500 ft) within 805 m (0.5 mi) of polar bears observed on ice or land. Helicopters may not hover or circle above such areas or within 805 m (0.5 mile) of such areas. When weather conditions do not allow a 457-m (1,500-ft) flying altitude, such as during severe storms or when cloud cover is low, aircraft may be operated below the required altitudes stipulated above. However, when aircraft are operated at altitudes below 457 m (1,500 ft) because of weather conditions, the operator must avoid areas of known walrus and polar bear concentrations and should take precautions to avoid flying directly over or within 805 m (0.5 mile) of these areas.

(iii) Plan all aircraft routes to minimize any potential conflict with active or anticipated walrus or polar bear hunting activity as determined through community consultations.

(4) *Additional mitigation measures for offshore exploration activities.*

(i) Offshore exploration activities will be authorized only during the open water season, defined as the period July 1 to November 30. Exemption waivers to the specified open water season may be issued by the Service on a case-by-case basis, based upon a review of seasonal ice conditions and available information on walrus and polar bear distributions in the area of interest.

(ii) To avoid significant additive and synergistic effects from multiple oil and gas exploration activities on foraging or migrating walruses, operators must maintain a minimum spacing of 24 km (15 mi) between all active seismic source vessels and/or exploratory drilling operations. No more than two simultaneous seismic operations and three offshore exploratory drilling operations will be authorized in the Chukchi Sea region at any time.

(iii) No offshore exploration activities will be authorized within a 64-km (40-mi) radius of the communities of Barrow, Wainwright, Point Lay, or Point Hope, unless provided for in a Service-approved, site-specific Plan of Cooperation as described in paragraph (a)(7) of this section.

(iv) Aerial monitoring surveys or an equivalent monitoring program acceptable to the Service will be required to estimate the number of walruses and polar bears in a proposed project area.

(5) *Additional mitigation measures for offshore seismic surveys.* Any offshore exploration activity expected to include the production of pulsed underwater sounds with sound source levels ≥160 dB re 1 μPa will be required to establish and monitor acoustic exclusion and disturbance zones and implement adaptive mitigation measures as follows:

(i) *Monitor zones.* Establish and monitor with trained marine mammal observers an acoustically verified exclusion zone for walruses surrounding seismic airgun arrays where the received level would be ≥ 180 dB re 1 μPa; an acoustically verified exclusion zone for polar bear surrounding seismic airgun arrays where the received level would be ≥ 190 dB re 1 μPa; and an acoustically verified walrus disturbance zone ahead of and perpendicular to the seismic vessel track where the received level would be ≥ 160 dB re 1 μPa.

(ii) *Ramp-up procedures.* For all seismic surveys, including airgun testing, use the following ramp-up procedures to allow marine mammals to depart the exclusion zone before seismic surveying begins:

(A) Visually monitor the exclusion zone and adjacent waters for the absence of polar bears and walruses for at least 30 minutes before initiating ramp-up procedures. If no polar bears or walruses are detected, you may initiate ramp-up procedures. Do not initiate ramp-up procedures at night or when you cannot visually monitor the exclusion zone for marine mammals.

(B) Initiate ramp-up procedures by firing a single airgun. The preferred airgun to begin with should be the smallest airgun, in terms of energy output (dB) and volume (in^3).

(C) Continue ramp-up by gradually activating additional airguns over a period of at least 20 minutes, but no longer than 40 minutes, until the desired operating level of the airgun array is obtained.

(iii) *Power down/Shutdown.* Immediately power down or shutdown the seismic airgun array and/or other acoustic sources whenever any walruses are sighted approaching close to or within the area delineated by the 180 dB re 1 μPa walrus exclusion zone, or polar bears are sighted approaching close to or within the area delineated by the 190 dB re 1 μPa polar bear exclusion zone. If the power down operation cannot reduce the received sound pressure level to 180 dB re 1 μPa (walrus) or 190 dB re 1 μPa (polar bears), the operator must immediately shutdown the seismic airgun array and/or other acoustic sources.

(iv) *Emergency shutdown.* If observations are made or credible reports are received that one or more walruses and/or polar bears are within the area of the seismic survey and are in an injured or mortal state, or are indicating acute distress due to seismic noise, the seismic airgun array will be immediately shutdown and the Service contacted. The airgun array will not be restarted until review and approval has been given by the Service. The ramp-up procedures provided in paragraph (a)(5)(ii) of this section must be followed when restarting.

(v) *Adaptive response for walrus aggregations.* Whenever an aggregation

of 12 or more walruses are detected within an acoustically verified 160 dB re 1 μPa disturbance zone ahead of or perpendicular to the seismic vessel track, the holder of this Authorization must:

(A) Immediately power down or shutdown the seismic airgun array and/or other acoustic sources to ensure sound pressure levels at the shortest distance to the aggregation do not exceed 160-dB re 1 μPa; and

(B) Not proceed with powering up the seismic airgun array until it can be established that there are no walrus aggregations within the 160 dB zone based upon ship course, direction, and distance from last sighting. If shutdown was required, the ramp-up procedures provided in paragraph (a)(5)(ii) of this section must be followed when restarting.

(6) *Additional mitigation measures for onshore exploration activities.*

(i) *Polar bear monitors.* If deemed appropriate by the Service, holders of a Letter of Authorization will be required to hire and train polar bear monitors to alert crew of the presence of polar bears and initiate adaptive mitigation responses.

(ii) *Efforts to minimize disturbance around known polar bear dens.* As part of potential terrestrial activities during the winter season, holders of a Letter of Authorization must take efforts to limit disturbance around known polar bear dens.

(A) *Efforts to locate polar bear dens.* Holders of a Letter of Authorization seeking to carry out onshore exploration activities in known or suspected polar bear denning habitat during the denning season (November to April) must make efforts to locate occupied polar bear dens within and near proposed areas of operation, utilizing appropriate tools, such as forward looking infrared (FLIR) imagery and/or polar bear scent trained dogs. All observed or suspected polar bear dens must be reported to the Service prior to the initiation of exploration activities.

(B) *Exclusion zone around known polar bear dens.* Operators must observe a 1-mile operational exclusion zone around all known polar bear dens during the denning season (November to April, or until the female and cubs leave the areas). Should previously unknown occupied dens be discovered within 1 mile of activities, work in the immediate area must cease and the Service contacted for guidance. The Service will evaluate these instances on a case-by-case basis to determine the appropriate action. Potential actions may range from cessation or modification of work to conducting additional monitoring, and the holder of the authorization must comply with any additional measures specified.

(7) *Mitigation measures for the subsistence use of walruses and polar bears.* Holders of Letters of Authorization must conduct their activities in a manner that, to the greatest extent practicable, minimizes adverse impacts on the availability of Pacific walruses and polar bears for subsistence uses.

(i) *Community Consultation.* Prior to receipt of a Letter of Authorization, applicants must consult with potentially affected communities and appropriate subsistence user organizations to discuss potential conflicts with subsistence hunting of walrus and polar bear caused by the location, timing, and methods of proposed operations and support activities (see § 18.114(c)(4) for details). If community concerns suggest that the proposed activities may have an adverse impact on the subsistence uses of these species, the applicant must address conflict avoidance issues through a Plan of Cooperation as described below.

(ii) *Plan of Cooperation (POC).* Where prescribed, holders of Letters of Authorization will be required to develop and implement a Service approved POC.

(A) The POC must include:

(*1*) A description of the procedures by which the holder of the Letter of Authorization will work and consult with potentially affected subsistence hunters; and

(*2*) A description of specific measures that have been or will be taken to avoid or minimize interference with subsistence hunting of walruses and polar bears and to ensure continued availability of the species for subsistence use.

(B) The Service will review the POC to ensure that any potential adverse effects on the availability of the animals are minimized. The Service will reject POCs if they do not provide adequate safeguards to ensure the least practicable adverse impact on the availability of walruses and polar bears for subsistence use.

(b) *Monitoring.*

Depending on the siting, timing, and nature of proposed activities, holders of Letters of Authorization will be required to:

(1) Maintain trained, Service-approved, on-site observers to carry out monitoring programs for polar bears and walruses necessary for initiating adaptive mitigation responses.

(i) Marine Mammal Observers (MMOs) will be required on board all operational and support vessels to alert crew of the presence of walruses and polar bears and initiate adaptive mitigation responses identified in paragraph (a) of this section, and to carry out specified monitoring activities identified in the marine mammal monitoring and mitigation plan (see paragraph (b)(2) of this section) necessary to evaluate the impact of authorized activities on walruses, polar bears, and the subsistence use of these subsistence resources. The MMOs must have completed a marine mammal observer training course approved by the Service.

(ii) Polar bear monitors. Polar bear monitors will be required under the monitoring plan if polar bears are known to frequent the area or known polar bear dens are present in the area. Monitors will act as an early detection system concerning proximate bear activity to Industry facilities.

(2) Develop and implement a site-specific, Service-approved marine mammal monitoring and mitigation plan to monitor and evaluate the effects of authorized activities on polar bears, walruses, and the subsistence use of these resources.

(i) The marine mammal monitoring and mitigation plan must enumerate the number of walruses and polar bears encountered during specified exploration activities, estimate the number of incidental takes that occurred during specified exploration activities (i.e., document immediate behavioral responses as well as longer term when possible), and evaluate the effectiveness of prescribed mitigation measures. The Service needs comprehensive observations to determine if encounters with Industry activities have a negligible impact. This not only includes the type of behavioral response, but also the duration of the response until previous behaviors are resumed. Ideally, this will involve a random sampling of individuals and observations of those individuals prior to, during, and following an encounter. This may require the use of additional vessels or aircraft or telemetry equipment to track animals encountered for extended periods of time. For example, resting walruses flushed from an ice floe would need to be tracked until they subsequently hauled out on the ice to rest. In addition, such a project could involve both opportunistic data collection (during the course of normal activities) and planned experimentation.

(ii) Applicants must fund an independent peer review of proposed monitoring plans and draft reports of monitoring results. This peer review will consist of independent reviewers

who have knowledge and experience in statistics, marine mammal behavior, and the type and extent of the proposed operations. The applicant will provide the results of these peer reviews to the Service for consideration in final approval of monitoring plans and final reports. The Service will distribute copies of monitoring reports to appropriate resource management agencies and co-management organizations.

(3) Cooperate with the Service and other designated Federal, State, and local agencies to monitor the impacts of oil and gas exploration activities in the Chukchi Sea on walruses or polar bears. Where insufficient information exists to evaluate the potential effects of proposed activities on walruses, polar bears, and the subsistence use of these resources, holders of Letters of Authorization may be required to participate in joint monitoring and/or research efforts to address these information needs and insure the least practicable impact to these resources. These monitoring and research efforts must employ rigorous study designs (e.g., before-after, control-impact [BACI]) and sampling protocols (e.g., ground-truthed remote sensing) in order to provide useful information. Information needs in the Chukchi Sea include, but are not limited to:

(i) Distribution, abundance, movements, and habitat use patterns of walruses and polar bears in offshore environments;

(ii) Patterns of subsistence hunting activities by the Native Villages of Kivalina, Point Hope, Point Lay, Wainwright, and Barrow for walruses and polar bears;

(iii) Immediate and longer term (when possible) behavioral and other responses of walruses and polar bears to seismic airguns, drilling operations, vessel traffic, and fixed wing aircraft and helicopters;

(iv) Contaminant levels in walruses, polar bears, and their prey;

(v) Cumulative effects of multiple simultaneous operations on walruses and polar bears; and

(vi) Oil spill risk assessment for the marine and shoreline environment of walruses, polar bears, their prey, and important habitat areas (e.g., coastal haulouts and den sites).

(c) *Reporting requirements.*

Holders of Letters of Authorization must report the results of specified monitoring activities to the Service's Alaska Regional Director (see 50 CFR 2.2 for address).

(1) *In-season monitoring reports.*

(i) *Activity progress reports.* Operators must keep the Service informed on the progress of authorized activities by:

(A) Notifying the Service at least 48 hours prior to the onset of activities;

(B) Providing weekly progress reports of authorized activities noting any significant changes in operating state and or location; and

(C) Notifying the Service within 48 hours of ending activity.

(ii) *Walrus observation reports.* The operator must report, on a weekly basis, all observations of walruses during any Industry operation. Information within the observation report will include, but is not limited to:

(A) Date, time, and location of each walrus sighting;

(B) Number, sex, and age of walruses (if determinable);

(C) Observer name, company name, vessel name or aircraft number, LOA number, and contact information;

(D) Weather, visibility, and ice conditions at the time of observation;

(E) Estimated distance from the animal or group when initially sighted, at closest approach, and end of the encounter;

(F) Industry activity at time of sighting and throughout the encounter. If a seismic survey, record the estimated radius of the zone of ensonification;

(G) Behavior of animals at initial sighting, any change in behavior during the observation period, and distance from the observers associated with those behavioral changes;

(H) Detailed description of the encounter;

(I) Duration of the encounter;

(J) Duration of any behavioral response (e.g., time and distance of a flight response) and;

(K) Actions taken.

(iii) *Polar bear observation reports.* The operator must report, within 24 hours, all observations of polar bears during any Industry operation. Information within the observation report will include, but is not limited to:

(A) Date, time, and location of observation;

(B) Number, sex, and age of bears (if determinable);

(C) Observer name, company name, vessel name, LOA number, and contact information;

(D) Weather, visibility, and ice conditions at the time of observation;

(E) Estimated closest point of approach for bears from personnel and/or vessel/facilities;

(F) Industry activity at time of sighting, and possible attractants present;

(G) Behavior of animals at initial sighting and after contact;

(H) Description of the encounter;

(I) Duration of the encounter; and

(J) Actions taken.

(iv) *Notification of incident report.* Reports should include all information specified under the species observation report, as well as a full written description of the encounter and actions taken by the operator. The operator must report to the Service within 24 hours:

(A) Any incidental lethal take or injury of a polar bear or walrus; and

(B) Observations of walruses or polar bears within prescribed mitigation monitoring zones.

(2) *After-action monitoring reports.*

The results of monitoring efforts identified in the marine mammal monitoring and mitigation plan must be submitted to the Service for review within 90 days of completing the year's activities. Results must include, but are not limited to, the following information:

(i) A summary of monitoring effort including: Total hours, total distances, and distribution through study period of each vessel and aircraft;

(ii) Analysis of factors affecting the visibility and detectability of walruses and polar bears by specified monitoring;

(iii) Analysis of the distribution, abundance, and behavior of walrus and polar bear sightings in relation to date, location, ice conditions, and operational state;

(iv) Estimates of take based on the number of animals encountered/kilometer of vessel and aircraft operations by behavioral response (no response, moved away, dove, etc.), and animals encountered per day by behavioral response for stationary drilling operations; and

(v) Raw data in electronic format (i.e., Excel spreadsheet) as specified by the Service in consultation with Industry representatives.

§ 18.119 What are the information collection requirements?

(a) The Office of Management and Budget has approved the collection of information contained in this subpart and assigned control number 1018–0070. You must respond to this information collection request to obtain a benefit pursuant to section 101(a)(5) of the Marine Mammal Protection Act. We will use the information to:

(1) Evaluate the application and determine whether or not to issue specific Letters of Authorization.

(2) Monitor impacts of activities conducted under the Letters of Authorization.

(b) You should direct comments regarding the burden estimate or any

other aspect of this requirement to the Information Collection Clearance Officer, U.S. Fish and Wildlife Service, Department of the Interior, Mail Stop 2042–PDM, 1849 C Street NW., Washington, DC 20240.

Dated: December 11, 2012.

Michael J. Bean,

Acting Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–31347 Filed 1–8–13; 8:45 am]

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Part III

Department of Transportation

Federal Transit Administration

49 CFR Part 611

Major Capital Investment Projects; Notice of Availability of Proposed New Starts and Small Starts Policy Guidance; Final Rule and Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 611

[Docket No. FTA–2010–0009]

RIN 2132–AB02

Major Capital Investment Projects

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Final rule.

SUMMARY: This final rule sets a new regulatory framework for FTA's evaluation and rating of major transit capital investments seeking funding under the discretionary ''New Starts'' and ''Small Starts'' programs. This final rule is being published concurrently with a Notice of Availability of revised proposed policy guidance that provides additional detail on the new measures and proposed methods for calculating the project justification and local financial commitment criteria specified in statute and this final rule. FTA seeks public comment on the revised proposed policy guidance referenced in the Notice of Availability published today. Because of the recent enactment of the Moving Ahead for Progress in the 21st Century Act (MAP–21), subsequent interim guidance and rulemaking will be forthcoming to address provisions not covered in this final rule.

DATES: This rule will become effective on April 9, 2013.

FOR FURTHER INFORMATION CONTACT: Elizabeth Day, Office of Planning and Environment, (202) 366–5159 or *Elizabeth.Day@dot.gov;* for questions of a legal nature, Scott Biehl, Office of Chief Counsel, (202) 366–0826 or *Scott.Biehl@dot.gov.* FTA is located at 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 9:00 a.m. to 5:30 p.m., EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Introduction

This final rule is being issued to amend the regulation (Part 611 of Title 49 of the Code of Federal Regulations) under which the Federal Transit Administration (FTA) evaluates and rates major transit capital investments seeking funding under the discretionary ''New Starts'' and ''Small Starts'' programs authorized by Section 5309 of Title 49, U.S. Code. The New Starts and Small Starts programs are FTA's primary capital funding programs for new or extended fixed guideway and corridor-based bus systems across the country, including rapid rail, light rail, commuter rail, bus rapid transit, and ferries. This final rule was the subject of an Advance Notice of Proposed Rulemaking (ANPRM) published on June 3, 2010 (75 FR 31383), which posed a series of questions about the current regulation and three of the criteria used to assess project justification, in particular. Following the ANPRM, FTA published a Notice of Proposed Rulemaking (NPRM) on January 25, 2012 (77 FR 3848), that proposed changes to the regulatory text. FTA also published on January 25, 2012, a Proposed New Starts/Small Starts Policy Guidance that provided additional detail on the proposed new measures and methods for calculating the project justification and local financial commitment criteria specified in statute. On July 8, 2012, President Obama signed into law the Moving Ahead for Progress in the 21st Century Act (MAP–21), which made changes in FTA's New Starts and Small Starts programs under Section 5309 of Title 49, United States Code. However, because significant portions of the project evaluation and rating requirements for major capital investments were not changed by MAP–21, FTA is proceeding with this final rule that covers the features of the NPRM that are consistent with the new law.

Accordingly, this final rule puts into place the following features:

- The regulatory structure that was proposed in the NPRM
- The New and Small Starts evaluation criteria and rating process defined in MAP–21 (including the five of the six evaluation criteria which were not changed by MAP–21); and
- The before and after study requirements for New Starts projects.

Subsequent guidance and rulemaking will cover new items included in MAP–21 that have not yet been the subject of a rulemaking process. These include

- The ''congestion relief'' evaluation criterion;
- The core capacity evaluation and rating process;
- The program of interrelated projects evaluation and rating process;
- The pilot program for expedited project delivery;
- The process for an expedited technical capacity review for project sponsors that have recently and successfully completed at least one new fixed guideway or core capacity project; and
- The revised New Starts and Small Start processes including eliminating the requirement that a New Starts or Small Starts project be the result of an alternatives analysis and instead relying on evaluations performed as part of the Metropolitan Transportation Planning process and the environmental review process conducted in accordance with the National Environmental Policy Act (NEPA); and
- The reduced number of defined steps in the process when FTA must evaluate and rate proposed projects.

MAP–21 created a step in the process called ''project development'' during which a local project sponsor will conclude the review required under NEPA, select a locally preferred alternative (LPA), adopt that LPA into the fiscally constrained regional long range transportation plan and develop sufficient information for FTA to evaluate and rate the project. Once ''project development'' is complete, if the project meets the criteria for advancement, the project will begin the ''engineering'' phase. Upon completion of ''engineering'' a project will be eligible for a construction funding commitment. While the final rule includes the names of the steps in the New and Small Starts process as defined in MAP–21, further detail on how those steps will be implemented will be the subject of future interim policy guidance and rulemaking. An important aspect of this subsequent guidance and rulemaking will be better defining the relationship of these changes in the New Starts process and the requirements for concluding the NEPA process during project development.

MAP–21 amends 49 U.S.C. § 5309(g)(5) to require the issuance of interim policy guidance describing how FTA will implement the requirements of MAP–21 on an interim basis. Additionally, Section 5309(g)(6), as amended by MAP–21, calls for a new regulation. Accordingly, as a next step in implementing MAP–21, FTA will issue draft interim policy guidance for public comment covering the MAP–21 changes which are not addressed in this final rule. FTA's new rulemaking on these subjects will follow.

In developing this final rule, FTA has been guided by two broad goals, outlined in the NPRM. First, FTA intends, as noted in the NPRM, to measure a wider range of benefits transit projects provide. Second, FTA desires to do so while establishing measures that support streamlining the New Starts and Small Starts process. In balancing these goals, FTA is seeking to continue a system in which well-justified projects are funded. At the same time, FTA seeks to ensure that it does not perpetuate a system in which the measures used to determine the project justification or local financial commitment are so

complex that they unnecessarily burden projects sponsors and FTA, or are difficult to understand.

First, to streamline the process, FTA has adopted measures of both mobility benefits and cost-effectiveness that are simplified yet reliably objective metrics. Second, FTA is expanding the ability of projects to pre-qualify based on the characteristics of the project or the corridor in which it is located. As with the current ''Very Small Starts'' category, FTA will determine, at some point in the future, what characteristics would be sufficient, without further analysis, to warrant a satisfactory rating of ''medium'' on one or more of the evaluation criteria. Third, FTA is adopting ways the data submitted by project sponsors and the evaluation methods employed by FTA could be simplified. Fourth, FTA is greatly simplifying the process for developing a point of comparison for incremental measures (i.e., measures that are based on a comparison between two different scenarios, such as a comparison of vehicle miles of travel (VMT) in the corridor without the project and VMT in the corridor with the project). Fifth, FTA is clarifying the local financial commitment criteria to address more clearly the strong interaction between capital and operating funding plans. To address more explicitly the broad range of benefits that transit projects provide, FTA has adopted several ways such benefits will be incorporated into the evaluation process. FTA is including more meaningful measures of the environmental benefits and additional measures on economic development effects of projects, as well as providing for equal weights for all of the project justification criteria. While FTA is streamlining the New Starts and Small Starts processes, nothing in this rule is intended to subvert or diminish the quality and rigor of the existing NEPA process.

II. What This Final Rule Contains

FTA also is publishing a notice in the **Federal Register** today that announces the availability of revised proposed policy guidance related to the provisions in this final rule for public review and comment. The regulation acts as a framework for the project evaluation process, and the policy guidance provides non-binding interpretations for implementing the regulations. Under both prior law and MAP–21, FTA is required to issue such policy guidance for public comment at least every two years and whenever major changes in policy are proposed. FTA believes that this approach allows FTA to make improvements in the measures used for the criteria as new techniques become available. FTA published proposed policy guidance along with the NPRM, and as promised in the NPRM, has revised that proposed policy guidance in response to comments received. In the revised proposed policy guidance made available today, FTA is providing more specificity on the measures and analytical techniques needed to calculate those measures. FTA encourages comment on the revised proposed policy guidance. Prior to the effective date of this final rule, FTA will publish final policy guidance on these issues. As noted above, at a later date, FTA will publish interim policy guidance on the items in MAP–21 under the major capital investment program that are not addressed in this rulemaking.

The Executive Summary that follows describes the purpose of this rule, discusses its major provisions, and summarizes its benefits and costs. The section that follows the Executive Summary includes a detailed summary of the comments received on the NPRM and FTA's responses to those comments. FTA received approximately 1,000 individual comments from over 103 respondents to the NPRM. FTA chose to categorize the comments by topical area, group them, and summarize them to assure all relevant comments received consideration in the development of this final rule and accompanying revised proposed policy guidance. The responses to comments help elucidate the provisions adopted by this final rule and provide additional context to the proposals in the accompanying revised proposed policy guidance. The provisions adopted by this final rule are more specifically detailed in the ''Section-by-Section'' analysis that directly follows the comment summaries and responses.

The Section-by-Section analysis is intended to do two things: (1) Explain the changes to the regulatory text found at the end of this final rule; and (2) explain what is in the related revised proposed policy guidance being published for comment today. FTA must strictly comply with the authorization statute, 49 U.S.C. 5309, in setting the regulatory process the agency will use to evaluate, rate, and approve funding for New Starts and Small Starts projects, and the criteria the agency will use to evaluate those projects. FTA is taking the occasion of this rulemaking, however, to introduce a number of administrative steps consistent with MAP–21, that will help to streamline the New Starts and Small Starts process.

Following the Section-by-Section analysis is the ''Regulatory Evaluation'' section of this final rule, which includes descriptions of the requirements that apply to the rulemaking process and information on how this rulemaking effort complies with those requirements.

The final rule concludes with the actual regulatory text FTA is adopting for its New Starts and Small Starts programs. This is the language that will govern the way New Starts and Small Starts projects are evaluated, rated, and funded. The language is binding, which means that FTA's future policy guidance documents must be consistent with the regulatory text. As noted earlier, while the regulatory text being adopted today includes the revised regulatory structure proposed in the NPRM and additional features consistent with the changes to the program made by MAP–21, further rulemaking will be needed to address the aspects of the major capital investment program in MAP–21 that were not included in the NPRM. Such changes require further public comment before being made final and thus will be the subject of a subsequent interim policy guidance and rulemaking.

III. Executive Summary

A. Purpose of Rule

The New Starts and Small Starts programs, established in Section 5309 of Title 49, U.S. Code, as amended by MAP–21, are FTA's primary capital funding programs for new or extended transit systems across the country, including rapid rail, light rail, commuter rail, bus rapid transit, and ferries. Under this discretionary program, proposed New and Small Starts projects are evaluated and rated as they seek FTA approval for a Federal funding commitment to finance project construction. Overall ratings for proposed New Starts and Small Starts projects are based on summary ratings for two categories of criteria: project justification and local financial commitment. Within these two categories, projects are evaluated and rated against several criteria specified in law. A summary of the current New Starts and Small Starts evaluation and rating process can be found at *http://www.fta.dot.gov/documents/FY13_Evaluation_Process.pdf.*

It is important to distinguish the purpose of this rule from other requirements which must be met as a prerequisite for funding of Major Capital Investments. This rule covers the process by which FTA rates and evaluates candidates for grants under the Major Capital Investments program.

Thus, it focuses on the criteria which FTA will use for this purpose. Candidate projects must still meet the other requirements, in particular, those laid out to address the National Environmental Policy Act (NEPA). Because of the changes made by MAP–21, these requirements will have to be met first, in particular for New Starts projects to advance into the newly defined ''engineering'' stage. Only once these requirements are met will projects be subject to evaluation and rating against the criteria laid out in this final rule. For example, through the NEPA process (including the use of linking planning and NEPA as provided for in 23 CFR 450.318), all environmental impacts will be evaluated, reasonable alternatives will be examined, and measures necessary to mitigate any adverse environmental impacts will be developed and included in the scope of the project. Only once these environmental effects are analyzed through the NEPA process, will the ''environmental benefits'' be evaluated using the measures established under this rule and the New Starts/Small Starts evaluation will focus on a more limited range of environmental criteria then the NEPA analysis.

This final rule is issued pursuant to the requirements first outlined in SAFETEA–LU and continued in MAP–21 that the Secretary promulgate regulations to implement the Small Starts program. The final rule and accompanying revised proposed policy guidance change FTA's implementation of the major capital investment program, primarily by giving the project justification criteria specified in law ''comparable, but not necessarily equal weights'' as required by Sections 5309 (g)(2)((B)(ii) and (h)(6), improving the measures FTA uses for each of the evaluation criteria specified in law, and streamlining and simplifying the means by which project sponsors develop the data needed by FTA.

In addition, this rule implements an initiative in the Department of Transportation's (DOT) *Plan for Implementation of Executive Order 13563: Retrospective Review and Analysis of Existing Rules* (*http://regs.dot.gov/docs/RRR-Planfinal-8–20.pdf*). Executive Order 13563 calls on agencies to identify rules that may be ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them…'' This rule streamlines and simplifies the various means by which project sponsors may obtain the information needed by FTA for its evaluation and rating of projects. For example, FTA is allowing project sponsors to use a simplified FTA-developed national model, once available, to estimate ridership rather than standard local travel forecasting models; to use a series of standard factors in a simple spreadsheet to calculate vehicle miles traveled (VMT) and environmental benefits; to no longer require the development of a baseline alternative for calculation of incremental measures; and to expand the use of warrants whereby a project may be able to automatically qualify for a rating if it meets parameters established by FTA. By doing so, this final rule achieves two broad goals—measuring a wider range of benefits that transit projects provide while at the same time establishing measures that support streamlining of the New Starts and Small Starts process. In balancing these goals, FTA is seeking to continue a system in which well-justified projects are funded. At the same time, FTA seeks to ensure that it does not perpetuate a system in which the measures used are so complex that they are difficult to understand or unnecessarily burdensome to project sponsors.

B. Major Provisions in This Final Rule

This section describes the most significant changes being adopted in this final rule. These adopted changes, some of which are altered in this final rule from the proposals made in the NPRM, are the result of FTA's review of the comments received on the ANPRM and NPRM and further evaluation of its proposals based on those comments.

1. Cost-effectiveness

Cost-effectiveness is currently evaluated and rated based on the incremental annualized capital and operating cost of the project divided by the incremental hour of travel time savings (i.e., the cost of the project divided by how much time it would save travelers). Changes in cost and travel time are estimated by comparing forecast data for the proposed project with forecast data for a baseline alternative (typically a lower-cost bus alternative referred to as the Transportation System Management alternative). FTA's thresholds for assigning ratings from ''low'' to ''high'' are based on U.S. DOT guidance on the value of time. To establish these thresholds, benefits other than travel time savings are not estimated directly, but are assumed to be equal to the value of the travel time savings. MAP–21 defined cost-effectiveness as ''cost per rider.''

With this final rule, FTA is adopting the significantly streamlined and simpler approach for measuring cost-effectiveness as proposed in the NPRM and consistent with the change in law in MAP–21. The measure of cost-effectiveness for New Starts project will now be annualized capital cost and operating cost per trip taken on the project, with some allowances for project ''enrichments'' to be excluded from the cost side of the equation. For Small Starts projects, the measure of cost-effectiveness will be annualized Federal share per trip taken on the project in accordance with the MAP–21 requirement that FTA base Small Starts ratings on the ''evaluation of the benefits of the project as compared to the Federal assistance to be provided.''

FTA will allow the cost of ''enrichments'' (referred to in the NPRM as ''betterments'') to be excluded from the cost side of the cost-effectiveness calculation for New Starts projects. Enrichments are those items above and beyond the items needed to deliver the mobility benefits of the project. Enrichments may include, for example, features needed to obtain LEED certification for the transit facilities, additional features to provide extra pedestrian and bicycle access to surrounding development, aesthetically-oriented design features, or joint development expenses. This will remove a disincentive to include such features in the design of projects. FTA received numerous helpful comments on the kinds of enrichments that should be excluded from the calculation and as a result was able to adopt a simple approach to identify how to define and assign a value to these features.

FTA is adopting the proposal in the NPRM to develop pre-qualification approaches that would allow for a project to automatically receive a satisfactory rating on a given criterion based on its characteristics or the characteristics of the project corridor. In Section 5309(g)(3), the use of such warrants is required for projects where: (1) The Section 5309 share either does not exceed $100,000,000 or is 50 percent or less of the project cost; and (2) the applicant seeks the use of warrants and certifies that the existing public transportation system is in a state of good repair. The text of the final rule will allow use of warrants for all projects, but the final warrants to be specified in subsequent policy guidance will be mindful of this statutory structure. The approach for pre-qualification would be developed by analyzing how certain projects or corridor characteristics would contribute to producing a satisfactory rating on the criterion in question. In this way, a project whose characteristics meet or exceed a certain threshold value

could be automatically rated without further project-specific analysis. Proposed pre-qualification values (''warrants'') would be proposed in future policy guidance with a period for public comment before being made final. The revised proposed policy guidance published along with this final rule does not propose any pre-qualification values at this time. However, FTA is interested in receiving suggestions about specific factors and values which could be adopted as pre-qualification thresholds.

2. Environmental Benefits

To evaluate and rate environmental benefits, FTA currently uses the EPA air quality designation for the metropolitan area in which a proposed project is located. Thus, FTA assigns projects located in nonattainment areas (areas that EPA has designated as having poor air quality) with a ''high'' rating; all other projects receive a ''medium'' rating.

FTA is adopting the proposal in the NPRM to expand the measure for environmental benefits to include direct and indirect benefits to the natural and human environment. These benefits will be based on estimated changes in highway and transit VMT resulting from an estimated change in mode from highway to transit due to the implementation of the project. FTA will evaluate changes in air quality based on changes in total emissions of EPA criteria pollutants, changes in energy use, changes in total greenhouse gas emissions, and safety improvements based on reductions in the amount of accidents, fatalities, and property damage. Changes in public health, such as benefits associated with long-term activity levels that would result from changes in development patterns, would be included once better methods for calculating this information are developed.

3. Economic Development

Currently, FTA evaluates and rates the economic development effects of major transit investments on the basis of the transit-supportive plans and policies in place and the demonstrated performance and impact of those policies. FTA adopts the proposal in the NPRM to continue to use this measure and to add a consideration of whether policies maintaining or increasing affordable housing are in place. The number of domestic jobs related to design, construction, and operation of the project will also be reported but not considered in the rating, as proposed in the NPRM.

FTA is also adopting the proposal in the NPRM to allow project sponsors, at their option, to also estimate indirect changes in VMT resulting from changes in development patterns that are anticipated to occur with implementation of the proposed project. The resulting environmental benefits from these changes in VMT would be calculated, monetized, and for New Starts projects compared to the annualized capital and operating cost of the project and for Small Starts projects compared to the Federal share. The resulting estimate would be evaluated under the economic development criterion. For New Starts projects, the final rule includes a provision that would subtract the costs of ''enrichments'' from the costs used in this calculation, just as in the measures of cost-effectiveness and environmental benefits. It is anticipated that the project sponsor at its option would undertake an analysis of the economic conditions in the project corridor, the mechanisms by which the project would improve those conditions, the availability of land in station areas for development and redevelopment, and a pro forma assessment of the feasibility of specific development scenarios to calculate the VMT changes.

4. Streamlining

Aside from changes that will improve FTA's measures for evaluating projects, FTA is adopting the changes proposed in the NPRM that are intended to streamline the process.

First, FTA will allow project sponsors to forgo a detailed analysis of benefits that are unnecessary to justify a project. For example, if a project rates ''medium'' overall based on benefit calculations developed using existing conditions in the project corridor today, the project sponsor would not be required to do the analysis necessary to forecast benefits out to some future year (i.e., a ''horizon'' year). In response to comments received on the NPRM, if a sponsor chooses to prepare future year forecasts, FTA will allow the project sponsor to use either a 10-year horizon, as proposed in the NPRM, or a 20-year horizon (which is consistent with metropolitan transportation planning requirements). Similarly, FTA is developing methods that can be used to estimate benefits using simple approaches. Only when a project sponsor feels it is necessary to further identify benefits beyond a simplified method would more elaborate analysis be undertaken, and only at the project sponsor's option.

C. Benefits and Costs

FTA believes that the benefits of this rule will far exceed its costs. FTA estimates that implementation of this final rule will have a one-time cost of $306,200 due to the need for projects sponsors and contractors to become familiar with the changes made by this final rule and another one-time cost of $306,200 for the development of the additional information required by this rule.

FTA estimates an annual savings of $423,750 in reduced paperwork burden arising from project sponsors being given the option of replacing the costly and time consuming application of local travel demand models with a simplified national model, the elimination of the requirement that project sponsors develop and analyze a baseline alternative, and the expanded use of automatic, pre-qualification (''warrants'') for certain projects. FTA believes that this is a conservative estimate. FTA believes some of the streamlining changes made in this final rule could result in much larger savings, including savings that may result from projects being able to be constructed sooner because of the reduced time it may take them to comply with Federal requirements.

FTA also estimates that because of the changes in evaluation criteria incorporated in this final rule, implementation of the final rule may result in the selection for a recommended commitment of Major Capital Investment program funding of one different New Starts or Small Starts project than under the current final rule each fiscal year, with an average Major Capital Investments program contribution of $250,000,000. However, because of the large number of factors which go into the selection of recommended projects beyond those being revised by this final rule (such as project readiness), there is a considerable degree of uncertainty to FTA's estimate of the number of different projects which may be recommended as a result of the changes made by this final rule. To put this figure in context, the Major Capital Investments program provides a total of just under $2,000,000,000 per year for New Starts and Small Starts projects.

The following table summarizes the costs, benefits, and changes in Federal transfers (Major Capital Investments grants) of this final rule over a ten year period, discounted at three and seven percent:

TOTAL BENEFITS AND COSTS SUMMARY FOR MAJOR CAPITAL INVESTMENTS FINAL RULE OVER TEN YEARS, 2012$

	3% Discount rate	7% Discount rate
Total Monetized Benefits	$3.7 M	$3.2 M
Total Cost	0.6 M	0.6 M
Total Net Impact (Benefit—Costs)	3.1 M	2.6 M
Changes in Transfer Payments	2.2 B	1.8 B

IV. Response to Comments

The following is a summary of the comments received in response to the proposals in the NPRM, FTA's response to the comments received, and how FTA has responded in this final rule to the issues raised. FTA received approximately 103 comment submissions from a wide-range of organizations and individuals that provided approximately 1,000 individual comments. Comments were received from: operators of public transportation; State departments of transportation; other departments of State government; metropolitan planning organizations (MPO) and regional councils of governments; local governments or entities; trade organizations; national non-profit organizations; lobbyists; research institutions; universities; local or regional community organizations; private citizens; and businesses.

Please note that FTA attempted to respond to all relevant comments received on the NPRM. In the section below, FTA summarizes and responds to a variety of general comments, comments on the project justification criteria, comments on the local financial commitment criteria, comments on the process for developing New Starts and Small Starts projects, and comments on eligibility for funding under these programs.

A. General Comments

1. General Support or Opposition

Comment: FTA received a total of 53 comments providing either general support or opposition to the NPRM. Of these comments, 51 expressed strong support for the proposed rule, citing the streamlined analytical approaches, use of a multiple measure approach, elimination of the baseline alternative as the point of comparison, use of a simplified measure for cost-effectiveness, improvements in the measures of environmental benefits, enhanced consideration of affordable housing, consideration of the mobility of transportation disadvantaged persons, the proposed approach for economic development, and the ability for projects to pre-qualify under certain conditions.

Two comments were generally opposed to the proposals in the NPRM. One of these comments objected to assessing projects on other than mobility impacts, and the other comment suggested use of a qualitative ''make the case'' approach focused primarily on how a project supports local goals and objectives.

Response: FTA appreciates the strong support for the ideas in the NPRM and thus is adopting much of what was proposed. FTA believes there are multiple reasons to make public transportation investments, and that they should be taken into account when evaluating and rating projects, not just the mobility benefits provided by the project. The statute requires FTA to evaluate six project justification criteria and to weight them comparably, but not necessarily equally. As this is a discretionary program in which projects across the United States compete with one another for a limited amount of federal financial assistance, FTA must explicitly consider more than just local goals and must be able to address project merit based on how well projects do against quantitative criteria.

2. Horizon Year

Comment: FTA received 41 comments on the horizon year to be used when a project sponsor chooses to prepare an optional future year forecast. In the NPRM, FTA proposed that a project sponsor would be required to provide forecasts of ridership on the proposed project using current year inputs. If the project sponsor was comfortable with how the project rated under the evaluation criteria based on the current year data, no further analysis would be required. FTA proposed that, at a project sponsor's option, it could choose to make a future year forecast, but that it would be based on a 10 year time horizon. Although many comments supported the concept of having a future year forecast be optional, only one agreed entirely with FTA's proposal to use a horizon year 10 years in the future. Another agreed with the 10-year time horizon, but suggested that funding be provided to project sponsors to do the analysis because it is not consistent with the normal time frame used in long range planning. Two comments asked for further clarification on the issue, and the remaining comments suggested that FTA retain its current practice of using a 20-year time horizon. These comments suggested that continuing to use a 20-year time horizon would be consistent with the requirements of the metropolitan planning process, which requires a 20-year fiscally constrained long-range transportation plan, and with the NEPA process. Comments suggested that it would be burdensome to have to do a 10-year forecast given that most MPO's forecast demographic data and develop transportation networks for a 20-year time horizon.

Response: FTA is not requiring project sponsors to prepare future year forecasts but is rather making them optional. FTA agrees that there is merit to using a 20-year time horizon for consistency with long-range planning requirements in the metropolitan transportation planning process. Nonetheless, FTA believes there is also merit in using a 10-year time horizon given that it allows for use of a simplified model to estimate trips on the project and a simpler point of comparison for estimating incremental measures. Additionally, FTA notes there is less uncertainty in 10-year forecasts than in 20-year forecasts and that 10-year forecasts are used for conformity purposes in non-attainment areas. Accordingly, FTA is adopting an approach that will require all project sponsors to prepare a current year forecast, and will make preparation of future year forecasts optional. FTA believes that current year data is a good basis for the evaluation of project merits in the opening year. Project sponsors may choose to prepare future year forecasts using either a 10-year or a 20-year time horizon. FTA cannot provide additional funding for sponsors that choose the 10-year time horizon to do additional analysis that would be needed. Also, FTA notes that project reviews pursuant to NEPA do not necessarily require any particular time horizon, but rather must be structured to evaluate impacts that are reasonably foreseeable.

3. Basis for Comparison

Comment: FTA received a total of 32 comments on the point of comparison to be used in calculating incremental measures. Of these comments, 29 supported FTA's proposal to use a no-build alternative while three supported continued use of the ''baseline alternative'' required under the current regulation (defined as the best that can be done in the absence of a major investment, typically the ''Transportation System Management (TSM) alternative''. Those supporting use of the no-build alternative cited the burden involved in developing a baseline alternative and the fact that it is often an artificial alternative not under active consideration locally for implementation. Those in support of continued use of the baseline or TSM alternative as the point of comparison noted the importance of isolating the effects of the proposed investment and the need for a level playing field between differing systems.

Response: FTA agrees that although there is some technical merit in the use of the baseline or TSM alternative for isolating the effect of the major investment versus less costly investments, the burden of developing the baseline alternative is significant as it requires an iterative process. FTA has found that it can take as much as a year to develop an adequate baseline alternative due to the difficulty in FTA and the project sponsor reaching agreement on what constitutes ''the best that can be done without a major investment'' since that is often a matter of judgment. FTA believes that consideration of lower cost alternatives should remain an integral part of the ongoing metropolitan planning and NEPA processes that occur prior to and during the project development phase. Once a locally preferred alternative has been chosen through completion of the metropolitan planning and NEPA processes, FTA does not believe it is necessary to continue examining other alternatives, including a baseline or TSM, after entering the engineering phase of the New Starts and Small Starts program. In addition, MAP–21 explicitly calls for use of the ''no-action'' alternative as the point of comparison for Small Starts projects. Accordingly, FTA is adopting use of a no-build alternative as the point of comparison for incremental measures.

Comment: Of the 29 comments supporting use of a no-build alternative, 12 commented further that it should be defined based on various products of the metropolitan planning process appropriate to the horizon year selected. Most supported a no-build alternative that includes projects in the Transportation Improvement Program (TIP), while others supported a no-build alternative that includes projects in the fiscally constrained long-range transportation plan.

Response: As noted above, FTA will require all project sponsors to prepare a current year forecast in which case the no-build alternative is simply the existing transportation system. FTA will allow project sponsors to choose either a 10-year or a 20-year time horizon if they wish to prepare a future year forecast that describes the environment to be affected by the proposed project. When a sponsor chooses to prepare a future year forecast based on a 10-year horizon, FTA is adopting its proposal to define the no-build alternative as the current transportation system plus projects included in the TIP in place at the time the sponsor seeks entry into the ''engineering'' phase. If forecasts are updated later, as required when there is a significant change in the project, the point of comparison would include projects in the TIP at that time. When a sponsor chooses to prepare a future year forecast based on a 20-year horizon, FTA is adopting a definition of the no-build alternative that includes all projects included in the fiscally constrained long-range transportation plan. Thus, sponsors choosing to prepare a forecast using a 20-year horizon should do so recognizing that development of the point of comparison (the no-build alternative) will require additional work beyond that required if they choose to prepare only a current year forecast or a 10-year forecast.

Regardless of which horizon years are used for purposes of the evaluation process under New Starts and Small Starts, FTA still expects that during the NEPA process, project sponsors will evaluate all reasonably foreseeable impacts of the proposed project and reasonable alternatives to the project as appropriate. As has always been the case, the horizon involved in evaluating those impacts could potentially vary depending on the type of impact and how reasonably foreseeable a particular impact type is determined to be.

Comment: FTA received two comments on how to weight the current and horizon year forecasts if a project sponsor chooses to do a horizon year forecast. FTA proposed that the current and future forecasts be weighted equally. One comment suggested that the current year forecast receive a higher weight (75 percent), citing the greater reliability of estimates based on known current year inputs of population and employment. The other comment suggested that the horizon year receive a higher weight (80 percent), noting that these are long term investments that should address future growth in population and employment.

Response: FTA believes that weighting estimates based on current year data and future year data equally is a reasonable trade-off between the increased reliability of current year estimates and the fact that major capital investment projects covered by this rule are long-lived investments with benefits that extend well out into the future. Under the current regulation, FTA evaluates only a 20-year time horizon, favoring investments whose benefits accrue in the longer term and giving no additional credit to projects that will accrue substantial benefits immediately after implementation. While many projects may need to use future year forecasts in order to be fully justified, FTA believes that because of the large demand for funds from this program, giving additional credit to projects whose benefits occur sooner is reasonable. FTA believes equally weighting estimates based on current year data with those based on horizon year data to develop a rating should appropriately balance the increased reliability that comes with using current year data and at the same time give adequate consideration to projects in fast growing areas and the long term benefits of the project.

4. Weighting of Project Justification Criteria

Comment: FTA received a total of 22 comments on the use of a multiple measure approach. All of these comments supported use of a multiple measure approach. A total of eight comments supported FTA's proposal to weight each project justification criterion equally. Three comments suggested weighting cost-effectiveness more heavily, assigning it as much as forty percent of the total weight. Two comments suggested allowing project sponsors to set their own weights.

Response: FTA is adopting its proposal to weight each of the project justification criteria equally. The statute requires ''comparable, but not necessarily equal'' weights. FTA believes each of the project justification criteria provides important information about project merit and, thus, feels that equal weights are appropriate. Although cost-effectiveness is important, it remains only one legislatively mandated criterion among several. Thus to give it a higher weight would undervalue some of the other significant benefits. FTA does not believe a weight of 40 percent would be consistent with the

requirement in the law that the weights of the project justification criteria be ''comparable.'' Given that this is a competitive, national discretionary grant program, FTA believes that consistent weights must be applied to all projects to assure fair evaluations.

5. Pre-Qualification and Establishing Breakpoints

Comment: FTA received a total of 25 comments about its proposal to allow projects to pre-qualify based on characteristics of the project or the corridor in which it is located (also called ''warrants''). Of these comments, 17 expressed general support for the concept. Many of these comments indicated that warrants could be applied to several of the criteria, not just to cost-effectiveness. The remaining eight comments provided general support, but expressed some concerns. Several of these expressed the concern that warrants not be developed in such a way as to be biased in favor of a specific mode. These comments noted that FTA's existing Very Small Starts warrants appear to strongly favor bus rapid transit. Others indicated that FTA needs to justify the warrants that it promulgates by describing exactly how a project with the FTA-specified characteristics would rate against the various criteria. Several suggestions were provided on specific warrants.

Response: FTA appreciates the support for the pre-qualification or ''warrants'' concept and is adopting it in the final rule. FTA notes that MAP–21 explicitly calls for the use of warrants for projects requesting $100 million or less in New Starts funds or requesting a Federal share of 50 percent or less. FTA agrees that warrants should be mode-neutral and will work to assure that when FTA proposes them in future policy guidance. FTA will provide the justification as each warrant is proposed. FTA will not be publishing warrants in the revised proposed policy guidance being published along with this final rule, but plans to do so in the near future once the criteria are established and additional data are gathered. Even though the changes made by MAP–21 focus warrants only on a certain set of projects, FTA believes it is appropriate to consider using warrants for as many kinds of projects as possible, in order to allow for additional streamlining of the process. Nonetheless, FTA will be mindful of the strictures placed on warrants by MAP–21 when it proposes warrants in the future.

Comment: FTA received 15 comments on how breakpoints should be established for the various quantitative criteria. Two of these comments suggested using different breakpoints for different modes. One comment provided a suggestion that several Transit Cooperative Research Program (TCRP) projects could provide input on how breakpoints should be established. A total of 12 comments were received on FTA's proposal that breakpoints should be established to recognize that a small amount of positive benefits is not bad, just small. Of these comments, eight opposed FTA's proposal to give a medium rating to projects that had small but positive benefits, citing the need to be able to more fully distinguish between projects. Four comments supported FTA's proposal.

Response: FTA appreciates the suggestions on how to establish breakpoints. FTA believes the breakpoints should be mode-neutral, as projects of various modes are competing for a single source of funds. Further, the intrinsic value of a particular benefit is not based on the mode of the project being considered. FTA agrees that assigning projects with small but positive benefits a medium rating will create a problem of not being able to adequately differentiate between projects. Thus, FTA is not adopting its proposal in this area. Instead, FTA will develop breakpoints that use all five rating levels. FTA is publishing proposed breakpoints for the criteria in the revised proposed policy guidance accompanying this final rule and requests comments on those breakpoints.

6. Use of Standard Factors To Calculate Benefits

Comment: FTA received a total of nine comments regarding the use of standard factors to calculate the value of the various evaluation criteria. Although four of the comments provided general support for the concept, citing the reduced burden on project sponsors, concern was expressed about the need to allow for some variation based on local conditions. Two comments suggested that establishment of the factors should await completion of ongoing TCRP projects. Three comments opposed the proposal, citing the wide variety in local conditions.

Response: FTA believes that use of standard factors can significantly streamline the process, but understands the need for flexibility. FTA is publishing the proposed standard factors in the revised proposed policy guidance accompanying this final rule and is seeking comments. FTA notes that certain factors, such as the value of time or of a statistical life, are established in policy that applies throughout the programs administered by the U.S. Department of Transportation (DOT). In these cases, FTA will use those set values.

7. Program Administration

Comment: FTA received eight comments suggesting the importance of cooperation with other Federal agencies in administering the New Starts and Small Start program. Specifically identified were the U.S. Department of Housing and Urban Development (HUD) on issues related to affordable housing and sustainable communities, other DOT modal administrations on alternative project delivery, and the Centers for Disease Control and Prevention (CDC) of the U.S. Department of Health and Human Services on issues related to public health.

Response: FTA agrees with the need to work with other agencies on a variety of issues. In particular, FTA has sought support and technical guidance from HUD on issues related to affordable housing. FTA will continue to work with other DOT agencies and agencies such as CDC to improve the process.

Comment: FTA received three comments supporting the proposal to have the measures and weights included in policy guidance, with the regulation itself providing a broader outline of the process and other required features. These comments supported the idea due to the increased flexibility allowing changes to be made through policy guidance subject to a public comment period as more information about various measures becomes available.

Response: FTA is adopting the approach of having measures and weights specified in policy guidance.

Comment: FTA received four comments noting the importance of developing clearly defined deliverables and schedules for the various steps in the process for developing New Starts and Small Starts projects. Similarly, FTA received one comment calling for as much streamlining as possible for Small Starts projects.

Response: FTA agrees that clearly defined deliverables and schedules are particularly important and notes that FTA already has clearly defined checklists of deliverables required of the project sponsor for each phase of the process and develops ''roadmaps'' for every project outlining a planned schedule. FTA plans to continue to make efforts along these lines as well as to assure that the process is as streamlined as possible. FTA continues to refine its reporting instructions and other information about the program to provide as much clarity as possible.

Further, FTA has found that the establishment of project roadmaps has been extremely effective in clearly identifying what must be done, who is responsible for it, and when deliverables are expected. FTA continues to look for ways to streamline the process.

Comment: FTA received three comments about the relationship of the New Starts and Small Starts project development process and the NEPA process.

Response: FTA continues to work to ensure that the New Starts and Small Starts process is coordinated with requirements under NEPA. FTA notes that MAP–21 calls for completion of the NEPA process during a newly-defined phase called ''project development.'' FTA notes that the evaluation criteria defined in this final rule are applied subsequent to the completion of the NEPA process for approval of entry in the ''engineering'' phase. In subsequent guidance and rulemaking, FTA will provide additional information on how a project sponsor will gain entry into the newly defined phase of ''project development'' and what must be completed during the phase before entry into the subsequent ''engineering'' phase will be granted.

Comment: FTA received seven comments about how the New Starts and Small Starts process should be structured to assure compliance with fair housing requirements, the Americans with Disabilities Act (ADA), FTA's requirements for Environmental Justice, Title VI of the Civil Rights Act, and private sector participation in New Starts and Small Starts projects, consistent with FTA's requirements for third-party contracting.

Response: FTA believes that fair housing issues are addressed by the inclusion under the economic development criterion of an assessment of local plans and policies to maintain or increase affordable housing, but that enforcement of fair housing practices is under the authority of HUD. The DOT and FTA regulations under the ADA prescribe the rules for grantee compliance with the ADA. In addition, FTA has published guidance for compliance with Title VI of the Civil Rights Act and the Executive Order on Environmental Justice. FTA is fully supportive of private sector involvement in New Starts and Small Starts projects, and will continue to explore opportunities to promote innovative project delivery methods. MAP–21 provides for a pilot program to test how to utilize such methods. FTA will more fully define this pilot program in subsequent interim policy guidance and rulemaking.

8. Definitions of Eligible Projects

Comment: FTA received two comments expressing general support for the definition of eligible projects proposed in the NPRM. Three comments suggested limiting bus rapid transit (BRT) to projects that operate on an exclusive guideway along at least half of the project length, while two other comments suggested broadening the definition of BRT to clearly include service operating on high occupancy or managed lanes. Another commenter suggested using a standard recently proposed by the Institute for Transportation Development Policy in order to define BRT. Another commenter suggested that the service standards for BRT clearly be limited to the ''trunk'' segment of a proposed route. One commenter suggested that eligibility be expanded to cover a variety of ''alternative modes,'' while another commenter suggested expanding eligibility to cover ''core capacity'' projects.

Response: In MAP–21, Small Starts BRT projects may include ''corridor-based bus projects'' not operating on exclusive rights of way. Accordingly, FTA must continue to define Small Starts BRT projects without specifying a requirement for an exclusive right-of-way. BRT projects proposed to operate on managed lanes may be eligible for funding through the Small Starts program, but only if the project otherwise meets the parameters for ''corridor-based bus projects'' defined by FTA. Under current law, managed lanes cannot be counted as exclusive lanes since they are not for the exclusive use of high occupancy vehicles. FTA's current approach, which it is continuing, allows a project to qualify as a corridor-based bus project if the frequency of service requirements defined by FTA are met on at least the core segment of the bus route, sometimes called the trunk. Services operated off the trunk may be part of the overall project. FTA is limited by law to fund only public transportation projects, not any ''alternative mode.'' Further, MAP–21 limits New Starts funding to new fixed guideways and extensions to existing fixed guideways. MAP–21 allows core capacity projects as eligible projects for funding through the Section 5309 major capital investments program. FTA will define the requirements for core capacity projects in subsequent interim policy guidance and rulemaking.

9. Incremental Funding and Programs of Projects

Comment: Thirteen comments recommended defining a project in such a way as to allow it to be evaluated and rated, but then have funding and construction of that project provided on a segment-by-segment basis incrementally. Another commenter suggested more clearly defining allowable programs of projects.

Response: FTA can undertake programs of projects, and can fund projects incrementally. In general, FTA believes it is appropriate to evaluate each segment of a project being proposed for funding independently, consistent with the requirement in law to fund ''operable segments.'' Thus, FTA is not adopting the suggestions to evaluate and rate a project as a whole and then fund it on a segment-by-segment basis. However, FTA will define the requirements for ''programs of interrelated projects'' in subsequent interim policy guidance and rulemaking.

10. Other General Issues

Comment: FTA received a total of 21 comments on other general issues. Three comments provided information related to the merits of specific local projects. Four comments expressed general support for comments received from other commenters. One comment opposed continuation of the New Starts and Small Starts program, while several comments provided general support for investment in public transportation. Several additional comments pointed out clerical or typographical errors or suggested editorial changes. One comment suggested that project sponsors be required to report the uncertainty involved in their forecasts.

Response: FTA appreciates the general comments and suggestions. FTA notes that this rulemaking concerns the process by which a specific grant funding program specified in law is implemented. The merits of investing in public transportation in general are a subject for other forums. FTA agrees it is important to have reliable forecasts and notes MAP–21 requires FTA to consider ''the reliability of the forecasting methods used to estimate costs and utilization'' on the project when developing the project justification rating.

B. Project Justification Criteria

1. Mobility Improvements

a. General Comments

Comment: Twelve comments supported FTA's proposed approach of measuring mobility improvements

solely in terms of trips. Eight comments disagreed with the proposed approach. Of these eight, three comments suggested that FTA retain passenger miles as part of the measure, three others recommended that the current measure be retained as is, and one requested that an alternative approach submitted in response to the Advance Notice of Proposed Rulemaking be adopted. The alternative approach suggested that FTA create a five-step process that would require project sponsors to: (1) Identify the full range of alternative projects; (2) identify key non-monetizable benefits of those alternative projects including benefits to mobility, the environment, and economic development; (3) estimate the costs and monetizable benefits of each alternative project, (4) estimate the non-monetary benefits of each alternative project, and (4) rank the alternative projects in terms of dollars of net cost per unit of each key non-monetary benefit. The suggested alternative indicated that FTA should fund only those projects that are the highest or near-highest ranked alternative by each of the non-monetary measure but did not provide specifics on how mobility benefits should be determined. This same commenter suggested that it is important to assess how a transit project may affect other modes, such as in the case where a general purpose lane is converted to exclusive transit use, thus increasing highway congestion.

Response: FTA is adopting its proposed trip-based mobility improvements measure. Use of a trip-based measure will permit use of a simplified national model. Furthermore, a trips measure is more easily understood by the public and decision-makers than is transportation system user benefits. Additionally, using fewer and simpler measures for the mobility criterion supports FTA's streamlining goal.

FTA believes that travel time savings can be an important benefit of a major transit investment, but notes they have been challenging to estimate. The proposed trips measure is easier to forecast and still provides a good indication of the mobility benefits provided by the project. FTA is not adopting the suggestion that the mobility measure include passenger miles travelled since that measure gives an advantage to projects serving longer trips. FTA believes that credit should be given to projects that serve the most riders, regardless of trip distance. FTA is also not adopting the suggested alternative approach to consider under the mobility measure the impact implementation of a transit project may have on other modes since it would be cumbersome to do so and be inconsistent with the goal of streamlining the process. FTA believes the impact of a transit project on other modes is adequately considered in the environmental process, where the mitigation of such negative effects is addressed. FTA does not believe it is necessary to assess such effects as part of the evaluation of mobility benefits.

Comment: Two comments suggested that FTA develop the mobility improvements criterion's breakpoints according to project mode or type. Three comments requested that FTA clarify whether a trip is equivalent to a boarding.

Response: FTA has developed a single set of mobility improvements breakpoints that will apply to all New and Small Starts projects regardless of mode. Mode-specific breakpoints would imply that a trip made on one mode is worth more or less than a trip made on another mode or that one mode is preferred over another. FTA has clarified in the revised proposed policy guidance being published concurrently with this final rule that a trip is equivalent to a ''linked trip using the project.''

b. Weighting of Trips by Transit Dependent Passengers

Comment: Fourteen comments supported FTA's proposal to assign a weight of two to project trips made by transit dependent passengers in the mobility improvements measure. Fourteen additional comments supported additional weight for transit dependent trips but requested that FTA provide a clear definition of ''transit dependent persons'' in final policy guidance. Of the comments that requested clarity on the definition of ''transit dependent persons,'' one commenter suggested that the elderly be included in the definition, one recommended that persons with disabilities be included, two commented that all zero-car households be included regardless of income level, and two proposed that FTA define transit dependent persons in terms of automobile ownership as a function of household size.

Eighteen comments disagreed with the proposal to assign extra weight to trips made by transit dependent persons. Of these, nine suggested that trips by transit dependent persons be reported as an ''other factor'' in project evaluation rather than included in the mobility improvements criterion. Three comments suggested that the measure count transit dependent households within one-half mile of stations rather than trips by transit dependent persons. Two comments proposed assigning additional weight to other types of trips instead, with one suggesting that FTA assign more weight to work trips than non-work trips and the other suggesting that FTA give credit to projects that offer travel options to ''highway dependent'' users.

Response: FTA is adopting its proposal to weight trips made by transit dependent persons twice that of trips made by non-transit dependent persons in the calculation of mobility improvements. FTA believes the mobility improvements criterion is the appropriate place to incorporate equity considerations into the New and Small Starts project evaluation and rating process given that populations that lack other travel options have a particularly strong need for mobility improvements. To keep data collection requirements manageable, in the simplified national model FTA is developing, trips made by ''transit dependent persons'' will be defined as trips made by individuals residing in households that do not own a car. Project sponsors that choose to continue to use their local travel model rather than the simplified national model to estimate trips will use trips made by individuals in the lowest socioeconomic stratum in the local model as the measure of trips made by transit dependent persons. Local models classify trips either by household auto ownership or by income level. Thus, trips made by transit dependent persons would be either trips made by individuals residing in households that do not own a car or trips made by individuals in the lowest income category. FTA feels that this proposed approach offers a relatively simple way to incorporate equity considerations into the mobility improvements measure and is consistent with other streamlining proposals included in this final rule. FTA believes that a weight of two on transit dependent trips is appropriate based on data from the National Household Travel Survey, which show that persons in zero-car households make up approximately 8.7 percent of households but make only 4.3 percent of all trips. FTA believes increasing mobility for these transit dependent persons should be considered in the evaluation. FTA notes that MAP–21 eliminated ''other factors'' as a consideration in the evaluation and rating process.

c. Simplified National Model

Comment: Ten comments supported the option of using an FTA-developed simplified national model to estimate trips for the purposes of the cost-

effectiveness and mobility improvements criteria. Three comments opposed the use of a simplified national model due to concerns that the model would not be adequately calibrated to the particularities of each region. One of the three felt that the model may be reasonable for Small Starts or Very Small Starts projects, but not robust enough for New Starts projects.

Several comments expressed concerns about the simplified national model without indicating support or opposition. Eleven comments indicated a preference for using travel forecasting approaches already in place in their localities. Seven comments stressed that the national model's approach should be transparent, tested by project sponsors, and neutral in its assumptions. Six comments (beyond the three that opposed the use of the simplified national model) indicated that the model may not replicate local conditions. Finally, four comments anticipated that FTA's proposal would require more effort because many project sponsors would likely feel compelled to prepare forecasts using both the simplified national model and their local travel model.

Response: FTA is making use of the simplified national model optional. The simplified national model is currently being developed by FTA and will only be made available to project sponsors after it is calibrated against completed transit projects in a range of environments. The model is intended to reduce the effort required by project sponsors to develop the data needed for the cost-effectiveness and mobility improvements criteria. Thus, it fits with FTA's streamlining goals. Moreover, FTA believes that it will allow project sponsors and/or metropolitan planning organizations the option of not expending significant time and resources on modeling refinements when ample data on the performance of transit projects in a wide range of environments would be available through the simplified national model. Regardless of the approach that project sponsors opt to pursue, FTA will continue to work with sponsors to assure that the models used are appropriate and the results as accurate as possible.

2. Environmental Benefits

a. General

Comment: One comment supported FTA's proposal in the NPRM to measure the direct and indirect benefits to human health, safety, energy, and air quality in the environmental benefits criterion. Two comments were concerned about FTA making the environmental benefits criterion a ''catch-all'' measure. Seventeen comments supported FTA's proposal to broaden the measures used in the environmental benefits criterion and suggested that FTA look at both direct and indirect benefits to the natural and human environment. Fourteen comments expressed support for including the change in air quality in the environmental benefits criterion. Four comments expressed support for including estimates of the change in greenhouse gas emissions as a measure under the environmental benefits criterion. Nine comments expressed support for including the change in energy use as a measure under the environmental benefits criterion. One comment agreed with the quantitative approach proposed by FTA instead of a simple checklist approach. This comment also agreed with FTA's proposal to specify the details of the approach in policy guidance as opposed to the final rule.

Response: FTA agrees that a new approach to evaluating and rating environmental benefits is required and is adopting the approach to quantify benefits to human health, safety, energy, and air quality. FTA believes this approach is appropriately focused on the benefits related to human health and the natural environment. As new information or methods for calculating environmental benefits data become available, FTA can propose alternate methodologies in future policy guidance.

Comment: One comment stated that the proposed environmental benefits measures appeared to favor transit agencies with a variety of fleet vehicles, corridors with high population density, corridors with strong existing transit service, and longer projects due to its use of change in vehicle miles of travel (VMT) as the basis for the various benefit calculations. One comment made a statement about data collection for environmental benefits and stated that a one-size-fits-all approach does not work in an urban setting. This comment also suggested that FTA should consider quality of life issues under the environmental benefits criterion.

Response: FTA agrees that by using VMT as a basis for the calculation of environmental benefits, longer projects or those projects with a high potential for acquiring new transit riders will generate a greater change in VMT and thus get a higher amount of environmental benefits. This advantage will be somewhat moderated because for New Starts projects environmental benefits will be compared to the annualized capital and operating cost of the project and for Small Starts projects environmental benefits will be compared to the Federal share. FTA does not expect transit agencies with a variety of fleet vehicles, strong existing service, and in areas with higher population density to have an advantage over other transit agencies.

b. Complexity and Suggestions for Simpler Approaches

Comment: One comment stated that the proposed measures for environmental benefits appeared to be somewhat complex, but went on to say that these types of analyses seem consistent with goals for environmental improvement. Another comment encouraged FTA to keep in mind the desire to simplify the project justification criteria and reduce the subjective measures that require FTA review. A third comment stated there were too many environmental measures proposed and that FTA should simplify the measures and consider warrants. One comment suggested a more qualitative analysis be used to evaluate environmental benefits given that it is difficult to combine and quantify environmental benefits. Another comment stated that because of the breadth and complexity of the measures proposed, they may not be in place at the time the final rule is published. This comment encouraged FTA to continue with the multi-measure approach.

Response: In choosing measures to use under the environmental benefits criterion, FTA's goal was to ensure that calculation of the measures would not impose an undue burden on project sponsors. FTA is adopting measures that are based on data coming directly from the project analysis methods normally used by project sponsors during project planning, as well as adopting simplified approaches for calculating environmental benefits. Through revised proposed policy guidance being published concurrently with the final rule, FTA is requesting public comment on a simple spreadsheet tool that will allow project sponsors to input only a few key data. The spreadsheet will use standard factors to calculate the various environmental benefits and monetize them, including air quality, greenhouse gas emissions, energy, and safety. The factors are shown in the revised proposed policy guidance.

FTA agrees it can be difficult to quantify environmental benefits and combine the measures into a meaningful value. To overcome this difficulty, FTA is using DOT-standard economic values or other published environmental and health economic research to monetize

the various measures of environmental benefits. By converting the environmental benefits into dollar values, they can easily be combined. FTA anticipates it may be necessary at some point in future proposed policy guidance to update the measures or modify the spreadsheet tool as new information and research becomes available.

c. Additional Information Sources

Comment: One comment recommended that FTA wait for the publication of the TCRP Report on Environmental Benefits before advancing measures and data sources. Another comment suggested that, in addition to using U.S. Environmental Protection Agency (EPA) and TCRP guidance to develop its measures, FTA should examine American Public Transportation Association (APTA) Sustainability Commitment metrics. This comment also suggested FTA create a system of data collection to enable project sponsors to use more specific environmental data when available (e.g., utility electricity emission factors vs. EPA regional grid factors).

Response: FTA agrees that information from TCRP's Report on Environmental Benefits was a helpful resource in defining the environmental benefits measures. FTA wrote the problem statement for that TCRP study and served as part of the review panel for the study. FTA has considered the research and findings in the development of the final rule and revised proposed policy guidance. If new or revised information on calculation methodologies becomes available they could be incorporated into the environmental benefits criterion in the future by FTA through policy guidance.

d. Monetization of Environmental Benefits

Comment: Two comments stated support for the monetization of environmental benefits, and one comment added that monetization of benefits ''can be good public policy.''

Thirteen comments expressed concern that monetizing environmental benefits would cause people to view it as a cost-benefit analysis when it is not attempting to capture all benefits. One comment added that environmental benefits do not need to be monetized because several other project justification criteria include cost considerations. Another comment stated it is appropriate to evaluate the environmental benefits of a project against the project's size or cost, but the environmental benefits themselves should not be monetized. One comment recommended, instead of monetizing environmental benefits, creating a second part to the cost-effectiveness criterion that would compare environmental benefits to the cost of the project.

Response: One of FTA's goals is to streamline the evaluation and rating process to the extent possible while maintaining sufficient rigor in the process to inform decision-making on whether taxpayer dollars should be invested in a project or not. FTA believes a detailed analysis of the net impacts of certain environmental factors, as may be required to support a cost-benefit analysis, is unnecessarily complicated. Instead, FTA is focusing on relevant environmental benefits that are most easily addressed, such as changes in air quality pollutant and greenhouse gas emissions, energy use, and safety. FTA notes that a complete review of all environmental effects, is still required as a part of the NEPA process (including through the use of linking planning and NEPA as provided for in 23 CFR 450.318), performed prior to entering into the engineering phase and independent of the particular variables chosen as part of the environmental benefits measures. FTA believes that at a later date it may be possible to develop an approach for assessing public health benefits. Monetizing these environmental benefits using existing economic methods and research is the simplest and most transparent way to combine the results into a single measure of environmental benefits. FTA is adopting the proposal to compare the combined monetized value of environmental benefits to the annualized capital and operating cost of a proposed New Starts project or to the Federal share of a proposed Small Starts project in order to ensure fair comparison of environmental benefits across widely variant projects. FTA believes it is best to compare the benefits to cost in the environmental benefits criterion, rather than combining environmental benefits into the cost-effectiveness criterion, because combining the two would not comport with the requirement in law that there be a separate environmental benefits criterion and that it be given ''comparable, but not necessarily equal weight'' in the evaluation process.

Comment: Three comments stated that a reliable tool does not exist that can accurately capture the full monetary value of environmental benefits. One comment felt monetizing environmental benefits would work against streamlining the process. Two comments suggested environmental benefits are subjective and that regions of the country do not have uniform environmental needs. These comments went on to say that attempting to monetize or uniformly quantify all environmental benefits for a national ranking may prove contrary to the overall goal of encouraging projects that provide environmental benefits as one of their key elements. These comments added that FTA should take a measured approach to monetization. One commenter recommended that FTA conduct an analysis of the ''impact'' of the monetization approach on projects that have successfully received New Starts and Small Starts funds in the past before finalizing the environmental benefits measures.

Response: FTA is not proposing and does not believe that it is necessary to capture the full monetary value of all environmental benefits generated by implementation of a major transit investment as would be necessary for a cost-benefit analysis. Instead, FTA is focusing on the potential environmental benefits most relevant and easily calculated on a national scale, such as changes in air quality pollutant and greenhouse gas emissions, energy use, and safety. FTA believes that at a later date it may also be possible to develop an approach for assessing public health benefits. FTA is using established methods and research to quantify and appropriately monetize these environmental benefits.

FTA recognizes the diversity of environmental settings throughout the country and that transit projects may have different, specialized effects on the human and natural environment depending on the environmental setting. FTA believes it is best to evaluate and mitigate, as appropriate, these specialized effects through the NEPA process. But FTA believes that the evaluation of changes in air quality pollutants and greenhouse gas emissions, energy use, safety, and, potentially some point in the future, public health benefits, is appropriate. These can be evaluated fairly and uniformly across the country to identify the merits of individual transit projects.

FTA believes transit projects are developed to meet numerous goals, one of which is to improve the environment. Similarly, the environmental benefits criterion is just one of six project justification criteria in the New and Small Starts evaluation process. FTA disagrees that the proposed environmental benefits measures would change or discourage environmental goals.

FTA is currently testing the environmental benefits measures with data from existing transit projects and will continue to do so prior to issuing final policy guidance. As expected, transit projects that reduce the greatest amount of VMT and New Starts projects with relatively lower costs or Small Starts projects with relatively lower Federal shares perform better than projects that do not result in substantial changes in VMT or have a very high cost or Federal share. FTA recognizes the primary goals and objectives of some projects seeking New or Small Starts funds are to make the transit system network run more efficiently and to improve mobility of existing transit riders. Although these types of projects would not result in substantial reductions in VMT and might, therefore, receive a lower environmental benefits rating, they would likely perform well under some of the other project justification criteria.

Comment: One comment suggested that instead of monetizing environmental benefits FTA develop warrants for evaluating environmental benefits related to development densities and land use patterns. Another comment suggested that, in lieu of monetization of environmental benefits, FTA use a checklist approach to allow projects to more easily demonstrate environmental improvements across an array of areas. This comment went on to suggest that the checklist include improvements to the natural environment through restoration of degraded wetlands, the clean-up of contaminated sites, and reductions in accidents at pedestrian crosswalks or railroad crossings. Another comment stated that, in lieu of monetization of environmental benefits, FTA use a checklist that would ask project sponsors if certain environmental benefits are expected from the proposed project and/or whether the project sponsor participates in a third-party verified environmental program.

Response: FTA does not agree that a checklist evaluating environmental improvements would be simpler or more advantageous over relatively simple quantitative measures of environmental benefits. In addition, the restoration of wetlands and the clean-up of contaminated sites are actions that are typically governed by or required by federal or state laws and, therefore, would not be an appropriate measure to evaluate the merits of an individual transit project. Also, all transit projects should be designed to avoid accidents at pedestrian crosswalks or railroad crossings to the maximum extent possible. FTA notes that the various environmental issues described in the comments are the kinds of issues that should be addressed through the metropolitan planning and NEPA processes, which would develop mitigation measures to be included in the proposed action in the event there are negative or adverse environmental impacts as a result of the proposed project.

FTA agrees that warrants can be useful in streamlining project evaluation. Such approaches, however, should be based primarily on the evaluation measures being used. In future proposed policy guidance, FTA may propose warrants for the environmental benefits criterion, but is not doing so at this time.

e. Use of VMT Change as Basis for Environmental Benefits

Comment: One comment stated the current approach of basing the rating simply on the air quality attainment status of the metropolitan area in which the project is located is not related to a project's effects on the environment and supported FTA's proposal for evaluating environmental benefits based on a reduction in VMT instead. The comment also stated that future changes to air quality standards for ozone may cause much of the country to be in nonattainment status, thereby making the current measure even less effective in differentiating between projects.

Response: FTA agrees that the existing measure, which examines only the EPA air quality conformity designation for the area in which the proposed project is located and does not look at any specific environmental benefits, does not provide a useful basis for decision-making.

Comment: Two comments did not support evaluating and rating environmental benefits from estimates of changes in VMT based on the idea that VMT-based calculations may not capture all environmental benefits or result in scores that fairly recognize the full environmental benefit of a given project. One comment noted that VMT assessed at a regional level would not capture localized health impacts or benefits of projects on ''hot spots'' of changes in air quality. The comment noted that, with respect to air quality, technology to assess intra-regional exposure variation and project level pollutant concentrations now exists with computational modeling approaches such as dispersion modeling and land use regression. It went on to say these tools can be used to create maps of cumulative air pollution concentrations within regions. The commenter noted the example of the San Francisco Department of Public Health (SFDPH), which has developed and routinely applies tools to assess local impacts that are being employed in the San Francisco Community Risk Reduction Plan to evaluate whether infill residential development needs additional ventilation system protections. Another comment stated that measuring the change in air quality criteria pollutants would be better for the proposed transit corridor than for the region. Two comments stated that environmental benefits should include changes in VMT for all roadways, not just ''highways.'' One comment suggested that FTA include environmental benefits due to the future predicted VMT changes resulting from projected development around stations instead of the economic development measure.

Response: FTA does not believe it is necessary in the New and Small Starts evaluation process to attempt to do a full cost-benefit analysis and capture all of the environmental benefits a transit project may produce as this would conflict with FTA's streamlining objectives. FTA also believes it is unnecessarily complicated to use computational modeling approaches to assess localized ''hot spots'' changes in air quality for the purposes of the New and Small Starts evaluation and rating process. FTA believes focusing on the most relevant environmental benefits that are more easily estimated and evaluated on a national scale is appropriate, such as changes in air quality pollutant and greenhouse gas emissions, energy use, safety, and at some point in the future human health. These can be derived from estimated changes in VMT and they allow FTA to fairly compare the merits of proposed projects. FTA conducts ''hot spot'' analyses as part of the NEPA process, as needed, in order to support transportation air quality conformity determinations required by the Clean Air Act.

FTA intends to look at the change in VMT for all roadways and not just changes in highway VMT. Estimates of VMT change will be based on the results of the simplified national model FTA is currently developing, or at the option of the project sponsor, from the results of their local travel forecasting models. FTA intends to continue the current practice of evaluating only the first order effects that come when transportation system users choose to change modes, rather than attempting to quantify higher order effects that might come from changes in land use patterns and increased densities that may lead to changes in destinations. Further, FTA

does not intend to quantify any induced or latent demand on the highway system that could result. FTA believes that while more accurate forecasts of overall transportation system usage might be possible by applying more complex analytical techniques, the increased precision is not worth the additional burden on project sponsors and that a metric relying on first order changes in VMT is sufficient to accurately determine the relative environmental benefits of candidate projects.

FTA believes that the best location to capture the benefits associated with dense, more compact development is in the economic development criterion rather than the environmental benefits criterion. FTA believes it is appropriate to focus the environmental benefits measure on the direct environmental effects that result from changes in mode use as a result of the project. The environmental benefits that might come as a result of changes in development patterns are a secondary impact of the economic development effects of the project.

Comment: Five comments suggested FTA consider total auto trips reduced given that ''cold starts'' of vehicles have a disproportionate impact on emissions and fuel consumption.

Response: FTA agrees cold starts can have a disproportionate effect on emissions and fuel consumption, but they are already included in the average emissions factors.

Comment: Five comments suggested FTA develop warrants for evaluating environmental benefits. Specifically, two comments stated many transit projects in dense urban areas do not result in VMT reduction, but do support existing dense development and energy-efficient land use patterns leading to walkable and bike-able communities and are still important for air quality emission reductions. These comments suggested that the environmental benefits of these projects should be counted. One of the comments went on to mention this linkage is currently being studied in a TCRP project entitled Quantifying Transit's Impact on GHG Emissions and Energy Use: The Land Use Component. Another comment stated transit projects located in corridors within or near the freeway system would experience more safety benefits based on VMT reduction than would transit projects located away from freeway systems.

Response: FTA recognizes the primary goals and objectives of some projects seeking New and Small Starts funds are to make the transit system network run more efficiently and to improve mobility for existing transit riders. FTA also recognizes these projects are environmentally beneficial because they sustain or improve transit service and are important components to maintaining regional air quality standards. While these types of projects would not result in substantial reductions of VMT and thereby would receive a lower environmental benefits rating, FTA anticipates they would perform well under the other New and Small Starts project justification criteria.

FTA agrees warrants can be useful in streamlining the New and Small Starts project evaluation process. Such approaches, however, should be based primarily on the evaluation measures being used. In future proposed policy guidance, FTA may propose warrants for the environmental benefits criterion, but is not doing so at this time.

f. Use of a National Model To Assess Environmental Benefits

Comment: Five comments stated concerns or did not support use of a simplified national model for deriving changes in highway VMT to be used when calculating environmental benefits. Three comments did support the flexibility to use a standard local travel forecasting method at the sponsor's option.

Response: Because streamlining is one of the main objectives associated with this rulemaking, FTA is proposing that project sponsors, at their option, may choose to use a simplified national model for estimating the number of trips on the project. The information from the simplified national model would be used to estimate the change in VMT, which would then be used to calculate environmental benefits. FTA recognizes estimating VMT in this manner may result in a higher margin of error than estimating VMT through standard travel forecasting tools, but believes the results will be fair estimates of environmental benefits attributable to the transit project. Given the streamlining benefits this approach will allow, FTA believes it will be an attractive option for many project sponsors. FTA will continue to allow project sponsors the flexibility of calculating VMT from their standard local travel forecasting models if they so choose. Project sponsors choosing this approach should recognize that FTA will need to verify the calculations.

g. Valuing Energy and Greenhouse Gas (GHG) Reductions and Recognizing GHG Performance Targets

Comment: One comment did not support evaluating and rating environmental benefits based on both the change in energy use and the change in greenhouse gas emissions. Another comment suggested that states or regions with GHG performance targets for their regional transportation plans should be acknowledged in the scoring for environmental benefits.

Response: FTA recognizes a significant part of the benefits that come from reducing energy use are accounted for by the resulting reduction in pollutant and greenhouse gas emissions. To avoid the double counting, the monetary value of energy conservation will be factored down to account for this, and will count only the public benefits related to energy security and will also not include the private benefits which accrue to transportation system users who do not have to purchase fuel. Because there is wide variation in the use of GHG performance targets in regional transportation plans and in the requirements and methods for achieving these targets, FTA could not acknowledge the use of these plans in the scoring for environmental benefits.

h. Inclusion of Health and Safety Benefits in Environmental Benefits

Comment: Twelve comments expressed support for the inclusion of changes in health in the environmental benefits criterion and nine comments expressed support for the inclusion of safety in the environmental benefits criterion.

One comment acknowledged FTA's efforts to keep the environmental benefits calculations as simple as possible. But this comment recommended FTA limit the evaluation of environmental benefits to only the impacts on air quality and greenhouse gas emissions, which are direct environmental impacts. This comment stated that calculation of change in energy use and health benefits would add time and uncertainty to project evaluations, would not help to distinguish between projects, and would dilute the importance of the direct environmental benefits, which are required to be evaluated under the current statute.

Two comments stated that although reduction in traffic accidents is important, it is not an environmental benefit and is captured in other project justification criteria. One comment went on to say FTA should avoid the complication of trying to measure health and safety separately under the environmental benefits criterion. Another comment suggested the best location to evaluate safety is within ''other factors'' or within the economic development criterion. Another comment added that safety is captured through the local financial commitment evaluation, which considers funding for

core state of good repair of the transit system. One comment suggested FTA distinguish between transit systems that operate in mixed traffic verses those operating on exclusive guideways.

Response: FTA disagrees that health and safety are not environmental benefits and believes that some safety and health benefits, in addition to the health benefits that come from improved air quality, should be included in the evaluation. FTA believes it is appropriate to highlight explicitly the safety and public health benefits of transit. Once a methodology becomes available for doing so, FTA believes it will measure public health benefits coming from implementation of a project based on the additional walking and other physical activity that would be expected. FTA notes that MAP–21 eliminates the consideration of ''other factors'' in the development of a project justification rating.

i. Valuation of Environmental Benefits in Areas of Nonattainment and Maintenance Areas

Comment: Five comments suggested while reductions in VMT and emissions are a benefit of many transit projects, emission reductions have greater value in metropolitan areas that are in nonattainment of the National Ambient Air Quality Standards. Three of these comments stated FTA's environmental benefit rating should continue to take into account a metropolitan area's nonattainment status. These comments further recommended FTA either increase the environmental benefit rating by one or two levels for projects located in metropolitan areas with the most severe air quality conditions or give a higher monetary value to emission reductions in these areas. One comment felt the New and Small Starts process should favor projects that support regional air quality objectives. Three comments said it is unclear how air quality maintenance areas would be treated and recommended they be treated like nonattainment areas when evaluating environmental benefits.

Response: FTA believes any reduction in the emission of criteria pollutants would be beneficial to public health. FTA agrees that reductions in pollutant emissions in metropolitan areas in nonattainment or maintenance of the National Ambient Air Quality Standards have greater value than reductions of emissions in areas that are in attainment of those air quality standards. FTA is reflecting these differences in how environmental benefits will be monetized rather than raising a rating by one or two levels.

j. Electric Vehicles and Fleet Energy Use

Comment: One comment stated electrically powered transit has a significant advantage because the vehicles do not produce any air pollution at the source, adding that the air pollution is generated at power plants, which are usually located away from population centers and employ advanced emission control technologies. The comment also stated that electric vehicles run more efficiently because of faster acceleration. In addition, the comment observed that bus fleets usually use a combination of new and older technologies and the effectiveness of new technologies such as hybrid vehicles in reducing air emissions is uncertain. The comment said it was unclear whether FTA would consider the increase in transit VMT from the new project or whether FTA would also look at system-wide changes. Another comment observed that in some parts of the country the electric generation mix is significantly different from the national average. This comment suggested the factors used by FTA to calculate emissions should be adjusted in these cases and should consider changes to the energy mix in the future.

Response: FTA does not believe electric vehicles will necessarily have a significant advantage in the environmental benefits measure because some emissions generated from power plants will still be calculated. FTA intends that the environmental benefits measure will consider both changes in automobile and truck VMT and changes in transit VMT to calculate changes in air quality, safety, greenhouse gas emissions, and energy. For transit VMT, FTA will consider changes in VMT associated with the proposed project and changes in ancillary service that may feed into the project. At this time, FTA plans to use national factors based on the national electric generation mix rather than adjusting the energy mix region by region. FTA may consider using regional electric generation mixes in future policy guidance.

k. Health Benefits

Comment: One comment suggested NEPA may be the more appropriate venue for assessing environmental impacts of a proposed project, and said ideally the New and Small Starts evaluation and rating process would be consistent with NEPA with respect to health findings and analysis.

Another comment recommended the environmental benefits measure for changes in health focus on the air quality of the Community Planning Association (CPA) district where the transit project is located based on the idea that minority and lower-income communities experience the poorest air quality and the highest rates of asthma.

Another comment commended FTA for recognizing the impacts poor transportation decisions have on public health (based on impacts they have on air quality, etc.) This comment suggested FTA find ways to evaluate how transit investments can foster better health through improved environments for accessing transit on foot and related physical activity. It went on to say this is an important step for FTA toward encouraging local and regional decision-makers to prioritize projects seeking to maximize public health benefits and reduce health disparities in the community where a transit project is to be built.

One comment recommended an evaluation tool—such as the Healthy Development Measurement Tool or a health impact assessment—should be used in order to determine the health impact of the transit project. This comment also stated FTA should recommend that project sponsors use health impact assessments as a means of prioritizing transit projects that could reduce health disparities across race and income and achieve more equitable outcomes.

Response: FTA agrees the results of the NEPA process and the New and Small Starts evaluation and rating process should be consistent with respect to health findings and analysis. During the NEPA process and during evaluations of New and Small Starts projects, FTA works closely with project sponsors to ensure that project descriptions and assumptions that go into each process are consistent with each other and with fiscally constrained long-range transportation plans. FTA is continuing this approach with the implementation of this final rule.

FTA is implementing environmental benefit measures that examine changes in air quality, changes in safety, and, as soon as a methodology becomes available to assess public health benefits, including changes in public health potentially related to walking and other physical activity. FTA recognizes that changes in air quality and changes in safety help with public health, but the measure of health would be focused on items not already captured under the other environmental benefit measures so as to avoid double counting. In monetizing the benefits from changes in air quality, the published literature being used by FTA to develop the factors considers the relationship of pollutants emissions and incidences of disease such as asthma

and other chronic illnesses linked to air quality. FTA does not agree with the suggestion to evaluate health benefits of transit projects at the Community Planning Association district scale as it would add complexity and conflict with FTA's streamlining goals. FTA is including in the final rule an environmental benefits measure of public health benefits associated with walking or physical activity, but is not implementing it until a relatively simple methodology for calculating it can be developed. FTA will consider evaluation tools such as the Healthy Development Measurement Tool as it continues its research.

3. Cost-Effectiveness

a. General Comments

Comment: Six comments supported FTA's proposed simplification of the cost-effectiveness measure in general. Two comments objected to the proposed simplification, stating the proposed changes would prioritize non-transportation objectives. Of these two comments, one recommended an alternative approach that had been submitted in response to the ANPRM, which is discussed above in the section on mobility benefits. Two comments suggested the cost-effectiveness criterion be renamed ''Mobility Cost-effectiveness,'' because other types of benefits are not explicitly included.

Response: FTA is adopting its proposed changes to cost-effectiveness with the exception that FTA will no longer assign additional weight under the cost-effectiveness criterion to trips made by transit dependent persons. Further, as required by MAP–21, for Small Starts projects, the cost-effectiveness calculation will be based only on the Federal share rather than the total project cost. As noted earlier, MAP–21 specifies cost-effectiveness should be measured as ''cost per trip''. FTA believes it is important in the mobility criterion to consider trips made by transit dependent persons, but that the cost-effectiveness evaluation should focus instead on total trips on the project without giving extra credit to a particular type of passenger. As noted above, FTA is not adopting the alternative approach received in a comment that was described in the earlier section of this document under the mobility measure since it was not fully described, it would appear to involve a cumbersome process, and it would not meet some of the streamlining goals intended by this final rule.

FTA notes major transit capital projects may serve worthwhile purposes beyond maximizing travel time savings, including improving accessibility to transit dependent persons, providing additional travel alternatives to the automobile, supporting changes in land development patterns around stations that may help to reduce sprawl and slow further congestion in the future, and improving environmental outcomes. The measure for the cost-effectiveness criterion is established in statute, and FTA is not proposing to change it as part of the rulemaking process, but rather is describing how the measure will be calculated, evaluated, and rated in Appendix A of the regulation. In addition, FTA is requesting comments in the revised proposed policy guidance published today on the method for calculating cost per trip. FTA notes that projects that produce significant travel time savings are likely to attract many riders since travel time is a major determinant of a traveler's choice of mode. Hence, the selected measure of cost-effectiveness does in fact account for reductions in travel time even if travel time savings, per se, is no longer the measure being utilized. FTA also notes that the calculation of net travel time savings is significantly more complex and subject to error compared to the calculation of estimated trips.

Comment: Three comments raised points related to the travel demand models used to forecast trips on the project that is used in the cost-effectiveness calculation. One comment stated no empirical evidence exists for the mode-specific constants used in travel forecasts. Another requested clarification on how special-event ridership would be treated under the proposed cost-effectiveness measure. The third comment encouraged FTA to continue to allow the use of spreadsheets and other travel model alternatives in developing ridership estimates for short streetcar segments.

Response: As described in the NPRM, FTA notes that it is all the attributes of a mode that cause riders to change modes, but that some cannot be modeled. Thus, FTA believes that mode-specific constants remain a good proxy for such un-modeled factors in travel demand models. FTA currently allows inclusion of special-event trips in ridership totals and will continue to do so. Sponsors of projects may propose use of simplified ridership estimating approaches to FTA. As outlined in FTA's Reporting Instructions, project sponsors should contact FTA to discuss potential alternate analytical techniques when beginning an alternatives analysis. If a sponsor uses a simplified ridership estimating approach, FTA will review the reasonability of the approach and the resulting ridership projections as it does today.

Comment: One comment requested FTA reconsider its decision not to allow regional differences in calculating project costs. Another comment recommended FTA require project sponsors to analyze baseline causes of delay and to compare current transit travel speeds with estimated free-flow travel speeds.

Response: As stated in the NPRM, FTA believes it is necessary to evaluate projects consistently rather than based on regional differences since this is a national program with greater demand for funds then there is supply of funds. Regarding travel speeds, FTA believes it is more appropriate to focus on total usage of the project in the cost-effectiveness calculation rather than travel time saved. The state of the art for reliably estimating travel time saved is not sufficiently advanced to make that method more appropriate than estimating total usage. Moreover, comfort, convenience, frequency of service, and travel time reliability will produce increased ridership, and thus will be captured in the number of trips on the project.

b. Discount Rate

Comment: Nine comments supported FTA's proposal to use a two percent discount rate for calculation of annualized capital costs for use in the measures of cost-effectiveness and environmental benefits. One comment stated two percent is too low and recommended a three percent discount rate.

Response: FTA is adopting the proposed two percent discount rate based on the fact that these are long term investments.

c. Cost per Trip Measure

Comment: Twenty-five comments supported FTA's proposed change to a cost-per-trip measure of cost-effectiveness. Nine of these comments requested FTA clarify that a trip is defined as an ''unlinked passenger trip'' or ''boarding'' for the purposes of the measure. Two comments proposed defining a trip as a ''passenger riding on the proposed project,'' but one of these comments made reference to Small Starts projects only. One comment made a series of suggestions, summarized earlier in this document for the horizon year, discount rate, and other values that should be used in the cost-per-trip calculation.

Seven comments opposed the replacement of the current cost-effectiveness measure with the proposed

cost-per-trip measure. Of these, five requested travel time savings be retained as part of the measure, one requested benefits gained by reducing congestion for existing users of the transit system be considered, and one requested the current measure be retained as is.

Response: FTA is adopting the proposed cost-per-trip measure of cost-effectiveness, except that no additional weight will be assigned to trips made by transit dependent persons. MAP–21 requires the use of cost per trip as the measure of cost-effectiveness. The definition of a trip in this measure is ''linked trip using the project,'' which FTA defines in the revised proposed policy guidance being published concurrently with this final rule. To support the streamlining of New and Small Starts procedures, FTA will not use multiple measures of cost-effectiveness.

FTA believes travel time savings can be an important benefit of a major transit investment, but observes they have been challenging to estimate reliably. The proposed trip-based measure is intended to be easier to forecast while still providing a good indication of project merit.

FTA has addressed comments on the horizon year, discount rate, and other parameters of the cost-per-trip measure elsewhere in this final rule.

d. Factor-Specific Breakpoints

Comment: Three comments recommended FTA develop cost-effectiveness breakpoints according to the objectives and characteristics of projects, such as mode-specific breakpoints.

Response: FTA is using a set of cost-effectiveness breakpoints that will apply to all New Starts projects and different set of breakpoints that will apply to all Small Starts projects. Because MAP–21 specifies the benefits of Small Starts project must be compared to the Federal share, the breakpoints will be different than for New Starts where the benefits are compared to the annualized capital and operating cost of the project. Having mode- or characteristic-specific breakpoints would imply that FTA weights trips and allocates funds according to these factors, which it does not.

e. Elimination of Baseline Alternative Requirement

Comment: Thirty-eight comments supported FTA's proposal to eliminate the requirement for a baseline alternative for the purposes of calculating cost-effectiveness. Two comments opposed the proposal.

Response: FTA is adopting its proposal to eliminate the baseline alternative requirement because of the streamlining benefits it will achieve for the New Starts and Small Starts process. Further, MAP–21 explicitly calls for use of the ''no-action'' alternative for Small Starts projects. Project sponsors have had to spend a significant amount of time, money, and effort to develop a baseline alternative. Often the baseline alternative is one that is never under serious consideration locally for actual construction because it is not desired by local leaders. Thus, developing the baseline alternative becomes simply a cumbersome exercise necessary to meet Federal requirements. The NEPA process requires project sponsors to consider a reasonable range of alternatives, so eliminating the development of a baseline alternative in no way eliminates the need for sponsors to look at various alternatives when making investment decisions. FTA required the development of a baseline alternative because of the use of incremental measures, particularly cost-effectiveness, and the need to help level the playing field for evaluation of a wide variety of projects nationwide. However, developing a baseline alternative was found to be a burdensome process and confusing to many, with the resulting calculation of cost-effectiveness not readily understood by the general public. By moving to a cost-effectiveness measure based on cost per trip as required in law, which is not an incremental measure, developing the baseline alternative as the point of comparison is no longer necessary. Furthermore, FTA believes it is the responsibility of local decision makers to balance the costs, benefits, and risks of various alternatives. Local officials are closest to the unique circumstances of their area and are in the best position to consider all relevant factors when developing alternatives for consideration. These analyses can be conducted as part of the metropolitan transportation planning and NEPA processes. Under MAP–21, only once a project has cleared both processes and a Locally Preferred Alternative is adopted into the Long Range Transportation Plan is a project ready to be evaluated for entry into the newly defined ''engineering'' stage for a New Starts project.

f. Pre-Qualification—Cost-Effectiveness-Specific

Comment: Three comments supported FTA's proposal to develop warrants that would allow projects to pre-qualify as cost-effective. One comment suggested a project be able to qualify for the same cost-effectiveness rating as an earlier project in the same corridor if its annualized cost per trip is equal to or less than that of the earlier project. Another comment requested that warrants not favor a particular mode.

Response: FTA is adopting in this final rule the ability to develop warrants. More information on warrants will be proposed in future policy guidance.

g. Betterments/Enrichments

Comment: Forty-five comments supported the proposal to exclude certain items, originally defined as ''betterments,'' from the calculation of cost-effectiveness. Of the comments that supported this proposal, nine supported excluding the costs of pedestrian and bicycle facilities and six supported excluding the costs of LEED design elements. Twelve of the comments stated that allowable ''betterments'' should be defined by FTA in policy guidance, and four suggested FTA use the same definition of ''betterments'' used in Circular 5010.D. Ten comments requested FTA be flexible in the definition of betterments to reflect local conditions. Most of the comments that supported excluding ''betterments'' provided lists of various elements to be considered as ''betterments,'' including items needed for climate adaptation, energy efficiency measures, safety improvements, noise mitigation, acquiring land for affordable housing, energy reduction elements comparable to LEED certification, structured parking instead of surface parking, off-site pedestrian and bicycle improvements, storm-water management, and a variety of other activities. Three comments opposed the inclusion of parking. Two comments were opposed to excluding the cost of ''betterments'' from cost-effectiveness altogether. One of these two comments suggested that categorizing elements as ''betterments'' may result in them becoming ineligible for funding in the future. The other suggested that ''betterments'' such as LEED certification would be more appropriately captured under the environmental benefits measure rather than the cost-effectiveness measure. Several comments suggested using a different term than ''betterments'' to reduce confusion with the definition of ''betterments'' listed in Circular 5010.D. Two comments proposed capping the cost-reduction of ''betterments'' at 10 percent of project cost.

Response: As suggested by several comments, FTA is adopting the term ''enrichments'' rather than the term ''betterments'' to avoid confusion with ''betterments'' defined in Circular

5010.1D. FTA believes allowing clearly defined ''enrichments'' (those elements that go beyond what is needed for the basic functioning of the project) to be excluded from the cost part of the cost-effectiveness calculation for New Starts projects is reasonable and can help to remove disincentives from including higher cost elements whose benefits would not be captured by the final rule's limited number of measures. For example, since the environmental benefits measure is focused on those impacts that come from a reduction in VMT, the environmental benefits of LEED certification of the transit facilities would not be captured in that measure. Likewise, most local travel models around the country are not sensitive enough to account for the number of trips that would be induced by bicycle improvements included in a project such as bike racks or lockers. FTA agrees with the comment received stating that New Starts cost-effectiveness should include only the costs necessary to produce the benefits examined in the cost-effectiveness calculation rather than include all costs. FTA is proposing to define the concept of ''enrichments'' in the Appendix to this final rule and to provide a list of the ''enrichments'' it will allow to be excluded from the New Starts cost-effectiveness calculation in the revised proposed policy guidance being published today concurrently with this final rule. Items being proposed as ''enrichments'' include artwork, landscaping, pedestrian and bicycle improvements, sustainable building design elements, alternative fueled vehicles, and joint development costs. FTA agrees the benefits of such features are not often captured in the primary benefits being evaluated in the cost-effectiveness criterion, but that these features nonetheless produce desirable outcomes such as reduced facility energy use, increased ridership, and/or improved aesthetics and quality of life factors. Although there is merit to the list of concurrent non-project activities or ''betterments'' described in Circular 5010.D, FTA proposes to limit the number of scope elements that may be considered ''enrichments'' to only those items non-integral for the planned functioning of the proposed project. Many comments expressed support for maintaining flexibility in what can be considered an ''enrichment,'' but a similar number of comments expressed concerns about prolonged negotiations with FTA over what may be considered as an ''enrichment.'' Thus, FTA is proposing a definition of ''enrichments'' in the Appendix to this final rule, and providing a list of allowable ''enrichments'' in the revised proposed policy guidance made available for comment today. FTA believes the list of ''enrichments'' that has been developed is generally consistent with the proposals suggested in the comments on the NPRM. The list of enrichments can be revisited in future proposed policy guidance, however, as more information becomes available. Further, FTA believes its approach for considering ''enrichments'' is consistent with its streamlining goals in that it will not require significant discussion or ''back and forth'' verification between project sponsors and FTA. FTA is not including parking in the list of proposed ''enrichments'' because some parking is clearly integral to some projects. FTA does not believe the ''enrichments'' it is proposing in the policy guidance would exceeded 10 percent of a proposed New Starts project's total cost.

For Small Starts projects, MAP–21 explicitly calls for FTA to establish ratings based on ''an evaluation of the benefits of the project as compared to the Federal assistance to be provided.'' Accordingly, FTA will adopt in this final rule a cost-effectiveness measure for Small Starts that compares the Federal share requested to trips taken on the project. FTA will not subtract the cost of ''enrichments'' from the Federal share considered in the cost-effectiveness measure for Small Starts.

4. Operating Efficiencies

Comment: Five of the nineteen comments received agreed with the proposed ''operating cost per place-mile'' measure for evaluating operating efficiencies. Three agreed without any comment and one commented that the project sponsor could lower operating cost per place mile artificially by adding more capacity than warranted. The same comment suggested consideration of efficiency factor adjustments to the measure to allow closer analysis of large and small systems. Another comment suggested FTA implement a spreadsheet or simple tracking tool to calculate the measure and requested that the vehicles and transit services currently in a corridor not have a bearing on how vehicles and transit services for a proposed project are defined for the purposes of calculating place-miles.

Of the fourteen comments that disagreed with the new measure, most preferred using the current measure, which is operating cost per passenger mile. The reason most often cited for not liking the proposed measure was that it considers only service provided and not the level of service utilization. Thus, the comments stated the new measure seems to reward transit projects that simply provide more capacity by increasing frequencies even if those frequencies are not warranted based on estimated ridership levels. Several comments also stated the proposed measure could favor larger systems over smaller systems. One of the comments stated concerns with how FTA would consider standing capacity when calculating place-miles and suggested that FTA would allow certain modes such as bus and heavy rail to assume standing capacity but not commuter rail. Another comment stated that in the determination of place-miles, peak loads should not exceed identified levels of service from TCRP Report 100 (''Transit Capacity and Quality of Service''). A third comment suggested FTA use ''operating cost per place-hour'' instead given that it measures service provided as ''operating cost per place-mile'' but does not reward projects in areas where commute distances have ballooned due to sprawl and insufficient planning for growth.

Response: MAP–21 eliminates ''operating efficiencies'' as a project justification criterion and instead calls for including a ''congestion relief'' criterion Accordingly, FTA will no longer include a measure for operating efficiencies. Because a measure for ''congestion relief'' was not proposed in the NPRM, FTA is proposing in the revised policy guidance published concurrently with this final rule to assign a medium rating for congestion relief for all projects seeking New and Small Starts funds until such time as subsequent interim policy guidance and rulemaking can be completed to allow for public comment on a proposed measure for the criterion.

5. Economic Development Effects

a. General Comments

Comment: Forty-two general comments were offered on the proposed economic development criterion, which was that FTA would evaluate and rate the extent to which a proposed project is likely to enhance additional, transit-supportive development based on the existing plans and policies to support economic development proximate to the project. Twenty-six of these agreed with the proposed economic development criterion. Of these, 10 offered general support for including economic development in project evaluations; three suggested broader measures for economic development and consideration of scenario-based analysis of direct changes to VMT; two supported the use of more qualitative measures; one suggested the inclusion

of the track record of jobs created; one recommended additional research; one suggested assessing how local and regional plans and policies would allow for future transit-oriented development; and eight did not make specific recommendations.

Six comments disagreed with the proposed economic development criterion. Two of these comments suggested additional research. One comment stated there is a contradiction between corridor-level versus regional-level analysis. One comment asserted that FTA's proposal does not adequately distinguish between economic development and land use. One comment stated that transit's ability to reduce transaction costs and increase productivity is not sufficient to cluster or intensify development. One comment stated that transit agencies have little land use authority.

Ten of the comments received were neutral about the proposed economic development criterion or did not offer a clear position. Five of these comments pertained to jobs. They mentioned evaluating the percent of jobs accessible via transit before and after project implementation, consideration of job growth policies and job creation and potential, and the use of a warrant-based approach based on current levels of employment density. Two comments stated higher land values could be a negative effect of transit. One of the two comments recommended more attention to value capture. Three comments suggested consideration of plans and policies or proactive measures such as funding committed through public-private partnerships.

Response: FTA appreciates the general support of the improved economic development criterion. FTA believes the clustering of development around a transit investment is a key measure of the value of the project. Transit projects can help local areas improve the livability and sustainability of their communities by increasing transportation choices and access to transportation services; improving energy efficiency, reducing greenhouse gas emissions and improving the environment; and improving the environmental sustainability of the communities they serve. Improved access to jobs and activity centers can contribute to local economic growth. FTA agrees with the comments that suggest additional research for this measure.

b. Affordable Housing

Comment: Thirty-nine comments were received in response to FTA's proposal to examine the plans and policies in place to maintain or increase affordable housing in the project corridor under the economic development criterion.

Twenty-six of the comments agreed with including affordable housing plans and policies in the evaluation of economic development. Of these comments, the majority gave general support for evaluating affordable housing and transit-oriented development. Several recommended FTA define affordable housing and provide further guidance about how it would be evaluated. Suggestions provided by several comments included examining plans and policies related to employer-assisted housing, community land trusts, inclusionary zoning, programs to preserve subsidized housing, and programs for attracting workforce and market-rate housing. Two comments suggested FTA examine affordable housing funding per track mile. A few comments stated FTA should coordinate with other agencies on developing how it would evaluate plans and policies to support affordable housing, including the U.S. Department of Housing and Urban Development (HUD) and the Partnership for Sustainable Communities. One comment stated FTA should examine the affordability of new residential development near transit stations.

Three comments disagreed with including plans and policies to maintain or increase affordable housing under the economic development criterion. One comment stated affordable housing should be addressed through public policy, rather than transit policy. One comment suggested it should be considered under the land use criterion, not the economic development criterion. Another comment stated plans and policies should not be included because transit agencies can only support, not mandate, plans and policies.

Ten of the comments received about the proposal to evaluate plans and policies to maintain or increase affordable housing were neutral or did not offer a clear position. Two of these comments suggested giving greater weight to proposals that exceed a minimum number of accessible units and that maximize three-bedroom family-sized units. One comment recommended that FTA develop strategies that communities can use to preserve affordable housing. Another comment recommended including ''workforce housing.'' One comment suggested rewarding areas that minimize displacement. One comment proposed ''affordability of new residential development near transit stations.'' One comment stated that townhouses should meet ICC–ANSI Type C unit requirements for ''visitable'' housing. One comment supported more FTA efforts to collaborate with others. Finally, one comment recommended FTA focus on projects that reduce combined housing and transportation costs.

Response: FTA is expanding its current practice of evaluating transit supportive plans and policies under economic development by including an examination of the plans and policies to maintain or increase the supply of affordable housing in the project corridor because FTA believes that maintaining affordable housing near transit creates more inclusive communities and helps to ensure lower income families have ready access to transit. FTA has outlined in the revised proposed policy guidance published today how it proposes to examine affordable housing plans and policies. The revised proposed policy guidance has been developed in coordination with HUD and is subject to public comment. FTA appreciates the suggestions provided and has taken them into consideration. In addition, FTA will evaluate the amount of existing affordable housing in the project corridor under the land use criterion.

FTA disagrees with comments stating affordable housing should not be addressed through transit policy based on the idea that affordable housing is a land use issue and not an economic development issue, and the comments stating that affordable housing plans and policies should not be included because transit agencies cannot mandate these plans and policies. Affordable housing is an economic development and land use issue because transportation access to affordable housing has great potential to stimulate new development and foster the future economic growth of an area. FTA recognizes transit agencies cannot mandate these plans and policies and they are instead developed by localities. But FTA believes the nature of the area surrounding transit has a great impact on its success, and, thus, through these requirements FTA encourages transit agencies to coordinate and form partnerships with localities to guide transit-supportive development and affordable housing.

c. Job Creation

Comment: Six comments were received in response to FTA's proposal to report under the economic development criterion the number of domestic jobs created by the design,

construction, and operation of the proposed project. Four of the comments agreed with including job creation as a measure of economic development. One of these suggested ''full-time equivalent jobs'' as the measure. Another recommended reviewing the track record of local transit supportive policies and domestic jobs created. One comment disagreed with the consideration of job creation, stating any figures would be based on industry averages and not on specific work plans for constructing the project. Thus, the commenter felt such a measure was likely to correlate directly with project cost and did not need to be reported separately. Another comment neither agreed or disagreed, but suggested FTA develop a methodology for calculating indirect jobs based on a measurement of a station area.

Response: FTA believes the number of domestic jobs related to the design, construction, and operation of a project is one indicator of how the transit investment contributes to local and regional economic development. FTA is not specifying a methodology for estimating job creation, but rather is allowing project sponsors to determine how to calculate the figure. FTA would not use the estimated number of domestic jobs in development of the economic development rating, but would simply report the number for the project as an informational item. FTA acknowledges that these jobs do not necessarily reflect net increases to overall U.S. employment. A net increase would result to the extent that these workers would otherwise be unemployed or underemployed. When the economy is at full employment, jobs related to New Starts and Small Starts projects are unlikely to have an impact on net overall U.S. employment; instead, labor would primarily be shifted from one sector to another. On the other hand, during a period of high unemployment, jobs related to New Starts and Small Starts projects may affect net overall U.S. employment because the labor market is not in equilibrium.

d. Optional Quantitative Analysis

Comment: Thirty-five comments were received in response to FTA's proposal to allow project sponsors, at their option, to perform a quantitative analysis that would estimate the change in indirect VMT resulting from changes in development patterns anticipated with implementation of the proposed project and then monetize the resulting benefits for comparison with the same annualized capital and operating cost of the project as used in the cost-effectiveness measure.

Twenty-one of the comments agreed with allowing an optional quantitative analysis to be prepared and submitted for evaluation under the economic development criterion. Several suggested FTA continue research in this area and develop guidance or a specific methodology for undertaking the analysis. Two comments supported the optional quantitative analysis, but were concerned with monetizing the benefits and comparing them to cost, stating it could give the impression the measure is a cost-benefit calculation that intends to capture all benefits when it does not. One comment supported an analysis of workforce access for New Starts projects only and not for Small Starts projects. One comment agreed with an optional quantitative scenario analysis but felt that VMT evaluation should be kept under the environmental benefits criterion.

Nine comments disagreed with the proposal to allow an optional quantitative analysis. Three of these comments asserted such an analysis is not well linked with economic development. Three of the comments stated the methodology is unclear and offered an alternative approach. One such suggested approach was to use direct measures such as increased density, job density, affordable housing, and property tax records. Another suggested approach was to consider past regional performance. One comment stated that increased density does not translate to less VMT or job creation. Several of the comments that disagreed with the proposal expressed concern with monetizing the benefits.

Five of the comments received were neutral or did not offer a clear position in agreement or disagreement. Four of these comments wanted the analysis to examine job accessibility such as change in station area access to the regional work force within 40 minutes of transit travel time. One stated that FTA should acknowledge that the purpose of many projects is to retain existing development levels.

Response: FTA believes allowing project sponsors the opportunity to do scenario analyses and estimate indirect changes in VMT resulting from changes in development patterns provides additional insight into the potential economic development effects of the proposed project. Such studies can assess whether denser land use patterns in the corridor that may result from implementation of the project will produce fewer VMT than if the development occurred elsewhere in the region at lower densities. Such analyses are not expected to produce results suggesting that the project is likely to induce additional growth in a region as a whole, but instead are likely to focus primarily the impacts of redirecting land development in the region. FTA notes that a recent Transit Cooperative Research Program (TCRP) report—''TCRP Web Only Document 56—Methodology for Determining the Economic Development Impacts of Transit Projects''—may provide useful insight into how such studies could be conducted. Such studies could lead localities and metropolitan planning organizations to reexamine growth plans and policies to reinforce transit-supportive development. FTA already uses direct measures such as existing population and employment densities to rate projects under the land use criterion. Similarly, FTA already considers past demonstrated regional performance in implementing transit supportive plans and policies under the economic development criterion and plans to continue to do so.

For some time, FTA has been researching methodologies for estimating economic development benefits resulting from implementation of transit projects. FTA sought comment on one potential approach it developed for undertaking such an analysis, but was told in the public comments received that the approach was too cumbersome and time consuming. Through the ANPRM, FTA again sought ideas on how to examine the economic development effects of transit projects. Again, no clear, consistent methodology was suggested that could be implemented nationwide using readily available and verifiable data. Thus, FTA is not prescribing an approach, but allowing project sponsors to undertake the analysis only at their option and only with a methodology they believe makes sense. FTA will continue to research better ways to measure economic development and perhaps propose a specific methodology in future policy guidance.

FTA understands the concerns noted with monetizing the benefits resulting from the change in indirect VMT and comparing them to the annualized capital and operating cost of the project, but believes under the multiple measure evaluation approach specified in law no single measure will be interpreted as a full cost-benefit analysis.

6. Policies and Land Use Patterns That Support Public Transportation

a. General Comments

Comment: Twenty comments were offered on FTA's proposal to base the

land use criterion on the existing population and employment densities in the corridor and the amount of existing publically-supported housing in the corridor today. Twelve of these comments agreed with the proposed land use criterion. One of these emphasized that parking management and pricing policies are key contributors to making transit effective and suggested giving credit to communities that develop parking strategies that complement transit mobility goals. One of the comments in favor of the proposed approach suggested the breakpoints for the land use measures be geared to the cost of the project and the level of population density. Another in favor of the proposed approach expressed appreciation for publically supported housing terminology that permits consideration of both traditional federally-supported public housing as well as other affordable housing developments subject to long-term affordability restrictions. This comment recommended FTA define the term ''publically supported housing'' in its policy guidance and provided thoughts on what it should include. One comment suggested adding a review of bicycle and local transit-friendliness of the project area under land use.

Four comments disagreed with the proposed land use criterion. Two suggested that rather than looking at existing land use only under this criterion, FTA should also examine regional and local planning documents and policies to support transit-oriented development. Another comment noted FTA does not explain why it proposed to focus on existing conditions only under the land use criterion rather than also looking at future conditions. One comment stated transit agencies have little land use authority and cannot control what is built.

Four of the comments received on the proposed land use criterion were neutral or did not offer a clear position. One of these recommended FTA clarify how it will evaluate non-central business district parking. One suggested adding to the evaluation the number of existing jobs within a corridor. One recommended a higher weight for the land use criterion given that existing patterns in corridors provide strong indicators of project success for environmental benefits, economic development, mobility, and operating efficiencies. One advocated that poor pedestrian accessibility reduce a land use rating.

Response: FTA stated previously on numerous occasions that it is difficult to separate land use and economic development when evaluating proposed projects. Thus, for quite some time, FTA chose to evaluate and rate them together. But the SAFETEA–LU Technical Corrections Act required FTA to give each of the six project justification criteria comparable, but not necessarily equal, weight, which required FTA to evaluate land use and economic development separately and give them distinct ratings. Consequently, FTA chose to look only at existing land use under the land use criterion and to examine the potential the project has of leading to economic development by evaluating transit supportive plans and policies under the economic development criterion. MAP–21 renames this criterion slightly to ''Policies and Land Use Patterns That Support Public Transportation'' and continues to require that the evaluation criteria be given comparable, but not necessarily equal weights. Thus, land use and economic development must be differentiated. To evaluate land use, FTA will continue to examine existing corridor and station area development, including population and employment within one-half mile of station areas. FTA will also continue to examine corridor and station area parking supply, costs, and parking strategies that support transit-supportive development. Evaluation of pedestrian accessibility will remain a corridor characteristic that FTA examines under the land use criterion as well. Existing site and urban design and the mix of uses serve as key features for evaluating the station area development character under the land use criterion. Lastly, FTA believes examining the amount of affordable housing in the corridor today makes sense given the higher propensity of lower income individuals to take transit. FTA will evaluate the existing amount of affordable housing in the project corridor under the land use criterion. Use of this broader terminology in the Appendix to the regulation will ensure that consideration is given to more than just federally-supported public housing. In this measure, FTA is assessing the current situation with regard to affordable housing. In contrast, the economic development measure is assessing the local plans and policies in place to help ensure affordable housing in the corridor is maintained or increased.

FTA does not agree the breakpoints for the various measures under the land use criterion should be based on the cost of the project or the level of population density. Effective transit service requires sufficient densities of people and destinations to make it affordable and efficient, regardless of project cost.

FTA agrees transit agencies often have little or no authority over land use decisions. But FTA believes that sufficiently dense land uses are a significant factor in the success of a transit project, and thus FTA expects that transit agencies can engage in discussions with the localities that have decision-making authority over land use in the project corridor.

b. Publically Supported Housing

Comment: Twenty-two comments were offered in response to FTA's proposal to include an examination of the amount of publically supported housing under the land use criterion.

Nineteen of these comments agreed with the proposal. Most of the comments supported this approach because of the link between transportation and housing policy and the fact that lower income families tend to use transit more frequently than higher income families and provide stable transit ridership and revenue. Several of the comments expressed concern that using HUD data only in the evaluation might underrepresent publically supported housing, and suggested a more expansive approach be used. Some comments recommended a broad definition of publically supported housing that includes housing supported by low-income housing tax credits, housing supported by other affordable housing programs, and housing that includes rent-restricted or income-restricted units per a government program. One comment suggested using the term ''publically assisted housing'' rather than ''publically supported housing.''

Three comments disagreed with the consideration of publically supported housing. One of these comments suggested that the proposed approach would duplicate the consideration given under the mobility measure (double weight for transit-dependent trips). One comment suggested FTA consider all housing units in the measure.

Response: FTA agrees that transportation and housing policy should be linked. FTA appreciates the comments and suggestions received for how FTA should examine affordable housing in the corridor. Although FTA recognizes there may be other methods for calculating the amount of publically supported or affordable housing in the project corridor, our goals for developing a streamlined and simplified evaluation process require that FTA stick with measures that are easily calculated based on available data. Thus, FTA is outlining in the revised

proposed policy guidance being published today how it will evaluate the amount of existing affordable housing in the project corridor using data obtained from local housing agencies and the Census. Use of this broader terminology in the Appendix to the regulation will ensure that consideration is given to more than just federally-supported public housing. FTA notes that the measure being used focuses on housing units defined as affordable and does not consider the possible use of housing vouchers.

FTA does not believe an evaluation of the extent of affordable housing in the corridor is duplicative of the trips made by transit dependent persons considered under the mobility measure, just as trips on the project used in the mobility criterion is not the same as total population and employment in the corridor evaluated under the land use criterion. The numbers are correlated but not the same. Thus, FTA believes it is prudent to examine them. The mobility criterion evaluates estimated usage of the project, while the land use criterion evaluates the transit supportive nature of the corridor in which the project is being located.

6. Other Factors

Comment: FTA received a total of 16 comments related to ''other factors.'' One comment suggested project sponsors be given the opportunity to define the key features of their projects that might qualify as an ''other factor.'' Several comments made specific suggestions of possible other factors including: user benefits, if that measure is no longer used for mobility improvements and cost-effectiveness; multimodal connections; livable communities; other public investments; innovative construction or procurement methods; consistency with Regional Sustainability Plans; and unusually large amounts of health, energy use, or traffic impacts. One comment suggested that consideration of other factors is not authorized in law. One comment suggested that the ''trip not taken'' be included as an ''other factor.'' Two comments suggested that adequate facilities should be provided to transit dependent users, particularly those with disabilities. Two comments suggested that project sponsors should be given incentives to ensure adequate consideration of fair and affordable housing and environmental justice. On the other hand, one comment questioned why environmental justice was included as an ''other factor.'' Two comments suggested trips by transit dependent persons be counted as an ''other factor,'' rather than being treated as part of the mobility and cost-effectiveness criteria. One comment suggested high gasoline price scenarios be explicitly considered. Another comment suggested projects in areas with a strong transit riding culture or in areas where consideration is given to communities of concern be given priority.

Response: MAP–21 eliminates ''other factors'' as a separate consideration in the evaluation process. Accordingly, this final rule does not include ''other factors.''

C. Local Financial Commitment

Comment: Thirty comments were received on FTA's proposal to evaluate local financial commitment by examining: current capital and operating condition (25 percent of rating); commitment of capital and operating funds (25 percent of rating); reasonableness of capital and operating cost estimates and planning assumptions/capital funding capacity (50 percent of rating); and the non-New Starts share of the proposed project (can raise the overall local financial commitment rating one level if greater than 50 percent). Of these, twenty-one agreed with the proposed approach, two disagreed with the proposed approach, and six neither agreed nor disagreed but opined on alternate approaches for evaluating some of the metrics.

Of the comments that agreed with the proposed approach, several stated that combining the evaluation of the capital and operating plans made sense given their interdependency. A majority were in favor of FTA's proposed approach of encouraging overmatch by using the share of non-New Starts funding contributed to the project as a way to boost the overall local financial commitment rating one level. These comments suggested further that FTA consider overmatch provided on the project sponsor's entire capital program. One of these suggested that rather than giving a one rating level boost to projects with significant overmatch, that FTA instead develop a graduated scale of rating improvements that could be possible based on the amount of overmatch.

A majority of the comments that agreed with the proposed approach also supported the expansion of pre-qualification or warrants to the local financial commitment rating of New Starts projects. Specifically, these comments suggested the same warrant that applies to Small and Very Small Starts projects be applied to New Starts projects. In other words, the comments suggested that if the estimated operating and maintenance cost of the proposed New Starts project is five percent or less of current system-wide operating and maintenance costs, the project should qualify for an automatic local financial commitment rating of medium without having to submit a detailed financial plan for evaluation and rating.

Several comments received in support of FTA's proposed approach for evaluating local financial commitment suggested FTA allow additional flexibility as to when funds need to be committed and in what shares under the commitment of funds subfactor. A few of these comments made specific reference to clarifying the commitment of funds necessary for design-build projects. Another comment suggested FTA be flexible when evaluating the current condition of project sponsors that have had to cut service due to extenuating circumstances. Another suggested that FTA's consideration of fleet age under the current condition subfactor take into account future vehicle purchases programmed in the long-term financial plan as well as reasonable vehicle life-cycles.

Another comment received in support of FTA's proposed approach suggested FTA ensure nationwide consistency, while considering geography, local economic conditions, and the age of the local transit system in its evaluation.

Of the comments received on the NPRM that disagreed with FTA's proposed approach to evaluating local financial commitment, one suggested FTA not use fleet age as a metric under the current condition subfactor. Instead, the comment suggested FTA use mean distance between failures as the metric. The comment felt using fleet age alone does not take into consideration aggressive preventative maintenance and rehabilitation programs that may be in place to extend the useful lives of vehicles.

Another comment that disagreed with FTA's proposed approach suggested FTA eliminate the examination of whether there have been significant service cutbacks in recent years when evaluating the current condition of the project sponsor. This comment felt service cuts do not necessarily reflect an agency's financial condition and the other metrics identified in FTA's proposal for evaluating current condition provide a more accurate representation.

Of the comments received on the NPRM that neither agreed nor disagreed with FTA's proposed approach, one suggested extra credit should be given in the evaluation process to project sponsors that are able to secure private contributions to the project. This same comment suggested FTA include

measures that will encourage states or regions to implement new taxes or user fees. Another comment suggested instead of evaluating the commitment of capital and operating funds for the project and the entire transit system, FTA instead look at ''the commitment of capital and operating funds for the project and for maintenance of effort towards its own local transit system(s) as well as toward any regional system which the project sponsor is obligated to support financially.'' Another urged FTA to recognize that state law or enabling legislation may limit a project sponsor's ability to make local financial commitments. Similarly, a separate comment stated that local legislative limitations may exist that would prevent a project sponsor from making capital commitments beyond a five-year timeframe. Lastly, one comment mentioned value capture should be used to evaluate local financial commitment.

Response: FTA believes the approach outlined in the NPRM and being adopted with this final rule reflects the interaction between capital and operating budgets and, therefore, reduces redundancy in the current evaluation process. MAP–21 specifies that the proposed New Starts or Small Starts share of a proposed project can only help the local financial commitment rating and not hurt it. Thus, FTA believes it is appropriate to evaluate the share only to the extent that significant overmatch is provided. Although FTA understands the reasoning behind the comments that suggest FTA consider overmatch on a project sponsor's entire capital program rather than simply the proposed project, FTA believes such an approach would be difficult to put into practice as there would be no way for FTA to verify the data on overmatch submitted by project sponsors. Additionally, it is likely such an approach would lead to all projects receiving an artificially high local financial commitment rating simply because of overmatch provided for ongoing capital rehabilitation and repair projects rather than because of the strength of the financial plan for constructing and operating the proposed project.

The metrics used to evaluate current condition of the project sponsor have worked well for FTA over the past decade to differentiate among projects, including fleet age, recent bond ratings, the ratio of current assets to current liabilities, and whether there have been significant service cuts in the recent past. FTA does not agree that service cuts are an ineffective indicator of the current condition of the project sponsor. Although service adjustments to improve efficiency are routinely made by project sponsors, these do not typically include significant service reductions. Significant reductions in service generally are not undertaken unless a transit agency is facing a sizeable budget shortfall. FTA agrees fleet age in and of itself does not reflect the current capital condition of the project sponsor as different agencies have difference preventative maintenance and rehabilitation cycles for their vehicles. But there is no single definition used by the industry for mean distance between failures, and FTA would have no way to verify such data, whereas fleet age can be verified against what is reported in the National Transit Database. Thus, FTA believes fleet age is the best metric to use at this time. FTA does not agree that examination of fleet age should take into consideration future vehicle purchases. Fleet age is used by FTA to evaluate the current condition of the project sponsor, not a future condition.

With regard to the evaluation of the amount of funds committed to a project, FTA believes it has clear guidance on how it defines committed versus budgeted versus planned funds. These definitions already take into consideration unique local circumstances or legislation that may make commitment of funds beyond a given timeframe difficult. The law requires FTA to evaluate the degree of local financial commitment, including evidence of stable and dependable financing sources to construct, maintain, and operate the transit system or extension, and maintain and operate the entire public transportation system without requiring a reduction in existing services. FTA does not believe design-build projects should operate under a different set of rules with regard to the level of committed funds required at the various stages of project development.

In evaluating the strength of a project sponsor's financial plan, FTA believes private contributions and value capture mechanisms should be considered in the same way other sources of funds are considered. FTA does not believe it is the role of the Federal government to encourage states or regions to implement new taxes or user fees.

In this rule, FTA is including the opportunity for projects to pre-qualify for various criteria based on project characteristics or the characteristics of the corridor in which a project is located. At this time, FTA is implementing a pre-qualification or warrant for the overall local financial commitment rating for Small Starts and Very Small Starts projects only and not for New Starts projects. In future policy guidance, FTA may decide to expand local financial commitment warrants to New Starts projects. Such guidance would be subject to a public comment process.

D. Process for Developing and Overseeing New Starts and Small Starts Projects

1. Pre-Award Authority

Comment: FTA received 18 comments on its proposal to codify current practice with respect to those activities for which pre-award authority is given and at what points in time, meaning when project sponsors are given approval to begin certain activities prior to award of a grant but retain eligibility of those activities for future Federal reimbursement should a future grant be awarded. All of these comments agreed that codification of the practice was desirable, with 12 of the comments suggesting that FTA expand the list of activities eligible for pre-award authority at various stages of the process. In addition, three of the comments suggested that pre-award authority for Small Starts be explicitly included.

Response: Because of the changes made to the steps in the New Starts and Small Starts processes by MAP–21, FTA is not finalizing the parts of this regulation concerning these steps at this time. This includes the provisions related to pre-award authority and letters of no prejudice. This will be the subject of subsequent interim policy guidance and rulemaking.

2. Alternatives Analysis

Comment: FTA received six comments suggesting modification of the definition of the Locally Preferred Alternative (LPA) selected at the conclusion of the alternatives analysis to be the ''locally preferred mode and general alignment.'' In addition, four comments suggested the regulation be clarified to indicate that alternatives analysis can be conducted concurrently with the NEPA requirements and two comments suggested that the alternatives analysis requirement can be met during the systems planning phase. FTA received one comment suggesting that ''Suspended Monorail Automated Rapid Transit'' be included in alternatives analyses and one comment suggesting that streetcar projects should be exempt from the alternatives analysis requirement. One comment suggested that lower cost alternatives should be included in alternatives analyses and another suggested that pre-screening

approaches be used in the alternatives analysis process.

Response: MAP–21 removes the requirement for a separate alternatives analysis as a prerequisite for entry into the New Starts or Small Starts program. Instead, project sponsors will undertake a step called ''project development,'' during which the NEPA process is to be completed, a locally preferred alternative is to be adopted and included in the region's long range transportation plan, and information is to be developed for evaluation and rating of the project by FTA. FTA notes that during the NEPA process project sponsors are required to consider a reasonable range of alternatives. Thus, while the New Starts Alternatives Analysis step is eliminated, project sponsors are still required to consider a reasonable range of alternatives prior to selection of a locally-preferred alternative, based on consideration of a wide range of local goals and objectives in the context of the environmental review process. Thus, much of the same analysis now undertaken during New Starts Alternatives Analysis will be accomplished before a project is identified for advancement into the New Starts process. MAP–21 creates a single subsequent step called ''engineering,'' at which time FTA must evaluate and rate the proposed project. In this final rule, FTA is finalizing some of the definitions proposed in the NPRM that are consistent with MAP–21. However, FTA believes there are a significant number of items that were not included in the NPRM related to these new steps that cannot be finalized at this time. FTA will issue subsequent interim proposed policy guidance and rulemaking to address these matters to allow for public comments.

3. Preliminary Engineering and Final Design

Comment: FTA received 16 comments stating that FTA should assure the definitions of preliminary engineering and final design do not interfere with the possible use of alternative project delivery methods such as design-build.

Response: While FTA believed the definitions for preliminary engineering and final design in the NPRM were sufficiently flexible to account for use of a wide variety of project delivery methods including design-build, MAP–21 eliminates these as separate steps in the process and instead creates a single step called ''engineering.'' FTA believes this change will further facilitate use of alternative project delivery methods. In this final rule, FTA is merging the current definitions of preliminary engineering and final design into a single definition for ''engineering.'' FTA will continue to work with project sponsors to make sure that their procedures and their engineering and design contract structures allow progress on the project to continue while FTA performs the statutorily required evaluation and rating for entry into engineering, and consideration of a full funding grant agreement. The concerns noted by the industry with stalled work while FTA performs its reviews most often occur because of the way the contracts have been structured by the project sponsor.

4. Before and After Studies

Comment: FTA received five comments on the requirements for ''Before and After'' studies. Of these comments, three were in general support of the proposals made in the NPRM to clarify the Before and After study requirements. Two comments addressed the question raised in the NPRM about the appropriate time frame for when the ''after'' data should be collected, supporting using three years after project opening rather than two years after opening as in the current regulation.

Response: FTA appreciates the support for its efforts to clarify the ''Before and After'' study requirements and is adopting them in this final rule. MAP–21 includes the same requirements for Before and After Studies as in SAFETEA–LU. FTA appreciates the input on when the ''after'' data should be collected. The two year timeframe is specified in law, so it cannot be changed at this time.

5. Ratings Updates

Comment: FTA received 14 comments supporting the concept of rating projects at entry into each step in the process, and updating those ratings only if a project has material changes in cost or scope.

Response: FTA is adopting this concept in the final rule.

6. Timing of Applicability of the New Final Rule Criteria

Comments: FTA received 11 comments on when the new criteria should be applied to projects already in the process. All of the comments suggested a flexible approach where a project sponsor could choose to be rated under the new criteria or continue to be rated under the criteria in effect prior to this final rule.

Response: FTA agrees with the need for flexibility. New Starts and Small Starts projects already in receipt of a full funding grant agreement or project construction grant agreement will not be subject to this final rule. New Starts projects approved into final design prior to the effective date of this rule and Small Starts projects approved into project development prior to the effective date of this rule will not be subject to this final rule unless they request to be evaluated under the new procedures. Projects in New Starts preliminary engineering prior to the effective date of this rule can continue to be covered by the former evaluation approach during engineering unless the project sponsor requests to be covered by the new evaluation approach. But when these projects seek a full funding grant agreement, the new procedures outlined in this final rule will apply. This approach will allow project sponsors time during engineering to complete the analysis needed for the new criteria. Because the new criteria generally require less analysis, or are derived from data normally produced during what was formerly preliminary engineering, this will require little if any additional effort.

7. Other Process Related Comments

Comment: FTA received one comment supporting establishment of a new Subpart C for Small Starts. One comment suggested the use of ''interim cooperative agreements'' to cover project development for streetcar and other Small Starts projects prior to identification of a public agency sponsor for a project being developed by a non-profit organization. One comment suggested the need for reimbursement of project costs proportional with spending on capital construction. Another comment suggested that projects be judged on their own merit rather than against other projects in the process. One comment suggested that a project in a corridor with a recently funded project be given the same rating as the initial project. FTA received one comment requesting more flexibility in the estimation of project costs.

Response: FTA appreciates the comment on establishing a separate subpart for Small Starts and is adopting that approach. FTA believes it is necessary to identify the public agency sponsor at the beginning of the process as only public bodies are eligible for funding. Without identification of the entity that will be the grant recipient, FTA cannot adequately judge the technical, legal, and financial capacity of the sponsor to carry out the project as required by law. FTA notes that project construction costs are already reimbursed as they are incurred based on the relative local and Federal shares for the project. FTA agrees that projects should be judged on their own merits

and has structured the process to do so. But given that the demand for New Starts and Small Starts funding exceeds supply of funds, projects will inevitably be compared to one another. FTA does not believe it is appropriate to grant automatic ratings to projects with existing New Starts projects in the corridor. FTA believes each project needs to be evaluated on its own merits. Further, FTA would be concerned with a project sponsor seeking to implement a second major capital investment in the same corridor and would question whether the projects might compete with one another unnecessarily.

Although FTA understands project costs change during engineering and design of the project, FTA believes estimates should be as accurate as possible given the level of engineering completed.

V. Section-by-Section Analysis

Reorganization

In the final rule, as proposed in the NPRM, FTA is rewriting and reorganizing 49 CFR Part 611 by dividing it into three subparts. The comments received are supportive of this approach. Subpart A includes general provisions (purpose and contents, applicability, definitions, and a description of how the provisions of this regulation relate to the requirements of the transportation planning process). Subpart B provides the process and project evaluation requirements applicable to New Starts projects. Subpart C provides the process and project evaluation requirements applicable to Small Starts projects. The current Appendix describing the evaluation measures remains, but is amended significantly to reflect the changes in the measures being made final. This distribution table shows the changes to the organization structure of Part 611 by section:

DISTRIBUTION TABLE

Current Part 611	New Part 611 as set forth by this final rule
611.1 Purposes and contents	Subpart A—611.101 Purpose and contents
611.3 Applicability	Subpart A—611.103 Applicability
611.5 Definitions	Subpart A—611.105 Definitions
611.7 Relation to planning and project development processes	Subpart A—611.107 Relation to the planning processes
	Subpart B—611.209 New Starts process
	Subpart C—611.309 Small Starts process
	Subpart B—611.211 New Starts Before and after study.
611.9 Project justification criteria for grants and loans for fixed guideway systems.	Subpart B—611.203 New Starts Project justification criteria
	Subpart C—611.303 Small Starts Project justification criteria.
611.11 Local financial commitment criteria	Subpart B—611.205 New Starts Local financial commitment criteria
	Subpart C—611.305 Small Starts Local financial commitment criteria
611.13 Overall project ratings	Subpart B—611.207 Overall New Starts project ratings
	Subpart C—611.307 Overall Small Starts project ratings
Appendix A—Description of Measures Used for Project Evaluation	Appendix A—Description of Measures Used for Project Evaluation

Although much of the regulation remains the same, FTA is making a series of changes to better comport with the requirements of Section 5309, Title 49, U.S. Code (Section 5309), as had been amended by SAFETEA–LU and the SAFETEA–LU Technical Corrections Act, and which are still in effect pursuant to MAP–21. Other changes made to the major capital investment program by MAP–21 that had not been in SAFETEA–LU or the NPRM, will be the subject of subsequent interim policy guidance and rulemaking.

First, and foremost, as noted above, FTA is creating a new subpart to formally establish the process and evaluation requirements for Small Starts, which was a newly created category in the major capital investment program in SAFETEA–LU that is continued in MAP–21. This final rule specifically adds eligibility of corridor-based bus systems for Small Starts funding as provided by MAP–21. In addition, this final rule does not include the exemption from the evaluation and rating process for projects requesting less than $25 million in Section 5309 funding that was allowed under SAFETEA–LU.

Second, as proposed in the NPRM, FTA is changing the project justification criteria, especially for cost-effectiveness, mobility benefits, environmental benefits, and economic development benefits. These changes respond to the comments received in response to the questions asked in the ANPRM issued on June 3, 2010, and the comments received on the NPRM. Further, FTA is replacing ''operating efficiencies'' with ''congestion relief,'' as required by MAP–21, although the specific measure used to evaluate congestion relief will be the subject of subsequent interim policy guidance and rulemaking.

Third, as proposed in the NPRM, FTA is putting in place a process whereby details related to evaluation measures and processes are included in policy guidance issued periodically for notice and comment, but not less than every two years as specified in MAP–21. This policy guidance will supplement the current Appendix to the regulation and provide a formal process, linked to this regulation, whereby changes in the technical details of the New Starts and Small Starts project development and evaluation processes can be specified and changed over time as needed. FTA made available a draft of its initial proposed policy guidance together with the NPRM and requested comment on it. In response to the comments received on the draft policy guidance published with the NPRM, FTA is publishing more detailed revised proposed policy guidance for further comment concurrently with this final rule. The effective date for this final rule has been established so that comments can be received and the policy guidance finalized in response to those comments before the final rule will go into effect.

Fourth, as proposed in the NPRM, FTA is changing the point of comparison for incremental measures from the ''baseline'' alternative (typically a Transportation Systems Management or TSM alternative) to a no-build alternative to be defined in the policy guidance. MAP–21 requires this change for Small Starts projects, and FTA believes it is also appropriate for New Starts projects.

Fifth, as proposed in the NPRM, FTA is establishing a process whereby projects may pre-qualify based on their characteristics or the characteristics of the corridor in which they are located for automatic ratings of ''medium'' or better on one or more project justification or local financial

commitment criteria. This is similar to the automatic ratings allowed under the ''Very Small Starts'' category that FTA had established through interim policy guidance. As proposed in the NPRM, this process will be included for both New Starts and Small Starts projects, with details and specific pre-qualification values (''warrants'') specified in future policy guidance that will be subject to a public comment period prior to finalization. MAP–21 provides for ''warrants'' for projects seeking $100 million or less in New Starts funds or a 50 percent or less New Starts share if the project sponsor requests the use of warrants and certifies that its existing transit system is in a state of good repair. FTA believes it is also appropriate to allow for the use of warrants for a wider range of projects than those allowed for in MAP–21, including Small Starts projects, but will be mindful of the strictures for ''warrants'' in MAP–21 as they are established in future proposed policy guidance.

Sixth, as proposed in the NPRM, FTA will re-rate projects only if there have been material changes in scope or estimated costs as they proceed through the process. FTA will continue to use its current practice, as provided in its reporting instructions, to define what constitutes a material change.

Finally, as proposed in the NPRM, FTA is adopting a series of language changes to clarify various requirements and definitions and to alter the references to law to be consistent with changes made by MAP–21. In addition, FTA has made changes in this final rule in a number of provisions to improve readability and clarity. Where such changes have been made from the NPRM they are not intended to have a material effect on the substance of the provision.

Subpart A—General Provisions

Section 611.101 Purpose and Contents

This section, like Section 611.1 in the current regulation, describes the purpose and contents of this regulation, which is to guide the development and evaluation of projects seeking to receive discretionary major capital investment funding under Section 5309 of Title 49, U.S. Code. Those projects can include fixed guideway projects, either completely new systems or extensions to existing systems (''New Starts'' or ''Small Starts'' depending on total project cost and the amount of Section 5309 funding sought) and corridor-based bus systems (under ''Small Starts''), as specifically added by SAFETEA–LU and continued in MAP–21. As part of a subsequent rulemaking, FTA will propose amendments to this section to add the eligibility for core capacity projects, as provided in MAP–21.

This section also specifically allows for separate procedures (described in a new subpart C) for ''Small Starts'' projects, which are projects that have a total cost of less than $250 million and are seeking less than $75 million in major capital investment funding under Section 5309. For New Starts projects, as in the current regulation, this section indicates that projects will be evaluated and rated at several steps during the New Starts process, including advancement into engineering and prior to entering into a full funding grant agreement. Ratings for each project are shown in the Annual Report on Funding Recommendations that FTA is required to submit to Congress each year. New language also indicates that this process will be used for Small Starts projects for advancement into engineering and prior to entering into a single year construction grant or expedited grant agreement. The language has also been changed to reflect that overall ratings will now be assigned on a five-level scale from ''high'' to ''low,'' instead of ''highly recommended,'' ''recommended,'' or ''not recommended,'' as was required by amendments to Section 5309 made by SAFETEA–LU, and is continued under MAP–21.

Section 611.103 Applicability

As in the current regulation, this section specifies that Part 611 would apply to all projects that are candidates for discretionary major capital investment funding under Section 5309. As in the current regulation, it would apply to new fixed guideway projects and extensions to existing fixed guideway projects. But the section is also amended to add the eligibility of corridor-based bus systems as Small Starts projects as was authorized by SAFETEA–LU and is continued under MAP–21. At a later time, FTA will propose amendments to this section to address core capacity projects made eligible under MAP–21.

The evaluation process in this regulation would not apply to New Starts projects that have already received a full funding grant agreement and to Small Starts projects that have already received a project construction grant agreement. As proposed in the NPRM, this section clarifies that the previous regulation would continue to apply to those projects. In response to comments received on the NPRM, the section has been clarified to indicate that New Starts projects already approved into final design, or Small Starts projects already approved into project development, would not be covered by this rule and the previous regulation would continue to apply. But in response to comments received on the NPRM, the section clarifies that these project sponsors may opt to be evaluated under this regulation if they so desire. New Starts projects currently approved into preliminary engineering and that have completed the NEPA process may continue in the newly defined step called engineering without being re-rated under this regulation If material changes to project scope or cost occur (as defined in policy guidance) while these projects are in engineering, these projects will be re-rated under this regulation. Additionally, when these projects seek a full funding grant agreement, they will be subject to the requirements of this rule. Projects currently approved into preliminary engineering that have not yet completed the NEPA process will be considered to be in the newly defined step called project development. They will need to be rated under this regulation to be admitted into the newly defined engineering stage after the completion of NEPA. When these projects seek to move from engineering to a full funding grant agreement, they will be subject to the requirements of this rule. As in the NPRM and consistent with MAP–21, FTA is modifying this section to eliminate the exemption from the New and Small Starts process in the current regulation for projects seeking less than $25 million in major capital investment funding from Section 5309. In addition, FTA is removing the provision for expedited procedures for projects that are air-quality transportation control measures, because that provision was deleted from the law by SAFETEA–LU.

Section 611.105 Definitions

This section provides definitions that apply to terms used throughout Part 611. As proposed in the NPRM, FTA is keeping most of the definitions in the current regulation and adding a number of new definitions.

A new definition is provided for a ''corridor-based bus rapid transit project.'' This definition is the same as it is now in the law at 49 U.S.C. 5309(a)(3), as amended by MAP–21 and is consistent with how FTA has defined it in policy guidance, except that it now covers only projects which do not have a fixed guideway component. Bus projects operating for a majority of the project on a guideway exclusively for use by public transportation vehicles are now covered by the definition for fixed

guideway projects, as called for by MAP–21. FTA expects to continue to define the term more specifically through policy guidance, which can be updated and revised as needed without the need for rulemaking. This definition essentially replaces the definition of ''bus rapid transit'' in the current regulation.

FTA is adopting the proposal in the NPRM to most often use the existing system as a point of comparison when calculating incremental measures (i.e., measures that need some other alternative as a point of comparison so that the change in that measure can be shown), but to use the no-build alternative when a project sponsor chooses to forecast benefits in a future year. MAP–21 requires use of the no-action alternative for Small Starts projects, and FTA believes it is appropriate to apply this change to New Starts projects, as proposed in the NPRM. In response to comments received on the NPRM, if a project sponsor chooses to forecast benefits in a future year, FTA is allowing the sponsor the option to choose either a 10-year horizon or a 20-year horizon. As proposed in the NPRM, FTA is deleting the definition of ''baseline alternative'' and adding a definition of ''no-build alternative.'' If a project sponsor opts to prepare a 10-year horizon forecast, the no-build alternative is the existing transportation system as well as those transportation investments committed in the Transportation Improvement Plan (TIP). If a project sponsor opts to prepare a 20-year horizon forecast, the no-build alternative is the existing transportation system plus the projects included in the fiscally constrained long-range transportation plan.

FTA is also adopting a number of changes to definitions that relate to the New Starts and Small Starts processes. First, FTA is deleting the definition of ''alternatives analysis'' in the regulation since an alternatives analysis is no longer required as a result of the changes made to section 5309 by MAP–21. Second, FTA is providing a definition for ''early systems work agreement'' by expanding on language added in SAFETEA–LU and continued in MAP–21. Third, FTA is expanding slightly that part of the definition of ''engineering'' which was proposed to be included in the definition of ''final design'' to indicate that all funding commitments must be obtained during engineering. This definition has been reworded slightly from that proposed in the NPRM to improve readability. Finally, FTA is adding definitions of ''long-range transportation plan'' and ''locally preferred alternative'' that are consistent with the metropolitan planning regulations located in 23 CFR part 450. Note that, rather than include a definition of ''metropolitan transportation plan'' as proposed by the NPRM, FTA is adopting instead a definition of ''long-range transportation plan,'' which will allow for the possibility of a project located outside of metropolitan planning areas covered by a long-range statewide transportation plan rather than by a metropolitan transportation plan.

While several comments suggested that FTA modify the definition of ''final design'' to account better for the use of alternative project delivery methods such as design-build, FTA did not do so because MAP–21 eliminates the preliminary engineering and final design steps and instead creates a single step called engineering.

As proposed in the NPRM, FTA is expanding the definition of ''major capital investment project'' to include corridor-based bus rapid transit projects as they are eligible in MAP–21 as Small Starts projects. The revision to the definition of ''NEPA process'' clarifies that NEPA is complete when a project is approved as a categorical exclusion or if it has received a Record of Decision or a Finding of No Significant Impact. FTA is also amending the definition of ''New Starts'' to account for the funding thresholds added by SAFETEA–LU and continued under MAP–21 and is accordingly adding a definition of ''Small Starts.'' ''Small Starts'' is defined as projects for new or extended fixed guideways or corridor-based bus rapid transit projects with a capital cost of less than $250 million that seek less than $75 million in major capital investment funding from Section 5309. FTA is also providing definitions for New Starts funds and Small Starts funds to improve the readability of the regulation.

The definition for ''project development'' accounts for the addition of the Small Starts program by SAFETEA–LU and continued by MAP–21, as that is the primary phase of development for Small Starts projects. The definition for TEA–21 is deleted given that it is no longer necessary.

In response to comments received on the NPRM, and the changes made by MAP–21, FTA is replacing the added definition that had been proposed in the NPRM for project construction grant agreement (PCGA) and instead using that definition for expedited grant agreement (EGA). The definition is consistent with that for full funding grant agreement, but recognizes that an EGA is the funding instrument specified in MAP–21 for a Small Starts project.

In addition, FTA is adding a definition for ''horizon year.'' This term is used in several places in the final rule, and given the comments received on the NPRM about this issue, FTA believes it should be explicitly defined in the regulation. At the option of the project sponsor, the horizon year may be either 10 or 20 years in the future.

In the NPRM, FTA proposed that the costs of ''betterments'' not be included in the cost portion of the cost-effectiveness calculation. A significant number of comments received on the NPRM suggested that this term be defined in the final rule. Other comments suggested that the use of the term ''betterments'' might be confusing given it is used in other contexts in other FTA program guidance. To avoid this problem, FTA is using the term ''enrichments'' to refer to the kinds of activities that would not be included in the cost portion of the cost-effectiveness calculation for New Starts projects. Because the term ''enrichments'' is not used in the final rule, and only in the Appendix, FTA has decided to include the definition for ''enrichments'' in the Appendix along with several other terms used only in the Appendix and not in the final rule itself.

In response to comments, FTA is adding a definition for ''transit dependent person'' in the Appendix. A number of comments on the NPRM indicated that a formal definition was needed because FTA proposed to weight trips by transit dependent persons more heavily in the measures for mobility and cost-effectiveness.

Section 611.107 Relation to the Planning Process

As in the current regulation, this section requires that projects seeking New Starts funds emerge from and be consistent with the metropolitan and statewide planning processes required by 23 CFR part 450. As proposed in the NPRM and as provided for by MAP–21, it adds Small Starts projects to this requirement. It no longer requires, as in the current regulation, that a project be based on the results of an alternatives analysis, since this is no longer a requirement pursuant to MAP–21. As proposed in the NPRM, the section removes the requirement for a specified baseline alternative (which often was required to be the ''Transportation System Management'' or ''TSM'' alternative.) The point of comparison for the various incremental measures will hereafter be defined in Appendix A and the policy guidance as the existing system (for comparisons with current travel patterns) or the no-build alternative (for comparisons with travel

patterns in a horizon year in the future.) The no-build alternative is defined as the existing transportation system as well as those transportation investments committed in the Transportation Improvement Plan (TIP) if the project sponsor chooses a 10-year horizon or the existing system plus the projects included in the fiscally constrained long-range transportation plan if the project sponsor chooses a 20-year horizon. The section is also modified slightly to note that the locally preferred alternative (LPA) must be adopted into the fiscally constrained long-range transportation plan, as required by MAP–21.

The project development process included in the current regulation is modified and moved to the separate subparts for New Starts and Small Starts, allowing them to be customized for each of the programs. However, because MAP–21 made substantial changes to the process, these sections are not made final by this final rule but will be the subject of subsequent interim policy guidance and rulemaking.

Subpart B—New Starts

Section 611.201 New Starts Eligibility

As proposed in the NPRM, this is a new section designed to clarify the basic requirements of what must be accomplished to be eligible for approval of grants at various stages of the New Starts process. The requirement for an alternatives analysis to be completed has been removed because MAP–21 no longer requires it. FTA approval of entry into final design is deleted, consistent with the change made by MAP–21 to replace the preliminary engineering and final design steps with one step called engineering. To make explicit a requirement already in place, FTA is adding a new Section 611.201(b)(2) to note that a project must be approved into each phase of the New Starts process in order to receive funding for that phase.

Section 611.203 New Starts Project Justification Criteria

As in the NPRM, many of the topics in this section of the final regulation are specified in Appendix A and, in far greater detail, described in the revised proposed policy guidance made available for public comment today. Thus, the section analysis for Section 611.203 contains one portion that describes the changes to the regulation and another portion that discusses what FTA is adopting in the Appendix and is proposing in more detail in the revised proposed policy guidance.

A. Final Regulation

Although Section 611.203 is a new section in the regulation, as proposed in the NPRM, much of the content is taken from the current regulation at 49 CFR 611.9. As in the current regulation, FTA is stating that project justification will be evaluated based on a multiple measure approach that takes into account each of the criteria specified in Section 5309(d). The measures for the criteria are included in Appendix A and described further in the revised proposed policy guidance, which may be modified and re-issued periodically by FTA whenever significant changes are proposed, but not less frequently than every two years, as required by Section 5309(g)(5) of Title 49, U.S. Code. This policy guidance supplements Appendix A of the regulation. FTA has found the process of notice and comment for this policy guidance first established by SAFETEA–LU and continued by MAP–21, to be an extremely effective way of continuing the improvement of the New Starts project evaluation process by providing flexibility to make changes to recommended technical methods as new methods become available.

As in the current regulation and as proposed in the NPRM, individual project justification criteria are assigned ratings on a five-level scale from ''high'' to ''low.'' The final rule implements the changes first made by SAFETEA–LU and continued in MAP–21, which added economic development to the project justification criteria. It also implements the changes made by MAP–21 to eliminate the operating efficiencies criterion and add the congestion relief criterion, and to rename ''public transportation supportive land use policies and future patterns'' to ''policies and land use patterns that promote public transportation * * * '' In response to comments received on the NPRM, the terms that will be used for these criteria will be changed to ''existing land use'' and ''economic development'' as FTA is focusing the land use criterion on current socio-economic data for the corridor including population, employment, and affordable housing and focusing the economic development criterion on the local plans and policies in place to support economic development in future, including plans and policies related to transit supportive development and affordable housing. In addition, as proposed in the NPRM, and consistent with the changes made by MAP–21, the final rule eliminates transportation system user benefits from the cost-effectiveness measure and eliminates ''other factors'' in current 611.9(b)(6).

The final rule indicates that any incremental project justification measures would be evaluated against a point of comparison specified in Appendix A and policy guidance. This language replaces the current requirement that a baseline alternative, usually in the form of a TSM alternative, be used as a point of comparison. As in the current regulation, it would be expected that as a project advances through the New Starts process, a greater degree of specificity would be required with respect to project scope and costs, that commitments made to public transportation supportive land use plans and policies would be expected to increase, and that a project sponsor's technical capacity would be expected to improve. A proposal in the NPRM that described FTA's expectation that the level of local financial commitment would also increase as a project moves through the process has been moved from the project justification section where it was inadvertently placed to the section on local financial commitment instead.

As proposed in the NPRM, FTA is not including the ''considerations'' listed in 49 U.S.C. 5309(d)(3) since these were eliminated by MAP–21.

As proposed in the NPRM, the section includes a provision that would allow for a process by which a project could pre-qualify to receive an automatic rating of ''medium'' or better on one or more of the project justification criteria based on its characteristics or the characteristics of the corridor in which it is being planned. Use of such pre-qualification tests or ''warrants'' is specifically called for by MAP–21 for projects requesting $100 million or less in New Starts funds or a 50 percent or less New Starts share. FTA believes that it may be able to specify such characteristics, as it currently does for ''Very Small Starts'' in policy guidance, for a range of larger projects and a wider range of corridor types. The pre-qualification values would be established by FTA by determining how projects rate on the criteria based on an analysis at the national level. Proposed pre-qualification values would be published in future policy guidance for public comment before finalization and would be consistent with the requirements in MAP–21, although a wider range of project characteristics would be covered. In this way, a project sponsor would not be required to conduct forecasts of various factors, as the project itself would be deemed to have sufficient merit to proceed for purposes of any such criterion.

As first required by the SAFETEA–LU Technical Corrections Act, and continued by MAP–21, FTA is adopting the proposal in the NPRM to combine the ratings on each of the project justification criteria using ''comparable, but not necessarily equal'' weights into a summary rating of project justification. FTA is adopting the proposal that the process for this, and the specific weights, will be described in policy guidance. Future changes to the policy guidance will be subject to public notice and comment.

B. Appendix A and Proposed Guidance

As noted above, FTA made available proposed policy guidance for public review and comment when it published the NPRM. That proposed policy guidance provided greater detail on the proposed project justification measures specified in statute and proposed in regulation. As noted in that draft policy guidance, however, there were a number of issues on which further detail would be forthcoming. Accordingly, FTA is publishing today revised proposed policy guidance that responds to a number of comments made on the earlier proposed policy guidance published at the same time as the NPRM. It proposes additional detail and specificity on many of the key matters raised in the comments. Once FTA has received and reviewed comments on this revised proposed policy guidance, FTA will finalize it. The effective date for this final rule has been developed to allow FTA time to receive and review comments on the revised proposed policy guidance and finalize the policy guidance before the final rule goes into effect.

Appendix A defines the measure of mobility benefits as the number of trips using the project, with extra weight given to trips that would be made on the project by transit dependent persons. This is consistent with the requirement in MAP–21 that the measure of cost-effectiveness be defined as cost per trip. In response to comments, a definition of ''transit dependent persons'' is included in the Appendix. For those project sponsors choosing to use the simplified national model FTA is developing, trips made by ''transit dependent persons'' will be defined as trips made by individuals residing in households that do not own a car. Project sponsors that choose to continue to use their local travel model rather than the simplified national model to estimate trips will use trips made by individuals in the lowest socioeconomic stratum in the local model as the measure of trips made by transit dependent persons. Local models classify trips either by household auto ownership or by income level. Thus, trips made by transit dependent persons would be either trips made by individuals residing in households that do not own a car or trips made by individuals in the lowest income category. Since some local travel demand models use zero-car households as the lowest socio-economic stratum and others use income based strata, to require use of one metric or the other would pose an unnecessary burden on project sponsors. FTA believes that this approach gives a reasonable indication of how well a proposed project supports access for transit dependent persons.

In response to comments seeking clarity, a definition of ''trips'' is provided in the Appendix as ''linked trips using the project.'' This is actually a larger number than ''boardings,'' as suggested in the comments, because, for example, a trip would be counted when a user of the proposed project rides through the project but boards and alights elsewhere in the transit system. Project sponsors would not need to compare the estimated number of trips generated by the proposed project to the estimated number of trips generated by a ''baseline alternative'' because, consistent with MAP–21, this rule eliminates the requirement to produce a baseline alternative. As noted in the NPRM, this change may have an impact on the kinds of projects that receive favorable ratings on the mobility and cost-effectiveness criteria. Under the former approach, which used ''transportation system user benefits'' (essentially travel time savings) as the measure of effectiveness, projects that involved longer trips were advantaged because there is more of an opportunity to save time. The revised measure is likely to rate projects with shorter trips better than they would have been rated under the former measure. On the other hand, projects with longer trips that may no longer do as well under the new mobility or cost-effectiveness measures because of the change from travel time savings to trips are more likely to reduce vehicle miles traveled (VMT), and thus are more likely to rate better on the new measure for environmental benefits.

As noted in the NPRM, to facilitate the estimation of project trips, FTA is planning to provide a simplified forecasting model that uses Census data and ridership experience on existing fixed-guideway systems. In response to comments, the revised proposed policy guidance proposes that use of the simplified model will be optional. Thus, project sponsors able to obtain a satisfactory overall rating based on estimates prepared with the simplified model will not be required to provide to FTA estimates of project trips prepared using traditional local travel forecasting models. As noted in the NPRM, if at the project sponsors' option they choose to instead estimate project trips prepared with traditional methods, FTA will continue to require that those methods be tested for their understanding of local transit ridership patterns using recent data adequate to the support the tests. FTA notes that if project sponsors choose at their option to submit future year forecasts in addition to those required to be submitted based on current year patterns, they may choose to use either a 10-year horizon or a 20-year horizon. If they choose a 10-year horizon (that requires use of the no-build alternative plus projects committed in the TIP as the background network), use of the FTA-developed simplified model may still be feasible and the scrutiny that FTA will apply will be reduced significantly. If the project sponsor instead chooses to submit a future year forecast based on a 20-year horizon (that requires use of the no-build alternative plus the projects included in the fiscally constrained long-range transportation plan as the background network), then the project sponsor must understand that FTA will be required to perform a similar level of scrutiny to the forecasts as under the current procedures and use of the simplified model may not be possible. Thus, the project sponsor would be choosing to obviate some of the streamlining benefits this new rule is intended to realize.

As proposed in the policy guidance published with the NPRM, FTA is adopting, in Appendix A, the ability for project sponsors to consider the project trips measure in the current year or in both the current year and the horizon year. The estimate of project trips for the current year puts all proposed projects in a consistent near-term timeframe for the evaluation. The estimate of project trips for the horizon year captures the increases in trips on the project that would be associated with population and employment growth and increasing congestion in the future. A definition for ''horizon year'' has been included in the regulation for clarity. In addition, in response to comments received, the Appendix defines the ''current year'' as the most recent year for which data on current transit use and demographic factors are available. As proposed in the policy guidance published with the NPRM, sponsors of projects that can obtain a satisfactory mobility, cost-effectiveness, and project justification rating (''medium'' or better) based on

current-year estimates of project trips may choose to forego the preparation of horizon year estimates. As proposed in the policy guidance published with the NPRM, if a project sponsor chooses to submit both current-year and horizon-year estimates, the two estimates will be weighted equally.

FTA is also adopting the proposal that the mobility rating be based on the number of trips estimated to use the project with extra weight given to trips made on the project by transit dependent persons. As proposed in the NPRM, FTA is again proposing in the revised proposed policy guidance to give a weight of 2.0 to estimated trips made on the project by transit dependent persons. FTA believes it is appropriate to give a higher weight to such travelers because of their greater mobility needs. Use of a weight of 2.0 is based on information from the National Household Travel Survey that indicates while households owning no cars make up 8.7 percent of total households they make only 4.3 percent of total trips. In the revised proposed policy guidance being published today, FTA is proposing mobility breakpoints based on an assessment of the values calculated for projects now in the pipeline. These breakpoints may be changed in future policy guidance that would be subject to public comment.

FTA is adopting the proposal in the NPRM to evaluate and rate the economic development criterion based on the likely future development outcomes resulting from the project because of local plans and policies in place (the land use criterion would focus on existing land use densities of population, employment, and affordable housing as well as current parking availability and pedestrian amenities). Accordingly, FTA will assess economic development benefits based on: (1) Local plans and policies to support economic development proximate to the project; and (2) at the option of the project sponsor, indirect changes in VMT resulting from changes in development patterns may also be estimated, and the resulting environmental benefits calculated, monetized, and compared to the annualized capital and operating cost of the project. FTA will evaluate the local plans and policies in a manner that is similar to current practice with the addition of an examination of local plans and policies in place to maintain or increase affordable housing in the corridor. As proposed in the policy guidance published with the NPRM, project sponsors may choose whether or not to perform the optional economic development quantitative analysis based on whether they believe it will help improve the economic development benefit rating for the project. Because of the absence of tools to predict development changes associated with transit projects, FTA is not specifying an approach but rather notes that quantification would involve an examination by the project sponsor of economic conditions in the project corridor, the mechanisms by which the project would improve those conditions, the availability of land in station areas for development and redevelopment, and a pro forma assessment of the feasibility of specific development scenarios. As proposed in the policy guidance published with the NPRM, the environmental benefits stemming from such changes in development patterns would be estimated, monetized, and compared to the annualized capital and operating cost of the proposed project. FTA would review the analysis before assigning a rating.

As proposed in the NPRM in Appendix A, FTA will measure environmental benefits by considering the dollar value of changes in: (1) Air-pollutant emissions, estimated using changes in VMT, with recognition of the air-quality attainment status of the metropolitan area; (2) greenhouse gas emissions estimated using VMT changes; (3) transportation energy use estimated using VMT changes; and (4) transportation fatalities and injuries estimated using changes in VMT and transit-passenger miles of travel. These dollar values would be summed and compared to the annualized capital and operating cost of the proposed project. In response to comments received, FTA has clarified that the cost of project ''enrichments'' would not be included in the annualized capital cost of the project for the New Starts environmental benefits criterion, just as they are excluded in the measure for cost-effectiveness. Changes in public health costs associated with long-term activity levels would be considered once better methods for calculating the information are developed. In the revised proposed policy guidance published with this final rule, FTA is proposing breakpoints for the environmental benefits rating.

FTA is not adopting the proposal in the NPRM to measure operating efficiencies as the change in operations and maintenance cost per ''place-mile'' compared to the existing transit system in the current year or to the no-build transit system (as defined in this final rule) in the horizon year. MAP–21 deleted the operating efficiencies criterion and replaced it with a congestion relief criterion. Because a measure for congestion relief was not proposed in the NPRM and related proposed policy guidance, FTA will propose a measure in subsequent interim policy guidance and rulemaking to allow for public comment. The revised proposed policy guidance being published concurrently with this final rule indicates that all projects will be assigned an automatic medium rating for congestion relief until such time as a measure is identified and the subsequent interim policy guidance and rulemaking are complete.

FTA adopts the proposal in Appendix A to the NPRM to measure cost-effectiveness of New Starts projects as the annualized cost per trip on the project, not including the costs of project enrichments. The Appendix defines annualized costs as the sum of: (1) The annualized capital cost of the project and (2) the change in annual operating and maintenance costs between the proposed project and the existing system or the no-build alternative if a horizon year forecast is prepared. In response to comments received, annual trips on the project used in the cost-effectiveness calculation would not include the additional weight applied to project trips made by transit dependents. FTA believes it is appropriate to consider the mobility provided to transit dependent persons under the mobility measure but focus cost-effectiveness on the anticipated usage of the project by all individuals. The annualized capital cost of the New Starts project used to compute the cost-effectiveness measure would exclude the costs of certain project enrichments. In the proposed policy guidance made available with the NPRM, the concept of ''betterments'' was introduced as project features that foster economic development and environmental benefits (e.g., the incremental cost of obtaining LEED certifications, station-access provisions beyond those required by the ADA, and station-design and station-access elements that would enhance development impacts) but that do not contribute directly to the measures of benefits used in cost-effectiveness. In response to comments received, this concept has been adopted, but the terminology has been changed from ''betterments'' to ''enrichments'' to avoid confusion with other FTA program guidance as suggested by the comments. This should make clear that these features, while not counted in the calculation of cost-effectiveness for New Starts projects, are eligible to be included in the scope of the project for federal funding.

Finally, FTA is adopting in Appendix A its proposal to measure existing land use generally as it does today based on existing population and employment density in the corridor with the addition of the amount of affordable housing in the project corridor. As proposed in the NPRM, the project justification rating would continue to be a weighted combination of the six criteria, which in accordance with the changes made by MAP–21 would be: (1) Mobility, (2) economic development, (3) environmental benefits, (4) congestion relief, (5) cost-effectiveness, and (6) land use. As specified in the proposed policy guidance published with the NPRM, FTA will give equal weights to each measure.

Section 611.205 New Starts Local Financial Commitment Criteria

Some of the topics in this section were proposed to be included in Appendix A and were described in far greater detail in the proposed policy guidance made available for public comment along with the NPRM. This final rule adopts the same approach. Thus, the section analysis for Section 611.205 will contain one portion that describes the changes adopted in the regulation and another portion that discusses what FTA is including in Appendix A and in revised proposed policy guidance being published concurrently with the final rule.

A. Final Regulation

As under the current regulation, FTA is adopting the proposal in the NPRM that a New Starts project must be supported by an acceptable degree of local financial commitment. FTA is adopting the proposal to continue to rate commitment of the proposed share of funding for the project provided by non-New Starts funds. In accordance with language in MAP–21, however, a project's overall local financial commitment rating cannot be downgraded based on this criterion (i.e., ''overmatch'' can only help the summary local financial commitment rating). FTA is reorganizing the rating of the other local financial commitment criteria to better reflect the strong interaction between capital and operating funding. FTA has found that the current process, which produces ratings on the capital and operating plans separately, is duplicative in many ways. Thus, in addition to the non-New Starts share of the project, the remaining measures used to evaluate local financial commitment are: (1) The current capital and operating financial condition of the agency that would operate the project; (2) the commitment of capital and operating funds for the project including an examination of private contributions as required by MAP–21; and (3) the reliability of the capital and operating cost and revenue estimates prepared by the project sponsor and the resulting financial capacity of the project sponsor.

As with the project justification criteria, FTA is adopting the proposal in the NPRM to allow for the possible use of pre-qualification standards for the local financial commitment criteria that would allow a project to receive an automatic rating of ''medium'' or better based on the characteristics of the project and the project sponsor. These thresholds or ''warrants'' would be established in future proposed policy guidance for New Starts projects. A reference to the requirement that FTA expects a greater degree of local financial commitment as a project proceeds through the New Starts process, which previously was included inappropriately under the project justification criteria section, has now been moved to this section. A new provision has been added, similar to that included in the project justification section, which indicates the measures for evaluation of local financial commitment may be amended through the issuance of policy guidance made available for public comment.

As in the current regulation, each of the local financial commitment criteria will be rated on a five-level scale from ''low'' to ''high'' and a summary local financial commitment rating will be established combining the individual ratings. The process and weights used to develop the summary rating will be established in policy guidance, just as under the current regulation.

B. Appendix A and Policy Guidance

As noted above, FTA made available with publication of the NPRM proposed policy guidance for public review and comment. That proposed policy guidance provided greater detail on the proposed local financial commitment measures specified in statute and proposed in regulation, as described above. In the NPRM and proposed policy guidance, FTA proposed to restructure the examination of local financial commitment to better reflect the interdependency of capital and operating financial plans submitted by project sponsors. Currently, FTA examines a project sponsor's financial plan and evaluates and rates: (1) The non-New Starts share of the project; (2) the strength of the capital financial plan (based on the current capital condition, the commitment of capital funds, and the reasonableness of the estimates used in the financial plan and the resulting financial capacity of the project sponsor); and (3) the strength of the operating financial plan (based on the current operating condition, the commitment of operating funds, and the reasonableness of the estimates used in the financial plan and the resulting financial capacity of the project sponsor). FTA is adopting the proposal in the NPRM to instead examine the project sponsor's financial plan and evaluate and rate it based on: (1) The non-New Starts share of the project; (2) the current financial condition of the project sponsor (both capital and operating); (3) the commitment of capital and operating funds for the project including an examination of private contributions to the project as required by MAP–21; and (4) the reasonableness of the estimates used in the financial plan and the resulting capital and operating financial capacity of the project sponsor. The individual measures are described in Appendix A with more detail and breakpoints provided in the revised proposed policy guidance made available today for public comment. These have been modified slightly from those included in the proposed policy guidance made available with the NPRM to accommodate the elimination in MAP–21 of separate preliminary engineering and final design steps.

Section 611.207 Overall New Starts Project Ratings

Because of the changes made by MAP–21 to the evaluation and rating process for major capital investments, which were not subject to comment in the NPRM, FTA is not adopting at this time the details of the process for combining ratings on the various criteria into an overall project rating . The approach for doing so will be the subject of subsequent rulemaking. As a result, Section 611.207(a) will be reserved for this purpose. However, in the revised proposed policy guidance being published concurrently with the final rule, FTA is proposing an interim approach for combing ratings on the various criteria into an overall project rating until subsequent rulemaking on this topic can be completed. As proposed in the NPRM, the final rule assigns an overall rating on a five-level scale from ''low'' to ''high'' in line with the changes made by SAFETEA–LU and continued by MAP–21, which replaced ratings of ''highly recommended,'' ''recommended,'' and ''not recommended.'' These overall ratings will be assigned when a project seeks approval into engineering and approval of a full funding grant agreement. In

contrast to the current regulation, however, FTA is adopting the proposal to not require re-rating of the project for each Annual Report to Congress as long as there have been no material changes to the scope or cost of the project since the previous rating. FTA will continue to use its current practice, defined in its reporting instructions, to identify material changes that will trigger a re-rating. These include design and construction scope of work changes, planning context changes, schedule changes of six months or more, or a change in a funding source or financing method. If there are no material changes, the rating developed at the earlier step will continue in force. Because of the changes made by MAP–21, FTA is not adopting the proposal that the overall rating be established by averaging the summary ratings obtained on project justification and local financial commitment and that the rating be rounded up when there is a one-level rating difference for the two summary ratings. Section 611.207(d) is being reserved for finalization in a subsequent rulemaking. In addition, FTA is not adopting in this final rule the requirement that both the summary project justification rating and the summary local financial commitment rating be at least ''medium'' to receive an overall rating of ''medium'' or better or that a project rated ''low'' on either the summary project justification rating or the summary local financial commitment rating will be rated ''low'' overall. Instead, these considerations will be part of a subsequent rulemaking process.

Section 611.209 New Starts Process

In response to comments received on the NPRM, the final rule renames this section ''New Starts Process,'' instead of ''project development process,'' as ''project development'' refers to a specific step in the process by statute. Because of the significant changes in the process in MAP–21, FTA is not finalizing this section at this time. The details on the steps in the New Starts Process will be covered in subsequent interim policy guidance and rulemaking. As a result, Section 611.209 is being reserved for such rulemaking. This section will include requirements for the New Starts process now included in paragraphs (b) through (d) of Section 611.7 in the current rule. For clarity, provisions related to the ''Before and After'' study have been moved to Section 611.211 in the final rule.

Section 611.211 New Starts Before and After Study

This section provides the requirements for the ''Before and After'' study required by statute. In the current regulation, these requirements appear in Section 611.7(c)(4) and (5) and in Section 661.7(d)(7). FTA is adopting the proposal to include in this section a consolidation of these requirements in one place and makes certain other changes to improve clarity. As in the current regulation and as proposed in the NPRM, the purpose of the study in the regulatory language is to assess the impacts of the New Starts project and to compare the costs and impacts of the project with costs and impacts forecast during the planning, engineering, and design of the project. Also in the current regulation and in the NPRM, the regulation requires that a project sponsor produce a plan for the ''Before and After'' study during engineering. New language adopted from the NPRM specifies in more detail the kind of information to be collected as part of the study, including information on the characteristics of the project and other related changes in the transit system (such as service levels and fares), the capital and operating costs of the project, and the impacts of the project on transit service quality, ridership, and fare levels.

As is generally required by the current regulation and as proposed in the NPRM, the final rule requires that the plan developed during engineering provide for preservation of data on the predicted scope, costs, and ridership; collection of ''before'' data on the transit system and ridership patterns and travel behavior; documentation of capital costs as the project is built; collection of ''after'' data two years after the project opens on actual project scope, costs, and ridership; an analysis of the project costs and impacts; and an assessment of the consistency of the forecasts of costs and ridership between those forecast and those actually achieved. FTA received a number of comments on the NPRM suggesting that three years after opening of revenue service would be a more appropriate timeframe to conduct the ''after'' part of the study. MAP–21 explicitly calls for review after two years, and thus the final rule continues this requirement. The final rule adopts the proposal in the NPRM that the final ''Before and After'' study report be submitted to FTA within three years of project opening. As in the current regulation, and as proposed in the NPRM, the costs of carrying out the ''Before and After'' study, including the necessary data collection, are an eligible expense of the proposed project.

A new requirement that FTA is adopting provides that, before execution of the full funding grant agreement, there must have been satisfactory progress on carrying out the ''Before and After'' study plan. As in the current regulation and as proposed in the NPRM, the full funding grant agreement would include a requirement that the ''Before and After'' study plan be carried out during the construction of the project and that FTA may condition receipt of annual funding during a full funding grant agreement on satisfactory execution of the ''Before and After'' study.

Subpart C—Small Starts

As proposed in the NPRM, Subpart C is a completely new subpart laying out the requirements for Small Starts projects. These are projects for new fixed guideways or extensions to existing fixed guideways, or new or extended corridor-based bus rapid transit projects meeting the definitions in law. Small Starts projects must have a capital cost of less than $250 million and seek less than $75 million in Small Starts funds.

Because the regulatory framework for Small Starts projects in Subpart C is quite similar to that of the framework in Subpart B for New Starts, this portion of the section-by-section analysis will only highlight differences between Subpart B and Subpart C.

Section 611.301 Small Starts Eligibility

As proposed in the NPRM, this section as adopted in the final rule is designed to clarify the basic requirements of what must be accomplished for a project to achieve award of an expedited grant agreement (EGA). This section is nearly identical to Section 611.201 for New Starts in Subpart B, except that this section expands eligibility to corridor-based bus rapid transit systems, requires that a project be a Small Starts project rather than a New Starts project, references the Small Starts evaluation criteria rather than the New Starts evaluation criteria, references an expedited grant agreement rather than a full funding grant agreement, and provides details on project development (rather than on engineering).

Section 611.303 Small Starts Project Justification Criteria

This section of the final regulatory text provides that the evaluation of project justification for Small Starts be based on a multiple measure approach

that takes into account each of the criteria specified in law. As now required by MAP–21, this section is similar to Section 611.203 for New Starts in that Small Starts projects are now to be rated on the same six project justification criteria. In addition, Small Starts projects are more likely to be able to take advantage of pre-qualification standards that could lead to automatic ratings given that such automatic ratings would more likely be applicable to smaller projects. That said, the regulatory language on that point is the same as in Section 611.203. As in the parallel Section 611.203 for New Starts, details concerning project justification criteria, the point of comparison for certain incremental measures, and the weights given to the criteria in Section 611.303 for Small Starts can be found in Appendix A and in the revised proposed policy guidance made available today for public review and comment. Thus, it is not necessary to repeat the details on Appendix A and the proposed policy guidance located above in Section 611.203, as the same details apply to Small Starts projects, only to slightly different evaluation criteria.

Section 611.305 Small Starts Local Financial Commitment Criteria

As proposed in the NPRM, and adopted in this final rule, this section is nearly identical to the parallel section for New Starts projects in Section 611.205 except that references are made to Small Starts and to the statutory language for Small Starts rather than for New Starts; and (2) the local financial commitment is evaluated based on the year the project is put into operation rather than based on a 20-year planning horizon, as provided for in statute.

As with the parallel section for New Starts, details concerning its proposals for evaluating local financial commitment were contained in proposed policy guidance made available with the NPRM and in revised proposed policy guidance made available for comment today. This process is similar to that of New Starts, so there is no need for a fuller explanation of the revised proposed policy guidance here.

Section 611.307 Overall Small Starts Project Ratings

Because MAP–21 did not make significant changes in the approach for developing an overall Small Starts project rating, this section is made final. In this section: (1) References are made to Small Starts and to the statutory language for Small Starts; (2) references focus on project development; and (3) references are made to expedited grant agreements.

Section 611.309 Small Starts Process

As noted above with the New Starts process, MAP–21 made significant changes to the process for developing Small Starts projects. Accordingly, FTA is not finalizing this section at this time. The changes made by MAP–21 will be the subject of subsequent interim policy guidance and rulemaking. This section is being reserved for that rulemaking.

VI. Regulatory Analysis and Notices

A. Executive Orders 13563 and 12866

Executive Orders and 13563 and 12866 direct agencies to 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); tailor its regulations to impose the least burden on society; and 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 also emphasizes the importance of harmonizing rules and of promoting flexibility. This final rule has been drafted and reviewed in accordance with the principles set forth in Executive Orders 13563 and 12866.

FTA has determined that this is an ''economically significant'' rule under Executive Order 12866, as it would affect transfer payments totaling more than $100 million annually. However, FTA is unable to estimate with precision just how much of the New Starts and Small Starts programs' roughly $2 billion in annual transfer payments will be affected by this rule. FTA provides a discussion below of the changes to the types, characteristics, and locations of projects it anticipates due this rule. Separate from its effects on transfer payments, and also discussed in more detail below, this rule makes significant changes to the information that sponsors must provide to FTA so that FTA can evaluate and rate projects. For example, the rule adopts a streamlined and simplified measure for justifying a proposed project's cost-effectiveness, and it eliminates the requirement to develop a ''baseline alternative.'' These and other similar changes will enable sponsors to develop the information required by FTA for proposed projects in less time and with fewer resources. The following table summarizes the monetized costs, benefits, and changes in transfers of this rule. The table does not include benefits which may arise due to the potential for accelerated project delivery due to process streamlining or reduced costs due to use of simplified forecasting techniques:

TOTAL BENEFITS AND COSTS SUMMARY FOR MAJOR CAPITAL INVESTMENTS FINAL RULE OVER TEN YEARS, 2012$

	3% Discount rate	7% Discount rate
Total Monetized Benefits	$3.7 M	$3.2 M
Total Cost	0.6 M	0.6 M
Total Net Impact (Benefit—Costs)	3.1 M	2.6 M
Changes in Transfer Payments	2.2 B	1.8 B

In the NPRM, however, FTA stated that it does not know precisely how much transfer payments would be affected by this rule. The NPRM noted that due to changes in the evaluation criteria, the projects selected for funding by the FTA may change. For example, by adding quantified measures for environmental benefits, projects that have relatively large amounts of such benefits may be advantaged. On the other hand, the change to the cost-effectiveness measure from cost per hour of travel time savings to cost per trip could advantage projects serving shorter trips and more densely developed areas. For the purposes of the initial regulatory impact analysis in the NPRM, FTA estimated that the proposals in the rule could affect the allocation of about $250 million of annual New Starts and Small Starts grant funds. FTA requested public comments on this estimate, as well as specific methods for more precisely estimating the impact of the rule.

FTA received no public comment in response to the NPRM on its preliminary estimate of likely impacts or on the methods for estimating such impacts. Accordingly, and given that the changes made by this final rule to the proposals in the NPRM are unlikely to have a substantial effect on the allocation, FTA adopts $250 million in annual New Starts and Small Starts allocations as its estimate of likely allocation effects. This is the average value of Federal funding for one New Starts or Small Starts project. FTA believes that the changes in evaluation criteria might result in one different project being recommended for funding each fiscal year.

B. Need for Regulation

This final rule is issued pursuant to the requirements first outlined in SAFETEA–LU and continued in MAP–21 that the Secretary promulgate regulations to implement the Small Starts program. The final rule and accompanying revised proposed policy guidance change FTA's implementation of the major capital investment program, primarily by giving the project justification criteria specified in law ''comparable, but not necessarily equal weights'' as required by Sections 5309 (g)(2)(B)(ii) and (h)(6), improving the measures FTA uses for each of the evaluation criteria specified in law, and streamlining and simplifying the means by which project sponsors develop the data needed by FTA.

The final rule, combined with the revised proposed policy guidance being made available concurrently for public comment, would improve the evaluation of project outcomes in mobility improvements, cost-effectiveness, environmental benefits, land use, economic development, and local financial commitment. The final rule provides for simplified measures of mobility improvements and cost-effectiveness which, while being much less burdensome to calculate than under the former regulation, will still provide for sufficient information about project merit on these metrics. The final rule provides for more detailed quantification of environmental benefits and makes clearer how projects will be evaluated in terms of land use, economic development, and local financial commitment. In addition, the final rule provides for optional quantification of the economic development benefits of projects.

In addition, this rule implements an initiative in the Department of Transportation's (DOT) *Plan for Implementation of Executive Order 13563: Retrospective Review and Analysis of Existing Rules* (*http://regs.dot.gov/docs/RRR-Planfinal-8-20.pdf*). Executive Order 13563 called on agencies to identify rules that may be ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them * * *.'' This rule streamlines and simplifies the various means through which project sponsors obtain the information they need to provide to FTA for its evaluation and rating of projects. For example, FTA is allowing project sponsors to use a simplified FTA-developed national model, once available, to estimate ridership rather than standard local travel forecasting models; to use a series of standard factors in a simple spreadsheet to calculate vehicle miles traveled (VMT) and environmental benefits; to no longer require the development of a baseline alternative for calculation of incremental measures; and to expand the use of warrants whereby a project may be able to automatically qualify for a rating if it meets parameters established by FTA.

C. Regulatory Evaluation

1. Overview

This regulatory evaluation examines the likely effects of this final rule and the revised proposed policy guidance. The NPRM asked the public for information to help FTA quantify the benefits and costs of the proposed provisions. No such information was provided in the public comments on the NPRM. Nevertheless, FTA has made its best efforts to meet the directive in Executive Order 13563 which states that agencies must ''use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible * * *.'' For provisions in which FTA is unable to provide quantified estimates of benefits and costs due to a lack of information, FTA provides a qualitative discussion of their likely effects.

FTA believes this rule will affect transfer payments totaling at least $100 million annually. In the NPRM, FTA stated that it did not know precisely how much transfer payments would be affected by the proposed rule and policy guidance. Nevertheless, FTA estimated in the NPRM that the proposals could affect the allocation of about $250 million of annual New Starts and Small Starts grant funds. FTA requested public comments on this estimate, as well as specific methods for more precisely estimating the impact of the rule. FTA received no public comments in response to the NPRM on its preliminary estimate of likely impacts or on the methods for estimating such impacts. Accordingly, and given that the changes made by this final rule to the proposals in the NPRM are unlikely to have a substantial effect on the allocation, FTA adopts $250 million in annual New Starts and Small Starts allocations as its estimate of likely allocation effects. This is the average value of Federal funding for one New Starts or Small Starts project. FTA believes that the changes in evaluation criteria might result in one different project being recommended for funding each fiscal year.

Due to changes in the evaluation criteria adopted by this rule and the policy guidance, the projects selected for funding by FTA may change. For example, by adding quantified measures for environmental benefits, projects that have relatively large amounts of such benefits—which tend to be projects that provide transportation over longer distances—may be advantaged. On the other hand, the change to the cost-effectiveness measure from travel time savings to cost per trip could advantage projects serving shorter trips and more densely developed areas. Since there is so much variation from project to project it is difficult to predict which will be the stronger effect.

In addition, the rule may have the effect of altering the pattern or timing of major transit capital expenditures and changing the allocation of funds by transit agency size. Because smaller scale projects are eligible for funding under Small Starts, smaller transit agencies may now be able to obtain funding from the program where prior to passage of SAFETEA–LU they could not. For example, SAFETEA–LU first made corridor-based bus projects eligible for Small Starts funding when previously only fixed guideway projects were eligible for major capital investment program funding, and MAP–21 continued this eligibility. Fixed guideway projects tend to be costlier than corridor-based bus projects. This eligibility change allows smaller transit agencies with smaller scale projects to obtain funding from the program.

Cost-effectiveness. As proposed in the NPRM, this final rule includes several features designed to assure equity in the distribution of benefits to groups of concern to the Federal government. First, the final rule weights trips taken by transit dependent persons more heavily in the measure for mobility. In that way, projects that provide enhanced accessibility to transit dependent persons will be favored. Second, by replacing travel time savings with trips in the measure of cost-effectiveness, projects that serve more

riders, rather than those that reduce more travel time for riders (which are generally projects serving people making longer trips) are likely to be favored. Riders making longer trips tend to be riders from higher-income suburban communities. Third, by including an assessment of existing affordable housing in the project corridor as a subfactor examined under the land use criterion, projects serving larger numbers of affordable housing units will be advantaged. Finally, by including an assessment under the economic development criterion of local plans and policies to support the maintenance of or an increase in affordable housing in the corridor, the evaluation and rating process recognizes that increasing land values around transit projects can sometimes result in a loss of affordable housing in proximity to the project, thereby reducing the accessibility of the people most in need of service.

Finally, as mentioned above, the rule will reduce the amount of time and resources needed by project sponsor to prepare information for FTA for evaluation and rating. For example, as discussed above, the rule adopts a simplified cost-effectiveness measure allowing for simplified methods for estimating trips on the project and it eliminates the requirement to develop a ''baseline alternative'' for use as a point of comparison for incremental measures. Also, project sponsors are given the latitude to forego the analysis of benefits that are not relevant to individual projects, which will simplify the project evaluation process, eliminating unnecessary analytical effort on the part of project sponsors. The final rule and revised proposed policy guidance achieve this by allowing for the use of default methods and assumptions whenever possible. The final rule and revised proposed policy guidance defer to project sponsors' decisions to pursue estimation of additional benefits and better ratings through more elaborate analysis.

2. Covered Entities

Eligible applicants under the major capital investment program are public entities (transit authorities and other state and local public bodies and agencies thereof) including states, municipalities, other political subdivisions of states; public agencies and instrumentalities of one or more states; and certain public corporations, boards, and commissions established under state law. The majority of applicants to the major capital investment program are transit agencies and other state and local public bodies such as metropolitan planning organizations or units of city or state governments located in areas with greater than 50,000 in population. These would be the entities most affected by the final rule. Over the past four years, FTA has received approximately 60 applications for entry into one of the various phases of the New and Small Starts process, roughly 40 of which were New Starts projects and 20 of which were Small Starts projects. New Starts projects have tended to be proposed primarily in medium- to large-sized urbanized areas with greater than 500,000 in population. Small Starts projects have been proposed in cities of varying size, including some of the largest urbanized areas in the country, as well as in areas with less than 500,000 in population.

The final rule would affect few, if any, local governments with populations of less than 50,000 people, as jurisdictions proposing New Starts and Small Starts projects are usually much larger in size with more extensive transit service already in place. Transit capital and operating funding for areas with populations less than 50,000 people is generally provided by FTA under a separate formula funding program to the states, which decide how to allocate the funds to the local areas within the state. Yet smaller jurisdictions are not prohibited from applying for major capital investment program funding. To date, FTA has funded only one project in an area under 50,000 in population through the major capital investment program.

Public entities often contract with private entities to prepare the information for ratings of project justification for a proposed project. Private entities, however, are not eligible for New Starts or Small Starts funds.

3. Cost-Effectiveness

The FTA regulation for the major capital investment program being replaced by this final rule, and still in effect for the next 90 days, defined cost-effectiveness as the incremental annualized capital and operating cost per incremental hour of transportation system user benefits (essentially travel time savings). The cost and travel time savings of the proposed project were compared to a baseline alternative (usually a lower cost bus project serving similar travel pattern in the corridor).

The breakpoints that FTA used to assign cost-effectiveness ratings under the existing regulation were based on the value of time with a 20 percent upward adjustment to account for congestion benefits and a 100 percent adjustment to account for non-mobility benefits. U.S. Department of Transportation (USDOT) guidance (*Departmental Guidance for the Valuation of Travel Time in Economic Analysis, April 9, 1997*) describes, in detail, the derivation of the standard values of time to be used by all U.S. DOT Administrations in the economic evaluation of proposed projects. Consistent with this departmental guidance, FTA valued travel time-savings at 50 percent of Median Household Income published by the Census Bureau, divided by 2,000 hours. FTA acknowledged, however, that the time savings for transit users alone does not capture the full range of benefits of major transit projects. Pending improved reliability of the estimates of highway congestion relief, FTA assumed that congestion relief adds about 20 percent to the travel time savings generated by the project. Further, indirect benefits (economic development, safety improvements, pollutant reductions, energy savings, etc.) increase that value. By assuming that indirect benefits were approximately equal to the direct transportation benefits, FTA increased the value of each hour of transit travel time by a factor of two. FTA inflated the breakpoints annually based on the Gross Domestic Product Index (also known as the GDP deflator).

This final rule adopts the NPRM proposal to use a simplified cost-effectiveness measure: Annualized capital and operating cost per trip for New Starts projects and Federal share per trip for Small Starts projects. It also eliminates the requirement for a ''baseline alternative'' For New Starts projects, project elements that provide benefits not captured in whole by the other New Starts measures would not count as project costs, but would rather be excluded from the cost-effectiveness calculation as ''enrichments.'' Enrichments would include items that are above and beyond the items needed to deliver the mobility benefits and that would not contribute to other benefits such as operating efficiencies. For example, enrichments could include features needed to obtain LEED certification for transit facilities or additional features to provide extra pedestrian access to surrounding development or aesthetically-oriented design features. Finally, to further streamline the evaluation and rating process, FTA is adopting the proposal to allow use of ''warrants'' to pre-qualify New and Small Starts projects as cost-effective based on their characteristics and/or the characteristics of the corridor

in which they are located. For example, if there is a certain level of transit ridership in the corridor today, and the proposed project falls within total cost and cost per mile parameters defined by FTA, then it would be ''warranted'' by FTA as cost-effective, it would receive an automatic medium rating on the cost-effectiveness criterion, and the project sponsor would not need to undertake or submit the results of certain analyses.

The net effect of these changes is to reduce the reporting and analytical burden on project sponsors. For example, the analytical design of a hypothetical alternative project is a costly effort that is eliminated in this final rule. Any increased burden would result from project sponsors electing to perform optional additional analysis in support of their projects entirely at their option.

The simplified cost-effectiveness measure proposed may result in different kinds of projects receiving more favorable ratings than under the current approach, which could lead to transfer payments totaling more than $100 million annually. Some examples are described below:

(a) Under the current approach, which uses ''transportation system user benefits'' (essentially travel time savings) as the measure of effectiveness, projects that involve longer trips are advantaged because there is more of an opportunity to save time. The revised measure values all trips equally, whether short or long. Thus, projects with shorter trips are likely to fare better than they do under the current measure.

(b) Under the current approach, which requires comparing the project to a baseline alternative to calculate cost-effectiveness, many project sponsors have had difficulty demonstrating sufficient travel time savings as compared to project cost. Further, as noted above, many project sponsors considered the baseline alternative a redundant requirement, since an assessment of alternatives is required in the NEPA process. One result of requiring a baseline alternative, was that project sponsors eliminated stations, shortened platforms, reduced parking, purchased only the number of vehicles needed to meet near term demand rather than longer term demand, etc. to reduce the cost of the build alternative in relation to the baseline alternative. Often such changes were made in a way that resulted in travel time savings for some riders, but only at the expense of accessibility for other riders. In such cases, this resulted in disproportionate impacts to minority and low-income populations and led to litigation that delayed the projects and caused further cost increases. To add deferred project scope at a later date is far more costly than if it had been constructed as part of the original project. FTA believes the new measure will help reduce these instances of nearsighted scope changes, given its emphasis on trips rather than travel time savings and its elimination of the baseline alternative point of comparison. FTA notes that excluding ''enrichments'' from the cost part of the cost-effectiveness calculation does not in and of itself address these issues, since ''enrichments'' are generally project elements whose benefits do not get adequately captured by the criteria.

4. Economic Development

Currently, FTA evaluates economic development based on the local plans and policies in place to enhance transit oriented development in proximity to the proposed transit stations. In other words, FTA examines through a qualitative assessment, the likelihood the project will foster economic development based on the transit supportive plans and policies in place, including whether increased densities are encouraged in station areas, whether there is a plan for pedestrian and non-motorized travel, whether zoning and parking requirements are in place that would support transit-friendly development, etc. FTA does not specify or require local plans and policies to include specific measures or requirements, but rather examines what the local area has included to see if it is generally transit supportive.

As proposed in the NPRM, the final rule continues to evaluate economic development based on a qualitative assessment of the local transit supportive plans and policies in place, but adds a qualitative assessment of local affordable housing plans and policies to encourage maintenance of or an increase in affordable housing in the corridor. As proposed in the NPRM, FTA is also requiring that project sponsors report under economic development the number of domestic jobs related to project design, construction, and operation, although this figure would not be used for evaluation purposes. Lastly, as proposed in the NPRM and implemented with this final rule, project sponsors have the option of using a scenario approach to characterize and estimate the quantitative impacts of economic development resulting from implementation of the project, including the environmental benefits that would result from such economic development due to agglomeration effects.

The added cost of the additions to the economic development criterion will likely be marginal because most sponsors already develop this information as part of the local planning process, with the exception of the affordable housing data perhaps. Many project sponsors are pursuing major capital investment projects to facilitate efforts to induce economic development, thus, information pertaining to economic development scenarios and job creation are typically developed during the planning process. With regard to the cost of developing the affordable housing data, it is difficult to be any more precise than to provide a qualitative description. Most studies that have examined the impact of transit lines on affordable housing are largely in line with the general consensus that improving accessibility through the addition of public transit increases housing costs in most, but not all, cases (*http://ctod.org/pdfs/2007TODCaseStudies.pdf*, *http://ctod.org/pdfs/2011R2R.pdf*, and *http://www.ctod.org/portal/node/2163*). It is difficult to generalize the magnitude of the impact. As a result, FTA believes examining the local plans and policies in place to mitigate rising rents and property taxes, and help preserve existing or increase affordable housing near transit, is appropriate to ensure that a share of new development is affordable to low- and moderate-income families.

5. Environmental Benefits

Currently, the environmental benefits of New Start projects are evaluated on the basis of the EPA air quality designation for the metropolitan area. Small Starts projects have not been required to estimate environmental benefits because SAFETEA–LU did not include it as a criterion for Small Starts projects. However, MAP–21 now requires that Small Starts projects be evaluated on environmental benefits as well as New Starts projects.

The NPRM proposed to examine under the environmental benefits criterion the direct and indirect benefits to the natural and human environment, including air quality improvement from changes in vehicular emissions, reduced energy consumption, reduced greenhouse gas emissions, reduced accidents and fatalities, and improved public health (once a measure is developed). The final rule adopts this proposal. The direct benefits are calculated using standard factors from changes in VMT and assigned a dollar value. The dollar value of the benefits is then compared to the annualized capital and operating cost of the project for New Starts projects and, in accordance with MAP–21 requirements,

to the Federal share for Small Starts projects. Project sponsors customarily calculate environmental benefits for transit projects to meet local political needs and for the purpose of the review required by the National Environmental Policy Act. FTA is adopting the simplified approach proposed in the NPRM for developing the newly required information needed for the environmental benefits evaluation and rating—a simple spreadsheet that would perform the calculations using a series of standard factors with only a few pieces of data required as input. Therefore, the proposed calculations will likely not measurably change the analytical and reporting burdens of project sponsors. As noted earlier, quantitative evaluation of environmental benefits is likely to be advantageous to projects that produce significant amounts of VMT reduction. These are likely to be projects that serve longer trips, often suburban commuter trips now made by automobile.

6. Mobility Improvements

Currently, five measures are applied to estimate mobility improvements for New Starts projects: (1) The number of transit trips using the project; (2) the transportation system user benefits per passenger mile on the project; (3) the number of trips by transit dependent riders using the project; (4) the transportation system user benefits of transit dependents per passenger mile on the project; and (5) the share of transportation system user benefits received by transit dependents compared to the share of transit dependents in the region. Transportation system user benefits reflect the improvements in regional mobility (as measured by the weighted in- and out-of-vehicle changes in travel-time to users of the regional transit system) caused by the implementation of the proposed project. The measures are calculated by comparing the proposed project to a baseline alternative, which is usually the ''Transportation System Management'' (TSM) alternative. Small Starts projects have not been required to estimate mobility improvements because SAFETEA–LU did not include it as a criterion for Small Starts projects. However, MAP–21 now requires that Small Starts projects be evaluated on mobility improvements as well as New Starts projects.

In the NPRM, FTA proposed to use total trips on the project as the measure of mobility, with extra weight given to trips made by transit dependents. Because it is not an incremental measure, no comparison to a baseline alternative is required. FTA is adopting this proposal.

Under the current approach, which uses ''transportation system user benefits'' (essentially travel time savings), projects that involve longer trips are advantaged because there is more of an opportunity to save time. The revised measure values all trips equally, whether short or long. Thus, projects with shorter trips are likely to fare better than they do under the current mobility improvements measure. As noted earlier, the quantification of the environmental benefits is likely to favor projects with longer trips. Given the wide variety of projects being evaluated, it is difficult to say with any certainty which effect would be more dominant. Because transit dependent trips are given higher weight in the adopted approach than they are given in the current approach, however, not all projects with shorter trips may fare better.

FTA notes that this change focuses the measure on an assessment of the transit project itself. Under the existing regulation, the cost-effectiveness measure was designed to take into account travel time on both the highway and transit system. However, FTA was unable to effectively include highway user travel times in its analyses because of shortcomings in local travel forecasting models in common use. Thus, in concept, the approach in the existing regulation could have accounted for changes in the transportation system as a whole, including the possible negative impacts of a transit project on highway users, but it could not do so in practice. The change made by this final rule will thus not be any different than the current approach in considering impacts on the transportation system as a whole.

The reporting burden for the mobility improvements measure for New Starts project sponsors will be significantly lowered under the approach adopted by this final rule as compared to the current approach because FTA is developing a simplified national model that would calculate trips rather than having project sponsors spend significant time and effort adjusting their local travel forecasting model to estimate trips on the project. Local models are typically developed by the metropolitan planning organization to forecast regional trips and are not often honed to adequately perform corridor-level analyses. In addition, because development of the baseline alternative is no longer required under the new measure, significant time developing that alternative is no longer required if it is not an alternative local decisions-makers wish to pursue. For local decision-making purposes, the number of trips made on the project is typically calculated, so the data required by FTA is not considered onerous for either New Starts or Small Starts project sponsors.

7. Operating Efficiencies

The current measure for operating efficiencies is the incremental difference in system-wide operating cost per passenger mile between the proposed project and the baseline alternative. In the NPRM, FTA proposed instead that the measure of operating efficiencies be the change in operating and maintenance cost per ''place-mile'' compared to either the existing transit system in the current year or, at the discretion of the project sponsor, both the existing transit system in the current year and the no-build transit system in the horizon year. MAP–21 eliminated the operating efficiencies criterion. Thus, FTA is not adopting the measure proposed in the NPRM.

8. Congestion Relief

MAP–21 includes a new project justification criterion for New and Small Starts projects called congestion relief. The final rule includes reference to this criterion, but reserves information on it until future interim proposed policy guidance and rulemaking can be undertaken since it was not included in the NPRM. The burden associated with collecting the information necessary for this new criterion will be discussed in that future rulemaking.

9. Regulatory Evaluation

FTA considered the industry-wide costs and benefits of the NPRM in preparing this final rule. Each is discussed below.

a. Costs

Regulatory Familiarization—Although FTA believes the rule will have overall net benefits, project sponsors and their contractors will need to expend resources to read and understand the final rule and policy guidance, and may need to make changes to their existing systems, programs, and procedures in response to the changes made by the rule. FTA estimates it will take project sponsors and their contractors 40 hours on average to perform these tasks. Assuming 100 project sponsors and 100 contractors, and an average hourly wage (including benefits) of $39.04 for project sponsors and $37.51 for contractors, FTA estimates a cost of $306,200 for regulatory familiarization. The hourly wage rates assumed came from the Bureau of Labor Statistics' 2010

National Compensation Survey and represent the median rates for civil engineers in local government and in private industry, respectively. Civil engineers were chosen as the reference point for simplification purposes and also because that hourly rate was higher than the rate for urban planners, but they are just two of the many professions involved in planning and project development of New and Small Starts projects. FTA expects project sponsors and their contractors to incur these regulation familiarization costs one time only. FTA requested comments on these assumptions and estimates and received no comments. Hence, FTA is adopting these estimates as included in the NPRM.

Project Information—The final rule will require project sponsors to submit information on project characteristics that they have not previously been required to submit to FTA. This includes the number of jobs resulting from implementation of the project, the change in environmental benefits resulting from the expected change in VMT, the amount of affordable housing existing in the corridor, and the plans and policies to maintain or increase affordable housing in the future. In general, FTA believes this information can be gathered and estimated rather quickly and easily, and will not require significant additional cost, time, or effort. The number of jobs created is information that project sponsors typically estimate for local decision-makers. FTA expects the data needed for the evaluation of the amount of existing affordable housing in the project corridor will come from census data and the local housing agency. FTA will develop spreadsheets with a number of standard factors to estimate environmental benefits. Project sponsors will be asked only to input a few key variables. FTA estimated the time to prepare the additional information proposed in the NPRM to be at most 40 hours per project, and received no public comment on this estimate. Using the same estimates of the value of time used above, FTA estimates this onetime cost at a total of $306,200. Therefore, FTA is adopting this estimate in this final rule.

The optional scenario analysis allowed under the economic development criterion may require some time and effort to prepare. But project sponsors may choose to forgo this analysis.

Disbenefits of Streamlining—The elimination of the requirement for a baseline alternative and the change in the measures could have disbenefits if the changes resulted in assignment of inappropriate or inaccurate project ratings. However, FTA believes that the measures being proposed are equally as good as the current measures at providing an accurate and appropriate understanding of the merits of proposed projects. A New Starts ratings process has been in place since 1984, and FTA has gained considerable experience in distinguishing between projects and determining those worthy of Federal assistance. Based on this experience, FTA believes that project utilization is as good, if not better, a metric for assessing project worthiness, than travel time savings, particularly since it involves substantially less resources to develop. Further, the current measure requires comparing the results of two estimates of future system characteristics (the proposed project and the proposed baseline alternative), thereby increasing the opportunity for additional imprecision.

b. Benefits

The costs to project sponsors associated with familiarizing themselves with the new regulation and providing FTA additional information for some of the criteria under the final rule compared to the former regulations will likely be counterbalanced by the simplification of methods for generating some of the information needed, as provided in the appendix to the final regulation and the revised proposed policy guidance made available today for public comment. Simplifying rules is a principle in Executive Order 13563. As examples of such simplification:

(a) Under the current rule, project sponsors are required to use local travel forecasts to obtain the information needed for FTA's evaluation of the various project justification criteria. The final rule adopts a number of simpler measures for project justification that will allow project sponsors to use a simplified national model once it is developed by FTA. After the simplified national model is in place, project sponsors may continue to use information generated by local travel forecasts if they believe it will result in a more favorable rating for the proposed project, but it is at the project sponsors' discretion (i.e., not required by regulation or suggested in guidance). FTA expects this change will save project sponsors significant time and resources. It often costs project sponsors from several hundreds of thousands of dollars up to millions of dollars in consultant help and six months or longer to adjust local travel forecasting models to obtain acceptable ridership results for FTA's evaluation and rating purposes. This information is based on anecdotal reporting by project sponsors to FTA as they complete their analyses. Because of the wide variety of project types, project sponsor experience, the state of local travel demand forecasting models, and other local factors, it is difficult to estimate and summarize these costs into a single annualized value.

(b) Project sponsors would no longer be required to develop a baseline alternative. The process of defining a baseline alternative is an iterative one. By eliminating the need to develop a baseline alternative (which is often not an alternative local decision-makers wish to implement), FTA estimates that up to six months of time could be saved. The cost of this time savings is difficult to estimate, and FTA has not seen any particular data on the estimation, but project sponsors have suggested that each month of delay in implementing a project is roughly $1 million in additional cost. Delay costs would depend on the size of the project. But even for smaller projects, these increases would come from the need to keep project management staff in place during the extended period of project development as well as increases in project construction costs above inflation.

(c) The expanded use of warrants (a process by which a project can qualify for an automatic rating if it can meet certain FTA defined parameters) would eliminate the need for project sponsors to undertake certain analyses and submit that data to FTA. This can save significant time and money because project sponsors often hire consultants to help undertake the analyses required to develop the data for FTA.

FTA believes the improved measures for cost-effectiveness, environmental benefits, and economic development will reduce the influence of a ''one size fits all'' evaluation approach that, historically, has favored some transit benefits over others and thereby has minimized locally preferred benefits. For example, by focusing on travel time savings, the current process tends to favor projects in areas with extreme congestion over areas that do not currently have extreme congestion but are planning future transit to keep from becoming mired in extreme congestion. This is because projects in areas with extreme congestion today may be able to show significant travel time savings simply because an additional travel option is offered that may operate on an exclusive guideway separate and apart from the roadway congestion. A similar exclusive guideway project in a non-congested area would not show as much travel time savings when compared to

the baseline alternative (a lower cost bus option) because that baseline bus would not be operating in as congested traffic. Similarly, the focus on travel time savings does not acknowledge that some areas undertake transit projects to encourage development rather than to address mobility challenges. Such projects are often tailored to smaller areas where increasing the number of trips on transit in higher density environments can be much more conducive to encouraging development around such stations. The final rule, with its focus on trips rather than travel time savings as the measure of mobility, acknowledges more varied purposes for undertaking these projects and a different ''basket'' of transit benefits.

FTA estimates the paperwork burden on project sponsors involved with developing and reporting the information to FTA will be lowered as a result of this final rule based on the above mentioned benefits. FTA estimates a reduction of paperwork burden of $423,750 in benefits on an annual basis. This estimate is only for the reduced reporting of information resulting from the changes made to the criteria in this rule and does not include the difficult to quantify reduction in burden that would come from use of the FTA developed national simplified model if a sponsor opted to use it.

D. Departmental Significance

This final rule is a ''significant regulation'' as defined by the Department's Regulatory Policies and Procedures because it implements the Departmental initiative to revise, simplify, and streamline the New Starts and Small Starts processes. The NPRM generated interest from sponsors of major transit capital projects, the general public, and Congress.

E. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* FTA evaluated the likely effects of the proposals contained in this final rule on small entities. Based on this evaluation, FTA believes that the proposals contained in this final rule will not have a significant economic impact on a substantial number of small entities because the proposals concern only New Starts and Small Starts which, by their scale and nature, are not usually undertaken by small entities. FTA sought public comment on this assessment in the NPRM and received no comments.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), a Federal agency may not conduct or sponsor the collection of information without first obtaining approval and a control number from the Office of Management and Budget (OMB). FTA has been collecting project evaluation information from project sponsors under the existing OMB approval for this program (OMB No. 2132–0561) entitled ''49 CFR Part 611 Major Capital Investment Projects.''

FTA has a longstanding requirement to evaluate proposed projects against a prescribed set of statutory criteria at specific points during the projects' development. In addition, FTA is required by law to report on its project evaluations and ratings annually to Congress. The Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) established in law a set of criteria that proposed projects had to meet in order to be eligible for federal funding. The requirement for summary project ratings has been in place since 1998. Thus, the requirements for project evaluation and data collection for New Starts projects are not new. However, one change to the program included in SAFETEA–LU, and continued by MAP–21, is the Small Starts program. The Small Starts program enables smaller cost projects with a smaller requested share of Section 5309 major capital investment funds to be eligible for funding. Additionally, MAP–21 reduces the number of steps in the New and Small Starts process, which reduces the number of times project sponsors must submit information to FTA for evaluation and rating purposes. MAP–21 also increases the number of evaluation criteria for Small Starts projects over what had been included in SAFETEA–LU, but with the streamlined approaches FTA is implementing in this final rule for calculating the criteria, the additional burden associated with those additional criteria is somewhat mitigated.

In general, the information used by FTA for New Starts and Small Starts project evaluation and rating should arise as a part of the normal planning process. But due to modifications in the project evaluation criteria and FTA evaluation and rating procedures in the final rule, some information may be beyond the scope of ordinary planning activities.

Eligible applicants under the major capital investment program are public bodies and agencies (transit authorities and other state and local public bodies and agencies thereof) including states, municipalities, other political subdivisions of states; public agencies and instrumentalities of one or more states; and certain public corporations, boards, and commissions established under state law. Private corporations and private non-profit entities are not eligible for funding under the program; private corporations such as consulting and engineering and construction firms, however, could be affected by the regulation if they are hired by project sponsors to assist in the development of the data needed by FTA.

FTA evaluates and rates projects in order to: (1) Decide whether proposed projects may advance into certain phases of the process; (2) assign ratings to proposed projects for the *Annual Report on Funding Recommendations;* and (3) develop funding recommendations for the President's budget. The law also requires that FTA evaluate the performance of the projects funded through the New Starts program in meeting ridership and cost estimates two years after they are opened for service, through implementation of a ''Before and After'' study requirement. This also helps to evaluate the success of the grant program itself for purposes of the Government Performance and Results Act.

MAP–21 requires New and Small Starts project sponsors to seek approval into the project development phase from FTA, which is the initial step in the process. The contents of the application that will be required with a project sponsor's request to enter project development and the type of review FTA will perform before giving approval into that phase is not covered in this final rule and will instead be discussed in subsequent rulemaking. However, unlike the requirements of SAFETEA–LU whereby FTA had to evaluate and rate a project before it would be approved into the first phase of the process, MAP–21 does not require that FTA evaluate and rate a project when a sponsor requests entry into project development. Thus, the burden hours associated with developing the application for the initial step in the process will be reduced. While a detailed estimate of the burden hours involved in preparing the materials for entry into project development will be prepared during the subsequent rulemaking process, FTA has included some rough estimates of the burden hours in the analysis included in this final rule, since a good part of the reduction will come from adoption of the revised evaluation criteria, rather than from the changes in the process under MAP–21. FTA will ensure that it does not double count burden hour reductions and cost savings when it produces the regulatory evaluation for the subsequent rulemaking needed to

put into effect the procedural changes made by MAP–21.

MAP–21 requires New Starts project sponsors to submit information to FTA for evaluation and rating purposes when the projects wish to enter the engineering phase of development and when they seek a Full Funding Grant Agreement. Small Starts project sponsors must submit information to FTA for evaluation and rating purposes when the project seeks an Expedited Grant Agreement. Both New and Small Starts project sponsors must submit updated information to FTA if the project scope and cost have changed materially since the last rating was assigned.

FTA needs to have accurate information on the status and projected benefits of proposed New Starts and Small Starts projects on which to base its decisions regarding funding recommendations in the President's budget. As discretionary programs, both the New Starts and Small Starts programs require FTA to identify proposed projects that are worthy of federal investment, and are ready to proceed with project development and construction activities.

FTA has tried to minimize the burden of the collection of information, and requests that project sponsors submit project evaluation data by electronic means. FTA has developed standard format templates for project sponsors to complete that automatically populate data used in more than one form. FTA then uses spreadsheet models to evaluate and rate projects based on the information submitted. FTA is adopting project justification measures in this final rule that will allow for the use of a simplified national model once it is developed to estimate project trips on a project based on simple inputs including census data and project characteristics. Where and when possible, FTA makes use of the information already collected by New Starts and Small Starts project sponsors as part of the planning process. As each proposed project develops at a different pace, however, FTA has a duty to base its funding decisions on the most recent information available. Project sponsors often find it necessary to develop updated information specifically for purposes of the New Starts or Small Starts program. This is particularly true for the *Annual Report on Funding Recommendations,* which is a supporting document to the President's annual budget request to Congress. To reduce the reporting burden on project sponsors, however, FTA has instituted a policy that Annual Report submissions are only required of projects that are seeking a funding recommendation or have changed significantly in cost or scope from the last evaluation.

FTA estimates current overall New Starts and Small Starts annual paperwork burden hours to be approximately 275 hours for each of the estimated 135 respondents, totaling 37,070 hours and annual costs totaling $2,780,250. The changes made by MAP–21 to the steps in the process, as well as the changes to the evaluation and rating criteria made in this final rule and accompanying policy guidance reflecting comments received on the NPRM, will modify the time required by project sponsors to prepare and submit applications to FTA. FTA now estimates burden hours would be approximately 242 hours for each of the estimated 130 respondents totaling 31,420 hours and annual costs totaling $2,356,500. Thus, FTA estimates this rule will reduce annual paperwork burden hours by 5,650 hours and paperwork costs by $423,750.

As discussed above, MAP–21 includes fewer steps in the process and reduced information at the initial step. Additional information will be required of project sponsors due to the revised measures included in the final rule, but FTA has also adopted simplified methods of data collection and data estimation (e.g., FTA will no longer require sponsors to model a baseline alternative; will allow estimation of project trips using a simplified national model, once developed, rather than local travel forecasting models; and will use standard factoring approaches). Thus, the changes made by MAP–21 and by FTA in this final rule and accompanying policy guidance are estimated to reduce the net paperwork burden for project sponsors. These and other paperwork requirement trade-offs were an express objective in developing this final rule and accompanying policy guidance. The amount of paperwork burden is partially proportionate to the scale of the project and the determination by the project sponsor whether it will choose to develop detailed forecasts of project benefits (instead of the simplified default methods FTA allows in its policy guidance). Such increased burdens are at the sponsor's discretion, rather than a requirement of this final rule or the accompanying policy guidance. Most of the estimated paperwork reduction would be realized when project sponsors are preparing the materials that allow FTA to evaluate and rate the project for the first time, which occurs when a New Starts project sponsor seeks entry into the engineering phase and when a Small Starts project sponsor seeks an expedited grant agreement.

The table below shows the annual project paperwork burden across sponsors of New Starts and Small Starts projects.

TOTAL PROJECT SPONSOR COST AND HOURS

Task	# Annual occurrences	Aver hours per occurrence	Total hours	Total $
Data Submission, Evaluation, and Ratings				
NEW STARTS				
(A) Project Development Request	30	20	600	$45,000
(B) Engineering Request	15	152	2,280	171,000
(C) Annual Report	20	40	800	60,000
(D) FFGA Approval	5	50	250	18,750
Subtotal			3,930	294,750
SMALL STARTS				
(A) Project Development	15	25	375	28,125
(B) Annual Report	15	25	375	28,125
(C) EGA Approval	10	82	820	61,500
Subtotal			1,570	117,750
Data Sub, Eval, and Ratings Total			5,500	412,500

TOTAL PROJECT SPONSOR COST AND HOURS—Continued

Task	# Annual occurrences	Aver hours per occurrence	Total hours	Total $
Before and After Data Collection				
NEW STARTS				
(A) Data Collection Plan	4	80	320	24,000
(B) Before Data Collection	4	3,000	12,000	900,000
(C) Documentation of Forecasts	4	160	640	48,000
(D) After Data Collection	4	3,000	12,000	900,000
(E) Analysis and Reporting	4	240	960	72,000
Before and After Total			25,920	1,944,000
TOTAL			31,420	2,356,500

The estimates for total number of annual submissions are based on projected annual workload. The estimated average number of hours per task is based on professional judgment of FTA staff. Estimated hourly costs are based on information informally shared by project sponsors and the professional judgment of FTA staff.

Interested parties were invited in the NPRM to send comments regarding any aspect of this information collection, including: (1) The necessity and utility of the information collection for the proper performance of the functions of the FTA; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. No comments were received on this analysis.

G. Executive Order 13132

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. The final rule implements a discretionary grant program that would make funds available, on a competitive basis, to States, local governments, and transit agencies. The requirements only apply to those entities seeking funds under this chapter, and thus this action would have not substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. FTA has also determined that this action would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions. Based on this analysis, it has been determined that the final rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment. Comment was solicited specifically on the Federalism implications of this proposal in the NPRM and no comments were received.

H. National Environmental Policy Act

FTA has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321), and has determined that this action would not have any potentially significant effect on the quality of the environment. This action qualifies for a categorical exclusion under FTA's NEPA regulations at 771.117(c)(20), which covers the ''[p]romulgation of rules, regulations, and directives.''

I. Energy Act Implications

The changes made in this final rule and accompanying guidance would likely have a positive effect on energy consumption because, through the Federal investment in public transportation projects, these projects would increase the use of public transportation.

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

Executive Order 13175 requires agencies to ensure meaningful and timely input from Indian tribal government representatives in the development of rules that ''significantly or uniquely affect'' Indian communities and that impose ''substantial and direct compliance costs'' on such communities. In the NPRM, we invited Indian tribal governments to provide comments on the effect that adoption of specific proposals in the NPRM and accompanying guidance may have on Indian communities. No comments were received on this issue.

K. Unfunded Mandates Reform Act

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, of $100,000,000 or more in any one year.

L. Statutory/Legal Authority for This Rulemaking

This rulemaking is issued under authority of 49 U.S.C. 5334(a)(11), which provides that the Secretary may ''issue regulations as necessary to carry out the purposes of [Chapter VI of Title 49, U.S. Code],'' and 49 U.S.C. 5309(g)(6), which requires the Secretary to issue regulations ''establishing an evaluation and rating process'' for new fixed guideway capital projects funded under 49 U.S.C. 5309. The Secretary's authority to issue these regulations is delegated to the Federal Transit Administrator through 49 CFR 1.19(a), the delegation from the Secretary to the Administrator to ''carry out'' the Federal transit programs authorized by 49 U.S.C. chapter 53.

M. Regulation Identifier Number (RIN)

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

List of Subjects in 49 CFR Part 611

Government contracts, Grant programs-transportation, Mass transportation.

VII. Regulatory Text

For the reasons set forth in the preamble, and under the authority of 49 U.S.C. 5309(g)(6) and 5334(a)(11), and the delegations of authority at 49 CFR 1.51, FTA hereby amends Chapter VI of Title 49, Code of Federal Regulations, by revising part 611 as set forth below:

PART 611—MAJOR CAPITAL INVESTMENT PROJECTS

Subpart A—General Provisions

Sec.
611.101 Purpose and contents
611.103 Applicability
611.105 Definitions
611.107 Relation to the planning processes

Subpart B—New Starts

611.201 New Starts eligibility
611.203 New Starts project justification criteria
611.205 New Starts local financial commitment criteria
611.207 Overall New Starts project ratings
611.209 New Starts process
611.211 New Starts Before and After study

Subpart C—Small Starts

611.301 Small Starts eligibility
611.303 Small Starts project justification criteria
611.305 Small Starts local financial commitment criteria
611.307 Overall Small Starts project ratings
611.309 [Reserved]
Appendix A—Description of Measures Used for Project Evaluation

Authority: § 49 U.S.C. 5309(g)(6) and 5334(a)(11); 49 CFR 1.51.

Subpart A—General Provisions

§ 611.101 Purpose and contents.

(a) This part prescribes the process that applicants must follow to be considered eligible for fixed guideway capital investment grants for a new fixed guideway, an extension to a fixed guideway, or a corridor-based bus rapid transit system (known as New Starts and Small Starts). Also, this part prescribes the procedures used by FTA to evaluate and rate proposed New Starts projects as required by 49 U.S.C. 5309(d) and Small Starts projects as required by 49 U.S.C. 5309(h).

(b) This part defines how the results of the evaluation described in paragraph (a) of this section will be used to:

(1) Rate projects as ''high,'' ''medium-high,'' ''medium,'' ''medium-low'' or ''low'' as required by 49 U.S.C. 5309(g)(2)(A) and 49 U.S.C. 5309(h)(6);

(2) Assign individual ratings for each of the project justification criteria specified in 49 U.S.C. 5309(d)(2)(B) and 49 U.S.C. 5309(h)(6);

(3) Determine project eligibility for Federal funding commitments, in the form of full funding grant agreements (FFGA) for New Starts projects and expedited grant agreements (EGA) for Small Starts projects; and

(4) Support funding recommendations for the New Starts and Small Starts programs for the President's annual budget request.

(c) The information collected and ratings developed under this part will form the basis for the *Annual Report on Funding Recommendations,* required by 49 U.S.C. 5309(o)(1).

611.103 Applicability.

(a) This part applies to all proposals for Federal major capital investment funds under 49 U.S.C. 5309 for new fixed guideways, extensions to fixed guideways, and corridor-based bus rapid transit systems.

(b) This part does not apply to projects for which an FFGA or PCGA has already been executed, or to projects that have been approved into final design or project development unless the project sponsor requests to be covered by this part. The regulations in existence prior to the effective date of this rule will continue to apply to projects for which an FFGA or PCGA has already been executed and to projects approved into final design or project development unless a project sponsor requests to be covered by this part. New Starts projects approved for entry into final design shall be considered to be in the engineering phase of the New Starts process.

(c) A New Starts project which has been approved for entry into preliminary engineering under the regulations in existence prior to the effective date of this rule shall be considered to be in the engineering phase of the New Starts process. For the purpose of completing engineering, the regulations in existence prior to the effective date of this rule will continue to apply to a New Starts project approved into preliminary engineering until such time as the sponsor requests an FFGA unless the project sponsor requests to be covered by this part prior to an FFGA.

§ 611.105 Definitions.

The definitions established by Titles 12 and 49 of the United States Code, the Council on Environmental Quality's regulation at 40 CFR parts 1500–1508, and FHWA–FTA regulations at 23 CFR parts 450 and 771 are applicable. In addition, the following definitions apply:

Corridor-based bus rapid transit project means a bus capital project where the project represents a substantial investment in a defined corridor as demonstrated by features such as park-and-ride lots, transit stations, bus arrival and departure signage, intelligent transportation systems technology, traffic signal priority, off-board fare collection, advanced bus technology, and other features that support the long-term corridor investment.

Current year means the most recent year for which data on the existing transit system and demographic data are available.

Early system work agreement means a contract, pursuant to the requirements in 49 U.S.C. 5309(k)(3), that allows some construction work and other clearly defined elements of a project to proceed prior to execution of a full funding grant agreement (FFGA). It typically includes a limited scope of work that is less than the full project scope of work and specifies the amount of New Starts funds that will be provided for the defined scope of work included in the agreement.

EGA means an expedited grant agreement.

Engineering is a phase of development for New Starts projects during which the scope of the proposed project is finalized; estimates of project cost, benefits, and impacts are refined; project management plans and fleet management plans are developed; and final construction plans (including final construction management plans), detailed specifications, final construction cost estimates, and bid documents are prepared. During engineering, project sponsors must obtain commitments of all non-New Starts funding.

ESWA means early system work agreement.

Extension to fixed guideway means a project to extend an existing fixed guideway or planned fixed guideway.

FFGA means a full funding grant agreement.

Fixed guideway means a public transportation facility that uses and occupies a separate right-of-way or rail line for the exclusive use of public transportation and other high occupancy vehicles, or uses a fixed catenary system and a right of way usable by other forms of transportation. This includes, but is not limited to, rapid rail, light rail, commuter rail, automated guideway transit, people movers, ferry boat service, and fixed-guideway facilities for buses (such as bus rapid transit) and other high occupancy vehicles. A new fixed guideway means a newly-constructed fixed guideway in a corridor or alignment where no such guideway exists.

FTA means the Federal Transit Administration.

Full funding grant agreement means a contract that defines the scope of a New Starts project, the amount of New Starts funds that will be contributed, and other terms and conditions.

Horizon year means a year roughly 10 years or 20 years in the future, at the

option of the project sponsor. Horizon years are based on available socioeconomic forecasts from metropolitan planning organizations, which are generally prepared in five year increments such as for the years 2020, 2025, 2030, and 2035.

Locally preferred alternative means an alternative evaluated through the local planning process, adopted as the desired alternative by the appropriate State and/or local agencies and official boards through a public process and identified as the preferred alternative in the NEPA process.

Long-range transportation plan means a financially constrained long-range plan, developed pursuant to 23 CFR Part 450, that includes sufficient financial information for demonstrating that projects can be implemented using committed, available, or reasonably available revenue sources, with reasonable assurance that the Federally supported transportation system is being adequately operated and maintained. For metropolitan planning areas, this would be the metropolitan transportation plan and for other areas, this would be the long-range statewide transportation plan. In areas classified by the Environmental Protection Agency as ''nonattainment'' or ''maintenance'' of air quality standards, the long-range transportation plan must have been found by DOT to be in conformity with the applicable State Implementation Plan.

Major capital transit investment means any project that involves the construction of a new fixed guideway, extension of an existing fixed guideway, or a corridor-based bus rapid transit system for use by public transit vehicles.

NEPA process means those procedures necessary to meet the requirements of the National Environmental Policy Act of 1969 (NEPA), as amended, at 23 CFR Part 771; the NEPA process is completed when the project receives a categorical exclusion, a Finding of No Significant Impact (FONSI) or a Record of Decision (ROD).

New Starts means a new fixed guideway project, or a project that is an extension to an existing fixed guideway, that has a total capital cost of $250,000,000 or more or for which the project sponsor is requesting $75,000,000 or more in New Starts funding.

New Starts funds mean funds granted by FTA for a New Starts project pursuant to 49 U.S.C. 5309(d).

No-build alternative means an alternative that includes only the current transportation system as well as the transportation investments committed in the Transportation Improvement Plan (TIP) (when the horizon year is 10 years in the future) or the fiscally constrained long-range transportation plan (when the horizon year is 20 years in the future) required by 23 CFR Part 450.

Secretary means the Secretary of Transportation.

Small Starts means a new fixed guideway project, a project that is an extension to an existing fixed guideway, or a corridor-based bus rapid transit system project, with a total capital cost of less than $250,000,000 and for which the project sponsor is requesting less than $75,000,000 in Small Starts funding.

Small Starts funds mean funds granted by FTA for a Small Starts project pursuant to 49 U.S.C. 5309(h).

Small Starts project development is a phase in the Small Starts process during which the scope of the proposed project is finalized; estimates of project costs, benefits and impacts are refined; NEPA requirements are completed; project management plans and fleet management plans are further developed; and the project sponsors obtains commitment of all non-Small Starts funding. It also includes (but is not limited to) the preparation of final construction plans (including construction management plans), detailed specifications, construction cost estimates, and bid documents.

§ 611.107 Relation to the planning processes.

All New Starts and Small Starts projects proposed for funding assistance under this part must emerge from the metropolitan and Statewide planning process, consistent with 23 CFR part 450, and be included in the fiscally constrained long-range transportation plan required under 23 CFR part 450.

Subpart B—New Starts

§ 611.201 New Starts eligibility.

(a) To be eligible for an engineering grant under this part for a new fixed guideway or an extension to a fixed guideway, a project must:

(1) Be a New Starts project as defined in § 611.105; and

(2) Be approved into engineering by FTA pursuant to § 611.209.

(b) To be eligible for a construction grant under section 5309 for a new fixed guideway or extension to a fixed guideway, a project must:

(1) Be a New Starts project as defined in § 611.105;

(2) Have completed engineering;

(3) Receive a ''medium'' or better rating on project justification pursuant to § 611.203;

(4) Receive a ''medium'' or better rating on local financial commitment pursuant to § 611.205;

(5) Meet the other requirements of 49 U.S.C. 5309.

§ 611.203 New Starts project justification criteria.

(a) To perform the statutorily required evaluations and assign ratings for project justification, FTA will evaluate information developed locally through the planning and NEPA processes.

(1) The method used by FTA to evaluate and rate projects will be a multiple measure approach by which the merits of candidate projects will be evaluated in terms of each of the criteria specified by this section.

(2) The measures for these criteria are specified in appendix A to this part and elaborated on in policy guidance. This policy guidance, which is subject to a public comment period, is issued periodically by FTA whenever significant changes to the process are proposed, but not less frequently than every two years, as required by 49 U.S.C. 5309(g)(5).

(3) The measures will be applied to projects defined by project sponsors that are proposed to FTA for New Starts funding.

(4) The ratings for each of the criteria in § 611.203(b)(1) through (6) will be expressed in terms of descriptive indicators, as follows: ''high,'' ''medium-high,'' ''medium,'' ''medium-low,'' or ''low.''

(b) The project justification criteria are as follows:

(1) Mobility improvements.

(2) Environmental benefits.

(3) Congestion relief.

(4) Economic development effects.

(5) Cost-effectiveness, as measured by cost per rider.

(6) Existing land use.

(c) In evaluating proposed New Starts projects under these project justification criteria:

(1) As a candidate project proceeds through engineering, a greater level of commitment will be expected with respect to transit supportive plans and policies evaluated under the economic development criterion and the project sponsor's technical capacity to implement the project.

(2) For any criteria under paragraph (b) of this section that use incremental measures, the point for comparison will be the no-build alternative.

(d) FTA may amend the measures for these project justification criteria. Any such amendment will be included in

policy guidance and subject to a public comment process.

(e) From time to time FTA may publish through policy guidance standards based on characteristics of projects and/or corridors to be served. If a proposed project can meet the established standards, FTA may assign an automatic rating on one or more of the project justification criteria outlined in this section.

(f) The individual ratings for each of the criteria described in this section will be combined into a summary project justification rating of ''high,'' ''medium-high,'' ''medium,'' ''medium-low,'' or ''low,'' through a process that gives comparable, but not necessarily equal, weight to each criterion. The process by which the project justification rating will be developed, including the assigned weights, will be described in policy guidance.

§ 611.205 New Starts local financial commitment criteria.

In order to approve a grant under 49 U.S.C. 5309 for a New Starts project, FTA must find that the proposed project is supported by an acceptable degree of local financial commitment, as required by 49 U.S.C. 5309(d)(4)(iv). The local financial commitment to a proposed project will be evaluated according to the following measures:

(a) The proposed share of the project's capital costs to be funded from sources other than New Starts funds, including both the non-New Starts match required by Federal law and any additional state, local or other Federal capital funding (also known as ''overmatch'');

(b) The current capital and operating financial condition of the project sponsor;

(c) The commitment of capital and operating funds for the project and the entire transit system including consideration of private contributions; and

(d) The accuracy and reliability of the capital and operating costs and revenue estimates and the financial capacity of the project sponsor.

(e) From time to time FTA may publish through policy guidance standards based on characteristics of projects and/or corridors to be served. If a proposed project can meet the established standards, FTA may assign an automatic rating on one or more of the local financial commitment criteria outlined in this section.

(f) As a candidate project proceeds through engineering, a greater level of local financial commitment will be expected.

(g) FTA may amend the measures for these local financial commitment criteria. Any such amendment will be included in policy guidance and subject to a public comment process.

(h) For each proposed project, ratings for paragraphs (a) through (d) of this section will be reported in terms of descriptive indicators, as follows: ''high,'' ''medium-high,'' ''medium,'' ''medium-low,'' or ''low.'' For paragraph (a) of this section, the percentage of New Starts funding sought from 49 U.S.C. 5309 will be rated and used to develop the summary local financial commitment rating, but only if it improves the rating and not if it worsens the rating.

(i) The ratings for each measure described in this section will be combined into a summary local financial commitment rating of ''high,'' ''medium-high,'' ''medium,'' ''medium-low,'' or ''low.'' The process by which the summary local financial commitment rating will be developed, including the assigned weights to each of the measures, will be described in policy guidance.

§ 611.207 Overall New Starts project ratings.

(a) [Reserved]

(b) FTA will assign overall project ratings to each proposed project of ''high,'' ''medium-high, ''medium,'' ''medium-low,'' or ''low'' as required by 49 U.S.C. 5309(g)(2)(A).

(1) These ratings will indicate the overall merit of a proposed New Starts project at the time of evaluation.

(2) Ratings for individual projects will be developed upon entry into engineering and prior to an FFGA. Additionally, ratings may be updated while a project is in engineering if the project scope and cost have changed materially since the most recent rating was assigned.

(c) These ratings will be used to:

(1) Approve or deny advancement of a proposed project into engineering ;

(2) Approve or deny projects for ESWAs and FFGAs; and

(3) Support annual funding recommendations to Congress in the *Annual Report on Funding Recommendations* required by 49 U.S.C. 5309(o)(1).

(d) [Reserved]

§ 611.209 [Reserved]

§ 611.211 New Starts Before and After study.

(a) During engineering, project sponsors shall submit to FTA a plan for collection and analysis of information to identify the characteristics, costs, and impacts of the New Starts project and the accuracy of the forecasts prepared during development of the project.

(1) The Before and After study plan shall consider:

(i) Characteristics including the physical scope of the project, the service provided by the project, any other changes in service provided by the transit system, and the schedule of transit fares;

(ii) Costs including the capital costs of the project and the operating and maintenance costs of the transit system in appropriate detail; and

(iii) Impacts including changes in transit service quality, ridership, and fare levels.

(2) The plan shall provide for:

(i) Documentation and preservation of the predicted scope, service levels, capital costs, operating costs, and ridership of the project;

(ii) Collection of ''before'' data on the transit service levels and ridership patterns of the current transit system including origins and destinations, access modes, trip purposes, and rider characteristics;

(iii) Documentation of the actual capital costs of the as-built project;

(iv) Collection of ''after'' data two years after opening of the project, including the analogous information on transit service levels and ridership patterns, plus information on operating costs of the transit system in appropriate detail;

(v) Analysis of the costs and impacts of the project; and

(vi) Analysis of the consistency of the predicted and actual characteristics, costs, and impacts of the project and identification of the sources of any differences.

(vii) Preparation of a final report within three years of project opening to present the actual characteristics, costs, and impacts of the project and an assessment of the accuracy of the predictions of these outcomes.

(3) For funding purposes, preparation of the plan for collection and analysis of data is an eligible part of the proposed project.

(b) The FFGA will require implementation of the plan prepared in accordance with paragraph (a) of this section.

(1) Satisfactory progress on implementation of the plan required under paragraph (a) of this section shall be a prerequisite to approval of an FFGA.

(2) For funding purposes, collection of the ''before'' data, collection of the ''after'' data, and the development and reporting of findings are eligible parts of the proposed project.

(3) FTA may condition receipt of funding provided for the project in the FFGA upon satisfactory submission of the report required under this section.

Subpart C—Small Starts

§ 611.301 Small Starts eligibility.

(a) To be eligible for a project development grant under this part for a new fixed guideway, an extension to a fixed guideway, or a corridor-based bus rapid transit system, a project must:

(1) Be a Small Starts project as defined in § . 611.105; and

(2) Be approved into project development by FTA pursuant to § 611.309.

(b) To be eligible for a construction grant under this part for a new fixed guideway, an extension to a fixed guideway, or a corridor-based bus rapid system, a project must:

(1) Be a Small Starts project as defined in § 611.105;

(2) Receive a ''medium'' or better rating on project justification pursuant to § 611.303;

(3) Receive a ''medium'' or better rating on local financial commitment pursuant to Sec. 611.305; and

(4) Meet the other requirements of 49 U.S.C. 5309.

§ 611.303 Small Starts project justification criteria.

(a) To perform the statutorily required evaluations and assign ratings for project justification, FTA will evaluate information developed locally through the planning, NEPA and project development processes.

(1) The method used by FTA to evaluate and rate projects will be a multiple measure approach by which the merits of candidate projects will be evaluated in terms of each of the criteria specified by this section.

(2) The measures for these criteria are specified in Appendix A and elaborated on in policy guidance. This policy guidance, which is subject to a public comment period, is issued periodically by FTA whenever significant changes are proposed, but not less frequently than every two years, as required by 49 U.S.C. 5309(g)(5).

(3) The measures will be applied to projects defined by project sponsors that are proposed to FTA for Small Starts funding.

(4) The ratings for each of the criteria in § 611.303(b)(1) through (6) will be expressed in terms of descriptive indicators, as follows: ''high,'' ''medium-high,'' ''medium,'' ''medium-low,'' or ''low.''

(b) The project justification criteria are as follows:

(1) Cost-effectiveness, as measured by cost per rider.

(2) Economic development effects.

(3) Existing land use.

(4) Mobility improvements.

(5) Environmental benefits.

(6) Congestion relief.

(c) In evaluating proposed Small Starts projects under these criteria:

(1) As a candidate project proceeds through project development, a greater level of commitment will be expected with respect to transit supportive land use plans and policies and the project sponsor's technical capacity to implement the project.

(2) For any criteria under paragraph (b) of this section that use incremental measures, the point for comparison will be the no-build alternative.

(d) FTA may amend the measures for these project justification criteria. Any such amendment will be included in policy guidance and subject to a public comment process.

(e) From time to time FTA may publish through policy guidance standards based on characteristics of projects and/or corridors to be served. If a proposed project can meet the established standards, FTA may assign an automatic rating on one or more of the project justification criteria outlined in this section.

(f) The individual ratings for each of the criteria described in this section will be combined into a summary project justification rating of ''high,'' ''medium-high,'' ''medium,'' ''medium-low,'' or ''low'' through a process that gives comparable, but not necessarily equal, weight to each criterion. The process by which the project justification rating will be developed, including the assigned weights, will be described in policy guidance.

§ 611.305 Small Starts local financial commitment criteria.

In order to approve a grant under 49 U.S.C. 5309 for a Small Starts project, FTA must find that the proposed project is supported by an acceptable degree of local financial commitment, as required by 49 U.S.C. 5309(h)(3)(c). The local financial commitment to a proposed project will be evaluated according to the following measures:

(a) The proposed share of the project's capital costs to be funded from sources other than Small Starts funds, including both the non-Small Starts match required by Federal law and any additional state, local, or other Federal capital funding (known as ''overmatch'');

(b) The current capital and operating financial condition of the project sponsor;

(c) The commitment of capital and operating funds for the project and the entire transit system including consideration of private contributions; and

(d) The accuracy and reliability of the capital and operating costs and revenue estimates and the financial capacity of the project sponsor.

(e) From time to time FTA may publish through policy guidance standards based on characteristics of projects and/or the corridors to be served. If a proposed project can meet the established standards, FTA may assign an automatic rating on one or more of the local financial commitment criteria outlined in this section.

(f) FTA may amend the measures for these local financial commitment criteria. Any such amendment will be included in policy guidance and subject to a public comment process.

(g) As a candidate project proceeds through project development, a greater level of local financial commitment will be expected.

(h) For each proposed project, ratings for paragraphs (a) through (d) of this section will be reported in terms of descriptive indicators, as follows: ''high,'' ''medium-high,'' ''medium,'' ''medium-low,'' or ''low.'' For paragraph (a) of this section, the percentage of Small Starts funding sought from 49 U.S.C. 5309 will be rated and used to develop the summary local financial commitment rating, but only if it improves the rating and not if it worsens the rating.

(i) The ratings for each measure described in this section will be combined into a summary local financial commitment rating of ''high,'' ''medium-high,'' ''medium,'' ''medium-low,'' or ''low.'' The process by which the summary local financial commitment rating will be developed, including the assigned weights to each of the measures, will be described in policy guidance.

§ 611.307 Overall Small Starts project ratings.

(a) The summary ratings developed for project justification and local financial commitment (§§ 611.303(f) and 611.305(i)) will form the basis for the overall rating for each project.

(b) FTA will assign overall project ratings to each proposed project of ''high,'' ''medium-high, ''medium,'' ''medium-low,'' or ''low,'' as required by 49 U.S.C. 5309(e)(8).

(1) These ratings will indicate the overall merit of a proposed Small Starts project at the time of evaluation.

(2) Ratings for individual projects will be developed prior to an EGA.

(c) These ratings will be used to:

(1) Approve or deny projects for EGAs; and

(2) Support annual funding recommendations to Congress in the

Annual Report on Funding Recommendations required by 49 U.S.C. 5309(k)(1).

(d) FTA will assign overall ratings for proposed Small Starts projects by averaging the summary ratings for project justification and local financial commitment. When the average of these ratings is unclear (e.g., summary project justification rating of ''medium-high'' and summary local financial commitment rating of ''medium''), FTA will round up the overall rating to the higher rating except in the following circumstances:

(1) A ''medium'' overall rating requires a rating of at least ''medium'' on both project justification and local financial commitment.

(2) If a project receives a ''low'' rating on either project justification or local financial commitment, the overall rating will be ''low.''

§ 611.309 [Reserved]

Appendix A to Part 611—Description of Measures Used for Project Evaluation

Project Justification

New Starts

New Starts Project Justification

FTA will evaluate candidate New Starts projects according to the six project justification criteria established by 49 U.S.C. 5309(d)(2)(A)(iii). From time to time, but not less frequently than every two years as directed by 49 U.S.C. 5309(g)(5), FTA publishes for public comment policy guidance on the application of these measures, and the agency expects it will continue to do so. Moreover, FTA may choose to amend these measures, pending the results of ongoing studies regarding transit benefit and cost evaluation methods. In addition, FTA may establish warrants for one or more of these criteria through which an automatic rating would be assigned based on the characteristics of the project and/or its corridor. FTA will develop these warrants based on analysis of the features of projects and/or corridor characteristics that would produce satisfactory ratings on one or more of the criteria. Such warrants would be included in policy guidance issued for public comment before being finalized.

(a) *Definitions.* In this Appendix, the following definitions apply:

(1) *Enrichments* mean certain improvements to the transit project desired by the grant recipient that are non-integral to the basic functioning of the project, whose benefits are not captured in whole by other criteria, and are carried out simultaneous with grant execution and may be included in the Federal grant. Enrichments include but are not limited to artwork, landscaping, and bicycle and pedestrian improvements such as sidewalks, paths, plazas, site and station furniture, site lighting, signage, public artwork, bike facilities, and permanent fencing. Enrichments also include sustainable building design features of up to 2.5 percent of the total cost of the facilities (when such facilities are designed to achieve a third-party certification or to optimize a building's design to use less energy, water and reduce greenhouse gas emissions that may not lead directly to an official certification).

(2) *Transit dependent person as used in this context* means either a person from a household that owns no cars or a person whose household income places them in the lowest income stratum of the local travel demand model. For those project sponsors choosing to use the simplified national model ''transit dependent persons'' will be defined as individuals residing in households that do not own a car. Project sponsors that choose to continue to use their local travel model rather than the FTA developed simplified national model to estimate trips will define transit dependent persons as individuals in the lowest socioeconomic stratum as defined in the local model, which is usually either households with no cars or households in the lowest locally defined income bracket.

(3) *Trips* mean linked trips riding on any portion of the New Starts or Small Starts project.

(b) *Mobility Improvements.* (1) The total number of trips using the proposed project. Extra weight may be given to trips that would be made on the project by transit dependent persons in the current year, and, at the discretion of the project sponsor, in the horizon year. The method for assigning extra weight is set forth in policy guidance. (2) If the project sponsor chooses to consider project trips in the horizon year in addition to the current year, trips will be based on the weighted average of current year and horizon year.

(c) *Environmental Benefits.* (1) The monetized value of the anticipated direct and indirect benefits to human health, safety, energy, and the air quality environment that are expected to result from implementation of the proposed project compared to: (i) The existing environment with the transit system in the current year or, (ii) at the discretion of the project sponsor, both the existing environment with the transit system in the current year and the no-build environment and transit system in the horizon year. The monetized benefits will be divided by the annualized capital and operating cost of the New Starts project, less the cost of enrichments.

(2) Environmental benefits used in the calculation would include:

(i) Change in air quality criteria pollutants,

(ii) Change in energy use,

(iii) Change in greenhouse gas emissions and

(iv) Change in safety,

.(3) If the project sponsor chooses to consider environmental benefits in the horizon year in addition to the current year, environmental benefits will be based on the weighted average of current year and horizon year.

(d) *Congestion Relief.* [Reserved]

(e) *Cost-effectiveness.* (1) The annualized cost per trip on the project, where cost includes changes in capital, operating, and maintenance costs, less the cost of enrichments, compared to:

(i) The existing transit system in the current year, or

(ii) At the discretion of the project sponsor, both the existing transit system in the current year and the no-build transit system in the horizon year.

(2) If the project sponsor chooses to consider cost-effectiveness in the horizon year in addition to the current year, cost-effectiveness will be based on the weighted average of current year and horizon year.

(f) *Existing Land Use.* (1) Existing corridor and station area development;

(2) Existing corridor and station area development character;

(3) Existing station area pedestrian facilities, including access for persons with disabilities;

(4) Existing corridor and station area parking supply; and

(5) Existing affordable housing in the project corridor.

(g) *Economic Development.* (1) The extent to which a proposed project is likely to enhance additional, transit-supportive development based on a qualitative assessment of the existing local plans and policies to support economic development proximate to the project including:

(i) Growth management plans and policies;

(ii) Local plans and policies in place to support maintenance of or increases to affordable housing in the project corridor; and

(iii) Demonstrated performance and impact of policies.

(2) At the option of the project sponsor, an additional quantitative analysis (scenario-based estimate) of indirect changes in VMT resulting from changes in development patterns that are anticipated to occur with implementation of the proposed project. The resulting environmental benefits from the indirect VMT would be calculated, monetized, and compared to the annualized capital and operating cost of the New Starts project in a manner similar to that under the environmental benefits criterion. Such benefits are not included in the environmental benefits measure.

New Starts Local Financial Commitment

From time to time, but not less than frequently than every two years as directed by U.S.C. 5309(g)(5), FTA publishes policy guidance on the application of these measures, and the agency expects it will continue to do so. Moreover, FTA may choose to amend these measures, pending the results of ongoing studies. In addition, FTA may establish warrants for one or more of these criteria through which an automatic rating would be assigned based on the characteristics of the project and/or its corridor. FTA will develop these warrants based on analysis of the features of projects and/or corridor characteristics that would produce satisfactory ratings on one or more of the criteria. Such warrants would be included in draft policy guidance issued for comment before being finalized.

FTA will use the following measures to evaluate the local financial commitment of a proposed New Starts project:

(a) The proposed share of total project costs from sources other than New Starts funds,

including other Federal transportation funds and the local match required by Federal law;

(b) The current financial condition, both capital and operating, of the project sponsor;

(c) The commitment of funds for both the proposed project and the ongoing operation and maintenance of the existing transit system once the project is built including consideration of private contributions.

(d) The reasonableness of the financial plan, including planning assumptions, cost estimates, and the capacity to withstand funding shortfalls or cost overruns.

Small Starts

Small Starts Project Justification

FTA will evaluate candidate Small Starts projects according to the six project justification criteria established by 49 U.S.C. 5309(h)(4), From time to time, but not less than frequently than every two years as directed by 49 U.S.C. 5309(g)(5), FTA publishes for public comment policy guidance on the application of these measures. Moreover, FTA may choose to amend these measures, pending the results of ongoing studies regarding transit benefit and cost evaluation methods. In addition, FTA may establish warrants for one or more of these criteria through which an automatic rating would be assigned based on the characteristics of the project and/or its corridor. Such warrants would be included in the policy guidance so that they may be subject to public comment.

(a) *Mobility Improvements.* (1) The total number of trips using the proposed project with extra weight given to trips that would be made on the project by transit dependent persons in the current year, and, at the discretion of the project sponsor, in the horizon year.

(2) If the project sponsor chooses to consider project trips in the horizon year in addition to the current year, trips will be based on the weighted average of current year and horizon year.

(b) *Environmental Benefits.* (1) The monetized value of the anticipated direct and indirect benefits to human health, safety, energy, and the air quality environment that are expected to result from implementation of the proposed project compared to:

(i) The existing environment with the transit system in the current year or,

(ii) At the discretion of the project sponsor, both the existing environment with the transit system in the current year and the no-build environment and transit system in the horizon year. The monetized benefits will be divided by the annualized federal share of the project.

(2) Environmental benefits used in the calculation would include:

(i) Change in air quality criteria pollutants,

(ii) Change in energy use,

(iii) Change in greenhouse gas emissions, and

(iv) Change in safety.

(3) If the project sponsor chooses to consider environmental benefits in the horizon year in addition to the current year, environmental benefits will be based on the weighted average of current year and horizon year.

(c) *Congestion Relief.* [Reserved]

(d) *Cost-effectiveness.* (1) The annualized federal share per trip on the project where federal share includes funds from the major capital investment program as well as other federal funds, compared to:

(i) The existing transit system in the current year, or

(ii) At the discretion of the project sponsor, both the existing transit system in the current year and the no-build transit system in the horizon year.

(2) If the project sponsor chooses to consider cost-effectiveness in the horizon year in addition to the current year, cost-effectiveness will be based on the weighted average of current year and horizon year.

(e) *Existing Land Use.* (1) Existing corridor and station area development;

(2) Existing corridor and station area development character;

(3) Existing station area pedestrian facilities, including access for persons with disabilities;

(4) Existing corridor and station area parking supply; and

(5) Existing affordable housing in the project corridor.

(f) *Economic Development.* (1) The extent to which a proposed project is likely to enhance additional, transit-supportive development based on the existing plans and policies to support economic development proximate to the project including:

(i) Growth management plans and policies;

(ii) Policies in place to support maintenance of or increases to the share of affordable housing in the project corridor; and

(iii) Demonstrated performance and impact of policies.

(2) At the option of the project sponsor, an additional quantitative analysis (scenario-based estimate) to estimate indirect changes in VMT resulting from changes in development patterns that are anticipated to occur with implementation of the proposed project. The resulting environmental benefits would be calculated, monetized, and compared to the annualized federal share of the project.

Small Starts Local Financial Commitment

If the Small Starts project sponsor can demonstrate the following, the project will qualify for a highly simplified financial evaluation:

(a) A reasonable plan to secure funding for the local share of capital costs or sufficient available funds for the local share;

(b) The additional operating and maintenance cost to the agency of the proposed Small Starts project is less than 5 percent of the project sponsor's existing operating budget; and

(c) The project sponsor is in reasonably good financial condition, as demonstrated by the past three years' audited financial statements.

Small Starts projects that meet these measures and request greater than 50 percent Small Starts funding would receive a local financial commitment rating of ''Medium.'' Small Starts projects that request 50 percent or less in Small Starts funding would receive a ''High'' rating for local financial commitment.

FTA will use the following measures to evaluate the local financial commitment to a proposed Small Starts project if it cannot meet the conditions listed above:

(a) The proposed share of total project costs from sources other than Small Starts funds, including other Federal transportation funds and the local match required by Federal law;

(b) The current financial condition, both capital and operating, of the project sponsor;

(c) The commitment of funds for both the proposed project and the ongoing operation and maintenance of the project sponsor's system once the project is built.

(d) The reasonableness of the financial plan, including planning assumptions, cost estimates, and the capacity to withstand funding shortfalls or cost overruns.

Issued on: December 27, 2012.

Peter Rogoff,

Administrator, Federal Transit Administration.

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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 611

[Docket No. FTA–2010–0009]

Notice of Availability of Proposed New Starts and Small Starts Policy Guidance

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of availability of proposed policy guidance; request for comments.

SUMMARY: The Federal Transit Administration (FTA) is announcing the availability of proposed policy guidance to sponsors of New Starts and Small Starts projects, and inviting comment on this proposed guidance, which has been placed both in the docket and on the agency's web site. This proposed policy guidance will accompany the final rule for Major Capital Investment Projects published elsewhere in this issue of the **Federal Register**. Specifically, this proposed policy guidance describes the particular measures FTA intends to apply in evaluating projects seeking New Starts and Small Starts funding and the way these measures would be used in project ratings, if adopted. The final rule establishes the framework for the New Starts and Small Starts evaluation and rating process; this proposed policy guidance complements the final rule by providing a deeper level of detail about the methods for calculating the project justification and local financial commitment criteria required for New Starts and Small Starts projects.

DATES: Comments must be received on or before March 11, 2013. Any comments received beyond this deadline will be considered to the extent practicable.

ADDRESSES: You may submit comments to DOT docket number FTA–2010–0009 by any of the following methods:

Federal eRulemaking Portal: Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.

U.S. Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Room W12–140, Washington, DC 20590–0001.

Hand Delivery or Courier: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Fax: 202–493–2251.

Instructions: You must include the agency name (Federal Transit Administration) and docket number (FTA–2010–0009) for this notice at the beginning of your comments. You must submit two copies of your comments if you submit them by mail. If you wish to receive confirmation FTA received your comments, you must include a self-addressed, stamped postcard. Due to security procedures in effect since October 2001, mail received through the U.S. Postal Service may be subject to delays. Parties submitting comments may wish to consider using an express mail firm to ensure prompt filing of any submissions not filed electronically or by hand.

All comments received will be posted, without change and including any personal information provided, to *http://www.regulations.gov,* where they will be available to internet users. You may review DOT's complete Privacy Act Statement published in the **Federal Register** on April 11, 2000, at 65 FR 19477. For access to the docket to read background documents and comments received, go to *http://regulations.gov* at any time or to the U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Management Facility, West Building Ground Floor, Room W12–140, Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For program matters, Elizabeth Day, FTA Office of Planning and Environment, telephone (202) 366–5159 or *Elizabeth.Day@dot.gov.* For legal matters, Scott Biehl, FTA Office of Chief Counsel, telephone (202) 366–0826 or *Scott.Biehl@dot.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to 49 U.S.C. 5309(g)(5), FTA is obliged to publish policy guidance on the review and evaluation process and criteria for major capital investment projects each time the agency makes significant changes to the process and criteria, and in any event, at least once every two years. Also, FTA is obliged to invite public comment on the guidance, and to publish its response to comments. In this instance, FTA is proposing policy guidance for the New Starts and Small Starts process and criteria consistent with the regulation at 49 CFR part 611 published elsewhere in this issue of the **Federal Register**, which will take effect on April 9, 2013. FTA asks that comments on the proposed policy guidance be submitted within 60 days of today's notice, so that FTA may respond to comments and make any revisions to the guidance to coincide with the effective date of the regulation.

The proposed policy guidance is available in its entirety on FTA's public Web site at *http://www.fta.dot.gov,* and in the docket at *http://www.regulatons.gov.* It is approximately 30 typewritten pages in length. The proposed policy guidance addresses, in detail, measures and methods for calculating both the local financial commitment criteria for a New Starts or Small Starts project, and the project justification criteria. The proposed policy guidance sets forth breakpoints for determining whether a project rates ''high,'' ''medium-high,'' ''medium,'' ''medium-low,'' or ''low'' against the various criteria for both project justification and local financial commitment. Also, the proposed policy guidance addresses the use of time horizons for calculating various measures and the weighting of the criteria and measures to arrive at an overall project rating.

The rulemaking that led to the issuance of the new regulation at 49 CFR part 611 began in June 2009, well before the enactment of the Moving Ahead for Progress in the 21st Century Act (''MAP–21'') in July 2012, which has reauthorized the Federal transit programs at 49 U.S.C. Chapter 53 and made a number of significant changes, in particular, to the discretionary capital investment program authorized at 49 U.S.C. 5309. Both the new regulation and the proposed policy guidance pertain only to the evaluation and rating of New Starts and Small Starts projects under Section 5309; they do not pertain to the new Core Capacity Improvement program established by MAP–21, nor the evaluation of Programs of Interrelated Projects, the pilot program for expedited project delivery, or the process for expedited review of project sponsors' technical capacity. Nor does the new regulation or the proposed policy guidance address the procedural changes made to the steps in the process, such as the elimination of the requirement for Alternatives Analysis, the newly defined project development phase, and the newly defined engineering phase, which were enacted by MAP–21. Those subjects will be addressed through future rulemakings and policy guidance.

Issued on: December 27, 2012.

Peter Rogoff,

Administrator, Federal Transit Administration.

[FR Doc. 2012–31539 Filed 1–3–13; 11:15 am]

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Part IV

Department of Agriculture

Animal and Plant Health Inspection Service

9 CFR Parts 71, 77, 78, et al.

Traceability for Livestock Moving Interstate; Final Rule

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 71, 77, 78, and 86

[Docket No. APHIS–2009–0091]

RIN 0579–AD24

Traceability for Livestock Moving Interstate

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations to establish minimum national official identification and documentation requirements for the traceability of livestock moving interstate. Under this rulemaking, unless specifically exempted, livestock belonging to species covered by the regulations that are moved interstate must be officially identified and accompanied by an interstate certificate of veterinary inspection or other documentation. These regulations specify approved forms of official identification for each species but allow the livestock covered under this rulemaking to be moved interstate with another form of identification, as agreed upon by animal health officials in the shipping and receiving States or Tribes. The purpose of this rulemaking is to improve our ability to trace livestock in the event that disease is found.

DATES: *Effective Date:* March 11, 2013.

FOR FURTHER INFORMATION CONTACT: Mr. Neil Hammerschmidt, Program Manager, Animal Disease Traceability, VS, APHIS, 4700 River Road Unit 46, Riverdale, MD 20737–1231; (301) 851–3539.

SUPPLEMENTARY INFORMATION:

Background

I. Purpose of the Regulatory Action

a. Need for the Regulatory Action

Preventing and controlling animal disease is the cornerstone of protecting American animal agriculture. While ranchers and farmers work hard to protect their animals and their livelihoods, there is never a guarantee that their animals will be spared from disease. To support their efforts, the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA) has promulgated regulations to prevent, control, and eradicate disease. Traceability does not prevent disease, but knowing where diseased and at-risk animals are, where they have been, and when, is indispensable in emergency response and in ongoing disease control and eradication programs.

We have clear indications that higher levels of official identification enhance tracing capability. For example, through the National Scrapie Eradication Program, 92 percent of the cull breeding sheep are officially identified at slaughter, primarily using flock identification eartags. This level of official identification made it possible in fiscal year 2010 to achieve traceback from slaughter of scrapie-positive sheep to the flock of origin or birth as part of the scrapie surveillance program 96 percent of the time, typically in a matter of minutes. Other diseases, particularly contagious ones, require that we trace to more than the birth premises, i.e., to other premises where the animal has been after leaving the birth premises but before going to slaughter, so the scrapie model is not a complete solution for such diseases.

APHIS believes that we must improve our tracing capabilities now not only to address current concerns, including the increasing number of cases of bovine tuberculosis, but also to ensure that we are well prepared to respond to new or foreign animal diseases in the future.

On August 11, 2011, we published in the **Federal Register** (76 FR 50082–50110, Docket No. APHIS–2009–0091) a proposal [1] to amend the regulations by establishing minimum national official identification and documentation requirements for the traceability of livestock moving interstate. Under the proposed regulations, unless specifically exempted, livestock belonging to species covered by the rulemaking that are moved interstate would have to be officially identified and accompanied by an interstate certificate of veterinary inspection (ICVI) or comparable appropriate documentation. The proposed rule specified approved forms of official identification for each species but allowed the livestock covered under the rulemaking to be moved interstate with another form of identification, as agreed upon by animal health officials in the shipping and receiving States or Tribes. The purpose of the proposed rule was to improve our ability to trace livestock in the event that disease is found.

b. Legal Authority for the Regulatory Action

Under the Animal Health Protection Act (AHPA, 7 U.S.C. 8301 *et seq.*), the Secretary of Agriculture has the authority to issue orders and promulgate regulations to prevent the introduction into the United States and the dissemination within the United States of any pest or disease of livestock. APHIS' regulations in 9 CFR subchapter B govern cooperative programs to control and eradicate communicable diseases of livestock. The regulations in 9 CFR subchapter C establish requirements for the interstate movement of livestock to prevent the dissemination of diseases of livestock within the United States.

II. Summary of the Major Provisions of the Regulatory Action

a. New or Revised Provisions

This section provides a brief summary of the more significant changes we are making to this final rule in response to comments on the August 2011 proposed rule. Both the comments and the changes will be discussed in greater detail later in this document. The changes are listed below in the order they are discussed later in this document.

- We are extending the phase-out period for manufacturer-coded AINs from 12 months to 24 months to make the transition less burdensome for producers.
- We are revising the definition of *official eartag* and adding a new definition of *official eartag shield.* These changes will allow the use of State or Tribal postal abbreviation or codes within the U.S. Route Shield in lieu of ''U.S.''
- We are revising the language of the exemption from the traceability requirements for animals moved interstate to custom slaughter to indicate clearly that the exemption applies to all interstate movement to a custom slaughter facility. The proposed rule contained language that implied that the meat must be consumed by the person moving the animal to custom slaughter. This was not the intent of the proposed rule. A significant number of backyard poultry growers commented and expressed concerns about the official identification requirement for movement of poultry to a custom slaughter facility.
- We are reducing the requirement for the maintenance of interstate movement records for poultry and swine from 5 years to 2 because, as noted by numerous commenters representing those industries, poultry and swine have shorter lifespans than do the other livestock species covered by this rulemaking. The requirement will

[1] To view the proposed rule, supporting documents, and the comments we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2009-0091.*

remain 5 years for cattle and bison, sheep and goats, cervids, and equines.

• In addition to eartags, in this final rule, we are recognizing brands, when accompanied by an official brand inspection certificate as means of official identification for cattle when the shipping and receiving States or Tribes are in agreement. We are making this change in response to the many comments we received on this issue advocating that we retain brands as a means of official identification for cattle. Additionally, we are allowing similar provisions for tattoos and breed registry certificates.

• In response to many commenters from the cattle industry, we will make feeder cattle (cattle under 18 months of age) subject to our official identification requirements in a separate rulemaking rather than in this one.

• We will continue to allow backtags to be used in lieu of official identification on direct-to-slaughter cattle rather than eventually requiring official identification, as we had originally proposed to do. We are stipulating, however, that for backtags to be used on such animals, the animals will have to be slaughtered within 3 days of their movement to the slaughter plant.

• We are no longer requiring that cattle and bison moved interstate to an approved tagging site be officially identified at the site prior to commingling with cattle or bison from other premises. Under this final rule, commingling can occur prior to official identification provided that other practices are used that will ensure that the identity of the animal's consignor is accurately maintained until the animal is tagged with an official eartag. We are making this change in response to numerous comments expressing concerns that operations at approved tagging sites could be slowed during busy periods.

• We are clarifying the circumstances under which multiple official identification methods, including official eartags, may be used on the same animal.

• We are exempting poultry growers that are not participating in the National Poultry Improvement Plan (NPIP) and that receive chicks from a hatchery or redistributor from the official identification requirements, with the stipulation that the producers maintain certain records, e.g., of the supplier of the birds. Many backyard poultry growers noted that group/lot identification of these birds was not applicable and that individual identification of these chicks was impractical.

• We are allowing the use of other interstate movement documentation, in lieu of an ICVI, as agreed to by the shipping and receiving States or Tribes, for cattle and bison of all ages. The proposed rule only allowed such an exemption for cattle and bison under 18 month of age.

• We are providing additional exemptions from the ICVI requirement for equines moving interstate under certain conditions.

b. New Part Number

In the August 2011 proposed rule, the new traceability regulations were contained in a new 9 CFR part 90. In this final rule, we are placing them in a new part 86 instead. The discussion below of the comments and our responses to them will reflect this change in numbering. When citing specific changes we are making in this final rule to the regulatory text, we refer to part 86.

III. Costs and Benefits

While this rulemaking applies to cattle and bison, horses and other equine species, poultry, sheep and goats, swine, and captive cervids, the focus of this analysis is on expected economic effects for the beef and dairy cattle industries. These enterprises are likely to be most affected operationally by the rule. For the other species, APHIS will largely maintain and build on the identification requirements of existing disease program regulations.

There are two main cost components for this rule: Using eartags to identify cattle and having ICVIs for cattle moved interstate. The combined annual costs of the rule for cattle operations of official identification and movement documentation will range between $14.5 million and $34.3 million, assuming official identification will be undertaken separately from other routine management practices; or between $10.9 million and $23.5 million, assuming that tagging will be combined with other routine management practices that require working cattle through a chute.

Direct benefits of improved traceability include the public and private cost savings expected to be gained under the rule. Case studies for bovine tuberculosis, bovine brucellosis, and BSE illustrate the inefficiencies currently often faced in tracing disease occurrences due to inadequate animal identification and the potential gains in terms of cost savings that may derive from the rule.

The benefits of this rulemaking are expected to exceed the costs overall.

IV. Discussion of Comments

We solicited comments concerning our proposal for 90 days ending November 9, 2011. We reopened and extended the deadline for comments until December 9, 2011, in a document published in the **Federal Register** on October 7, 2011 (Docket No. APHIS–2009–0091, 76 FR 62313). We received 1,618 comments by that date. They were from cattle and other livestock producers and producers' associations, livestock marketers and marketing associations, representatives of State and Tribal governments, and individuals. They are discussed below by topic.

Rationale for and Scope of the Rulemaking

Some commenters viewed our proposed animal traceability regulations as a one-size-fits-all approach to animal disease management. It was suggested that a risk-based approach focusing on specific animal diseases would be more effective than an overarching animal traceability program.

Traceability is a common epidemiological need, regardless of the disease. If APHIS relied only on the traceability provided by disease control and eradication programs, there would be a void when the programs were concluded. That, in fact, is the case today with our progress toward successful eradication of many diseases. For example, as we noted in the preamble to the August 2011 proposed rule, the success of our brucellosis eradication program, while certainly a positive development, has resulted in a steep decline in the number of cattle required to be officially identified. As a result of decreasing levels of official identification in cattle, the time required to conduct other disease investigations has been increasing. An improved traceability system would help address the risk of new, emerging, foreign, or reoccurring diseases. Our new approach to animal disease traceability provides a flexible solution that is endorsed by the animal health officials who conduct disease control programs.

Other commenters offered criticisms of our approach from the opposite perspective. A commenter stated that to ensure adequate traceability, the rule should apply to all livestock sold commercially, and not just livestock moving interstate. The commenter further stated that covering all commercial livestock under our regulations can be justified under the commerce clause of the U.S. Constitution. A commenter representing

a foreign government stated that our proposed traceability system was not sufficiently comprehensive in that it would cover only animals moving interstate, would exempt animals being slaughtered for personal consumption from the requirements, and would allow different States to have their own traceability systems. Another commenter emphasized the latter point, stating that an overarching national system would be more beneficial for traceability purposes than would allowing States to enact their own requirements.

We are not making any changes to the final rule in response to these comments. Our statutory authority to regulate livestock movement derives from the Animal Health Protection Act (7 U.S.C. 8305), which authorizes the Secretary ''to prohibit or restrict the movement in interstate commerce of any animal, article, or means of conveyance, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction of dissemination of any pest or disease of livestock.'' *Interstate commerce* is defined in the Act as ''trade, traffic, or commerce between a place in a State and a place in another State.'' The question of when or where that trade or traffic begins is subject to interpretation, and it is possible that some intrastate livestock movements may be regulated under the authority of the Act. Regulating the intrastate movement of livestock, however, would be contrary to the Secretary's vision, laid out on February 5, 2010, for the animal disease traceability system. The Secretary's approach, which called for the establishment of minimum uniform national traceability standards, was nevertheless intended to be sufficiently flexible to allow State and Tribal animal health officials to implement, with the cooperation of industry, the traceability systems that worked best for them; it was not intended to be a top-down system under Federal control. Additionally, it was not the intent behind the proposed rule to provide for a full-scale farm-to-plate traceability system, which would be beyond the scope of our statutory authority. Regarding the comments on the need for greater standardization, as we have noted, the proposed rule did provide for a uniform set of minimum national standards for States and Tribes to follow. This rulemaking allows States and tribes to adapt their individual traceability systems to meet local needs, but those systems will need to comply with these traceability regulations and will need to satisfy the traceability performance standards that will be set forth in future rulemaking.

Many commenters expressed concern about the possible impact on small producers of the proposed regulations, suggesting that the traceability requirements could be more burdensome to small entities than to large ones. It was recommended by some commenters that we exempt small producers. Specific recommendations included exempting producers with less than 300 or 500 mature livestock and producers who are sole proprietors of their operations.

We note that the size of the herd or flock is not the only factor contributing to the risk of the spread of animal diseases. Much more important is the degree to which the animals are moved interstate and commingled with other animals. Herds with no movement across State lines are exempt from these traceability requirements, regardless of the size of the operation, though the States and Tribes may have their own requirements. Additionally, we do exempt certain interstate movements where the risk of disease spread is minimal or where tracing such animals is easily achieved without additional requirements, e.g., movement of livestock to a custom slaughter facility.

A commenter recommended that we exempt registered heritage livestock from the proposed traceability requirements. The commenter stated that there already are adequate identification standards in place for such animals.

We agree in part with this comment. Specifically, we do agree that the identification provided by purebred registries may be adequate for disease traceability of heritage livestock. Nothing in these regulations would preclude the use of means of identification commonly employed on such animals. Our definition of *official identification device or method* is broad enough to allow for the use of tattoos and identification methods acceptable to a breed association for registration purposes when accompanied by a breed registration certificate, provided that those methods are determined to be official by the receiving State or Tribal animal health authorities. We do not believe, however, that heritage livestock moving interstate should be categorically exempt from all Federal identification and movement documentation requirements.

A commenter recommended that we exempt horses from the proposed traceability regulations and stated that interstate movements of equines should not have to be reported. According to the commenter, an adequate traceability and notification system, which includes brand inspections, certificates of veterinary inspection, and permits, already exists for equines, rendering additional Federal requirements unnecessary.

We do not agree that horses or other equines should be categorically exempt from traceability requirements; however, we believe that most horse owners are already in compliance with these provisions and need take no further action. A considerable amount of time in the last few years has been related to equine diseases, e.g., contagious equine metritis, equine herpes virus, equine infectious anemia, and equine piroplasmosis. Additionally, we do not view our traceability requirements as excessively onerous for equine owners, since, under these regulations, methods of identification and movement documentation that are already employed in the equine industry, e.g., written descriptions, digital photographs, and electronic identification methods, and are approved by State and Tribal animal health officials will be recognized as official.

It was recommended by commenters that APHIS recognize existing export verification programs as satisfying the requirements of the proposed rule and that livestock in such programs should not be subject to the animal traceability requirements.

While APHIS does support the use of official animal identification methods for various programs, including age and source verification programs used for export purposes, not all systems that verify age, source, or management processes for marketing animal products are necessarily designed to address the needs of animal disease traceability. Official identification methods used in these programs now can be used on animals moving interstate under these regulations if those methods meet our requirements for officially identifying such animals. Options to ensure that export verification programs cover disease traceability requirements more uniformly in the future will be developed in collaboration between APHIS and the USDA's Agricultural Marketing Service (AMS). States and Tribes currently have the flexibility under these traceability regulations to accept the identification and documentation such programs provide in lieu of official identification and ICVIs for animals moving into their jurisdictions.

Our overall justification for the proposed regulations was questioned by some commenters. It was stated that we did not explain or document how the

proposed rule would correct problems that have occurred in previous traceback investigations. It was further stated that the lack of identification on individual animals was not the sole source of our problems in conducting tuberculosis traceback investigations in the past.

The Regulatory Impact Analysis (RIA) accompanying the proposed rule provided several actual scenarios where the lack of traceability resulted in significant costs to producers and the public in general. We agree that the lack of identification on individual animals is not the only issue related to tuberculosis traceback investigations, but it is an ongoing and significant issue. There is general consensus among animal health officials that insufficient traceability has helped to prevent the successful completion of the tuberculosis eradication program, which began in 1917.

A commenter representing a Tribal Government, while generally supportive of the proposed rule, cautioned that the proposed regulations should not contain language diminishing or implying a waiver of Tribal sovereignty. Tribal lands have defined borders that cannot be bisected by State borders.

We agree with this comment, but on further review, we were unable to identify any language in the proposed rule implying a waiver of Tribal sovereignty, nor did the commenter cite any specific problem areas. Therefore, we are not making any changes to the final rule in response to this comment.

Definitions

In the August 2011 proposed rule, definitions were contained in § 90.1; in this final rule, they are contained in § 86.1.

The August 2011 proposed rule included a new definition of *animal identification number (AIN)* that was similar to the one being used elsewhere in the regulations at the time, albeit with one important difference. The proposed definition stated that the AIN consists of 15 digits, with the first 3 being the country code (840 for the United States), except that the alpha characters USA or the numeric code assigned to the manufacturer of the identification device by the International Committee on Animal Recording may be used as alternatives to the 840 prefix until 1 year after the effective date of the final rule for this proposal. Existing definitions of *animal identification number (AIN)* in the regulations contained the same formatting requirements but did not specify a sunset date for the use of AINs beginning with the characters USA or the manufacturer's code. We proposed to phase out those two AIN formats in order to achieve greater standardization of this numbering system, while providing producers with adequate notice of the change to enable them to work through existing inventories of eartags.

Some commenters suggested that phasing out AINs with manufacturers' codes would economically harm many producers and that we should instead continue to recognize such AINs as official under certain circumstances. Specifically, it was suggested that manufacturer-coded AIN tags should be recognized as official if the cattle bearing them have been enrolled in a process verified program (PVP) or a Quality System Assessment (QSA) program recognized by the AMS; if producers provide listings of the AINs to their State or Tribal animal health official; or if a system were developed whereby private organizations or marketing entities, in cooperation with State and Tribal animal health officials, could coordinate the application, recording, and/or management of the manufacturer-coded AIN tags.

APHIS does support the use of official identification devices for management and marketing purposes and is sensitive to the concerns about additional cost if such systems are not compatible with our traceability regulations. While the commenters did not specifically state what additional cost would result from the transition to 840 AINs, as provided for in the proposed rule, we have evaluated factors that could potentially increase costs. Low frequency radio frequency identification (RFID) AIN tags are based on ISO 11784 and 11785; thus, the manufacturing of tags in regards to technology would be unchanged. Likewise, electronic reading infrastructure currently in place would not need to be replaced. We acknowledge that retagging animals that already have been tagged with AIN tags using manufacturers' codes would increase costs to producers. The phasing out of such tags over time was intended to allow producers to avoid the need to retag animals. AIN tags with manufacturers' codes that are applied to animals before the 840 requirement becomes effective will be recognized as official for the remainder of the animal's life. Cattle enrolled in PVP and QSA programs are primarily feeder cattle, and these animals will be exempt from official identification requirements under this rulemaking; therefore, the need for producers of such cattle to transition to 840 AINs and possibly incur additional costs is further minimized. Future official identification options for feeder cattle, including options used in PVP and QSA programs, can be evaluated prior to initiating rulemaking to subject feeder cattle to the official identification requirements.

We do recognize that some producers may have larger inventories of manufacturer-coded tags that may not be used by the date previously proposed for the phase-out to be completed. To address the possible economic burden on these producers resulting from the transition, we are amending the definition of *animal identification number (AIN)* in this final rule to extend by 12 additional months the phase-out period for manufacturer-coded AINs. The amended definition states that the provision under which the 840 AIN will be the only one recognized as official will become effective on March 11, 2015. Tamper-evident AIN tags with a manufacturer code or USA prefix that are applied to animals before that date will be recognized as official identification for the life of the animals. In that the date of tagging cannot always be known or documented, we will continue to be flexible through the transition period, realizing that breeding animals with manufacturer-coded tags may be in the population for several years.

APHIS does not oppose the other options suggested by the commenters of having producers provide listings of the manufacturer-coded AINs to their State or Tribal animal health official or having private organizations or marketing entities, in cooperation with State and Tribal animal health officials, coordinate the application, recording, and/or management of the manufacturer-coded AIN tags. These alternatives are best implemented at the local level between the State and Tribal animal health officials and the producers in their area. If the shipping State continues to allow the use of manufacturer-coded AIN tags after APHIS no longer recognizes them as official, the receiving State can refuse shipments of animals identified with such tags.

We are also making a change to the AIN definition in this final rule based on another comment we received. A comment from an association representing Puerto Rican cattle producers noted that Puerto Rico has a unique country code under ISO (PR, PRI, or 630). The commenter requested that we amend the definition of AIN in the final rule to allow producers in Puerto Rico to use the 630 code on RFID tags. We support this recommendation and are amending the definition of the AIN in this final rule to allow Puerto Rico and other U.S. territories to use their country codes instead of the 840

code issued to the United States. However, the territories may continue to use 840 AIN tags if they prefer. We are also updating the Animal Disease Traceability General Standards document to reference these country codes.

Finally, we are making a minor change to the wording of the requirement, contained in the proposed definition of the AIN, that 840 AIN tags be used only on animals born in the United States. The amended provision states that 840 AIN tags may not be applied to animals known to have been born in another country. This change reflects our view that we cannot reasonably expect that the person responsible for tagging an animal, or having it tagged, will, in every instance, possess documentation that verifies a U.S. birth location for the animal. In many cases, our import requirements for live animals in 9 CFR part 93 lessen the need for such documentation. For example, the overwhelming majority of cattle imported into the United States come from Canada or Mexico and are required to have a brand denoting their country of origin. This requirement ensures that almost all cattle of non-U.S. origin, i.e., cattle ineligible for identification with 840 AIN tags, are clearly identified as such.

Some commenters suggested that we should expand the proposed definition of *approved tagging site* to include any location in the receiving State where tagging can be completed prior to commingling, as verified by the State animal health official.

The definition contained in the August 2011 proposed rule provides for locations to become tagging sites when authorized by APHIS, State, or Tribal animal health officials. It is important that such locations are approved by animal health officials to ensure that the exemption from official identification requirements at time of movement interstate to an approved tagging site is properly administered. While livestock markets are frequently referenced as being potential approved tagging sites, other locations, such as feedlots, could become approved tagging sites under our definition. Therefore, it is not necessary to make any changes to the definition of *approved tagging site* in this final rule for the commenters' suggestion to be adopted.

In the August 2011 proposed rule, we defined *commuter herd* as a herd of cattle or bison moved interstate during the course of normal livestock management operations and without change of ownership directly between two premises, as provided in a commuter herd agreement. Under the proposed rule, cattle or bison moving interstate as part of a commuter herd were to be exempted from both official identification and ICVI requirements.

One commenter recommended that we amend the definition so that shipments of feeder cattle that are infrequently consigned or leased as rodeo stock could be moved interstate as commuter herds. The commenter stated that the commuter herd exemptions could be justified for such feeder cattle because they are not associated with the same level of disease risk as are cattle regularly used for rodeos or exhibitions.

We do not agree with this comment. Cattle that move interstate, commingle with animals from other locations, and then return to the original location pose a risk for disease transmission. We recently experienced an outbreak of a disease of horses that was disseminated from a regional rodeo to several States. Cattle diseases can also be spread in a similar manner.

Some commenters viewed our proposed definition of *dairy cattle* (all cattle, regardless of age or sex or current use, that are of a breed(s) typically used to produce milk or other dairy products for human consumption) as vague and overly broad, stating that they thought it would create significant problems for small-scale and diversified dairy operations. In particular, commenters stated that the definition lacked clarity regarding dual-purpose breeds, potentially creating confusion about which cattle are subject to the more stringent dairy cattle requirements.

After considering these comments, we determined that greater precision in the definition of *dairy cattle* would be desirable. In this final rule, therefore, we are adding to the definition of *dairy cattle* a list of some common dairy breeds to serve as examples. Specifically, we define *dairy cattle* as all cattle, regardless of age or sex or current use, that are of a breed(s) used to produce milk or other dairy products for human consumption, including, but not limited to, Ayrshire, Brown Swiss, Holstein, Jersey, Guernsey, Milking Shorthorn, and Red and Whites. The list of representative dairy breeds we are incorporating into this definition comes from the Purebred Dairy Cattle Association. As noted in the definition, however, the category of dairy cattle is not limited to the listed breeds. While we believe that this new definition of *dairy cattle* is clearer than the original one we proposed, State, Tribal, or Federal animal health officials may still be called upon at times to exercise their judgments as to whether the cattle in a shipment are indeed dairy cattle, taking into account such factors as the intended use of the animals.

It was also suggested that we should amend the definition of *dairy cattle* to exclude dairy steers and spayed heifers, as such animals will not be in the U.S. herd for an extended period and therefore do not pose a major disease risk.

We disagree with this comment. Dairy steers and spayed heifers are part of an industry that has been identified as posing a high risk for disease transmission. Many dairy heifers and bull calves are moved from the dairy to calf-raising facilities, while some calves, mostly bull calves, are marketed privately or through livestock markets. This degree of movement and commingling at young ages and as yearlings makes them ''animals of interest'' regardless of whether they become herd replacements or feeder cattle. Furthermore, dairy steers typically are in feeding channels longer than beef cattle due to the length of time required for the former to reach finishing weight. Dairy steers and heifers may also undergo more changes of ownership and movements where commingling occurs than beef calves that typically stay with their dams until they are weaned.

Some commenters took issue with our proposed definition of *directly* as ''without unloading en route if moved in a means of conveyance and without being commingled with other animals, or without stopping, except for stops of less than 24 hours that are needed for food, water, or rest en route if the animals are moved in any other manner.'' A commenter representing the pork industry stated that while these restrictions were acceptable for swine moving for other purposes, swine considered to be in slaughter market channels should be exempted. Another commenter, noting that the proposed definition did not allow the animals to be unloaded from a conveyance even if they aren't commingled, recommended modifying the definition to address ''the real risk factor'' of commingling.

After reviewing these comments, we have decided to revise the definition of *directly* in this final rule to clarify that it will allow for necessary stops while addressing the risk factor of commingling. We are defining *directly* as ''moved in a means of conveyance, without stopping to unload while en route, except for stops of less than 24 hours to feed, water, or rest the animals being moved, and with no commingling of animals at such stops.''

A commenter representing an egg producers' association stated that we should clarify the definition of *group/lot*

identification number (GIN) to allow for its use on poultry managed together as a group throughout the production system even if initial placement of birds may occur over a more extended period than a single day. The proposed definition stated that a GIN may be applied to a group of animals managed together as one group throughout the preharvest production chain. The commenter stated that the proposed definition could be interpreted to mean that a group of birds must be assembled in one day in order to be eligible for official identification by means of a GIN. The commenter viewed such a requirement as being problematic for the commercial egg industry because it is a common practice at commercial egg farms to place hens in a laying house over a period of days.

The GIN formatting requirements contained in the Animal Disease Traceability General Standards document do lend some support to the commenter's concerns over the proposed definition. Those formatting standards specify that the GIN must include a six-digit representation of the date on which the group or lot was assembled (MM/DD/YY).

We agree with the commenter on the need to recognize current practices in the commercial egg industry. While we do not judge it to be necessary to amend the definition of *group/lot identification number (GIN)* in the regulations, we are amending the GIN formatting standards in the Animal Disease Traceability General Standards document to specify that the six-digit date component of the GIN may represent either the date on which the group or lot of animals was assembled or the date when the assembly of the group was initiated.

Another commenter suggested that we modify the definition of *group/lot identification number (GIN)* as it applies to cattle to recognize that a GIN may be effectively used for some classes of livestock that may move from one location to another but are not managed as a group throughout the production system.

We do not agree with this comment. The GIN is intended to provide a method of livestock identification that is cost effective without sacrificing traceability. Due to the current gaps in animal disease traceability in the cattle sector, allowing the formation of marketing ''groups'' using a GIN, meaning that a GIN could, for example, be used when a group of animals is moved from or assembled at one premises but then split and/or commingled in subsequent movements, would be unwise from an epidemiological perspective.

In the August 2011 proposed rule, we defined *interstate certificate of veterinary inspection (ICVI)* as an official document issued by a Federal, State, Tribal, or accredited veterinarian at the location from which animals are shipped interstate. The proposed definition also listed information requirements for the ICVI. A commenter representing a pork industry association expressed concern that the proposed definition could be misconstrued to require the ICVI to be physically issued by the veterinarian at the shipping location. The commenter stated that it is common in the industry for livestock to be inspected at veterinary offices and an ICVI issued while the animals are in transport from origin to destination, a practice that provides a savings to the producer by supporting timely movement and clear identification of animals involved in interstate transportation.

The proposed definition of the ICVI did not prohibit the issuance of an ICVI at a veterinary clinic. The interstate movement could very well begin at a veterinary clinic, with prior movements to the clinic considered to be ''intrastate'' and not covered by these regulations. In order to clarify that ICVIs may be issued at veterinary clinics, however, as well as the premises at which they originated and other locations, we are amending the definition of *interstate certificate of veterinary inspection (ICVI)* in this final rule. The amended definition states that the ICVI is an official document issued by a Federal, State, Tribal, or accredited veterinarian certifying the inspection of animals in preparation for interstate movement.

A commenter stated that our definition of *livestock* as ''all farm-raised animals'' is vague and open to problems of interpretation. It was stated that, rather than tying our definition to a farm, we should define *livestock* by species.

As we noted in the preamble to the August 2011 proposed rule, our definition of *livestock* was incorporated directly from the Animal Health Protection Act. As we also noted then, the definition is a broad one covering species that are not included in this rulemaking but that could be commingled at venues, such as approved livestock facilities, with those species that are. Along with the definition of *livestock,* we included in the proposed rule a separate definition of *covered livestock* that listed the species subject to the requirements of the proposed new CFR traceability part. We included the latter definition in the proposed rule to remove any possible ambiguity regarding which species were covered under the rulemaking. Therefore, we are not making any changes to the final rule in response to this comment.

In the August 2011 proposed rule, we defined *official eartag* as an identification tag approved by APHIS that bears an official identification number for individual animals. The proposed definition further stated that beginning 1 year after the effective date of the final rule, all official eartags applied to animals would have to bear the U.S. shield. Previously, the definition of official eartag used elsewhere in the regulations, e.g., in § 71.1, required that the U.S. shield be used only on official eartags bearing an 840 AIN. We proposed to broaden the U.S. shield requirement to all official eartags in order to achieve greater standardization of this type of official identification device.

Some commenters objected to the proposed U.S. shield requirement for all official eartags. It was stated that the proposed requirement effectively mandated that private property be identified with a U.S. shield. Some commenters recommended that we allow official eartags to bear a State seal rather than the U.S. shield or that we allow States and Tribes to issue their own official identification tags without the U.S. shield, as long as combining the tag number and State identifier resulted in a unique number. It was claimed that a State code on an eartag actually provides the most important information enabling traceback.

After considering these comments, we have decided to amend the definition of *official eartag* in this final rule in a way that will allow the imprinting of a State postal abbreviation or Tribal alpha code within the shield in lieu of ''US.'' Instead of a U.S. shield, official eartags will have to bear an official eartag shield. This final rule includes a new definition of official eartag shield in § 86.1, as well as in §§ 71.1, 77.2, and 78.1. We define *official eartag shield* as the shield-shaped graphic of the U.S. Route Shield, with ''US'' or the State postal abbreviation or a Tribal alpha code imprinted within the shield. The alpha codes for Tribes, published in the Animal Disease Traceability General Standards document, may be used by Tribes that administer their own traceability systems. The States or Tribes will have the discretion to request that their postal abbreviations or alpha codes be imprinted on tags they obtain from approved manufacturers. Additionally, to ease the transition for producers, the revised definition will state that beginning on March 11, 2013,

all official eartags manufactured will have to bear the official eartag shield, but all official eartags applied to animals will not have to bear that official eartag shield until March 11, 2015.

We believe that these changes are responsive to the issues raised by the commenters, while still achieving greater standardization of official eartags without lessening traceability or increasing costs.

A commenter representing a cattle producers' association favored altering the proposed definition of *official identification device or method,* which stated that such devices or methods were means of applying an official identification number to an animal or group of animals or otherwise officially identifying an animal or group of animals. The commenter wanted the definition to be broadened so that it would not preclude the use of other, non-numerical means of identification, such as brands.

The proposed definition allowed for the use of brands or tattoos or other methods in lieu of official identification devices when agreed to by the States or Tribes involved in the movement. Nevertheless, as discussed in greater detail below, we are making changes in this final rule to recognize brands, tattoos, and other methods as means of official identification for cattle and bison.

The same commenter also suggested that we add a definition to the final rule of *official identification* as ''any means of identification agreed upon by animal health officials in the shipping and receiving States or Tribes.'' Other commenters took a similar view, though they did not recommend adding that specific definition.

It is our view that recognizing any identification method agreed to by the shipping and receiving States or Tribes as official would expand the range of identification methods that would be so recognized to an unacceptable degree, thereby hindering traceability. However, in keeping with our goal of having a flexible traceability system, we will allow for the use of other options deemed adequate at the local level by retaining in this final rule the provision that the shipping and receiving States or Tribes may agree to accept any other form of identification in lieu of official identification.

We are making a change to the definition of *recognized slaughtering establishment* in 9 CFR parts 77, 78, and 86 of this final rule. In the proposed rule, *recognized slaughtering establishment* was defined as any slaughtering facility operating under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), or State meat or poultry inspection acts. Under the existing regulations in 9 CFR 71.21, slaughtering establishments may receive animals moved in interstate commerce only if they have been approved for that purpose by the Administrator. The amended definition of *recognized slaughtering establishment* in this final rule states that, in addition to meeting the requirements listed above, the establishment must be approved in accordance with § 71.21.

Finally, while we are issuing a revised version of the Animal Disease Traceability Standards document concurrently with this final rule, we are removing the definition of that document from the definitions section because it is not used elsewhere in the regulatory text.

Recordkeeping Requirements

Recordkeeping requirements, which were contained in § 90.3 of the August 2011 proposed rule, are contained in § 86.3 of this final rule.

Many commenters expressed the view that the requirements in the proposed rule for maintaining official identification device distribution records and interstate movement records would be burdensome for veterinarians, sale barns, livestock markets and/or small producers. Under the proposed rule, any State, Tribe, accredited veterinarian, or other person or entity who distributes official identification devices was required to maintain for 5 years a record of the names and addresses of anyone to whom the devices were distributed. Approved livestock facilities were required to keep for at least 5 years any ICVIs or alternate documentation that is required under the regulations for the interstate movement of any covered livestock entering the facility. It was stated that the proposed requirements were excessive for traceability needs in the poultry industry, since most broilers are slaughtered by about 8 weeks of age. A commenter representing a poultry association recommended that the requirement be for 2 years for poultry. The 5-year requirement was also deemed by some commenters to be excessive for feeder cattle, given their relatively short life spans. It was also suggested that the requirement should be 2 years for swine.

We agree with the commenters who stated that the requirements for maintaining movement records should reflect animal life cycles and industry practices. The lifespans of poultry and swine are relatively short compared with those of other species of covered livestock. We are therefore reducing the requirement for maintaining movement records to 2 years for poultry and swine.

In this final rule, however, we are retaining the 5-year requirement for the maintenance of official identification device distribution records. This requirement is warranted, as many of the species typically identified with eartags are those with the longer lifespans, with the exception of swine. Also, many official eartag distribution records do not include a species indicator; thus, having tag distribution records maintained specifically by species would often not be practical. Increasingly, these records will be maintained in electronic information systems, rather than on paper, making the recordkeeping requirement less burdensome.

It was also stated that the records that would be required under the proposed rule are maintained by States already, making our proposed requirements duplicative and burdening States unnecessarily.

Many States and Tribes do already have recordkeeping requirements at the local level. For States and Tribes with requirements that meet or exceed those included in this rule, there would be no additional burden. For States and Tribes that do not meet the minimum requirements, additional administrative processes may be needed or new rules may need to be promulgated at the State or Tribal level. States and Tribes receive Federal assistance through cooperative agreements for data processing and recordkeeping for animal disease traceability, lessening their financial burdens. We have the endorsement of the United States Animal Health Association, which has representation from all State animal health officials, for our recordkeeping requirements and for this rulemaking overall.

Contrary to the sentiments voiced by many of the commenters, a few questioned whether a 5-year recordkeeping requirement was adequate, given the long incubation period of such animal diseases as bovine spongiform encephalopathy (BSE). One commenter stated that movement records should be kept for the entire life span of an individual animal.

We will not be making any changes to this final rule as a result of these comments. As States and Tribes convert from paper-based to electronic recordkeeping systems, the length of time that records need to be stored becomes less of an issue. We believe, in fact, that those electronic records will be

maintained well beyond the minimum requirements. At the present time, we believe that the requirements we include in this rulemaking achieve a good balance between what is needed and what is cost effective to achieve.

Official Identification Requirements

Official identification requirements for covered livestock, which were contained in § 90.4 of the August 2011 proposed rule, are contained in § 86.4 of this final rule.

Cattle and Bison

The August 2011 proposed rule included a schedule for the phasing in of official identification requirements for cattle and bison. We proposed that, beginning on the effective date of this final rule, the requirements would cover all sexually intact cattle and bison aged 18 months and over; dairy cattle of any age; and cattle and bison of any age used for rodeos, recreational events, shows, or exhibitions. We deemed it essential to apply the official identification requirements immediately to those categories because they tend to live longer than feeder cattle, move around more, and have more opportunities for commingling, thus presenting a great risk of spreading disease via interstate movement. We further proposed to initiate a second implementation phase, in which we would extend the requirements to cover all other classes of cattle and bison, including feeders, after conducting an assessment and determining that the requirements were being implemented effectively throughout the production chain for the cattle and bison covered under the initial phase.

Many commenters objected to our plans to include feeder cattle (cattle under 18 months of age) in the second phase of our implementation of these traceability regulations. It was stated that it was unnecessary to include feeder cattle because most of them are destined for slaughter before the age of 2 years and hence do not pose much risk of spreading disease. Other commenters stated that the sheer number of animals that will be required to be identified and tracked under these regulations will make including feeder cattle very costly for producers, veterinarians, sale barns, and State agencies and that the volume of information that will need to be generated may swamp the whole system, for no significant benefit. The eartagging requirement for feeder cattle was viewed by some commenters as particularly burdensome for producers and others, and it was stated that identifying feeder cattle will not help in disease control.

We view the inclusion of feeder cattle in the traceability regulations as an essential component of an effective traceability system in the long term. Typical cattle management systems do not isolate feeder cattle from exposure to diseases. The epidemiological factors that support a complete, overarching traceability system in the United States require that all ages and classes of cattle be included in the animal disease traceability framework.

Many other commenters, including several representing cattle producers' organizations, recognized the necessity of adding feeder cattle to the traceability system but stated that such cattle should be added in a separate rulemaking for maximum transparency. Some of these commenters stated that they could not support the proposed rule as written if feeder cattle were not added in a separate rulemaking rather than under the notice-based process that we proposed.

After reviewing these comments, we have concluded that the inclusion of feeder cattle within the traceability framework can best be achieved through a separate future rulemaking, as the commenters recommended.

As noted above, we indicated in the August 2011 proposed rule that we would apply the official identification requirements to feeder cattle only after conducting an assessment and determining that the requirements were being implemented effectively throughout the production chain for those classes of cattle and bison covered under the initial implementation phase. Many industry commenters offered suggestions for an alternative assessment model to the one we described in the proposed rule. While feeder cattle will be subject to the official identification requirements in a future rulemaking rather than the current one, APHIS still recognizes the merits of conducting such an assessment as that future rulemaking is being considered. APHIS plans to consult closely with representatives from States, Tribes, and industry, including individuals from stocker/feeder sectors most affected by applying the official identification requirements to feeder cattle and most knowledgeable about the practical issues and concerns that can arise as a result.

One commenter expressed the concern that by requiring individual identification for sexually intact cattle over 18 months in the current rulemaking, we will inadvertently be including feeder heifers that were never intended to go into a breeding herd but that are being shipped to feedlots out of State.

When this final rule becomes effective, sexually intact beef heifers less than 18 months of age will be exempt from the official identification requirements, thus avoiding potential conflicts in determining if the animal is in feeder channels or being used for breeding purposes.

Some commenters, including the one who wrote to express concerns about including feeder heifers in this rulemaking, advocated increasing the age for the category of feeder cattle. It was stated that the identification requirements should apply to sexually intact cattle 24 months and older rather than 18 months and older. Another commenter from the same State indicated that 24 months would better represent the age of feeder cattle in that State, as under common operating conditions, calves after weaning may remain on pasture or grass until 2 years of age before being sold as feeder cattle.

We recognize the management and marketing challenges the 18-month age limit may cause, but emphasize the importance of retaining it based on the need to identify cattle and bison for disease control purposes. The 18-month age threshold has been used successfully in the brucellosis eradication program to define test-eligible cattle. Age, when not documented, can more accurately be determined for cattle at 18 months of age, as they would have lost their first pair of temporary incisors, than it can at 24 months. The need to officially identify this class and age category is further demonstrated when we note that since 1995, the number of heifers vaccinated for brucellosis has declined by approximately 50 percent, and the trend continues. Today, fewer than 20 percent of heifers are vaccinated for brucellosis. This low level of official identification is concerning, in particular for a class of animals of which many will be part of the breeding herd. For those heifers that were vaccinated for brucellosis, the official eartag applied to meet the identification requirements for vaccinates would meet the need for official identification required by this rule. We have noted several times that the States and Tribes have the option to recognize alternative forms of identification when both the shipping and receiving animal health officials agree. This flexibility allows unique and/or regional issues to be considered at the local level. In the scenario provided by the commenters, we believe that the alternatives to the official identification requirement for interstate movement of feeder heifers

over 18 months of age to feedlots can best be administered by the shipping and receiving State and Tribe. Exempting all heifers over 18 months of age would hinder traceability nationwide; thus, in these regulations, we are maintaining the 18-month age cut-off for the official identification requirement. Under these regulations, however, calves that remain after weaning on pasture or grass until 2 years of age before being sold as feeder cattle will not have to be officially identified before 24 months because they are not moving interstate until then.

Use of Brands as Official Identification for Cattle

One aspect of the August 2011 proposed rule that generated many comments was our decision to recognize only official eartags as a means of officially identifying individual cattle. Many commenters expressed the view that brands should continue to be recognized as an official method of identification for cattle and bison when the shipping and receiving States and Tribes agreed. Many of these commenters also maintained that we should continue to recognize tattoos as official. Commenters pointed out that brands have worked effectively in brand States for many years and that they provide a permanent method of identification, whereas eartags can be removed or lost. It was further stated by one commenter that electronic brand inspection certificates are a great aid to traceability, as they can provide traceback to the premises of origin for individual animals in less than 30 minutes. It was also claimed that the delisting of brands as a means of official identification would strip from States and Tribes the option of continuing to rely upon the brand accompanied by a brand certificate. A commenter further claimed that removing brands from the regulations as a means of official identification for cattle would discriminate against producers in States that require brand inspection as a condition of leaving a brand inspection area because such producers would have to pay for both the brand inspection and for other identification as well, as required by the proposed rule.

APHIS recognizes that brands and brand-certificate information can provide timely information that may enhance disease traceback investigations. The original intent of the proposed official identification requirements was to define as official identification devices and methods those that could easily be administered by all States and Tribes, since all States and Tribes would be required to accept all official identification devices and methods listed in the regulations for each species. As we noted in the preamble to the proposed rule, we did not view brands as suitable for listing as a means of official identification for cattle because 36 States currently do not have brand inspection authorities. The option for States and Tribes to accept other identification methods, such as brands, in lieu of official identification was provided for in the proposed rule.

Some commenters provided recommendations for alternative text that would maintain the initial intent of the proposed requirements, while achieving the recognition of brands as an official identification method under specific conditions. Several commenters suggested that brands be accepted as official identification via bilateral or multilateral agreements or memorandum(s) of understanding between or among agreeing shipping and receiving States or Tribes.

APHIS appreciates and supports the suggested text revisions, and in this final rule, we are modifying § 86.4(a)(1) to add to the list of official identification devices and methods for cattle brands registered with a recognized brand inspection authority and accompanied by an official brand inspection certificate if the shipping and receiving State or Tribal animal health authorities agree to recognize them as such. We are also amending the paragraph to recognize as official identification tattoos and other identification methods acceptable to a breed association for registration purposes, provided that the animals are accompanied by a breed registration certificate and that the shipping and receiving States or Tribes agree to recognize them as such.

Some commenters cited as a concern the possible effects of the proposed official identification requirements for cattle on our import requirements. A commenter stated that in the in an earlier rulemaking (70 FR 459–553, Docket No. 03–080–3) in which we established requirements for the importation of animals and animal products from minimal-risk regions for BSE, we cited brands as a permanent form of identification and acknowledged that eartags may be lost. Under that rulemaking, imported bovines had to be identified with both brands and eartags. Another commenter stated that since cattle imported from Canada and Mexico are currently required to have a hot-iron brand, if we were to stop recognizing hot-iron brands as official identification for domestic cattle, those nations could claim that the United States is imposing a higher standard on their producers than on domestic producers. The commenter stated that we may not be able to keep the branding requirement in effect for imported cattle.

This rulemaking does not affect our import/export requirements. While brands may be used as official identification for cattle moving interstate in accordance with the provisions of this final rule, the branding of imported cattle from Canada and Mexico is not intended to provide official individual identification, but is rather a permanent mark used to designate the country that exported the animal.

One commenter stated that brands, accompanied by a certificate from a recognized brand inspection authority, should be allowed as a group/lot identifier. It was claimed that brands are more effective than any other means of group/lot identification provided for in the proposed rule and are the only means that would enable a traceback of a group/lot that inadvertently becomes separated from a herd and for which the paperwork is lost or destroyed.

The GIN provides a uniform standard for identifying groups of animals that are managed together throughout the preharvest production chain. In such a situation, the group is identified in its entirety as it moves from location to location with the GIN. The Animal Disease Traceability General Standards document provides the format specifications for the GIN. This standard number format is needed to establish and maintain compatibility of information systems.

Animals that are not maintained with the group will need to be identified with an official eartag or as otherwise agreed to by the animal health officials of the shipping and receiving State or Tribe. The revised definition of *official identification device or method* recognizes brand certificates as official when agreed to by the shipping and receiving State and Tribe. While we will be maintaining the numbering format specification for the GIN, States and Tribes have the option to accept other methods of identification, including those of groups of animals.

Finally, in contrast to the general trend of the comments on branding, one commenter supported the delisting of brands as a means of individual identification because of the cost to producers of brand inspections and health papers in brand-inspection States.

We are not making any changes to this final rule in response to this comment. Health papers and brand inspection are

two different activities. States that have elected to administer brand inspections have done so for purposes of determining ownership and preventing theft. Health papers, such as ICVIs, provide documentation that an accredited veterinarian has examined the health of the animals.

Identification of Direct-to-Slaughter Cattle

Many commenters favored exempting all direct-to-slaughter cattle from any identification requirements. It was stated that the risks to animals and the personnel that would be tasked with tagging them, along with the costs of tagging and reading tags, outweigh the benefits of tagging.

We agree that cattle moving directly to slaughter pose less of a disease risk than do other cattle, and we did allow in the August 2011 proposed rule for the use of backtags in lieu of official identification for cattle moving directly to slaughter. We view exempting such animals from any identification requirements as a hindrance to traceability, however.

In the August 2011 proposed rule, we indicated that our recognition of backtags in lieu of official identification for direct-to-slaughter cattle was to be phased out. Many commenters opposed the phase-out of backtags for identifying slaughter cattle. It was stated that while backtags have a poor reputation when placed improperly and when not collected by USDA's Food Safety and Inspection Service (FSIS) or plant personnel at slaughter, when they are properly placed, carefully collected, and recorded, backtags are an economically efficient, easily readable, and recordable form of identification for slaughter cattle.

After reviewing these comments, we have decided to amend § 86.4(b)(1) in this final rule to allow permanently the use of backtags in lieu of official identification, albeit with some new stipulations. One commenter who supported the proposed phase-out of the use of backtags in lieu of official identification for direct-to-slaughter animals thought the phase-out appropriate because some slaughter establishments put some cattle on feed after they arrive at the plant for conditioning purposes. After this extended period of time, the backtags are unlikely to be on the animals when the animals are harvested. Therefore, we are stipulating that the exemption from the requirement for official identification only applies when the animals going directly to slaughter are harvested within 3 days of their movement to the slaughter plant. This exemption is intended to apply only to cattle that are moving directly to a slaughter plant to be slaughtered shortly after arrival. We agree with the commenter's concern about the practicality of using backtags for slaughter animals when the animals are not going to be slaughtered shortly after their arrival. We believe that the 3-day timeframe adequately address that concern. Cattle moved to slaughter will typically be slaughtered within 3 days of that movement. If they are not slaughtered within 3 days, the movement is not considered to be directly to slaughter, and permanent official identification is required to ensure that proper identification is maintained until slaughter. If the determination to hold animals for more than 3 days is made after the animals arrive at the slaughter establishment, the animals must be officially identified with an official identification device. Such identification will be considered a retagging event in accordance with § 86.4(d)(4)(ii).

Another commenter stated that backtags used on slaughter cattle can sometimes be lost during high-pressure washing prior to slaughter. To address this issue, we have amended § 86.4(d)(2) in this final rule to account for the cross referencing of all animals, as well as their carcasses, with backtags or other identification received by the slaughter plant. Requiring the cross-referencing of the devices with the live animals, and not just their carcasses, will help to ensure that traceback capability is not lost between arrival at the plant and slaughter.

Approved Tagging Sites

In the August 2011 proposed rule, we provided an exemption to the requirement that cattle and bison must be officially identified prior to interstate movement if the cattle or bison were moved directly to an approved tagging site and officially identified prior to commingling with cattle and bison from other premises. Some commenters favored allowing approved tagging sites to tag cattle moved interstate with a back tag prior to commingling, which then could be correlated with the official eartag once the cattle are sold and sorted and before further movement. It was suggested that such an approach would enable markets that become approved tagging sites to better manage the flow of cattle in and out of the sites on a sale day, since having to tag cattle and bison with an eartag prior to commingling could prevent such facilities from operating at the speed of commerce.

We recognize that applying the official eartag on cattle or bison received at approved tagging sites before they are commingled can be problematic in some situations. Therefore, this final rule allows the use of backtags prior to commingling, as well as other practices that will enable approved tagging sites to efficiently manage livestock while ensuring that the identity of each animal is accurately maintained until tagging so that official eartags may be correlated to the person responsible for shipping the animals to the tagging site.

Commuter Herds

Another exemption from the official identification requirements was provided for cattle and bison moving interstate as part of a commuter herd with a copy of the commuter herd agreement. It was recommended that we also allow the use of other documentation or forms as agreed to by the States or Tribes involved in these movements that may not specifically be labeled or called commuter herd agreements. We agree with this comment, as it is in keeping with our approach to developing a traceability system that will allow States and Tribes to use the methods that work best for them, and we are amending § 86.4(b)(1) accordingly.

Use of Multiple Eartags

In the August 2011 proposed rule, we prohibited the use of multiple official identification devices on a single animal with the following exceptions:

- A State or Tribal animal health official or an area veterinarian in charge could approve the application of a second official identification device in specific cases when the need to maintain the identity of an animal is intensified, such as for export shipments, quarantined herds, field trials, experiments, or disease surveys, but not merely for convenience in identifying animals.
- An eartag with an AIN beginning with the 840 prefix (either RFID or visual-only tag) may be applied to an animal that is already officially identified with an eartag with a NUES number, as AIN devices are commonly used for herd management purposes.
- A brucellosis vaccination eartag with a NUES number could be applied for management purposes in accordance with the existing brucellosis regulations to an animal that is already officially identified under the traceability regulations.

Many commenters opposed the proposed restrictions, with some questioning our rationale that the use of multiple official identification devices

on the same animal can cause confusion and impede efforts to track the movements of that animal. Some of these commenters stated that, contrary to our view, using multiple official identification devices on the same animal can create redundancies and thereby aid traceability. Other commenters requested clarification of the requirements, suggesting that if brands or tattoos were to be allowed as official identification for cattle in the final rule, then the prohibition on multiple official identification devices would seem to preclude the use of eartags on branded or tattooed cattle.

As stated in the preamble of the August 2011 proposed rule, the use of multiple official eartags with multiple official identification numbers for a single animal can cause confusion and impede efforts to track the movements of that animal. This problem has primarily occurred when the same animal had multiple National Uniform Eartagging System (NUES) eartags, sometimes as many as three or more. We acknowledge that having more than one NUES tag may provide additional points of reference for the animal's location. For example, if the animal with multiple NUES tags is the index animal that has tested positive for the disease under investigation, the multiple NUES tag numbers for that animal are all recorded when the traceback investigation is initiated. While applying an additional NUES eartag effectively identifies the cattle in the shipment, however, the animals become difficult to trace when the official number on the new official eartag is not recorded or aligned with the initial or existing NUES tag number. An investigating animal health officer often sees tag numbers on epidemiological reports of suspect animals that need to be located for testing. Without being able to cross-reference the multiple official identification numbers, the animal health official can only assume that each official identification number that becomes part of the investigation represents a different animal that must each be traced. This increases the complexity of the traceback and lengthens the investigation.

After reviewing the comments on this issue, we considered requiring recording the initial number(s) when applying an additional official eartag to align the official identification numbers of the new tag and the tag(s) already attached to the animal and reflect that both the existing eartag(s) and the new eartag are on the same animal. However we determined it was more practical to adhere to the general approach we took in the proposed rule, which was to prohibit the application of additional official identification devices to a single animal unless warranted by a specific situation. We are, however, clarifying that the restriction applies to official eartags only. As noted above, under the provisions of this final rule, brands, tattoos, and breed registry certificates may be recognized as official by shipping and receiving States and Tribes. Because only the use of multiple official eartags will be restricted, it will be permissible to tag animals already identified with brands or tattoos.

Adjusting for instances where stakeholders have indicated that additional official eartags would provide herd management advantages, we are also clarifying the language of the above-listed exceptions, including information recording requirements, and adding an exception that will allow the use of multiple official eartags with the same official identification number on a single animal. Producers often use AIN tags to manage herds because the tags are large enough to contain both management numbers and the AIN. Tag manufacturers, at the request of producers, have provided sets of two or three tags with the same AIN. This allows the AIN eartag to be applied in each ear; in some situations, a smaller button or RFID tag with the same number is applied to one of the ears. AIN tags with the same number thus may be applied to the same animal. While metal NUES tags have not been provided in sets, this option will apply to any official eartag produced with the same number and attached to the same animal.

Removal or Loss of Official Identification Devices

Some cattle producers stated that traceability considerations are often ignored by slaughterhouses, and the traceability of an animal is lost and open to fraud once an animal is dismembered and its tags separated from the meat. It was suggested that such noncompliance could continue to hinder traceability even after traceability program is implemented. Many of these commenters stated that before the proposed rule is finalized, APHIS must have a defined plan and agreement in place with FSIS and/or the harvesting establishments relative to the collection and recording of retired tags at slaughter. Such recording and retirement is necessary for a bookend system to function.

We recognize that compliance with all the regulations is important to support traceability and plan to work with FSIS and slaughter plants to ensure the collection of identification devices. A memorandum of understanding (MOU) will be established between APHIS and FSIS regarding the responsibilities of the two agencies for the collection of identification at the slaughter plants. We are also amending § 86.4(d)(2) to state explicitly that collecting identification devices at slaughter and providing them to APHIS and FSIS is the responsibility of the slaughter plant. Additionally, this rulemaking requires that a cross reference of the carcass and the animal's identification be maintained through carcass inspection. Maintaining the identity past that inspection is outside the scope of these regulations, however. When the carcass passes inspection, the collected identification devices are to be provided to APHIS, which will be responsible for the administration of tag and animal termination recording.

Replacement of Official Eartags

Some commenters stated that our proposed process for replacing lost tags would necessitate additional recordkeeping and place an unrealistic burden on small producers. It was recommended that producers be exempted from the 5-year recordkeeping requirement associated with applying a new device after one has been lost.

The vast majority of the records that support the traceability regulations will be maintained by individuals other than producers. Since producers may retag animals that lose their official eartags, they may be the only ones that have such information. Therefore, these records must be maintained by the producer. While tag loss is expected, the percentage of animals that lose their eartags is a small percentage of all animals tagged. Therefore, the volume of records any producer will need to maintain for this requirement is expected to be quite low.

Some commenters requested that we amend the final rule to allow producers to obtain a replacement AIN tag with the same 840 AIN when a tag has been lost or is no longer a viable tag. It was stated that because these tags are already used for management purposes in many dairies and some beef operations, allowing producers to replace AIN/840 tags with duplicates would avoid unnecessary confusion that could be caused by assigning an animal more than one number and thus help to maintain the viability and integrity of the national traceability system.

We agree with this comment. In fact, while the proposed rule did not include regulatory text allowing for the issuance of such duplicate tags, it did not expressly prohibit such issuance either. The existing Animal Identification

Management System (AIMS) has had a tag reporting option established for AIN device manufacturers for reporting the distribution of duplicate AIN eartags. Additionally, ISO 11784, which AIN radio frequency tags adhere to, provides for the encoding of a portion of the code for the administration of duplicate replacement tags. Nonetheless, we are amending § 86.4(d)(4) in this final rule to allow for both the retagging of animals with tags imprinted with different official identification numbers from the ones being replaced and retagging of animals with replacement or duplicate tags that have the same official identification number as was imprinted on the animal's initial official eartag. While the commenters referenced the issuance of duplicate replacement eartags for 840 AIN tags only, the amended text allows for the use, as well, of other animal numbering systems that can readily be produced with the animal's original number. The protocol for the administration of duplicate replacement eartags is provided for in the Animal Disease Traceability General Standards document, a revised version of which is being released in conjunction with this final rule.

Other Issues Pertaining to the Use of Official Eartags on Cattle

Some commenters recommended that the final rule should allow the use of owner-shipper tags, for feeder cattle only, at receiving locations for cattle owners or shippers who lack tagging facilities and who sell directly to buyer in another State. A few of these commenters, while supporting the recommendation, stated that this tagging option should be allowed only at an approved tagging site.

While markets are likely to be the most common locations that become approved tagging sites, animal health officials may approve feedlots to tag animals on behalf of the producer that shipped or sold the animals. This exemption from the requirement for official identification prior to interstate movement, however, is limited to locations that are approved tagging sites. Producers that elect to use a tagging site may choose to obtain the official eartags and provide them to the personnel of the tagging site to have those official tags applied to their animals. We consider the option of officially identifying animals at any destination to be too broad, potentially leading to deficiencies in the maintenance of identification records. The approval process for tagging sites allows for oversight of these locations to ensure that necessary records are properly maintained and provides adequate flexibility to allow States and Tribes to determine the extent to which tagging sites are utilized.

Some commenters suggested that we should require a State code to be imprinted on official eartags. It was claimed that a State code provides the most important information needed to enable traceback.

While the numbering system for the NUES utilizes State and Tribal codes, the 840 AIN does not. States that obtain AIN devices may elect to have the State abbreviation imprinted on the AIN eartags, and several States are doing so when they obtain the tags. Unlike NUES tags, the AIN tags are available in many tag types, currently exceeding 40. The inventorying of multiple tag types by States and Tribes creates significant logistical challenges, and to minimize the options would lessen the flexibility currently provided. While States and/or producers that obtain the tags may have their State or Tribal codes imprinted on them, we determined that requiring it to be imprinted on the tag or to be part of the AIN would cause tag distribution inefficiencies that outweighed the potential advantages. For example, because the distribution of AIN tags is not limited to direct shipment from the manufacturer to the producer's farm at the time of manufacture, the State where the farm receiving the tags is located may be unknown. Additionally, maintaining distribution records of both NUES tags and AIN tags in electronic systems is imperative for timely retrieval of tag distribution data for traceback investigations, as the State designations alone are typically not specific enough for this purpose.

Our reliance on eartags for official identification in the proposed traceability regulations was questioned by some commenters on the grounds that tagging is not necessarily synonymous with effective traceability.

We agree that official identification in itself is not sufficient for an effective traceability system. When combined, however, with the information obtained from the records of tag distribution and the availability of management records and movement documents with nationally unique numbers, eartags have been and will continue to be invaluable to traceback investigations.

In our earlier discussion of the definition of *official eartag,* we noted that some commenters opposed the U.S. shield requirement, and we amended the definition in response to those comments. Some of those commenters recommended that we allow States and Tribes to issue their own official identification tags without the U.S. shield, as long as combining the tag number and State identifier resulted in a unique number.

A standardized way of marking all official tags is considered critical to help clarify the confusion that currently exists relative to eartags being official. Standardization will support a more user-friendly system and help increase the level of compliance. We believe it is important to have a simple and standardized means of determining if a tag is official. The standardization of numbers also allows for automated error checking, resulting in greater data integrity in information systems. The addition of the definition of *official eartag shield,* discussed above, to the regulations allows the States and Tribes to imprint their postal abbreviations or alpha codes instead of ''US'' on the tag. States and Tribes will be able to administer their own official eartags, provided that those eartags adhere to our definition of *official eartag.*

A commenter questioned how a producer or organization would request printed AIN tags for a location without a national premises identification number (PIN). The commenter recommended allowing AIN eartags to be ordered with a State location identifier in lieu of a national PIN.

In this rulemaking, while continuing to allow for the use of the PIN, we also provide for the use of a *location identification (LID) number,* which we define as a nationally unique number issued by a State, Tribal, and/or Federal animal health authority to a location as determined by the State or Tribe in which it is issued. As noted in Section B of the Animal Disease Traceability General Standards document, producers may obtain AIN tags provided they have either a PIN or an LID.

Some commenters recommended that we add language to the final rule to provide a method for the use of electronic identification of cattle that are currently located in the United States but that originated in another country.

APHIS does recognize that limiting the use of 840 AINs to cattle born in the United States and the transition from accepting manufacturer-coded AINs as official will cause a void in the availability of official RFID tags for imported livestock. The use of the manufacturer-coded RFID AIN tags will provide an option for the identification of such cattle until the date such tags are no longer recognized as official at time of application. Consideration of a long-term solution to this issue is being given, and any resulting changes will be reflected in future updates of the

Animal Disease Traceability General Standards document.

A commenter recommended that we require official 840 RFID tags for all female dairy cattle and those male dairy cattle used for reproductive purposes and that we require an official 840 ''brite'' or RFID tag for those male dairy cattle (bull calves) used for meat purposes, i.e., fed veal or dairy beef steers.

In keeping with the vision for the animal disease traceability system set out by the Secretary on February 5, 2010, we have elected not to specify which eartag is required for any sector of the cattle population, as it is our thinking that this decision is best made by the producers and animal owners.

A commenter stated that we should not allow exemptions from official identification requirements for cattle and bison moving to approved livestock facilities, as he believed we did in the August 2011 proposed rule. The commenter stated that such facilities may be high-risk facilities due to the possibility of commingling of animals on the premises.

In the proposed rule, we provided an exemption from the official identification requirements for cattle and bison moving interstate to an approved tagging site. This exemption was intended to allow producers to have their animals tagged at such a site when they were unable to tag the animals themselves. We did not propose to exempt cattle and bison moving interstate to an approved livestock facility from the official identification requirements. The exemption for movement to an approved livestock facility applies to the ICVI and was provided because livestock markets are the approved facilities where accredited veterinarians are typically available on sale days to conduct the necessary inspections and issue the ICVIs.

Miscellaneous Cattle Identification Issues

Under the August 2011 proposed rule, beef cattle under the age of 18 months did not have to be officially identified prior to interstate movement during the initial phase of the implementation process, but dairy cattle, regardless of age or sex or current use, were required to be officially identified. Some dairy producers stated that the age for requiring official identification prior to interstate movement should be the same for dairy and beef cattle.

We do not agree with this comment. Dairy calves are raised much differently than calves in the beef sector, which typically stay with their dams until weaning. The significant movement of dairy calves and yearlings and their commingling with cattle from multiple dairies increases the risk of disease spread, justifying their inclusion in the current rulemaking. As we have already noted, we now intend to subject feeder cattle to the official identification requirements in a separate future rulemaking.

A commenter requested clarification on whether steers of dairy origin would be exempted from identification requirements when this final rule became effective.

Under the proposed rule, all dairy cattle were to be subject to the official identification requirements beginning on the effective date of this final rule. Upon further consideration, we have concluded that there would be minimal value in officially identifying for the first time older dairy steers that may have already moved interstate before the effective date of this final rule. While the identification of animals in the dairy sector is important, in particular at young ages, we have determined it to be appropriate, at this point, to apply the official identification requirements only to male dairy animals born after the effective date of this final rule. We have revised the provision pertaining to the official identification of dairy cattle for interstate movement to state that beginning on March 11, 2013, all dairy females, regardless of age, and all male dairy animals that are born after that date will be required to be officially identified prior to interstate movement.

A commenter requested that we include third-party traceability programs, such as the above-mentioned AMS-recognized programs, currently used by numerous cattle producers to verify the age and source of livestock as an official identification method.

The use of the official identification devices or methods allowed for cattle under these regulations can easily support such programs if the eartags used in the programs bear numbers that meet our definition of *official identification number.* The AMS programs referred to earlier require a unique number only within their certified programs, however. Since there are a number of other systems that verify processes, feeding claims, exports, quality system assessment, or product label claims, relying only on system-specific or proprietary numbers would cause problems in traceability systems that require nationally unique numbers. Therefore, we are not making any changes to the final rule in response to this comment. However, as noted earlier, APHIS will work with AMS to establish greater standardization, in particular for animal numbering systems, to ensure that identification methods meet the requirements necessary for both programs.

A commenter stated that the cattle industry cannot afford to have individual tags read and that APHIS should allow tags or brands to be used to identify groups of cattle.

These traceability regulations do allow for the use of group identification when the animals move through the preharvest production chain as one group. In such a situation, the group can be identified in its entirety. However, when individual animals are moved and commingled with cattle from other premises, the determination of which animal was at what location can no longer be achieved with a group identifier; therefore, we cannot allow for the broad use of group identification for cattle that the commenter recommends. APHIS does recognize the complexity of recording official identification numbers on the ICVI and has limited that requirement in this rulemaking to those cattle and bison that will be covered by the official identification requirements on the date when this final rule becomes effective.

A commenter took the position that APHIS should allow one PIN to apply to all cattle at various ranches owned by a single operation.

Location identifiers are administered by the States and Tribes. The use of one location identifier is often appropriate when cattle typically move among those locations. Allowing the use of a single location identifier to designate multiple premises or locations, however, can be problematic if there are large distances between the various locations. For example, consider an operation with a home location and one or more locations at various distances, one of which is 20 miles from the home premises. In this example, suppose that a disease is traced to the home farm and a 10-mile quarantine zone is placed around it. If at the time of quarantine, the animal health official is only aware of the location of the home premises (because all locations are reported as one), the operations outside the 10-mile zone would initially be left out of the investigation. As the investigation is further conducted, the quarantine zone will be extended, but having knowledge of those additional locations early on helps animal health officials quickly determine the scope of the disease and reduces the time and expense of the investigation. Since States and Tribes administer location identifiers, it is their prerogative to determine how to issue them in such situations.

It was suggested by a commenter that APHIS should require the approval of

both the sending and receiving States or Tribes for use of group/lot identification with cattle. A location-based GIN would appear to be most useful in identifying calves from the ranch of origin to the backgrounding feedlot, according to the commenter. A location-based GIN, particularly when associated with a registered brand, would provide a level of traceability that is cost-effective for the producer, and would likely yield the level of granularity that animal health officials seek when conducting a disease traceback investigation.

While State and Tribes have the option to agree on other methods of group/lot identification, for such identification to be recognized under these regulations as official, the animals in a shipment must meet our criteria for recognition as a group or lot, i.e., they must be of the same species and must comprise a ''unit'' that is managed as one group throughout the preharvest production chain. In such a situation, the entire group of animals is being traced, and one number for the entire group is very adequate for traceability. It is the view of APHIS that these criteria for a group or lot of animals should be uniformly applied, so that, while States and Tribes may agree on alternative forms of group/lot identification, if they do not agree, a receiving State or Tribe will not be required to accept shipments of animals that do not meet the criteria.

Some commenters stated that what they termed ''event cattle,'' meaning cattle that may be used for a single event, are not a high-risk group like rodeo cattle and, therefore, should not be grouped with the classes of cattle and bison subject to the official identification requirements on that date that this final rule becomes effective. It was further suggested that event cattle should not have to be individually identified and, even if they were, that their identification numbers should not have to be recorded on an ICVI.

We do not agree with these comments. The commingling of cattle with rodeo stock, even for a short period of time, increases the risk of disease exposure. Additionally, due to the frequent movement of such animals, the documentation of individual animal numbers is important.

It was suggested that when commuter herds are approved for movement of animals between States or Tribes without meeting the requirements of the proposed regulations, language should be added indicating that if any of these animals are shipped to a different State not included in the commuter herd agreement, then these animals must be officially identified and documented to the original State of origin.

We agree with this comment and are incorporating it into § 86.4(b)(1)(i)(A) in this final rule.

Official Identification Requirements for Poultry

Many commenters opposed our proposed poultry identification requirements. It was stated that the proposed regulations would allow vertically integrated operations to use group identification for thousands of birds, while mandating individually numbered leg bands for any bird that crosses State lines and is not kept in an isolated group ''throughout the preharvest chain.'' Such leg bands are impractical, according to the commenters, and requiring them could be devastating for many pastured poultry and backyard poultry owners. It was also maintained that since many pastured poultry operations and backyard poultry owners order day-old chicks from hatcheries scattered around the country, the proposed regulations would apply to many people who never take their birds across State lines after that first shipment.

We have reviewed these comments and are revising this final rule to take into account the situation of poultry growers that are not part of the National Poultry Improvement Plan (NPIP) but that receive chicks from a hatchery and/or re-distributor (feed store, etc.). Poultry belonging to such growers will be exempted from the official identification requirements under this final rule, but we will require that the persons responsible for the animals received from the hatchery and/or redistributor maintain a record of where they obtained the birds. Redistributors will be required to maintain a record of where they received chicks and which growers received the birds. Most growers already retain these records, so the recordkeeping requirement should not cause an additional burden.

It was suggested by some commenters that we substitute for the proposed poultry identification provisions a statement that interstate movement of poultry would be governed by the NPIP. The existing NPIP program has worked well, according to the commenters, and there is no reason to add new, onerous tagging requirements.

While the voluntary NPIP meets our traceability requirements and has worked well for those States that require it, we acknowledge that not all poultry growers and sectors of the industry participate in NPIP. We believe it is important to maintain poultry, a major commodity group, as a covered species in these regulations and have done so. We continue to maintain reference to NPIP, but as noted above, we are amending this final rule to address the primary concerns raised by the ''backyard'' poultry growers.

Some commenters also stated that existing poultry numbering systems have been working well and should be recognized in this rulemaking as group or flock identifiers.

This final rule establishes a standard for identifying groups or flocks of poultry by means of the GIN. Shipping and receiving States or Tribes may also agree, however, to recognize alternate methods of identification in lieu of official identification for animals moved from the shipping State or Tribe into the receiving one, thus allowing for the use of other numbering systems that have been working effectively as group or flock identifiers.

Commenters representing the poultry industry also stated that requiring identification of chickens moved to a custom slaughter facility would cause a significant and unwarranted economic burden for producers.

In the proposed rule, we did exempt from the requirements of these regulations any covered livestock moving interstate to a custom slaughter facility in accordance with Federal and State regulations for preparation of meat for personal consumption. To alleviate concerns expressed by the commenters, we are clarifying the intent of the exemption in this final rule by removing the phrase ''for personal consumption.'' Therefore, under § 86.2(e)(2) of this final rule, all livestock moved to a custom slaughter facility will be exempted from the traceability regulations.

Some commenters suggested that commuter herd provisions, which exempt cattle and bison meeting the commuter herd requirements from official identification requirements, should be extended to include commercial poultry flocks as well. One of the commenters stated that the commercial broiler industry should be allowed to form agreements with States to ensure traceability.

Our commuter herd provisions were intended to address a specific need in the cattle industry, where cattle move across State lines under retained ownership for grazing purposes.

What the commenter is asking for more closely resembles the provisions in 9 CFR 71.19 that provide for the movement of swine within a production system. We do not believe that changes are necessary in this final rule in regards to expanding the concept of commuter herds to the commercial poultry industry, as the NPIP guidelines, which

are well-established in the commercial poultry industry, have provided very good traceability solutions. Additionally, the proposed rule did provide for States and Tribes to use other methods of identification and movement documentation for poultry. That is still the case under this final rule; thus, States and Tribes may enter into agreements with the commercial broiler industry, as suggested by the commenter.

Official Identification Requirements for Equines

Many commenters stated that a physical description of the animal should qualify as official identification for equines without that description having to be approved by an official of the receiving State or Tribe, as provided for in the proposed rule.

That proposed requirement was intended to apply only to those situations where the person examining the equine's identity had questions regarding the description provided. Where such uncertainty existed, an animal health official in the receiving State or Tribe was to determine if the description was sufficient or not. In this final rule, § 86.4(a)(2) has been revised to provide, as an option, that the animal health official at the destination may make the determination when called upon, but the use of the animal health official is not required. For example, the accredited veterinarian or authority at an equine exhibition may elect to make the determination of the equine's identity without review by the animal health official.

A commenter suggested that we should provide for additional identification methods for equines, such as existing microchips and biometric measurements.

These traceability regulations do provide for various methods of identification, including physical descriptions, electronic identification, digital photographs or other methods agreed to by the shipping and receiving States or Tribes. Most of these methods are already in use, though biometrics is relatively new. Adding a second microchip that is ISO compliant to an equine that already has an existing non-ISO injectable transponder is not practical. We are, however, amending § 86.4(a)(2) of this final rule to add an option to recognize the non-ISO transponders as official for those applied to the equine on or prior to March 11, 2014. We are also adding a reference to biometric measurements as official identification.

Additionally, in response to other commenters who viewed our proposed equine official identification requirements as burdensome, we are adding some exemptions from the official identification requirements. Most of these parallel the exemptions allowed for cattle and bison. One, however, reflects the unique nature of equines. Equines moving interstate would be exempted from the official identification requirements if used as a mode of transportation, e.g., for riding or to pull a buggy, provided they then return to the original location. These exemptions will also be added to the ICVI requirements for equines in § 86.5(f).

A commenter questioned the need for imposing additional identification and veterinary inspection requirements for equines when current requirements for Coggins tests are being met.

Horse owners who are meeting vaccination and Coggins-test requirements would likely satisfy the requirements for official identification and documentation of equines under these regulations. Documentation completed in accordance with the equine infectious anemia (EIA) requirements in 9 CFR part 75 may be used in lieu of ICVIs. Identification previously used on EIA test reports may be accepted by the animal health official in the receiving State or Tribe.

Official Identification Requirements for Swine

Some commenters representing the swine industry expressed concern that allowing for the use of LIDs in lieu of PINs defeats the purpose of a single nationally standardized number and may lead to unnecessary confusion and difficulties in implementation. The commenters state that the PIN has become the preferred location identifier for the pork industry, with more than 95 percent of swine premises having registered with the standard PIN to date. Members of the industry strongly supported our maintaining the National Premises Allocator, National Premises Information Repository, and the data elements that are currently included in the repository. One comment from a pork producer stated that the use of the PIN should be mandatory on tags applied to sows going to cull markets.

This rulemaking does not disallow the use of a PIN, nor does it prohibit an industry from adopting it as a standard. We are simply providing additional flexibility for States or Tribes that offer an acceptable alternative means of identifying locations where livestock are raised.

Commenters representing the pork industry also expressed concern about our modifying some current definitions in the CFR by removing the data standards for GINs and PINs and defining them in the Animal Disease Traceability General Standards document. The commenters stated that while the proposed changes would allow for flexibility in defining various location identifiers and for the use of the LID as a component of a GIN, they will lead to unnecessary confusion. To avoid that confusion, these industry commenters requested that APHIS recognize the data standards defined in § 71.1 for the PIN and GIN as the official data standards for the pork industry.

We do not agree that it is the role of APHIS to establish industry standards; rather, it is to set minimum standards for States and Tribes that provide flexibility at the local level. If an industry chooses to adopt a specific standard, that is its prerogative as long as the standard meets the minimum guidelines of these regulations or is agreed to by animal health officials involved in the interstate movement.

Pork industry commenters further stated that, to avoid any possible conflicts that might arise between the requirements set out in this rulemaking and the currently applicable sections of the regulations that deal with the identification of swine in interstate commerce, veterinary inspection, and issuance of ICVI's, APHIS should clearly indicate in this final rule that the requirements of § 71.19 are the ones that govern the interstate movement of swine.

We agree with this comment. The August 2011 proposed rule did, in fact, state that swine moving interstate were subject to the requirements of § 71.19, and this final rule does so as well.

Official Identification Requirements for Captive Cervids

A commenter stressed the importance of flexibility in identification requirements for cervids. It was stated that such identification methods as brands, tattoos, and microchips, may be more appropriate than eartags for some markets within the cervid industry.

This rulemaking does not change the requirements for official identification of captive cervids, which are currently contained in 9 CFR part 77. Those existing regulations provide for various official identification methods, including tattoos and electronic implants.

Official Identification Requirements for Sheep and Goats

A commenter representing sheep and goat producers stated that, if in the future, APHIS should determine that identification for sheep is needed

beyond what is currently required for the scrapie program, then group identification should be allowed.

Group/lot identification is allowed under this rulemaking. Group/lot identification is not species-specific and will be available as an option for sheep and goat producers, as well as other livestock producers.

Miscellaneous Identification Issues

A commenter questioned how the LID is different from the PIN and stated that having two different numbering systems for the identification or premises may be unnecessarily complex and expensive.

The option of allowing a State or Tribe to issue a location identifier resulted from the strong negative feedback we received from livestock owners opposed to the premises registration component of the NAIS. While having location information on where livestock are raised is critical to traceability, it is recognized that States may have their own systems to maintain information on such locations. The LID option was established to provide that flexibility. Data standards for both LIDs and PINs are contained in the Animal Disease Traceability General Standards document.

A commenter questioned why the proposed regulations allowed the use of other identification methods and devices, if agreed to by the shipping and receiving States or Tribes, in lieu of the official identification devices for the various species of covered livestock. In the commenter's view, allowing the use of other identification devices would result in a lack of standardization of official identification devices and would be detrimental to traceability.

These traceability regulations list official identification devices and methods for each species of covered livestock. The diversification of animal agriculture across the United States is tremendous, and, taking into account all the feedback we received over the last few years, we recognized that ''one size does not fit all.'' Thus we designed these regulations to support the efforts of States and Tribes to work with producers at the local level to implement traceability solutions that work best for all concerned.

A commenter stated that allowing group/lot identification of animals managed together as one group through the production chain would give a competitive advantage to vertically integrated operations over smaller producers.

The group/lot identification option is based on the need to have adequate information available to State, Tribal, and Federal animal health officials to conduct traceback investigations. Requiring there to be individual identification on each animal that moved through the preharvest production chain would not improve the traceability of those animals. Thus, group/lot identification is a justified option in those situations, regardless of the size of the group.

A commenter stated that there should be a uniform requirement, with no exemptions, that all livestock in interstate commerce be individually officially identified before moving interstate, as is now the case with horses, according to the commenter.

We do not agree with this comment. We recognize that there are circumstances where official identification and/or ICVIs for interstate movement of animals are not warranted from a disease-risk perspective or that the traceability of animals moving interstate may be possible without requiring official identification of individual animals. For example, livestock moved interstate to a custom slaughter facility are already identified to the person responsible for bringing the animal to the facility. An official eartag would not make the animal more traceable; thus, we exempted such livestock from the traceability requirements.

It was the view of some commenters that we should allow States and Tribes to choose the identification methods that work best for them and to select the level of traceability that works best for them, based on their needs and infrastructure constraints.

State and Tribes may use the forms of identification they prefer in lieu of official identification when the receiving States or Tribes agree to accept that method of identification for animals moving into its jurisdiction. Likewise, the level of traceability States or Tribes establish within their jurisdictions is at their discretion.

Documentation Requirements

Documentation requirements, which were contained in § 90.5 of the August 2011 proposed rule, are contained in § 86.5 of this final rule.

Many cattle organizations recommended that a fully electronic ICVI system be in place in all the States and Tribes as a prerequisite to expanding the official identification requirements to include cattle and bison exempted in this rulemaking.

The conditions for initiating a second rulemaking to cover those additional classes of cattle and bison have yet to be determined. The merits of electronic ICVIs are fully recognized by APHIS, and we believe their adoption is important to increase administrative efficiencies and to support timely traceability. APHIS provides an electronic ICVI system that all States and Tribes may utilize and supports options for third-party developed and supported systems. We have established data standards that third-party system providers need to incorporate so that their systems and ours will be compatible.

Some commenters took the argument further, stating that paper copies of ICVIs are not needed at all and that electronic copies are not only sufficient for traceability needs but should be required. It was also stated that the regulations need to allow for the use of electronic ICVI addenda.

We agree that electronic ICVIs have inherent benefits in terms of data retrieval, readability, and ease of execution, but disagree that paper ICVIs have no place in our traceability program. Although all States currently have the electronic ICVIs available for use, full implementation by the majority of accredited veterinarians will take time. We have areas of the country where electronic issuance of certificates that are Web-based is not possible at the locations where they are needed. While moving to increased use of electronic ICVIs is important, paper-based ICVIs will have a role in the foreseeable future. Additionally, even as the use of electronic ICVI systems become more widespread, it will still be necessary for enforcement purposes for the printouts of such certificates to accompany the livestock in transit.

Some commenters stated that the proposed ICVI requirements would be burdensome for producers. Because there are not enough veterinarians available in all States to conduct the necessary inspections on animals preparing to move interstate, having to obtain an ICVI would require some producers to pen their calves longer to arrange for those inspections. The result would be greater stress on the animals and reduced profits for the producers.

We acknowledge that there may be situations where the issuance of an ICVI is an economic burden. For that reason, we allow States or Tribes to issue alternative movement documentation in lieu of ICVIs when agreed to by the States or Tribes involved in the interstate movement. In this final rule, we are extending this exemption to include breeding cattle over 18 months of age, which would have been required to be accompanied by an ICVI under the proposed rule.

A number of commenters viewed the proposed requirement for the recording of individual identification numbers on

the ICVI as burdensome to producers and market operators, stating that the benefits of such recording would not outweigh the costs. It was suggested that State officials should be allowed to waive the recording of individual identification numbers on ICVIs.

An ICVI is a certification that a veterinarian has inspected specific animals. The requirement for recording the animals' identification numbers on the ICVI ensures that the inspections have actually taken place for those specific animals. State and Tribal animal health officials use the ICVIs to help in animal disease investigations. If the animals' identification numbers are not listed on the ICVI, it is more difficult to determine which animals were moved. To limit any possible burdens resulting from the recording requirements, the only animals we require to be listed on the ICVI are those we have determined to be associated with a higher risk of disease spread.

Some commenters stated that we should allow for the stapling of a printed list of RFID tag numbers to a paper ICVI rather than requiring the writing down of the numbers on the ICVI itself.

We agree with this comment and are amending the ICVI definition in this final rule to allow for State-approved addenda that would include an option for an attached printout of official identification numbers generated by computer or other means. The amended definition will also note, however, that such addenda or attachments may only be used if agreed to by the receiving State or Tribe.

Some commenters took the opposite view, stating that when official identification is required, the identification numbers should always be recorded on the ICVI. Attaching another sheet of paper to the ICVI was not seen as adequate because that other sheet seldom accompanies the ICVI to the State of destination.

While this final rule will allow for the use of attachments to the ICVI, as noted above, States and Tribes are not required to accept them if they do not view that method of recording official identification numbers as sufficient to meet their traceability needs.

Some commenters stated that we should allow for greater flexibility than we originally proposed in the use of alternative, State-approved methods of ICVI addenda. It was stated that we should allow for the listing of a series or range of numbers included in a shipment rather than the exact identification tag numbers for each animal in the shipment.

The ability to find individual animals quickly and determine what other animals they had contact with is key to effective epidemiological investigations. If ICVIs did not have individual identification numbers listed for the animals in a shipment, the ability of State, Tribal, and Federal animal health officials to conduct traceback investigations on those animals would be hampered. Alternative methods can only be used if States or Tribes involved in the interstate movement have agreed to them.

Some commenters stated that to avoid placing undue burdens on small entities, there should be a farm, business, or herd size threshold for exemption from the ICVI requirement. Traceability is more related to the number of animals that move interstate than it is to herd size. Regardless of size, herds that do not move animals interstate are exempt. Furthermore, APHIS has no intent to monitor the size of herds, require the reporting of inventory, or conduct any activity along those lines that would be necessary to establish herd size exemptions.

A commenter stated that there is no need to require an ICVI for equines moving interstate because the movement documents already required for equine species are adequate for traceback purposes.

We will not be making any changes to the final rule in response to this comment. It is true that most States already have movement requirements for equines. This rulemaking helps to make existing requirements more uniform throughout the nation. The EIA test chart, commonly required for interstate movement, certifies that a horse is not infected with the disease, but does not document the origin and destination of an interstate movement. The ICVI, issued by a veterinarian, does provide the ship-from and ship-to locations. These regulations also provide that States and Tribes may use other methods of movement documentation, which may include an EIA test chart, when agreed upon by the animal health officials in the States or Tribes involved in the interstate movement.

Some commenters stated that an exemption from the ICVI requirements in the proposed rule for cattle and bison moving interstate to a veterinary clinic and then returning to their farm of origin without a change in ownership should be also be allowed for equines and other species as well.

We acknowledge the support for the exemption, which was included in the proposed rule for poultry as well as for cattle and bison. In this final rule, we are adding the same exemption for equines.

Under the proposed rule, individual identification numbers of cattle and bison moving interstate were required to be recorded on the ICVI with certain exceptions. Exempted categories were sexually intact cattle and bison under 18 months of age or steers or spayed heifers, excluding sexually intact dairy cattle of any age or cattle or bison used for rodeos, exhibitions, or recreational purposes. Many cattle organizations strongly supported maintaining those exemptions from the ICVI recording requirements rather than phasing them out, as they claimed we proposed to do.

We agree with these comments. The proposed rule did not in fact contain language suggesting that we intended to phase out these exemptions.

Many commenters stated that we should allow the use of other movement documents in lieu of the ICVI for all ages of cattle and bison when the shipping and receiving States or Tribes agree. The potential burden to producers of the ICVI requirement, resulting from a decline in the availability of veterinary coverage around the country, was cited as a reason for this recommended change from the proposed rule, which only allowed such an exemption for cattle and bison under 18 months of age.

We agree with the commenters on the need for flexibility and alternatives in areas of the country where obtaining an ICVI would impose an economic hardship on producers. We are, therefore, amending § 86.5(c)(6) in this final rule to allow for the use of alternative movement documentation for all ages of cattle and bison when agreed to by the animal health officials in the shipping and receiving States or Tribes.

It was recommended that the ICVI exemption contained in the proposed rule for poultry moved directly to a recognized slaughtering establishment should be expanded to cover poultry moved directly to rendering establishments as well.

We agree that the exemption is appropriate for poultry moving directly to either destination and are amending § 86.5(g)(2) of this final rule accordingly.

While we received many comments recommending exemptions to the ICVI requirements, we also received one stating that we should allow no exemptions and no use of alternative forms of documentation. The ICVI, the commenter stated, should be used for all interstate movements because standard documentation is necessary for an effective traceability program.

We do not agree with this comment. Due to the lack of large-animal veterinarians in some areas of the country, allowing only the ICVI to be used for interstate movement could result in significant economic hardship for some producers. We view a more flexible approach, one which allows the use of alternative movement documentation when agreed to by the animal health officials in the shipping and receiving States or Tribes, as more effective and less burdensome.

Some commenters stated that we should allow an ICVI to be valid for a period of time, e.g., 30 days, for brief and frequent out-of-State movements not involving a change of ownership of the livestock. One commenter recommended issuing an alternative document called an ''event passport'' for equines for this purpose. It was stated that allowing an ICVI to be valid for a period of time would alleviate burdens on livestock owners and veterinarians.

We realize that there are many ways in which livestock move interstate. These include movements in which animals return to their original location and, in some cases, move again a few days later to another location. While a new ICVI for each movement would aid in traceability, we realize that in some situations, other options are more practical for both the animal owner and accredited veterinarian. However, to account specifically for each variable in the regulation would likely create significant confusion. The rule, as proposed, provided the local officials with the authority to utilize other movement documents when agreed to at the local level by the State and Tribes involved. While not specifically referenced, such documents could include an event passport. We have maintained these options in the final rule to support the use of other movement documentation as agreed to by the involved State or Tribe animal health officials. Yet, we do believe that a standard and uniform definition for the ICVI and standard and uniform requirements for its administration are critical, and we have maintained those as proposed.

It was stated by a commenter representing a swine industry association that the ICVI requirements contained in the proposed rule included some data not currently required for swine and could cause some confusion regarding issuance. Specifically, the commenter questioned why it was necessary for an accredited veterinarian to indicate on the ICVI the purpose for which the animals are being moved interstate.

As we explained in the preamble to the August 2011 proposed rule, the information requirements for the ICVI were closely modeled on the requirements for certificates in the brucellosis regulations. The requirement for the accredited veterinarian to state the purpose of the interstate movement is to differentiate between temporary movements (shows, exhibitions, etc.) and permanent movements (sales, retained ownership, etc.). On many existing State-issued ICVIs, there is a box that can be checked indicating the purpose of the movement. In any event, the establishment of these traceability regulations does not affect the documentation requirements for the interstate movement of swine, which will continue to be governed by § 71.19.

A commenter representing the swine industry stated that while swine moved directly to slaughter are not currently required to have an ICVI, under the proposed rule, the requirements would become more stringent, since only animals moved to custom slaughter would be exempt. The commenter requested that, in the final rule, we reference exemptions for ICVIs for swine going into official slaughter channels.

This rulemaking does not alter the documentation requirements for swine moving interstate for slaughter or other purposes. Such swine will continue to be subject to the documentation requirements of § 71.19. Swine that are not moving within a swine production system and that are covered by the pseudorabies regulations in part 85 will continue to be subject to the documentation requirements of that part.

It was stated by commenters that we needed to be clearer regarding the location at which the ICVI must be issued and when the 5-day period for forwarding the ICVI begins.

The ICVI is required to show the address at which the animals in a shipment are loaded for interstate movement. As we noted earlier, however, we are amending this final rule to clarify that veterinary inspection of the animals and issuance of the ICVI do not have to be done at that address. The inspection may take place at an alternate site, such as a veterinary clinic, and the actual completion of the ICVI may take place at another location, such as the office of the issuing veterinarian. To clarify the forwarding requirements, we are also amending § 86.5(b) of this final rule to specify that the ICVI or other document accompanying the covered livestock must be forwarded by the person issuing it to the State or Tribal animal health official in State or Tribe of origin within 7 calendar days from the date of issuance and that that official must then forward it to the State or Tribe of destination within 7 calendar days of having received it.

Additionally, to close a potential gap in the movement recordkeeping requirements, we are adding a new 86.5(b)(2) to this final rule stating that an animal health official or accredited veterinarian who issues or receives an ICVI or other interstate movement document in accordance with the paragraph above must retain a copy of the ICVI or other document. The timeframes are the same as those for approved livestock facilities: Such documents must be retained for 2 years for poultry and swine and 5 years for cattle and bison, equines, cervids, and sheep and goats.

A commenter expressed concern about the provision in the proposed rule that stated that the person directly responsible for animals leaving a premises would be responsible for ensuring that the animals are accompanied by the ICVI or other interstate movement document. The commenter indicated that it is common in the pork industry for the production system veterinarian to be the person responsible for writing the ICVI or other documents used for interstate movements. It is also common for movements to be arranged by a designated person in the production system. In the view of the commenter, we needed to better define or explain what we meant by ''directly responsible.''

It is not our intention to single out the accredited veterinarian or any other individual as being the primary responsible party in all cases. To avoid this, and to eliminate any possible ambiguity, we are revising the language of this provision slightly. Specifically, we are inserting, in § 86.5(a) of this final rule, the words ''the persons responsible'' in place of ''the person directly responsible.''

Some commenters stated that we should include fitness-to-travel requirements in the ICVI process and should require ICVIs to show the estimated travel times and stops. It was further stated that the ICVI should include a certification of intent to comply with the 28-hour law, which states that animals should not be driven for more than 28 hours without food or rest.

Although these comments may have merit, the suggested requirements are beyond the scope of this rule, which is designed to improve animal disease traceability, and of our statutory

authority under the Animal Health Protection Act.

A few commenters expressed the view, contrary to that of most, that there is no justification for the exemption from ICVI requirements of direct-to-slaughter cattle.

We do not agree with this comment. Cattle, upon arrival at a recognized slaughtering establishment, are inspected ante mortem and throughout the slaughtering process under the veterinary supervision of FSIS or State employees. When animals are shipped directly to slaughter, the location the animals were shipped from is known, and if there is any disease found at slaughter, it can easily be traced to that location. A requirement to have a veterinarian come to a farm to issue an ICVI for animals that are destined for immediate slaughter is unwarranted.

Finally, a commenter stated that we should allow for greater flexibility in documentation by allowing inventory verification by a third party or at a shipment's destination rather than only its origin.

We disagree with this comment. Movement documentation is an essential part of our animal disease tracing capability. Allowing animals to move without documentation and relying instead on the destination to verify the identity of animals, would require a complex and expensive system of reporting and compliance. Although we are aware that at certain times of the year, handling of animals can be difficult, with added risk to animal health, there are management techniques and procedures that can minimize the time required to identify animals and reduce the strain of preparing them for interstate movement.

Regulatory Impact Analysis

Costs

It was claimed by some commenters that the regulatory impact analysis (RIA) we published in conjunction with the August 2011 proposed rule grossly underestimated the economic cost to be borne by U.S. cattle producers. Some commenters expressed the view that we did not properly account for the cost of expanding the official identification requirements to cover feeder cattle.

In the RIA, we attempted to estimate the new costs that will be associated with the provisions of the rulemaking. We acknowledged the significant portion of the cattle industry that already uses some method of identification, as reported in the National Animal Health Monitoring System 2007 and 2008 surveys. In the RIA, we noted that two-thirds of the beef operations and 90 percent of dairy operations use some method of identification. Additionally, within beef operations, over 60 percent of the calves had some form of individual identification. Consideration of these existing practices is important when estimating new costs that may be attributed to the new traceability requirements, as we believe that official eartags, in many cases, will likely be applied at the same time at which cattle are already being tagged or worked through chutes for other management purposes. Additionally, with an array of official eartags, producers may choose a single eartag that meets both management and official identification needs. This option would make the additional cost of official eartags quite small. Likewise, we believe that producers will continue to develop tagging practices that minimize the cost of applying official eartags. Producers that are not able to tag their own cattle may find a tagging site to be the most practical option for meeting the official identification requirements. We believe that the RIA accurately identified tagging costs that may occur at tagging sites. We acknowledge that our estimates for the number of animals moved interstate that would require official identification is based on several assumptions and that the estimation of costs involves many variables. The range of $12.5 million to $30.5 million annually for official identification costs to producers resulting from this rulemaking is our best estimate at this time.

Regarding ICVI costs, we noted that most States already require ICVIs for many interstate movements. Thus, we do not believe the overall volume of ICVIs issued will increase significantly as a result of this rule. In this final rule, the exemption that allowed other documentation to be used in lieu of an ICVI, provided that the shipping and receiving States or Tribes agreed, for cattle and bison under 18 months of age moving interstate has been extended to cover all ages and classes of cattle and bison. This revision will likely make the potential increase in the volume of ICVIs issued less than originally anticipated.

One commenter, citing a study on the cost of tagging, asserted that the likely cost of the proposed rule to producers would range from $1.2 billion to $1.9 billion.

The commenter cited testimony before the U.S. International Trade Commission (ITC). We believe that the costs described in that testimony included activities not associated with the provisions of the proposed rule. The estimated costs per calf cited in the U.S. ITC testimony included $5 for tags, data management, and verification; $7 for working calves, tag placement, and documentation; and $8 for feedlot and harvest data collection and chute fees. The U.S. ITC testimony cited estimated losses due to shrinkage as $10 to $20 in lost income potential per calf. The U.S. ITC testimony was also based on an electronic animal identification system involving data management and verification activities at the producer level.

We are not disputing the cost factors for the practices referenced in the U.S. ITC report. However, we do not believe they reflect management practices necessary for producers to comply with the identification requirements of the traceability rule and, therefore, do not believe those cost factors are applicable in our economic analysis.

Commenters stated that we ignored the cost to distribute official identification devices and collect and maintain data on people receiving them and animals moved with them. It was stated that we also ignored the costs of official tags bearing the required emblem, the costs of replacing existing tag systems with official tags, the costs of equipment to read the tags, the costs of configuring corrals and handling facilities to allow for collection of identification information, and the costs associated with technology problems when tags are not read.

We included information in the RIA about the cost of the tags, the cost of the labor to work the cattle in chutes and apply the tags, and the cost of the ICVI when the official identification information is recorded. Since the U.S. Shield has been imprinted on the NUES tags obtained by APHIS for disease-control programs for many years, we do not agree that the standardized use of the official eartag shield will increase the cost of official eartags. This rulemaking is designed to allow producers to use tags that do not require any electronic or special equipment to read the official eartags.

As described in the RIA, States and Tribes would bear responsibility for the collection, maintenance, and retrieval of data on interstate livestock movements. Federal funding, as available, would be allocated to assist States and Tribes in meeting program goals. Additionally, APHIS continues to provide information systems that States and Tribes may elect to use at no charge.

Some commenters stated that we underestimated the cost to producers of the rulemaking because we did not factor in the costs of buying chutes in calculating the costs of tagging.

As stated previously, in the RIA, we attempted to determine only the costs and benefits that were associated with the provisions of the proposed rule. While we included estimated costs for chute operations for tagging, we did not include the entire costs of buying or renting chutes because we were only trying to determine the costs associated with the rule. If an operation does not currently own equipment needed for tagging, such as chutes, we note that tagging may take place at an approved tagging site. We do realize that some operations may elect to purchase a chute that will allow them to tag their own animals. However, we do not believe the investment in the chute will be made solely for applying the official eartags to the operation's cattle. Rather, the chute is likely to be used for many other management practices. Therefore, we believe that analyzing the cost of tagging animals at tagging sites provides a more reliable basis for a reasonable estimate of producer costs for tagging animals than would including the entire costs of buying or renting chutes in such an estimate.

Commenters stated that we did not adequately account for the added costs to producers, sale barns, veterinarians, and veterinary clinics that would be associated with our proposed ICVI requirements.

As mentioned previously, many States already require ICVIs for interstate movements of livestock covered in the traceability rule. Therefore, we do not believe the volume of ICVIs issued is likely to change significantly. We did, however attempt to account for an increase in these cost to producers, which was projected to be $2.0 million to $3.8 million. In this final rule, as we have already noted, the exemption allowing the use of other documentation in lieu of ICVIs has been extended to all ages and classes of cattle and bison when agreed to by the receiving and shipping States and Tribes, thus limiting the increase in the number of ICVIs issued. If sale barns and veterinarians are providing services associated with the rulemaking, we anticipate that they would charge an appropriate price for those services. Costs that could be incurred by producers as a result were estimated in the RIA.

One commenter stated that our RIA grossly underestimated the costs of ICVIs for horse owners. Another stated that the increased costs for the ICVI would place a greater burden on the horse industry than on the cattle industry because horses move more regularly.

The RIA included information about estimated costs for equines. We estimated the incremental cost of an ICVI for most horses moved interstate to range between $4.00 and $7.50, based on the cost of testing for EIA. We estimated that the total additional cost for the equine industry could range from $8.8 million to $16.5 million, given the current number of EIA tests per year.

Many commenters expressed concerns about the potential economic burdens on small producers and livestock markets, arguing that the rulemaking favored larger, vertically integrated entities.

While APHIS is sensitive to these concerns, many commenters did not provide specific information to support these claims or provide traceability solutions that would be more cost effective. While larger, vertically integrated entities may realize economic benefits from the size of their operations, those benefits result from market forces and are not due to specific provisions of this rulemaking. However, in this final rule, we did add exemptions in response to comments from small poultry producers for certain movements, so as not to put such producers at a disadvantage. In particular, we exempted from the official identification requirements chicks moving interstate from a hatchery to a poultry producer or redistributor.

It was stated that the rulemaking would disadvantage U.S. producers because they would be required to meet our traceability requirements when moving cattle across State lines, while we would place no such requirement on foreign producers.

The official identification and documentation requirements for imported livestock are well established through 9 CFR part 93 and are not affected by this rulemaking. The requirements in part 93 are at least equivalent to those specified in this rulemaking, so domestic producers will not be placed at a competitive disadvantage.

It was stated that the proposed rule was unfair in that it would only regulate interstate movement. As a result, producers may choose to take cattle to in-State markets that are farther away, thus incurring increased transportation costs, in order to avoid the cost and burden of the proposed requirements. Producers and markets located in the interiors of States may be given an unfair competitive advantage by not having to comply.

We realize there are many factors that producers will consider when marketing their animals. While the cost of officially identifying animals moved interstate to a market may be considered, there are many other economic factors associated with marketing decisions, including, but not limited to, transportation costs and the availability of local and out-of-State buyers. Therefore, we cannot conclude that this final rule favors livestock markets based on their geographic location or distance from State borders.

Many commenters viewed the proposed traceability program as an unfunded mandate. For example, it was said that State agencies would have to build database storage, management, and retrieval systems, which could strain their budgets. It was suggested that we provide funds to help States modernize and upgrade their data systems and train people to use them.

The RIA discussed the estimated Federal funding available to support animal disease traceability. A significant portion of the budgeted funds are targeted to field implementation. However, APHIS has taken the position that it will not fund the development of duplicative information systems, as such investments cannot be justified. Rather, APHIS will provide information systems that the States and Tribes may use at no charge. If a State or Tribe elects to develop its own system, however, it will have to cover the cost. Federal funds, however, may be used for the overall administration of the local traceability activities.

It was stated that our proposed traceability system would enhance the bargaining power of packers at the expense of producers.

The commenters who expressed this view did not describe how the proposed rule would alter the relative bargaining power of packers at the expense of producers, and we are unable to determine how this point is applicable to the rulemaking.

Many commenters noted that our RIA did not include a cost analysis for poultry producers.

The RIA noted that there would be no additional costs for poultry enterprises that participate in the NPIP. As noted earlier, a primary concern about the cost of identifying individual birds, in particular chicks shipped from hatcheries, has been accounted for in the exemption from the official identification requirements for such poultry shipments. Likewise, it has been clarified that interstate movements to a custom slaughter facility are exempt from these traceability regulations. Poultry moved interstate to live bird markets would need to have an ICVI or other documentation as agreed to by the States. States have the option of

maintaining current requirements for movement documentation, in which case no additional costs will be incurred.

Benefits

It was stated by some commenters that the RIA indicated that the primary benefits of this rulemaking would be to minimize losses and enable the reestablishment of foreign and domestic markets. This rationale was questioned. A commenter requested more detailed information on tuberculosis traceouts in the last 5 years and how animal identification has contributed to successful or unsuccessful traceouts. The commenter also requested data on foreign market access lost due to tuberculosis and brucellosis. Some other commenters stated that the discussion of benefits focused too much on the benefits of exports. It was maintained that, while exporters would likely benefit from the proposed rule, the costs would mainly be borne by domestic producers and related businesses.

The ability of U.S. producers to export affects all producers, even those who do not directly sell to an international market. Trade restrictions lead to products intended for the export market being diverted to the domestic market. An increase in the supply of a product that otherwise may have been exported on the domestic market may lead to lower prices in the short run. In the event that exports cannot be re-established, the likely result is a smaller domestic herd.

A commenter stated that since the potential cost-benefit ratio of the rule could not be determined, the costs should be borne by the Federal Government.

The RIA provided our estimate of who would bear the costs and the amount of those costs. In cases where we cannot quantify benefits or costs, we have described those benefits and costs qualitatively. The benefits of an efficient system for tracing animal disease occurrences, as set forth in the proposed rule and in this document, would accrue directly to the livestock and meat industries and indirectly to other sectors of the economy.

Performance Standards

Many commenters stated that we should not finalize the proposed rule until the actual traceability performance standards that States and Tribes would have to meet are established through rulemaking. In a system that would be so dependent upon the performance levels achieved by the States and Tribes, the current lack of performance measures, it was suggested, could be a barrier to successful implementation.

We do not agree with these comments, as we believe that it would be premature to enact traceability performance requirements in this rulemaking. As noted in the preamble to the August 2011 proposed rule, our current thinking is that we will measure the performance of States and Tribes by evaluating their ability to carry out, in a timely manner, certain activities that animal health officials would typically conduct during a trace investigation of covered livestock that have moved interstate. The establishment of actual traceability performance standards, however, can only be done following review and analysis of actual data compiled from animal movement records after these regulations have been implemented. Without such information, the establishment of performance standards would be too subjective. Therefore, we maintain our initial position: We will establish the traceability performance standards at a later date to ensure we have necessary data to objectively define and establish those performance standards. As the rule is implemented, we will continue to work with States and Tribes to measure tracing capabilities resulting from these regulations. Comparing the results obtained earlier on and over time will help document the progress being made.

One commenter stated that the discussion of the performance standards in the preamble to the proposed rule did not adequately address possible consequences for States with traceability systems that do not meet our goals. Several others stated that it would be counterproductive to place additional restrictions on producers from States that do not comply with our traceability standards, as was discussed in the preamble.

This rulemaking does not contain any traceability performance standards or provisions for additional restrictions based on non-compliance. The discussion in the preamble to the August 2011 proposed rule was presented as our ''current thinking,'' with the understanding that any performance and compliance measures will be developed with input from individuals and organizations that would be affected. We made it clear in that discussion that the performance measures will be developed in a separate rulemaking process.

One commenter stated that the performance standards we ultimately implement should be more rigorous than the ones we discussed in the preamble to the proposed rule. Specifically, the commenter stated that 3 years is too long a time to allow States to come into compliance with our requirements.

As noted above, the discussion in the preamble to the proposed rule reflects our current thinking on performance standards. That thinking is likely to evolve as we accumulate more data after this final rule becomes effective.

Preemption

Provisions related to preemption of State and local requirements, which were contained in § 90.8 of the August 2011 proposed rule, are contained in § 86.8 of this final rule.

Some commenters stated that APHIS should not preempt any State's identification requirements.

It is our view that the minimal preemption provisions provided in these regulations are necessary to ensure that no one State or Tribe can establish certain requirement for having livestock moved into their State or Tribe. For example, we do not believe a State should be able to require that all cattle entering its jurisdiction have an RFID eartag, nor should a receiving State be able to require a method of identification that is not listed as official in our regulations unless agreed to by the shipping State.

It was stated that APHIS should preempt States' or Tribes' identification requirements, except when those requirements are stricter than ours. States and Tribes should be able to impose more strict requirements than ours, e.g., requiring the official identification of feeder cattle during the time they are exempt from the Federal regulation.

These regulations only preempt the specific items noted in the preemption clause in § 86.8. A State or Tribe may require official identification for livestock to enter its jurisdiction when these regulations do not, so long as that State or Tribe does not specify a particular official identification device or method to be used if multiple ones are allowed under these regulations, or to impose requirements that would otherwise cause the shipping State or Tribe to have to develop a particular kind of traceability system or modify its existing one.

A commenter representing a State government expressed concern that that State's stricter existing official identification requirements, e.g., requiring official identification of all sexually intact beef cattle as well as all classes of dairy and rodeo cattle prior to importation, could be preempted under this rulemaking.

As noted above, there is no provision in these regulations that would prevent a State from requiring official identification for cattle that are exempted under this rulemaking.

While we are not making any substantive changes to the preemption provisions as a result of the comments we received, we are making some editorial changes for the sake of clarity.

Miscellaneous Comments

Some commenters stated that the proposed rule did not address the two main reservoirs of cattle disease in the United States: The introduction of tuberculosis from imported Mexican cattle and the spread of brucellosis and tuberculosis from wildlife to livestock. A number of these commenters further stated that it was unfair for U.S. cattle producers to be burdened with additional requirements and costs when a principal cause of the resurgence of cattle diseases is cattle imported from Mexico.

This rulemaking is not intended to provide methods of disease prevention or establish policy for international trade or wildlife issues. Having these traceability regulations in place will help us to build a uniform infrastructure of animal disease traceability that will aid us in disease response.

This rulemaking is intended to put the recordkeeping responsibility and data in the hands of States and Tribes. States and Tribes may choose to use the data systems already developed by APHIS, but the data contained in those systems are controlled at the local level. Maintenance of distribution records of official identification devices is shared among States/Tribes, APHIS, and the private sector. For instance, the distribution of official AIN eartags purchased by private individuals is recorded in an APHIS system by the tag manufacturers and distributors. Other official eartags purchased with State or Tribe resources are recorded in databases or logs at the discretion of the State or Tribe. While APHIS provides NUES tags to States and Tribes, the States and Tribes also may obtain official identification tags from approved manufacturers.

Many commenters faulted the proposed rule for not addressing potential liabilities to producers and associated individuals and entities under our traceability system. It was stated that under the bookend system we are attempting to implement, the person applying an identification tag would be the primary suspect in any disease traceback investigation, even if the animal was sold by that person well before detection of the disease.

Our animal disease programs are not designed to find fault or assign blame for disease, but to find and control disease. With a bookend system of traceability, the point-of-origin identification merely provides a starting point for an epidemiological investigation to trace an animal forward. The identification collected at slaughter is a starting point for tracing the animal backward. Good identification and recordkeeping at the farm level can actually reduce the impact of a disease investigation on producers, livestock markets, and other entities. For example, if a producer has a record that the animal of interest in an investigation was tested prior to movement or that a herd test was conducted, the amount of time Federal, State, or Tribal officials may be required to spend at the farm could be minimized, thereby minimizing the effect on the producer's operations.

It was stated by one commenter that our proposed traceability system would eliminate redundancies built into current systems and actually degrade, rather than enhance, traceability. The commenter did not offer any evidence to support that claim, however.

The same commenter also stated that APHIS lacks the constitutional and statutory authority to establish a traceability system. According to the commenter, the language of the Animal Health Protection Act does not confer broad authority to mandate overt action by producers in the form of an animal traceability system. The commenter claimed that our assertion of such broad powers is contrary to Article 1, Section 8 of the U.S. Constitution.

We do not agree with this comment. The Animal Health Protection Act authorizes the Secretary ''to prohibit or restrict the movement in interstate commerce of any animal, article, or means of conveyance, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction of dissemination of any pest or disease of livestock.'' The promulgation of regulations establishing an animal disease traceability system is clearly within APHIS' statutory authority.

It was also maintained that the proposed rule represented an unauthorized attempt by APHIS to implement OIE codes and standards domestically.

We do not agree with this comment. In this rulemaking, we are promulgating regulations that improve traceability nationally and yet allow the flexibility at the local level for States and Tribes to implement traceability solutions that work best for them.

One commenter noted that horses are not classified as livestock by the Food and Drug Administration and stated that agencies need to decide on a single classification before traceability requirements for horses go into effect.

We will not be making any changes to the final rule in response to this comment. Horses are classified as livestock under the Animal Health Protection Act, from which we derive our authority to regulate to protect animal health.

A commenter pointed out a possible discrepancy in the regulations regarding cervid herd tuberculosis testing and reaccreditation intervals. In current and proposed §§ 77.25, 77.27, and 77.29, reference is made to requirements for testing within 24 months of interstate movement. In § 77.35, however, there is a reference to a 36-month interval for herd testing for reaccreditation.

While we did not propose any changes to the requirements for testing intervals in these sections, we note that the differing intervals to which the commenter refers are associated with testing for different purposes.

A commenter representing a community of Old Order Amish opposed the proposed rule on religious grounds.

The commenter would only be subject to the traceability regulations if moving livestock interstate, and the availability of alternate tagging sites would make it possible for identification practices to which he might object to be carried out after a change of ownership of the livestock. While we respect the commenter's religious beliefs, we do need to be able to trace animals to prevent the spread of livestock pests and diseases. Congress has authorized the Secretary to regulate animals moving interstate when necessary to prevent the spread of disease.

A commenter representing a State Government stated that the proposed rule did not explain whether an approved livestock facility would be treated the same as the approved livestock markets in the existing regulations. The commenter maintained that cattle buying stations should be considered to be approved livestock facilities.

The regulations in § 71.20 use the term ''approved livestock facility,'' and we use the term in these regulations to provide consistency and a source of reference. Cattle buying stations could be recognized as approved livestock facilities if they are approved under § 71.20.

A commenter stated that a concern in Pennsylvania about the proposed rule was that the proposed traceability plan

would revert to older, more conventional technologies, such as metal tags and paper. Pennsylvania already uses RFID technology and has a rather sophisticated electronic database system. The commenter questioned how APHIS' proposed system would mesh with the electronic system that currently works very well in the State.

This rulemaking does not prohibit the use of RFID technology and electronic records. No State can deny entry to animals identified with electronic eartags and accompanied by electronic records if they met the standards provided for in these regulations. The regulations do, however, prohibit a State or Tribe from mandating the use of RFID or electronic records, or any other specific technology, for animals moving into their jurisdiction.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the changes discussed in this document.

Executive Orders 12866 and 13563 and Regulatory Flexibility Act

This final 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, which 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, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The economic analysis also provides a final regulatory flexibility analysis that examines the potential economic effects of this rule on small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below. Copies of the full analysis are available on the Regulations.gov Web site (see footnote 1 in this document for a link to Regulations.gov) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

We are establishing general traceability regulations for certain livestock moving interstate. The purpose of this rulemaking is to improve APHIS' ability to trace such livestock in the event disease is found. The benefits of this rulemaking are expected to exceed the costs overall.

While the rule applies to cattle and bison, horses and other equine species, poultry, sheep and goats, swine, and captive cervids, the focus of this analysis is on expected economic effects for the beef and dairy cattle industries. These enterprises are likely to be most affected operationally by the rule. For the other species, APHIS will largely maintain and build on the identification requirements of existing disease program regulations.

Costs for cattle producers are estimated in terms of activities that will need to be conducted for official animal identification and issuance of an ICVI, or other movement documentation, for livestock moved interstate. Incremental costs incurred are expected to vary depending upon a number of factors, including whether an enterprise does or does not already use eartags to identify individual cattle. For many operators, costs of official animal identification and ICVIs will be similar, respectively, to costs associated with current animal identification practices and the inshipment documentation currently required by individual States. Existing expenditures for these activities represent cost baselines for the private sector. To the extent that official animal identification and ICVIs will simply replace current requirements, the incremental costs of the rule for private enterprises will be minimal.

There are two main cost components for this rule: Using eartags to identify cattle and having ICVIs for cattle moved interstate. Approximately 20 percent of cattle are not currently eartagged as part of routine management practices, and an estimated 45 percent of cattle are identified for management purposes other than by using official identification. Annual incremental costs of official identification for cattle enterprises are estimated to total from $12.5 million to $30.5 million, assuming producers who are not already using official identification will tag their cattle as an activity separate from other routine management practices. More likely, some producers who are not already using official eartags can be expected to combine tagging with other routine activities such as vaccination or de-worming, thereby avoiding the costs associated with working cattle through a chute an additional time. Under this second scenario, the total incremental cost of official identification will range from $8.9 million to $19.7 million. After considering public comments, we have increased the estimated cost of this second scenario. We recognize that all producers may not combine tagging with other management activities and therefore some will continue to incur higher costs.

All States currently require a certificate of veterinary inspection, commonly referred to as a health certificate, for the inshipment from other States of breeder cattle, and 48 States require one for feeder cattle. Annual incremental costs of the rule for ICVI's are estimated to range between $2 million and $3.8 million. If States currently requiring documentation other than ICVIs, such as owner-shipper statements or brand certificates, continue to accept these documents in lieu of an ICVI, as permitted by this rule, the ICVI requirement in this rule will not result in any additional costs.

The combined annual costs of the rule for cattle operations of official identification and movement documentation will range between $14.5 million and $34.3 million, assuming official identification will be undertaken separately from other routine management practices; or between $10.9 million and $23.5 million, assuming that some producers will combine tagging with other routine management practices that require working cattle through a chute.

Currently, States and Tribes bear responsibilities for the collection, maintenance, and retrieval of data on interstate livestock movements. These responsibilities will be maintained under this rulemaking, but the way they are administered will likely change. Based on availability, Federal funding will be allocated to assist States and Tribes as necessary in automating data collection, maintenance, and retrieval to advance animal disease traceability.

Direct benefits of improved traceability include the public and private cost savings expected to be gained under the rule. Case studies for bovine tuberculosis, bovine brucellosis, and BSE illustrate the inefficiencies currently often faced in tracing disease occurrences due to inadequate animal identification and the potential gains in terms of cost savings that may derive from the rule.

Benefits of the traceability system are for the most part potential benefits that rest on largely unknown probabilities of disease occurrence and reactions by domestic and foreign markets. The primary benefit of the regulations will be the enhanced ability of the United States to regionalize and compartmentalize animal health issues more quickly, minimizing losses and enabling reestablishment of foreign and domestic market access with minimum delay in the wake of an animal disease event.

Having a traceability system in place will allow the United States to trace animal disease more quickly and efficiently, thereby minimizing not only the spread of disease but also the trade impacts an outbreak may have. The value of U.S. exports of live cattle in 2010 was $131.8 million, and the value of U.S. beef exports totaled $2.8 billion. The value of U.S. cattle and calf production in 2009 was $31.8 billion. The estimated incremental costs of the rule for cattle enterprises—between $14.5 million and $34.3 million, assuming official identification is a separately performed activity, and between $10.9 million and $23.5 million, assuming some official identification is combined by some operations with other routine management practices that require working cattle through a chute—represent about one-tenth of one percent of the value of domestic cattle and calf production. If there were an animal disease outbreak in the United States that affected our domestic and international beef markets, preservation of only a very small proportion of these markets would justify estimated private sector costs attributable to the animal disease traceability program.

Most cattle operations in the United States are small entities. USDA will ensure the rule's workability and cost effectiveness by collaborating in its implementation with representatives from States, Tribes, and affected industries.

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 13175

In accordance with Executive Order 13175, APHIS has consulted with Tribal Government officials. A tribal summary impact statement, published concurrently with the August 2011 proposed rule, includes a summary of Tribal officials' concerns and of how APHIS has attempted to address them.

Copies of the tribal impact summary statement are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the Regulations.gov Web site (see footnote 1 in this document for a link to Regulations.gov).

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts State and local laws and regulations that are in conflict with this rule, as provided in § 86.8; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This final rule contains two information collection requirements that were not included in the proposed rule. Specifically, in response to comments we received on the proposed rule, this final rule allows States and Tribes to use eartags with their State or Tribal code printed inside an official eartag shield. The rule also includes an ICVI-related recordkeeping requirement for accredited veterinarians that was not noted in the proposed rule. Notwithstanding these additional requirements, the total paperwork burden is reduced from what we determined it to be in the proposed rule because we did not adequately account for the increasing use by States of electronic recordkeeping for ICVIs and, as a result, overestimated the ICVI reporting burden for the States. In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this information collection requirement has been submitted for approval to the Office of Management and Budget (OMB). When OMB notifies us of its decision, we will publish a document in the **Federal Register** providing notice of the assigned OMB control number or, if approval is denied, providing notice of what action we plan to take.

List of Subjects

9 CFR Parts 71, 77, and 78

Animal diseases, Bison, Cattle, Hogs, Livestock, Poultry and poultry products, Quarantine, Reporting and recordkeeping requirements, Transportation, Tuberculosis.

9 CFR Part 86

Animal diseases, Bison, Cattle, Interstate movement, Livestock, Official identification, Reporting and recordkeeping requirements, Traceability.

Accordingly, we are amending 9 CFR chapter I as follows:

PART 71—GENERAL PROVISIONS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

■ 2. Section 71.1 is amended by revising the definitions of *animal identification number (AIN), group/lot identification number (GIN), livestock, official eartag, official identification device or method,* and *premises identification number (PIN),* removing the definitions of *moved (movement) in interstate commerce* and *United States Department of Agriculture Backtag,* and adding definitions of *flock-based number system, flock identification number (FIN), move, National Uniform Eartagging System (NUES), official eartag shield, official identification number,* and *United States Department of Agriculture (USDA) approved backtag* in alphabetical order to read as follows:

§ 71.1 Definitions.

* * * * *

Animal identification number (AIN). A numbering system for the official identification of individual animals in the United States that provides a nationally unique identification number for each animal. The AIN consists of 15 digits, with the first 3 being the country code (840 for the United States or a unique country code for any U.S. territory that has such a code and elects to use it in place of the 840 code). The alpha characters USA or the numeric code assigned to the manufacturer of the identification device by the International Committee on Animal Recording may be used as an alternative to the 840 or other prefix representing a U.S territory; however, only the AIN beginning with the 840 or other prefix representing a U.S. territory will be recognized as official for use on AIN tags applied to animals on or after March 11, 2015. The AIN beginning with the 840 prefix may not be applied to animals known to have been born outside the United States.

* * * * *

Flock-based number system. The flock-based number system combines a flock identification number (FIN) with a producer's unique livestock production numbering system to provide a nationally unique identification number for an animal.

Flock identification number (FIN). A nationally unique number assigned by a State, Tribal, or Federal animal health authority to a group of animals that are managed as a unit on one or more premises and are under the same ownership.

* * * * *

Group/lot identification number (GIN). The identification number used to uniquely identify a ''unit of animals'' of the same species that is managed together as one group throughout the

preharvest production chain. When a GIN is used, it is recorded on documents accompanying the animals moving interstate; it is not necessary to have the GIN attached to each animal.

* * * * *

Livestock. All farm-raised animals.

* * * * *

Move. To carry, enter, import, mail, ship, or transport; to aid, abet, cause, or induce carrying, entering, importing, mailing, shipping, or transporting; to offer to carry, enter, import, mail, ship, or transport; to receive in order to carry, enter, import, mail, ship, or transport; or to allow any of these activities.

National Uniform Eartagging System (NUES). A numbering system for the official identification of individual animals in the United States that provides a nationally unique identification number for each animal.

* * * * *

Official eartag. An identification tag approved by APHIS that bears an official identification number for individual animals. Beginning March 11, 2014, all official eartags manufactured must bear an official eartag shield. Beginning March 11, 2015, all official eartags applied to animals must bear an official eartag shield. The design, size, shape, color, and other characteristics of the official eartag will depend on the needs of the users, subject to the approval of the Administrator. The official eartag must be tamper-resistant and have a high retention rate in the animal.

Official eartag shield. The shield-shaped graphic of the U.S. Route Shield with ''U.S.'' or the State postal abbreviation or Tribal alpha code imprinted within the shield.

Official identification device or method. A means approved by the Administrator of applying an official identification number to an animal of a specific species or associating an official identification number with an animal or group of animals of a specific species.

Official identification number. A nationally unique number that is permanently associated with an animal or group of animals and that adheres to one of the following systems:

(1) National Uniform Eartagging System (NUES).

(2) Animal identification number (AIN).

(3) Location-based number system.

(4) Flock-based number system.

(5) Any other numbering system approved by the Administrator for the official identification of animals.

* * * * *

Premises identification number (PIN). A nationally unique number assigned by a State, Tribal, and/or Federal animal health authority to a premises that is, in the judgment of the State, Tribal, and/or Federal animal health authority a geographically distinct location from other premises. The PIN may be used in conjunction with a producer's own unique livestock production numbering system to provide a nationally unique and herd-unique identification number for an animal. It may be used as a component of a group/lot identification number (GIN).

* * * * *

United States Department of Agriculture (USDA) approved backtag. A backtag issued by APHIS that provides a temporary unique identification for each animal.

§ 71.18 [Removed and Reserved]

■ 3. Section 71.18 is removed and reserved.

§ 71.19 [Amended]

■ 4. In § 71.19, paragraphs (b)(2) and (d) introductory text are amended by removing the words ''United States Department of Agriculture backtags'' and adding the words ''United States Department of Agriculture (USDA) approved backtag'' in their place each time they occur.

§ 71.22 [Removed and Reserved]

■ 5. Section 71.22 is removed and reserved.

PART 77—TUBERCULOSIS

■ 6. The authority citation for part 77 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

■ 7. Section 77.2 is amended by revising the definitions of *animal identification number (AIN), livestock, official eartag,* and *premises identification number (PIN),* removing the definitions of *certificate, moved, moved directly,* and *premises of origin identification,* and adding definitions of *directly, interstate certificate of veterinary inspection (ICVI), location-based numbering system, location identification (LID) number, move, National Uniform Eartagging System (NUES), official eartag shield, official identification number, recognized slaughtering establishment,* and *United States Department of Agriculture (USDA) approved backtag* in alphabetical order to read as follows:

§ 77.2 Definitions.

* * * * *

Animal identification number (AIN). A numbering system for the official identification of individual animals in the United States that provides a nationally unique identification number for each animal. The AIN consists of 15 digits, with the first 3 being the country code (840 for the United States or a unique country code for any U.S. territory that has such a code and elects to use it in place of the 840 code). The alpha characters USA or the numeric code assigned to the manufacturer of the identification device by the International Committee on Animal Recording may be used as an alternative to the 840 or other prefix representing a U.S territory; however, only the AIN beginning with the 840 or other prefix representing a U.S. territory will be recognized as official for use on AIN tags applied to animals on or after March 11, 2015. The AIN beginning with the 840 prefix may not be applied to animals known to have been born outside the United States.

* * * * *

Directly. Moved in a means of conveyance, without stopping to unload while en route, except for stops of less than 24 hours to feed, water, or rest the animals being moved, and with no commingling of animals at such stops.

* * * * *

Interstate certificate of veterinary inspection (ICVI). An official document issued by a Federal, State, Tribal, or accredited veterinarian certifying the inspection of animals in preparation for interstate movement.

(a) The ICVI must show the species of animals covered by the ICVI; the number of animals covered by the ICVI; the purpose for which the animals are to be moved; the address at which the animals were loaded for interstate movement; the address to which the animals are destined; and the names of the consignor and the consignee and their addresses if different from the address at which the animals were loaded or the address to which the animals are destined. Additionally, unless the species-specific requirements for ICVIs provide an exception, the ICVI must list the official identification number of each animal, except as provided in paragraph (b) of this definition, or group of animals moved that is required to be officially identified, or, if an alternative form of identification has been agreed upon by the sending and receiving States, the ICVI must include a record of that identification. If animals moving under a GIN also have individual official identification, only the GIN must be listed on the ICVI. An ICVI may not be issued for any animal that is not officially identified if official

identification is required. If the animals are not required by the regulations to be officially identified, the ICVI must state the exemption that applies (e.g., the cattle and bison do not belong to one of the classes of cattle and bison to which the official identification requirements of 9 CFR part 86 apply). If the animals are required to be officially identified but the identification number does not have to be recorded on the ICVI, the ICVI must state that all animals to be moved under the ICVI are officially identified.

(b) As an alternative to typing or writing individual animal identification on an ICVI, if agreed to by the receiving State or Tribe, another document may be used to provide this information, but only under the following conditions:

(1) The document must be a State form or APHIS form that requires individual identification of animals or a printout of official identification numbers generated by computer or other means;

(2) A legible copy of the document must be stapled to the original and each copy of the ICVI;

(3) Each copy of the document must identify each animal to be moved with the ICVI, but any information pertaining to other animals, and any unused space on the document for recording animal identification, must be crossed out in ink; and

(4) The following information must be written in ink in the identification column on the original and each copy of the ICVI and must be circled or boxed, also in ink, so that no additional information can be added:

(i) The name of the document; and

(ii) Either the unique serial number on the document or, if the document is not imprinted with a serial number, both the name of the person who prepared the document and the date the document was signed.

Livestock. All farm-raised animals.

Location-based numbering system. The location-based number system combines a State or Tribal issued location identification (LID) number or a premises identification number (PIN) with a producer's unique livestock production numbering system to provide a nationally unique and herd-unique identification number for an animal.

Location identification (LID) number. A nationally unique number issued by a State, Tribal, and/or Federal animal health authority to a location as determined by the State or Tribe in which it is issued. The LID number may be used in conjunction with a producer's own unique livestock production numbering system to provide a nationally unique and herd-unique identification number for an animal. It may also be used as a component of a group/lot identification number (GIN).

Move. To carry, enter, import, mail, ship, or transport; to aid, abet, cause, or induce carrying, entering, importing, mailing, shipping, or transporting; to offer to carry, enter, import, mail, ship, or transport; to receive in order to carry, enter, import, mail, ship, or transport; or to allow any of these activities.

National Uniform Eartagging System (NUES). A numbering system for the official identification of individual animals in the United States that provides a nationally unique identification number for each animal.

Official eartag. An identification tag approved by APHIS that bears an official identification number for individual animals. Beginning March 11, 2014, all official eartags manufactured must bear an official eartag shield. Beginning March 11, 2015, all official eartags applied to animals must bear an official eartag shield. The design, size, shape, color, and other characteristics of the official eartag will depend on the needs of the users, subject to the approval of the Administrator. The official eartag must be tamper-resistant and have a high retention rate in the animal.

Official eartag shield. The shield-shaped graphic of the U.S. Route Shield with ''U.S.'' or the State postal abbreviation or Tribal alpha code imprinted within the shield.

Official identification number. A nationally unique number that is permanently associated with an animal or group of animals and that adheres to one of the following systems:

(1) National Uniform Eartagging System (NUES).

(2) Animal identification number (AIN).

(3) Flock-based number system.

(4) Location-based number system.

(5) Any other numbering system approved by the Administrator for the official identification of animals.

* * * * *

Premises identification number (PIN). A nationally unique number assigned by a State, Tribal, and/or Federal animal health authority to a premises that is, in the judgment of the State, Tribal, and/or Federal animal health authority a geographically distinct location from other premises. The PIN may be used in conjunction with a producer's own livestock production numbering system to provide a nationally unique and herd-unique identification number for an animal. It may be used as a component of a group/lot identification number (GIN).

Recognized slaughtering establishment. Any slaughtering facility operating under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), or State meat or poultry inspection acts that is approved in accordance with 9 CFR 71.21.

* * * * *

United States Department of Agriculture (USDA) approved backtag. A backtag issued by APHIS that provides a temporary unique identification for each animal.

* * * * *

■ 8. Section 77.5 is amended by removing the definition of *approved slaughtering establishment* and adding a definition of *recognized slaughtering establishment* in alphabetical order to read as follows:

§ 77.5 Definitions.

* * * * *

Recognized slaughtering establishment. Any slaughtering facility operating under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), or State meat or poultry inspection acts that is approved in accordance with 9 CFR 71.21.

* * * * *

■ 9. Section 77.8 is revised to read as follows:

§ 77.8 Interstate movement from accredited-free States and zones.

Cattle or bison that originate in an accredited-free State or zone may be moved interstate in accordance with 9 CFR part 86 without further restriction under this part.

■ 10. Section 77.10 is revised to read as follows:

§ 77.10 Interstate movement from modified accredited advanced States and zones.

Cattle or bison that originate in a modified accredited advanced State or zone, and that are not known to be infected with or exposed to tuberculosis, may be moved interstate only in accordance with 9 CFR part 86 and, if moved anywhere other than directly to slaughter at a recognized slaughtering establishment, under one of the following additional conditions:

(a) The cattle or bison are sexually intact heifers moved to an approved feedlot, or are steers or spayed heifers, and are officially identified.

(b) The cattle or bison are from an accredited herd, are officially identified, and are accompanied by an ICVI stating

that the accredited herd completed the testing necessary for accredited status with negative results within 1 year prior to the date of movement.

(c) The cattle or bison are sexually intact animals; are not from an accredited herd; are officially identified; and are accompanied by an ICVI stating that they were negative to an official tuberculin test conducted within 60 days prior to the date of movement.

(Approved by the Office of Management and Budget under control numbers 0579–0146, 0579–0220, and 0579–0229)

■ 11. Section 77.12 is revised to read as follows:

§ 77.12 Interstate movement from modified accredited States and zones.

Cattle or bison that originate in a modified accredited State or zone, and that are not known to be infected with or exposed to tuberculosis, may be moved interstate only in accordance with 9 CFR part 86 and, if moved anywhere other than directly to slaughter at a recognized slaughtering establishment, under one of the following additional conditions:

(a) The cattle or bison are sexually intact heifers moved to an approved feedlot, or are steers or spayed heifers; are officially identified, and are accompanied by an ICVI stating that they were classified negative to an official tuberculin test conducted within 60 days prior to the date of movement.

(b) The cattle or bison are from an accredited herd, are officially identified, and are accompanied by an ICVI stating that the accredited herd completed the testing necessary for accredited status with negative results within 1 year prior to the date of movement.

(c) The cattle or bison are sexually intact animals; are not from an accredited herd; are officially identified; and are accompanied by an ICVI stating that the herd from which they originated was negative to a whole herd test conducted within 1 year prior to the date of movement and that the individual animals to be moved were negative to an additional official tuberculin test conducted within 60 days prior to the date of movement, except that the additional test is not required if the animals are moved interstate within 60 days following the whole herd test.

(Approved by the Office of Management and Budget under control number 0579–0146)

■ 12. Section 77.14 is revised to read as follows:

§ 77.14 Interstate movement from accreditation preparatory States and zones.

Cattle or bison that originate in an accreditation preparatory State or zone, and that are not known to be infected with or exposed to tuberculosis, may be moved interstate only in accordance with 9 CFR part 86 and, if moved anywhere other than directly to slaughter at a recognized slaughtering establishment, under one of the following additional conditions:

(a) The cattle or bison are sexually intact heifers moved to an approved feedlot, or are steers or spayed heifers; are officially identified; and are accompanied by an ICVI stating that the herd from which they originated was negative to a whole herd test conducted within 1 year prior to the date of movement and that the individual animals to be moved were negative to an additional official tuberculin test conducted within 60 days prior to the date of movement; *Except that:* The additional test is not required if the animals are moved interstate within 6 months following the whole herd test.

(b) The cattle or bison are from an accredited herd; are officially identified; and are accompanied by an ICVI stating that the accredited herd completed the testing necessary for accredited status with negative results within 1 year prior to the date of movement and that the animals to be moved were negative to an official tuberculin test conducted within 60 days prior to the date of movement.

(c) The cattle or bison are sexually intact animals; are not from an accredited herd; are officially identified; and are accompanied by an ICVI stating that the herd from which they originated was negative to a whole herd test conducted within 1 year prior to the date of movement and that the individual animals to be moved were negative to two additional official tuberculin tests conducted at least 60 days apart and no more than 6 months apart, with the second test conducted within 60 days prior to the date of movement; *Except that:* The second additional test is not required if the animals are moved interstate within 60 days following the whole herd test.

(Approved by the Office of Management and Budget under control number 0579–0146)

§ 77.16 [Amended]

■ 13. Section 77.16 is amended by removing the words ''an approved'' and adding the words ''a recognized'' in their place.

§ 77.17 [Amended]

■ 14. Section 77.17 is amended as follows:

■ a. In paragraphs (a) introductory text and (b) introductory text, by removing the words ''an approved'' and adding the words ''a recognized'' in their place.

■ b. In paragraph (a)(4), by removing the words ''transportation document'' and adding the words ''VS Form 1–27'' in their place.

■ c. In paragraph (c), by removing the words ''to an approved slaughtering establishment'' and adding the words ''to a recognized slaughtering establishment in accordance with 9 CFR part 86'' in their place.

■ 15. Section 77.23 is revised to read as follows:

§ 77.23 Interstate movement from accredited-free States and zones.

Notwithstanding any other provisions of this part, captive cervids that originate in an accredited-free State or zone may be moved interstate in accordance with 9 CFR part 86 and without further restriction under this part.

■ 16. Section 77.25 is revised to read as follows:

§ 77.25 Interstate movement from modified accredited advanced States and zones.

Captive cervids that originate in a modified accredited advanced State or zone, and that are not known to be infected with or exposed to tuberculosis, may be moved interstate only in accordance with 9 CFR part 86 and, if moved anywhere other than directly to slaughter at a recognized slaughtering establishment, under one of the following additional conditions:

(a) The captive cervids are from an accredited herd, qualified herd, or monitored herd; are officially identified; and are accompanied by an ICVI stating that the herd completed the requirements for accredited herd, qualified herd, or monitored herd status within 24 months prior to the date of movement.

(b) The captive cervids are officially identified and are accompanied by an ICVI stating that they were negative to an official tuberculin test conducted within 90 days prior to the date of movement.

(Approved by the Office of Management and Budget under control number 0579–0146)

■ 17. Section 77.27 is revised to read as follows:

§ 77.27 Interstate movement from modified accredited States and zones.

Except for captive cervids from a qualified herd or monitored herd, as provided in §§ 77.36 and 77.37, respectively, captive cervids that originate in a modified accredited State or zone, and that are not known to be

infected with or exposed to tuberculosis, may be moved interstate only in accordance with 9 CFR part 86 and, if moved anywhere other than directly to slaughter at a recognized slaughtering establishment, under one of the following additional conditions:

(a) The captive cervids are from an accredited herd, are officially identified, and are accompanied by an ICVI stating that the accredited herd completed the testing necessary for accredited status with negative results within 24 months prior to the date of movement.

(b) The captive cervids are sexually intact animals; are not from an accredited herd; are officially identified; and are accompanied by an ICVI stating that the herd from which they originated was negative to a whole herd test conducted within 1 year prior to the date of movement and that the individual animals to be moved were negative to an additional official tuberculin test conducted within 90 days prior to the date of movement; *Except that:* The additional test is not required if the animals are moved interstate within 6 months following the whole herd test.

(Approved by the Office of Management and Budget under control number 0579–0146)

■ 18. Section 77.29 is revised to read as follows:

§ 77.29 Interstate movement from accreditation preparatory States and zones.

Except for captive cervids from a qualified herd or monitored herd, as provided in §§ 77.36 and 77.37, respectively, captive cervids that originate in an accreditation preparatory State or zone, and that are not known to be infected with or exposed to tuberculosis, may be moved interstate only in accordance with 9 CFR part 86 and, if moved anywhere other than directly to slaughter at a recognized slaughtering establishment, under one of the following additional conditions:

(a) The captive cervids are from an accredited herd; are officially identified; and are accompanied by an ICVI stating that the accredited herd completed the testing necessary for accredited status with negative results within 24 months prior to the date of movement and that the individual animals to be moved were negative to an official tuberculin test conducted within 90 days prior to the date of movement.

(b) The captive cervids are sexually intact animals; are not from an accredited herd; are officially identified; and are accompanied by an ICVI stating that the herd from which they originated was negative to a whole herd test conducted within 1 year prior to the date of movement and that the individual animals to be moved were negative to two additional official tuberculin tests conducted at least 90 days apart and no more than 6 months apart, with the second test conducted within 90 days prior to the date of movement; *Except that:* The second additional test is not required if the animals are moved interstate within 6 months following the whole herd test.

(Approved by the Office of Management and Budget under control number 0579–0146)

§ 77.31 [Amended]

■ 19. Section 77.31 is amended by removing the words ''an approved'' and adding the words ''a recognized'' in their place.

§ 77.32 [Amended]

■ 20. Section 77.32 is amended as follows:

■ a. In paragraph (a), by removing the words ''§§ 77.25(a), 77.27(a), 77.29(a), and 77.31(d)'' and adding the words ''9 CFR part 86'' in their place.

■ b. In paragraph (c), by removing the words ''accompanied by a certificate'' and adding the words ''officially identified and accompanied by an ICVI'' in their place.

■ 21. In § 77.35, paragraph (b) is revised to read as follows:

§ 77.35 Interstate movement from accredited herds.

* * * * *

(b) *Movement allowed.* Except as provided in § 77.23 with regard to captive cervids that originate in an accredited-free State or zone, and except as provided in § 77.31 with regard to captive cervids that originate in a nonaccredited State or zone, a captive cervid from an accredited herd may be moved interstate without further tuberculosis testing only if it is officially identified and is accompanied by an ICVI, as provided in § 77.32(c), that includes a statement that the captive cervid is from an accredited herd. If a group of captive cervids from an accredited herd is being moved interstate together to the same destination, all captive cervids in the group may be moved under one ICVI.

* * * * *

■ 22. In § 77.36, paragraphs (b)(2), (b)(3), and (b)(4) are revised to read as follows:

§ 77.36 Interstate movement from qualified herds.

* * * * *

(b) * * *

(2) The captive cervid is officially identified and is accompanied by an ICVI, as provided in § 77.32(c), that includes a statement that the captive cervid is from a qualified herd. Except as provided in paragraphs (b)(3) and (b)(4) of this section, the ICVI must also state that the captive cervid has tested negative to an official tuberculosis test conducted within 90 days prior to the date of movement. If a group of captive cervids from a qualified herd is being moved interstate together to the same destination, all captive cervids in the group may be moved under one ICVI.

(3) Captive cervids under 1 year of age that are natural additions to the qualified herd or that were born in and originate from a classified herd may move without testing, provided that they are officially identified and that the ICVI accompanying them states that the captive cervids are natural additions to the qualified herd or were born in and originated from a classified herd and have not been exposed to captive cervids from an unclassified herd.

(4) Captive cervids being moved interstate for the purpose of exhibition only may be moved without testing, provided they are returned to the premises of origin no more than 90 days after leaving the premises, have no contact with other livestock during movement and exhibition, are officially identified, and are accompanied by an ICVI that includes a statement that the captive cervid is from a qualified herd and will otherwise meet the requirements of this paragraph.

* * * * *

■ 23. In § 77.37, paragraphs (b)(2) and (b)(3) are revised to read as follows:

§ 77.37 Interstate movement from monitored herds.

* * * * *

(b) * * *

(2) The captive cervid is officially identified and is accompanied by an ICVI, as provided in § 77.32(c), that includes a statement that the captive cervid is from a monitored herd. Except as provided in paragraph (b)(3) of this section, the ICVI must also state that the captive cervid has tested negative to an official tuberculosis test conducted within 90 days prior to the date of movement. If a group of captive cervids from a monitored herd is being moved interstate together to the same destination, all captive cervids in the group may be moved under one ICVI.

(3) Captive cervids under 1 year of age that are natural additions to the monitored herd or that were born in and originate from a classified herd may move without testing, provided that they are officially identified and that the ICVI accompanying them states that the captive cervids are natural additions to the monitored herd or were born in and

originated from a classified herd and have not been exposed to captive cervids from an unclassified herd.

* * * * *

§ 77.40 [Amended]

■ 24. In § 77.40, paragraph (a)(3) is amended by removing the words ''an approved'' and adding the words ''a recognized'' in their place.

PART 78—BRUCELLOSIS

■ 25. The authority citation for part 78 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

■ 26. Section 78.1 is amended by revising the definitions of *animal identification number (AIN*), *dairy cattle, directly, market cattle identification test cattle, official eartag, officially identified,* and *recognized slaughtering establishment,* removing the definitions of *certificate, official identification device or method,* and *rodeo bulls,* and adding definitions of *commuter herd, commuter herd agreement, interstate certificate of veterinary inspection (ICVI), location-based numbering system, location identification (LID) number, National Uniform Eartagging System (NUES), official eartag shield, official identification number,* and *rodeo cattle* in alphabetical order to read as follows:

§ 78.1 Definitions.

* * * * *

Animal identification number (AIN). A numbering system for the official identification of individual animals in the United States that provides a nationally unique identification number for each animal. The AIN consists of 15 digits, with the first 3 being the country code (840 for the United States or a unique country code for any U.S. territory that has such a code and elects to use it in place of the 840 code). The alpha characters USA or the numeric code assigned to the manufacturer of the identification device by the International Committee on Animal Recording may be used as an alternative to the 840 or other prefix representing a U.S territory; however, only the AIN beginning with the 840 or other prefix representing a U.S. territory will be recognized as official for use on AIN tags applied to animals on or after March 11, 2015. The AIN beginning with the 840 prefix may not be applied to animals known to have been born outside the United States.

* * * * *

Commuter herd. A herd of cattle or bison moved interstate during the course of normal livestock management operations and without change of ownership directly between two premises, as provided in a commuter herd agreement.

Commuter herd agreement. A written agreement between the owner(s) of a herd of cattle or bison and the animal health officials for the States or Tribes of origin and destination specifying the conditions required for the interstate movement from one premises to another in the course of normal livestock management operations and specifying the time period, up to 1 year, that the agreement is effective. A commuter herd agreement may be renewed annually.

* * * * *

Dairy cattle. All cattle, regardless of age or sex or current use, that are of a breed(s) used to produce milk or other dairy products for human consumption, including, but not limited to, Ayrshire, Brown Swiss, Holstein, Jersey, Guernsey, Milking Shorthorn, and Red and Whites.

* * * * *

Directly. Moved in a means of conveyance, without stopping to unload while en route, except for stops of less than 24 hours to feed, water or rest the animals being moved, and with no commingling of animals at such stops.

* * * * *

Interstate certificate of veterinary inspection (ICVI). An official document issued by a Federal, State, Tribal, or accredited veterinarian certifying the inspection of animals in preparation for interstate movement.

(1) The ICVI must show the species of animals covered by the ICVI; the number of animals covered by the ICVI; the purpose for which the animals are to be moved; the address at which the animals were loaded for interstate movement; the address to which the animals are destined; and the names of the consignor and the consignee and their addresses if different from the address at which the animals were loaded or the address to which the animals are destined. Additionally, unless the species-specific requirements for ICVIs provide an exception, the ICVI must list the official identification number of each animal, except as provided in paragraph (2) of this definition, or group of animals moved that is required to be officially identified, or, if an alternative form of identification has been agreed upon by the sending and receiving States, the ICVI must include a record of that identification. If animals moving under a GIN also have individual official identification, only the GIN must be listed on the ICVI. An ICVI may not be issued for any animal that is not officially identified if official identification is required. If the animals are not required by the regulations to be officially identified, the ICVI must state the exemption that applies (e.g., the cattle and bison do not belong to one of the classes of cattle and bison to which the official identification requirements of 9 CFR part 86 apply). If the animals are required to be officially identified but the identification number does not have to be recorded on the ICVI, the ICVI must state that all animals to be moved under the ICVI are officially identified.

(2) As an alternative to typing or writing individual animal identification on an ICVI, if agreed to by the receiving State or Tribe, another document may be used to provide this information, but only under the following conditions:

(i) The document must be a State form or APHIS form that requires individual identification of animals or a printout of official identification numbers generated by computer or other means;

(ii) A legible copy of the document must be stapled to the original and each copy of the ICVI;

(iii) Each copy of the document must identify each animal to be moved with the ICVI, but any information pertaining to other animals, and any unused space on the document for recording animal identification, must be crossed out in ink; and

(iv) The following information must be written in ink in the identification column on the original and each copy of the ICVI and must be circled or boxed, also in ink, so that no additional information can be added:

(A) The name of the document; and

(B) Either the unique serial number on the document or, if the document is not imprinted with a serial number, both the name of the person who prepared the document and the date the document was signed.

Location-based number system. The location-based number system combines a State or Tribal issued location identification (LID) number or a premises identification number (PIN) with a producer's unique livestock production numbering system to provide a nationally unique and herd-unique identification number for an animal.

Location identification (LID) number. A nationally unique number issued by a State, Tribal, and/or Federal animal health authority to a location as determined by the State or Tribe in which it is issued. The LID number may be used in conjunction with a producer's own unique livestock production numbering system to

provide a nationally unique and herd-unique identification number for an animal. It may also be used as a component of a group/lot identification number (GIN).

Market cattle identification test cattle. Cows and bulls 18 months of age or over which have been moved to recognized slaughtering establishments, and test-eligible cattle which are subjected to an official test for the purposes of movement at farms, ranches, auction markets, stockyards, quarantined feedlots, or other assembly points. Such cattle must be identified with an official identification device as specified in § 86.4(a) of this chapter prior to or at the first market, stockyard, quarantined feedlot, or slaughtering establishment they reach.

* * * * *

National Uniform Eartagging System (NUES). A numbering system for the official identification of individual animals in the United States that provides a nationally unique identification number for each animal.

* * * * *

Official eartag. An identification tag approved by APHIS that bears an official identification number for individual animals. Beginning March 11, 2014, all official eartags manufactured must bear an official eartag shield. Beginning March 11, 2015, all official eartags applied to animals must bear an official eartag shield. The design, size, shape, color, and other characteristics of the official eartag will depend on the needs of the users, subject to the approval of the Administrator. The official eartag must be tamper-resistant and have a high retention rate in the animal.

Official eartag shield. The shield-shaped graphic of the U.S. Route Shield with ''U.S.'' or the State postal abbreviation or Tribal alpha code imprinted within the shield.

* * * * *

Official identification number. A nationally unique number that is permanently associated with an animal or group of animals and that adheres to one of the following systems:

(1) National Uniform Eartagging System.

(2) Animal identification number (AIN).

(3) Location-based number system.

(4) Flock-based number system.

(5) Any other numbering system approved by the Administrator for the official identification of animals.

Officially identified. Identified by means of an official identification device or method approved by the Administrator.

* * * * *

Recognized slaughtering establishment. Any slaughtering facility operating under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), or State meat or poultry inspection acts that is approved in accordance with 9 CFR 71.21.

Rodeo cattle. Cattle used at rodeos or competitive events.

* * * * *

■ 27. Section 78.2 is revised to read as follows:

§ 78.2 Handling of certificates, permits, and ''S'' brand permits for interstate movement of animals.

(a) Any ICVI, other interstate movement document used in lieu of an ICVI, permit, or ''S'' brand permit required by this part for the interstate movement of animals shall be delivered to the person moving the animals by the shipper or shipper's agent at the time the animals are delivered for movement and shall accompany the animals to their destination and be delivered to the consignee or the person receiving the animals.

(b) The APHIS representative, State representative, Tribal representative, or accredited veterinarian issuing an ICVI or other interstate movement document used in lieu of an ICVI or a permit, except for permits for entry and ''S'' brand permits, that is required for the interstate movement of animals under this part shall forward a copy of the ICVI, other interstate movement document used in lieu of an ICVI, or permit to the State animal health official of the State of origin within 5 working days. The State animal health official of the State of origin shall forward a copy of the ICVI, other interstate movement document used in lieu of an ICVI, or permit to the State animal health official of the State of destination within 5 working days.

(Approved by the Office of Management and Budget under control number 0579–0047)

■ 28. Section 78.5 is revised to read as follows:

§ 78.5 General restrictions.

Cattle may not be moved interstate except in compliance with this subpart and with 9 CFR part 86. Cattle moved interstate under permit in accordance with this subpart are not required to be accompanied by an interstate certificate of veterinary inspection or owner-shipper statement.

■ 29. Section 78.6 is revised to read as follows:

§ 78.6 Steers and spayed heifers.

Steers and spayed heifers may be moved interstate in accordance with 9 CFR part 86 and without further restriction under this subpart.

■ 30. Section 78.9 is amended as follows:

■ a. In the introductory text, by revising the first sentence to read as set forth below.

■ b. By revising paragraphs (a)(3)(ii), (a)(3)(iii), (b)(3)(i), (b)(3)(ii), (b)(3)(iv), (c)(1)(i), (c)(1)(ii), (c)(1)(iv)(A), (c)(1)(vi)(A), (c)(2)(ii)(A), (c)(3)(i), (c)(3)(ii), (c)(3)(iv), (d)(1)(i), (d)(1)(ii), (d)(1)(iv)(A), (d)(1)(vi)(A), (d)(2)(ii)(A), and (d)(3) to read as set forth below.

§ 78.9 Cattle from herds not known to be affected.

Male cattle which are not test eligible and are from herds not known to be affected may be moved interstate without further restriction under this subpart. * * *

(a) * * *

(3) * * *

(ii) Such cattle are moved interstate as part of a commuter herd in accordance with a commuter herd agreement or other documents as agreed to by the shipping and receiving States or Tribes.

(iii) Such cattle are moved interstate accompanied by an ICVI which states, in addition to the items specified in § 78.1, that the cattle originated in a Class Free State or area.

(b) * * *

(3) * * *

(i) Such cattle originate in a certified brucellosis-free herd and are accompanied interstate by an ICVI which states, in addition to the items specified in § 78.1, that the cattle originated in a certified brucellosis-free herd; or

(ii) Such cattle are negative to an official test within 30 days prior to such interstate movement and are accompanied interstate by an ICVI which states, in addition to the items specified in § 78.1, the test dates and results of the official tests; or

* * * * *

(iv) Such cattle are moved as part of a commuter herd in accordance with a commuter herd agreement or other documents as agreed to by the shipping and receiving States or Tribes..

(c) * * *

(1) * * * (i) Such cattle may be moved interstate from a farm of origin or a nonquarantined feedlot directly to a recognized slaughtering establishment without further restriction under this subpart.

(ii) Such cattle may be moved interstate from a farm of origin directly

to an approved intermediate handling facility without further restriction under this subpart.

* * * * *

(iv) * * *

(A) They are negative to an official test conducted at the specifically approved stockyard and are accompanied to slaughter by an ICVI or ''S'' brand permit which states, in addition to the items specified in § 78.1, the test dates and results of the official tests; or

* * * * *

(vi) * * *

(A) They are negative to an official test within 30 days prior to such interstate movement and are accompanied by an ICVI or ''S'' brand permit which states, in addition to the items specified in § 78.1, the test dates and results of the official tests; or

* * * * *

(2) * * *

(ii) * * *

(A) They are negative to an official test within 30 days prior to such movement and are accompanied by an ICVI which states, in addition to the items specified in § 78.1, the test dates and results of the official tests; or

* * * * *

(3) * * *

(i) Such cattle originate in a certified brucellosis-free herd and are accompanied interstate by an ICVI which states, in addition to the items specified in § 78.1, that the cattle originated in a certified brucellosis-free herd; or

(ii) Such cattle are negative to an official test within 30 days prior to interstate movement, have been issued a permit for entry, and are accompanied interstate by an ICVI which states, in addition to the items specified in § 78.1, the test dates and results of the official tests; or

* * * * *

(iv) Such cattle are moved interstate as part of a commuter herd in accordance with a commuter herd agreement or other documents as agreed to by the shipping and receiving States or Tribes, and

(A) The cattle being moved originate from a herd in which:

(*1*) All the cattle were negative to a herd blood test within 1 year prior to the interstate movement;

(*2*) Any cattle added to the herd after such herd blood test were negative to an official test within 30 days prior to the date the cattle were added to the herd;

(*3*) None of the cattle in the herd have come in contact with any other cattle; and (B) The cattle are accompanied interstate by a document which states the dates and results of the herd blood test and the name of the laboratory in which the official tests were conducted

* * * * *

(d) * * *

(1) * * * (i) Such cattle may be moved interstate from a farm of origin or a nonquarantined feedlot directly to a recognized slaughtering establishment without further restriction under this subpart.

(ii) Such cattle may be moved interstate from a farm of origin directly to an approved intermediate handling facility without further restriction under this subpart.

* * * * *

(iv) * * *

(A) They are negative to an official test conducted at the specifically approved stockyard and are accompanied by an ICVI or ''S'' brand permit which states, in addition to the items specified in § 78.1, the test dates and results of the official tests; or

* * * * *

(vi) * * *

(A) They are negative to an official test within 30 days prior to such interstate movement and are accompanied by an ICVI or ''S'' brand permit which states, in addition to the items specified in § 78.1, the test dates and results of the official tests; or

* * * * *

(2) * * *

(ii) * * *

(A) They are negative to an official test within 30 days prior to such movement and are accompanied by an ICVI which states, in addition to the items specified in § 78.1, the test dates and results of the official tests; or

* * * * *

(3) *Movement other than in accordance with paragraphs (d)(1) or (2) of this section.* Such cattle may be moved interstate other than in accordance with paragraphs (d)(1) or (2) of this section only if such cattle originate in a certified brucellosis-free herd and are accompanied interstate by an ICVI which states, in addition to the items specified in § 78.1, that the cattle originated in a certified brucellosis-free herd.

* * * * *

§ 78.12 [Amended]

■ 31. Section 78.12 is amended as follows:

■ a. In the introductory text, by adding the words '', 9 CFR part 86,'' after the citation ''§ 78.10''.

■ b. In paragraph (a), by adding the word ''further'' after the word ''without''.

■ c. In paragraphs (d)(1)(i), (d)(2)(i), and (d)(3)(ii), by removing the words ''a certificate'' and adding the words ''an ICVI'' in their place each time they occur.

■ 32. Section 78.14 is revised to read as follows:

§ 78.14 Rodeo cattle.

(a) Rodeo cattle that are test-eligible and that are from a herd not known to be affected may be moved interstate if:

(1) They are classified as brucellosis negative based upon an official test conducted less than 365 days before the date of interstate movement: *Provided, however, That:* The official test is not required for rodeo cattle that are moved only between Class Free States;

(2) The cattle are identified with an official eartag or any other official identification device or method approved by the Administrator in accordance with § 78.5;

(3) There is no change of ownership since the date of the last official test;

(4) An ICVI accompanies each interstate movement of the cattle; and

(5) A permit for entry is issued for each interstate movement of the cattle.

(b) Cattle that would qualify as rodeo cattle, but that are used for breeding purposes during the 365 days following the date of being tested, may be moved interstate only if they meet the requirements for cattle in this subpart and in 9 CFR part 86.

(Approved by the Office of Management and Budget under control number 0579–0047)

§ 78.20 [Amended]

■ 33. Section 78.20 is amended by adding the words ''and with 9 CFR part 86'' after the word ''subpart''.

§ 78.21 [Amended]

■ 34. Section 78.21 is amended by adding the word ''further'' after the word ''without''.

■ 35. Section 78.23, paragraph (c) introductory text, is revised to read as follows:

§ 78.23 Brucellosis exposed bison.

* * * * *

(c) *Movement other than in accordance with paragraphs (a) or (b) of this section.* Brucellosis exposed bison which are from herds known to be affected, but which are not part of a herd being depopulated under part 51 of this chapter, may move without further restriction under this subpart if the bison:

* * * * *

§ 78.24 [Amended]

■ 36. Section 78.24 is amended as follows:

■ a. In paragraphs (a) and (b), by adding the word ''further'' after the word ''without'' each time it occurs.

■ b. In paragraphs (d)(1), (d)(2), (d)(3), and (d)(4), by removing the words ''a certificate'' and adding the words ''an ICVI'' in their place each time they occur.

■ 37. A new part 86 is added to subchapter C to read as follows:

PART 86—ANIMAL DISEASE TRACEABILITY

Sec.
86.1 Definitions.
86.2 General requirements for traceability.
86.3 Recordkeeping requirements.
86.4 Official identification.
86.5 Documentation requirements for interstate movement of covered livestock.
86.6 [Reserved]
86.7 [Reserved]
86.8 Preemption.

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

§ 86.1 Definitions.

Animal identification number (AIN). A numbering system for the official identification of individual animals in the United States that provides a nationally unique identification number for each animal. The AIN consists of 15 digits, with the first 3 being the country code (840 for the United States or a unique country code for any U.S. territory that has such a code and elects to use it in place of the 840 code). The alpha characters USA or the numeric code assigned to the manufacturer of the identification device by the International Committee on Animal Recording may be used as an alternative to the 840 or other prefix representing a U.S. territory; however, only the AIN beginning with the 840 or other prefix representing a U.S. territory will be recognized as official for use on AIN tags applied to animals on or after March 11, 2015. The AIN beginning with the 840 prefix may not be applied to animals known to have been born outside the United States.

Approved livestock facility. A stockyard, livestock market, buying station, concentration point, or any other premises under State or Federal veterinary inspection where livestock are assembled and that has been approved under § 71.20 of this chapter.

Approved tagging site. A premises, authorized by APHIS, State, or Tribal animal health officials, where livestock may be officially identified on behalf of their owner or the person in possession, care, or control of the animals when they are brought to the premises.

Commuter herd. A herd of cattle or bison moved interstate during the course of normal livestock management operations and without change of ownership directly between two premises, as provided in a commuter herd agreement.

Commuter herd agreement. A written agreement between the owner(s) of a herd of cattle or bison and the animal health officials for the States or Tribes of origin and destination specifying the conditions required for the interstate movement from one premises to another in the course of normal livestock management operations and specifying the time period, up to 1 year, that the agreement is effective. A commuter herd agreement may be renewed annually.

Covered livestock. Cattle and bison, horses and other equine species, poultry, sheep and goats, swine, and captive cervids.

Dairy cattle. All cattle, regardless of age or sex or current use, that are of a breed(s) used to produce milk or other dairy products for human consumption, including, but not limited to, Ayrshire, Brown Swiss, Holstein, Jersey, Guernsey, Milking Shorthorn, and Red and Whites.

Directly. Moved in a means of conveyance, without stopping to unload while en route, except for stops of less than 24 hours to feed, water, or rest the animals being moved, and with no commingling of animals at such stops.

Flock-based number system. The flock-based number system combines a flock identification number (FIN) with a producer's unique livestock production numbering system to provide a nationally unique identification number for an animal.

Flock identification number (FIN). A nationally unique number assigned by a State, Tribal, or Federal animal health authority to a group of animals that are managed as a unit on one or more premises and are under the same ownership.

Group/lot identification number (GIN). The identification number used to uniquely identify a ''unit of animals'' of the same species that is managed together as one group throughout the preharvest production chain. When a GIN is used, it is recorded on documents accompanying the animals moving interstate; it is not necessary to have the GIN attached to each animal.

Interstate certificate of veterinary inspection (ICVI). An official document issued by a Federal, State, Tribal, or accredited veterinarian certifying the inspection of animals in preparation for interstate movement.

(a) The ICVI must show the species of animals covered by the ICVI; the number of animals covered by the ICVI; the purpose for which the animals are to be moved; the address at which the animals were loaded for interstate movement; the address to which the animals are destined; and the names of the consignor and the consignee and their addresses if different from the address at which the animals were loaded or the address to which the animals are destined. Additionally, unless the species-specific requirements for ICVIs provide an exception, the ICVI must list the official identification number of each animal, except as provided in paragraph (b) of this definition, or group of animals moved that is required to be officially identified, or, if an alternative form of identification has been agreed upon by the sending and receiving States, the ICVI must include a record of that identification. If animals moving under a GIN also have individual official identification, only the GIN must be listed on the ICVI. An ICVI may not be issued for any animal that is not officially identified if official identification is required. If the animals are not required by the regulations to be officially identified, the ICVI must state the exemption that applies (e.g., the cattle and bison do not belong to one of the classes of cattle and bison to which the official identification requirements of this part apply). If the animals are required to be officially identified but the identification number does not have to be recorded on the ICVI, the ICVI must state that all animals to be moved under the ICVI are officially identified.

(b) As an alternative to typing or writing individual animal identification on an ICVI, if agreed to by the receiving State or Tribe, another document may be used to provide this information, but only under the following conditions:

(1) The document must be a State form or APHIS form that requires individual identification of animals or a printout of official identification numbers generated by computer or other means;

(2) A legible copy of the document must be stapled to the original and each copy of the ICVI;

(3) Each copy of the document must identify each animal to be moved with the ICVI, but any information pertaining to other animals, and any unused space on the document for recording animal identification, must be crossed out in ink; and

(4) The following information must be written in ink in the identification column on the original and each copy of the ICVI and must be circled or boxed, also in ink, so that no additional information can be added:

(i) The name of the document; and

(ii) Either the unique serial number on the document or, if the document is not imprinted with a serial number, both the name of the person who prepared the document and the date the document was signed.

Interstate movement. From one State into or through any other State.

Livestock. All farm-raised animals.

Location-based numbering system. The location-based number system combines a State or Tribal issued location identification (LID) number or a premises identification number (PIN) with a producer's unique livestock production numbering system to provide a nationally unique and herd-unique identification number for an animal.

Location identification (LID) number. A nationally unique number issued by a State, Tribal, and/or Federal animal health authority to a location as determined by the State or Tribe in which it is issued. The LID number may be used in conjunction with a producer's own unique livestock production numbering system to provide a nationally unique and herd-unique identification number for an animal. It may also be used as a component of a group/lot identification number (GIN).

Move. To carry, enter, import, mail, ship, or transport; to aid, abet, cause, or induce carrying, entering, importing, mailing, shipping, or transporting; to offer to carry, enter, import, mail, ship, or transport; to receive in order to carry, enter, import, mail, ship, or transport; or to allow any of these activities.

National Uniform Eartagging System (NUES). A numbering system for the official identification of individual animals in the United States that provides a nationally unique identification number for each animal.

Official eartag. An identification tag approved by APHIS that bears an official identification number for individual animals. Beginning March 11, 2014, all official eartags manufactured must bear an official eartag shield. Beginning March 11, 2015, all official eartags applied to animals must bear an official eartag shield. The design, size, shape, color, and other characteristics of the official eartag will depend on the needs of the users, subject to the approval of the Administrator. The official eartag must be tamper-resistant and have a high retention rate in the animal.

Official eartag shield. The shield-shaped graphic of the U.S. Route Shield with ''U.S.'' or the State postal abbreviation or Tribal alpha code imprinted within the shield.

Official identification device or method. A means approved by the Administrator of applying an official identification number to an animal of a specific species or associating an official identification number with an animal or group of animals of a specific species or otherwise officially identifying an animal or group of animals.

Official identification number. A nationally unique number that is permanently associated with an animal or group of animals and that adheres to one of the following systems:

(1) National Uniform Eartagging System (NUES).

(2) Animal identification number (AIN).

(3) Location-based number system.

(4) Flock-based number system.

(5) Any other numbering system approved by the Administrator for the official identification of animals.

Officially identified. Identified by means of an official identification device or method approved by the Administrator.

Owner-shipper statement. A statement signed by the owner or shipper of the livestock being moved stating the location from which the animals are moved interstate; the destination of the animals; the number of animals covered by the statement; the species of animal covered; the name and address of the owner at the time of the movement; the name and address of the shipper; and the identification of each animal, as required by the regulations, unless the regulations specifically provide that the identification does not have to be recorded.

Person. Any individual, corporation, company, association, firm, partnership, society, or joint stock company, or other legal entity.

Premises identification number (PIN). A nationally unique number assigned by a State, Tribal, and/or Federal animal health authority to a premises that is, in the judgment of the State, Tribal, and/or Federal animal health authority a geographically distinct location from other premises. The PIN may be used in conjunction with a producer's own livestock production numbering system to provide a nationally unique and herd-unique identification number for an animal. It may be used as a component of a group/lot identification number (GIN).

Recognized slaughtering establishment. Any slaughtering facility operating under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act

(21 U.S.C. 451 *et seq.*), or State meat or poultry inspection acts that is approved in accordance with 9 CFR 71.21.

United States Department of Agriculture (USDA) approved backtag. A backtag issued by APHIS that provides a temporary unique identification for each animal.

§ 86.2 General requirements for traceability.

(a) The regulations in this part apply only to covered livestock, as defined in § 86.1.

(b) No person may move covered livestock interstate or receive such livestock moved interstate unless the livestock meet all applicable requirements of this part.

(c) The regulations in this part will apply to the movement of covered livestock onto and from Tribal lands only when the movement is an interstate movement; i.e., when the movement is across a State line.

(d) In addition to meeting all applicable requirements of this part, all covered livestock moved interstate must be moved in compliance with all applicable provisions of APHIS program disease regulations (subchapter C of this chapter).

(e) The interstate movement requirements in this part do not apply to the movement of covered livestock if:

(1) The movement occurs entirely within Tribal land that straddles a State line and the Tribe has a separate traceability system from the States in which its lands are located; or

(2) The movement is to a custom slaughter facility in accordance with Federal and State regulations for preparation of meat.

§ 86.3 Recordkeeping requirements.

(a) *Official identification device distribution records.* Any State, Tribe, accredited veterinarian, or other person or entity who distributes official identification devices must maintain for 5 years a record of the names and addresses of anyone to whom the devices were distributed.

(b) *Interstate movement records.* Approved livestock facilities must keep any ICVIs or alternate documentation that is required by this part for the interstate movement of covered livestock that enter the facility on or after March 11, 2013. For poultry and swine, such documents must be kept for at least 2 years, and for cattle and bison, sheep and goats, cervids, and equines, 5 years.

§ 86.4 Official identification.

(a) *Official identification devices and methods.* The Administrator has approved the following official

identification devices or methods for the species listed. The Administrator may authorize the use of additional devices or methods for a specific species if he or she determines that such additional devices or methods will provide for adequate traceability.

(1) *Cattle and bison.* Cattle and bison that are required to be officially identified for interstate movement under this part must be identified by means of:

(i) An official eartag; or

(ii) Brands registered with a recognized brand inspection authority and accompanied by an official brand inspection certificate, when agreed to by the shipping and receiving State or Tribal animal health authorities; or

(iii) Tattoos and other identification methods acceptable to a breed association for registration purposes, accompanied by a breed registration certificate, when agreed to by the shipping and receiving State or/Tribal animal health authorities; or

(iv) Group/lot identification when a group/lot identification number (GIN) may be used.

(2) *Horses and other equine species.* Horses and other equine species that are required to be officially identified for interstate movement under this part must be identified by one of the following methods:

(i) A description sufficient to identify the individual equine including, but not limited to, name, age, breed, color, gender, distinctive markings, and unique and permanent forms of identification when present (e.g., brands, tattoos, scars, cowlicks, blemishes or biometric measurements). When the identity of the equine is in question at the receiving destination, the State or Tribal animal health official in the State or Tribe of destination or APHIS representative may determine if the description provided is sufficient; or

(ii) Electronic identification that complies with ISO 11784/11785; or

(iii) Non-ISO electronic identification injected to the equine on or before March 11, 2014; or

(iv) Digital photographs sufficient to identify the individual equine; or

(v) For equines being commercially transported to slaughter, a device or method authorized by 88 of this chapter.

(3) *Poultry.* Poultry that are required to be officially identified for interstate movement under this part must be identified by one of the following methods:

(i) Sealed and numbered leg bands in the manner referenced in the National Poultry Improvement Plan regulations (parts 145 through 147 of this chapter); or

(ii) Group/lot identification when a group/lot identification number (GIN) may be used.

(4) *Sheep and goats.* Sheep and goats that are required to be officially identified for interstate movement under this part must be identified by a device or method authorized by part 79 of this chapter.

(5) *Swine.* Swine that are required to be officially identified for interstate movement under this part must be identified by a device or method authorized by § 71.19 of this chapter.

(6) *Captive cervids.* Captive cervids that are required to be officially identified for interstate movement under this part must be identified by a device or method authorized by part 77 of this chapter.

(b) *Official identification requirements for interstate movement*—(1) *Cattle and bison.* (i) All cattle and bison listed in paragraphs (b)(1)(iii)(A) through (b)(1)(iii)(D) of this section must be officially identified prior to the interstate movement, using an official identification device or method listed in paragraph (a)(1) of this section unless:

(A) The cattle and bison are moved as a commuter herd with a copy of the commuter herd agreement or other documents as agreed to by the shipping and receiving States or Tribes. If any of the cattle or bison are shipped to a State or Tribe not included in the commuter herd agreement or other documentation, then these cattle or bison must be officially identified and documented to the original State of origin.

(B) The cattle and bison are moved directly from a location in one State through another State to a second location in the original State.

(C) The cattle and bison are moved interstate directly to an approved tagging site and are officially identified before commingling with cattle and bison from other premises or identified by the use of backtags or other methods that will ensure that the identity of the animal is accurately maintained until tagging so that the official eartag can be correlated to the person responsible for shipping the animal to the approved tagging site.

(D) The cattle and bison are moved between shipping and receiving States or Tribes with another form of identification, as agreed upon by animal health officials in the shipping and receiving States or Tribes.

(ii) Cattle and bison may also be moved interstate without official identification if they are moved directly to a recognized slaughtering establishment or directly to no more than one approved livestock facility and then directly to a recognized slaughtering establishment, where they are harvested within 3 days of arrival; and

(A) They are moved interstate with a USDA-approved backtag; or

(B) A USDA-approved backtag is applied to the cattle or bison at the recognized slaughtering establishment or federally approved livestock facility.

(C) If a determination to hold the cattle or bison for more than 3 days is made after the animals arrive at the slaughter establishment, the animals must be officially identified in accordance with § 86.4(d)(4)(ii).

(iii) Beginning on March 11, 2013, all cattle and bison listed below are subject to the official identification requirements of this section:

(A) All sexually intact cattle and bison 18 months of age or over;

(B) All female dairy cattle of any age and all dairy males born after March 11, 2013;

(C) Cattle and bison of any age used for rodeo or recreational events; and

(D) Cattle and bison of any age used for shows or exhibitions.

(2) *Sheep and goats.* Sheep and goats moved interstate must be officially identified prior to the interstate movement unless they are exempt from official identification requirements under 9 CFR part 79 or are officially identified after the interstate movement, as provided in 9 CFR part 79.

(3) *Swine.* Swine moving interstate must be officially identified in accordance with § 71.19 of this chapter.

(4) *Horses and other equines.* Horses and other equines moving interstate moved interstate must be officially identified prior to the interstate movement, using an official identification device or method listed in paragraph (a)(2) of this section unless:

(i) They are used as the mode of transportation (horseback, horse and buggy) for travel to another location and then return direct to the original location.

(ii) They are moved from the farm or stable for veterinary medical examination or treatment and returned to the same location without change in ownership.

(iii) They are moved directly from a location in one State through another State to a second location in the original State.

(iv) They are moved between shipping and receiving States or Tribes with another form of identification as agreed upon by animal health officials in the shipping and receiving States or Tribes.

(5) *Poultry.* Poultry moving interstate must be officially identified prior to interstate movement unless:

(i) The shipment of poultry is from a hatchery to a redistributor or poultry

grower and the person responsible for receiving the shipment maintains a record of the supplier; or

(ii) The shipment is from a redistributor to a poultry grower and the person responsible for receiving the chicks maintains a record of the supplier of the chicks; or

(iii) The poultry are identified as agreed upon by the States or Tribes involved in the movement.

(6) *Captive cervids.* Captive cervids moving interstate must be officially identified prior to interstate movement in accordance with part 77 of this chapter.

(c) *Use of more than one official eartag.* Beginning on March 13, 2013, no more than one official eartag may be applied to an animal, except that:

(1) Another official eartag may be applied providing it bears the same official identification number as an existing one.

(2) In specific cases when the need to maintain the identity of an animal is intensified (e.g., such as for export shipments, quarantined herds, field trials, experiments, or disease surveys), a State or Tribal animal health official or an area veterinarian in charge may approve the application of an additional official eartag to an animal that already has one or more. The person applying the additional official eartag must record the following information about the event and maintain the record for 5 years: The date the additional official eartag is added; the reason for the additional official eartag device; and the official identification numbers of both the new official eartag and the one(s) already attached to the animal.

(3) An eartag with an animal identification number (AIN) beginning with the 840 prefix (either radio frequency identification or visual-only tag) may be applied to an animal that is already officially identified with one or more National Uniform Eartagging System tags and/or an official vaccination eartag used for brucellosis. The person applying the AIN eartag must record the date the AIN tag is added and the official identification numbers of both official eartags and must maintain those records for 5 years.

(4) A brucellosis vaccination eartag with a National Uniform Eartagging System number may be applied in accordance with part 78 of this chapter to an animal that is already officially identified with one or more official eartags under this part. The person applying the vaccination eartag must record the date the tag is added and the official identification numbers of both the existing official eartag(s) and the vaccination eartag and must maintain those records for 5 years.

(d) *Removal or loss of official identification devices.* (1) Official identification devices are intended to provide permanent identification of livestock and to ensure the ability to find the source of animal disease outbreaks. Removal of these devices, including devices applied to imported animals in their countries of origin and recognized by the Administrator as official, is prohibited except at the time of slaughter, at any other location upon the death of the animal, or as otherwise approved by the State or Tribal animal health official or an area veterinarian in charge when a device needs to be replaced.

(2) All man-made identification devices affixed to covered livestock unloaded at slaughter plants after moving interstate must be removed at the slaughter facility by slaughter-facility personnel with the devices correlated with the animal and its carcass through final inspection or condemnation by means approved by the Food Safety Inspection Service (FSIS). If diagnostic samples are taken, the identification devices must be packaged with the samples and be correlated with the carcasses through final inspection or condemnation by means approved by FSIS. Devices collected at slaughter must be made available to APHIS and FSIS by the slaughter plant.

(3) All official identification devices affixed to covered livestock carcasses moved interstate for rendering must be removed at the rendering facility and made available to APHIS.

(4) If an animal loses an official identification device and needs a new one: (i) A replacement tag with a different official identification number may be applied. The person applying a new official identification device with a different official identification number must record the following information about the event and maintain the record for 5 years: The date the new official identification device was added; the official identification number on the device; and the official identification number on the old device if known.

(ii) Replacement of a temporary identification device with a new official identification device is considered to be a retagging event, and all applicable information must be maintained in accordance with paragraph (d)(4)(i) of this section.

(iii) A duplicate replacement eartag with the official number of the lost tag may be applied in accordance with APHIS' protocol for the administration of such tags.

(e) *Replacement of official identification devices for reasons other than loss.*

(1) Circumstances under which a State or Tribal animal health official or an area veterinarian in charge may authorize replacement of an official identification device include, but are not limited to:

(i) Deterioration of the device such that loss of the device appears likely or the number can no longer be read;

(ii) Infection at the site where the device is attached, necessitating application of a device at another location (e.g., a slightly different location of an eartag in the ear);

(iii) Malfunction of the electronic component of a radio frequency identification (RFID) device; or

(iv) Incompatibility or inoperability of the electronic component of an RFID device with the management system or unacceptable functionality of the management system due to use of an RFID device.

(2) Any time an official identification device is replaced, as authorized by the State or Tribal animal health official or area veterinarian in charge, the person replacing the device must record the following information about the event and maintain the record for 5 years:

(i) The date on which the device was removed;

(ii) Contact information for the location where the device was removed;

(iii) The official identification number (to the extent possible) on the device removed;

(iv) The type of device removed (e.g., metal eartag, RFID eartag);

(v) The reason for the removal of the device;

(vi) The new official identification number on the replacement device; and

(vii) The type of replacement device applied.

(f) *Sale or transfer of official identification devices.* Official identification devices are not to be sold or otherwise transferred from the premises to which they were originally issued to another premises without authorization by the Administrator or a State or Tribal animal health official.

§ 86.5 Documentation requirements for interstate movement of covered livestock.

(a) The persons responsible for animals leaving a premises for interstate movement must ensure that the animals are accompanied by an interstate certificate of veterinary inspection (ICVI) or other document required by this part for the interstate movement of animals.

(b)(1) The APHIS representative, State or Tribal representative, or accredited

veterinarian issuing an ICVI or other document required for the interstate movement of animals under this part must forward a copy of the ICVI or other document to the State or Tribal animal health official of the State or Tribe of origin within 7 calendar days from the date on which the ICVI or other document is issued. The State or Tribal animal health official in the State or Tribe of origin must forward a copy of the ICVI or other document to the State or Tribal animal health official the State or Tribe of destination within 7 calendar days from date on which the ICVI or other document is received.

(2) The animal health official or accredited veterinarian issuing or receiving an ICVI or other interstate movement document in accordance with paragraph (b)(1) of this section must keep a copy of the ICVI or alternate documentation. For poultry and swine, such documents must be kept for at least 2 years, and for cattle and bison, sheep and goats, cervids, and equines, 5 years.

(c) *Cattle and bison.* Cattle and bison moved interstate must be accompanied by an ICVI unless:

(1) They are moved directly to a recognized slaughtering establishment, or directly to an approved livestock facility and then directly to a recognized slaughtering establishment, and they are accompanied by an owner-shipper statement.

(2) They are moved directly to an approved livestock facility with an owner-shipper statement and do not move interstate from the facility unless accompanied by an ICVI.

(3) They are moved from the farm of origin for veterinary medical examination or treatment and returned to the farm of origin without change in ownership.

(4) They are moved directly from one State through another State and back to the original State.

(5) They are moved as a commuter herd with a copy of the commuter herd agreement or other document as agreed to by the States or Tribes involved in the movement.

(6) Additionally, cattle and bison may be moved between shipping and receiving States or Tribes with documentation other than an ICVI, e.g., a brand inspection certificate, as agreed upon by animal health officials in the shipping and receiving States or Tribes.

(7) The official identification number of cattle or bison must be recorded on the ICVI or alternate documentation unless:

(i) The cattle or bison are moved from an approved livestock facility directly to a recognized slaughtering establishment; or

(ii) The cattle and bison are sexually intact cattle or bison under 18 months of age or steers or spayed heifers; *Except that:* This exception does not apply to sexually intact dairy cattle of any age or to cattle or bison used for rodeo, exhibition, or recreational purposes.

(d) *Sheep and goats.* Sheep and goats moved interstate must be accompanied by documentation as required by part 79 of this chapter.

(e) *Swine.* Swine moved interstate must be accompanied by documentation in accordance with § 71.19 of this chapter or, if applicable, with part 85.

(f) *Horses and other equines.* Horses and other equines moved interstate must be accompanied by an ICVI unless:

(1) They are used as the mode of transportation (horseback, horse and buggy) for travel to another location and then return direct to the original location.

(2) They are moved from the farm or stable for veterinary medical examination or treatment and returned to the same location without change in ownership.

(3) They are moved directly from a location in one State through another State to a second location in the original State.

(4) Additionally, equines may be moved between shipping and receiving States or Tribes with documentation other than an ICVI, e.g., an equine infectious anemia test chart, as agreed to by the shipping and receiving States or Tribes involved in the movement.

(5) Equines moving commercially to slaughter must be accompanied by documentation in accordance with part 88 of this chapter. Equine infectious anemia reactors moving interstate must be accompanied by documentation as required by part 75 of this chapter.

(g) *Poultry.* Poultry moved interstate must be accompanied by an ICVI unless:

(1) They are from a flock participating in the National Poultry Improvement Plan (NPIP) and are accompanied by the documentation required under the NPIP regulations (parts 145 through 147 of this chapter) for participation in that program; or

(2) They are moved directly to a recognized slaughtering or rendering establishment; or

(3) They are moved from the farm of origin for veterinary medical examination, treatment, or diagnostic purposes and either returned to the farm of origin without change in ownership or euthanized and disposed of at the veterinary facility; or

(4) They are moved directly from one State through another State and back to the original State; or

(5) They are moved between shipping and receiving States or Tribes with a VS Form 9–3 or documentation other than an ICVI, as agreed upon by animal health officials in the shipping and receiving States or Tribes.

(6) They are moved under permit in accordance with part 82 of this chapter.

(h) *Captive cervids.* Captive cervids moved interstate must be accompanied by documentation as required by part 77 of this chapter.

§ 86.6 [Reserved]

§ 86.7 [Reserved]

§ 86.8 Preemption.

State, Tribal, and local laws and regulations may not specify an official identification device or method that would have to be used if multiple devices or methods may be used under this part for a particular species, nor may the State or Tribe of destination impose requirements that would otherwise cause the State or Tribe from which the shipments originate to have to develop a particular kind of traceability system or change its existing system in order to meet the requirements of the State or Tribe of destination.

Done in Washington, DC, this 19th day of December 2012.

Edward Avalos,

Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 2012–31114 Filed 1–8–13; 8:45 am]

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Part V

Federal Communications Commission

47 CFR Part 73

Implementation of the Local Community Radio Act of 2010; Revision of Service and Eligibility Rules for Low Power FM Stations; Final Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 99–25; FCC 12–144]

Implementation of the Local Community Radio Act of 2010; Revision of Service and Eligibility Rules for Low Power FM Stations

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission modifies its rules in order to implement provisions of the Local Community Radio Act of 2010 (''LCRA''). It also proposes changes to its rules intended to promote the low power FM service's localism and diversity goals, reduce the potential for licensing abuses, and clarify certain rules.

DATES: Effective February 8, 2013, except for amendments to §§ 73.807, 73.810, 73.827, 73.850, 73.853, 73.855, 73.860, 73.872 which contain information collection requirements that are not effective until approved by the Office of Management and Budget (''OMB''). The FCC will seek Paperwork Reduction Act comments via a separate notice in the **Federal Register**. The FCC will publish a document in the **Federal Register** announcing the effective date for those sections.

FOR FURTHER INFORMATION CONTACT: Peter Doyle (202) 418–2789.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Sixth Report and Order* (''*Sixth R&O*''), FCC No. 12–144, adopted November 30, 2012. The full text of the Order 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 full text may also be downloaded at: *http://www.fcc.gov.*

Summary of Sixth Report and Order

1. On March 19, 2012, we released a *Fourth Further Notice of Proposed Rule Making* (''*Fourth FNPRM*'') in this proceeding, seeking comment on proposals to amend the rules to implement provisions of the LCRA and to promote a more sustainable community radio service. These proposed changes were intended to advance the LCRA's core goals of localism and diversity while preserving the technical integrity of all of the FM services. We also sought comment on proposals to reduce the potential for licensing abuses.

2. In this *Sixth R&O,* we adopt an LPFM service standard for second-adjacent channel spacing waivers (''second-adjacent waivers''), in accordance with section 3(b)(2)(A) of the LCRA. We also specify the manner in which a waiver applicant can satisfy this standard and the manner in which we will handle complaints of interference caused by LPFM stations operating pursuant to second-adjacent waivers. As specified in section 7 of the LCRA, we establish separate third-adjacent channel interference remediation regimes for short-spaced and fully-spaced LPFM stations. Finally, as mandated by section 6 of the LCRA, we modify our rules to address the potential for predicted interference to FM translator input signals from LPFM stations operating on third-adjacent channels.

3. We also make a number of other changes to our rules to better promote the core localism and diversity goals of LPFM service. Specifically, we modify our rules to clarify that the localism requirement set forth in § 73.853(b) applies not just to LPFM applicants but also to LPFM permittees and licensees. We revise our rules to permit cross-ownership of an LPFM station and up to two FM translator stations, but we adopt a number of restrictions on such cross-ownership in order to ensure that the LPFM service retains its extremely local focus. In the interests of advancing the Commission's efforts to increase ownership of radio stations by federally recognized American Indian Tribes and Alaska Native Villages (''Tribal Nations'') or entities owned or controlled by Tribal Nations, we revise our rules to explicitly provide for the licensing of LPFM stations to Tribal Nations or entities owned and controlled by Tribal Nations (collectively, ''Tribal Nation Applicants''), and to permit Tribal Nation Applicants to own or hold attributable interests in up to two LPFM stations. In addition, we modify the point system that we use to select from among MX LPFM applications. Specifically, we revise the established community presence criterion; retain the local program origination criterion; and add new criteria to promote the establishment and staffing of a main studio, radio service proposals by Tribal Nation Applicants to serve Tribal lands, and new entry into radio broadcasting. Given these changes, we revise the existing exception to the cross-ownership rule for student-run stations. We also modify the way in which involuntary time sharing works, shifting from sequential to concurrent license terms and limiting involuntary time sharing arrangements to three applicants. We adopt mandatory time sharing, which previously applied to full-service NCE stations but not LPFM stations, for the LPFM service. We also revise our rules to eliminate the LP10 class of LPFM facilities and eliminate the intermediate frequency (''I.F.'') protection requirements applicable to LPFM stations. Finally, we briefly discuss administrative aspects of the upcoming filing window for LPFM stations.

A. Waiver of Second-Adjacent Channel Minimum Distance Separation Requirements

4. Section 3(b)(2)(A) of the LCRA explicitly grants the Commission the authority to waive the second-adjacent channel spacing requirements set forth in § 73.807 of the rules. It permits second-adjacent waivers where an LPFM station establishes, ''using methods of predicting interference taking into account all relevant factors, including terrain-sensitive propagation models,'' that its proposed operations ''will not result in interference to any authorized radio service.'' In the *Fourth FNPRM,* we tentatively concluded that this waiver standard supersedes the interim waiver processing policy adopted by the Commission in 2007. We sought comment on this tentative conclusion. The three commenters that addressed this tentative conclusion agreed with it. As we noted in the *Fourth FNPRM,* the interim waiver processing policy requires the Commission to ''balance the potential for new interference to the full-service station at issue against the potential loss of an LPFM station.'' This balancing is inconsistent with the language of section 3(b)(2)(A) of the LCRA described above, which does not contemplate such a balancing. Accordingly, we affirm our tentative conclusion that the waiver standard set forth in the LCRA and discussed herein supersedes the interim waiver processing policy previously adopted by the Commission.

5. In the *Fourth FNPRM,* we sought comment on the factors relevant to and showings appropriate for second-adjacent waiver requests. Some commenters express support for a requirement that waiver applicants demonstrate there are no fully-spaced channels available, a potential waiver standard about which we specifically sought comment. One commenter—the National Association of Broadcasters (''NAB'')—proposes additional requirements for second-adjacent waivers. These commenters argue that the plain language of the LCRA and its

legislative history require that the Commission grant second-adjacent waivers ''only in strictly defined circumstances.'' In contrast, Prometheus and others argue that ''[b]eyond a showing of non-interference as required by the statute, no other showing should be required for LPFM applicants seeking waivers.'' Prometheus states that ''[t]he Commission is bound by the LCRA's terms'' and cannot ''infer a wide range of additional limitations or prescriptions that appear nowhere in the statute.''

6. We have reviewed both the text of the LCRA and the legislative history. The plain language of section 3(b)(2)(A) of the LCRA permits the Commission to grant second-adjacent waivers where a waiver applicant demonstrates that its proposed operations ''will not result in interference to any authorized radio service.'' Nothing in the LCRA or its legislative history suggests that Congress intended to require that waiver applicants make any additional showings. The statute does not mandate any further conditions on the grant of such waivers, and it does not prescribe the burden of proof. We conclude that Congress intended to ensure that LPFM stations operating pursuant to second-adjacent waivers do not cause interference to full-service FM and other authorized radio stations. We find that additional limitations are not needed to achieve this goal. Indeed, to require additional showings of waiver applicants would impose requirements that go beyond those established in the LCRA that we do not believe are either necessary to the implementation of its interference protection goals or consistent with the localism and diversity goals underlying the LPFM service. Accordingly, we will not further restrict the availability of second-adjacent waivers. Likewise, we will not consider any of the other factors proposed in the *Fourth FNPRM* in determining whether to grant a waiver request, none of which received any support in the comments.

7. We find unconvincing the policy arguments made by supporters of requiring additional showings of waiver applicants. For instance, we are not persuaded that any additional limits are needed to preserve the technical integrity of the FM service. Neither NAB nor any other commenter has offered evidence to support the claim that granting second-adjacent waivers that satisfy the LCRA requirements will harm audio quality or disrupt the expectations of listeners. Indeed, we are not sure how any commenter could since waivers will only be granted where an applicant makes a showing that its proposed operations will not cause interference. Moreover, we note that many FM translators successfully operate on second-adjacent channels, often at higher effective radiated powers (''ERPs'') and heights above average terrain (''HAAT'') than LPFM stations, under a protection scheme that permits second-adjacent channel operations at less than LPFM distance separation requirements. We believe LPFM stations can operate just as successfully. Should interference occur, the interference remediation obligations set forth in section 3(b)(2)(B) of the LCRA will serve as a backstop to ensure that the technical integrity of the FM band is maintained.

8. We find equally unpersuasive the argument that imposing additional limits on second-adjacent waivers is in the best interest of LPFM applicants. LPFM applicants may lack broadcast experience and technical expertise, and therefore, may have difficulty predicting interference issues. However, Commission staff will review each waiver request and will deny any request that they determine would cause interference. In addition, while the interference remediation obligations may prove burdensome to LPFM licensees and may require some LPFM stations to cease operations, we do not see this as a reason to limit waivers. We agree with Prometheus that the potential benefit of promoting a locally-based non-commercial radio service in potentially thousands of communities nationwide vastly outweighs the risks that individual LPFM licensees may face. In this regard, we note that, in spectrum-congested markets, few LPFM opportunities would exist without the use of second-adjacent waivers. For instance, applicants will be able to select from 19 unique LPFM channels in the Denver Arbitron Metro market and 18 in the New Haven Arbitron Metro market if second-adjacent waivers are available. If these waivers are not available, an applicant will have a much more limited selection—four unique LPFM channels in the Denver Arbitron Metro market and three in the New Haven Arbitron Metro market.

9. We turn to the manner in which waiver applicants can ''establish, using methods of predicting interference taking into account relevant factors, including terrain-sensitive propagation models, that their proposed operations will not result in interference to any authorized radio service.'' In the *Fourth FNPRM,* we asked whether we should permit LPFM applicants to make the sort of showings we routinely accept from FM translator applicants to establish that ''no actual interference will occur.'' A number of commenters offer general support for this proposal. Prometheus grounds its support in the fact that, read together, sections 3(b)(2)(A) and (B) of the LCRA ''set out a second adjacent waiver standard substantially identical to the rules allocating translators on the second adjacent frequency.'' NAB opposes the use of these showings by waiver applicants, arguing that it could lead to ''over-packing of the FM band, unwanted interference, and the degradation of listeners' experience.'' NAB, however, does not offer any evidence to support its claims. Nor does NAB explain why the operations of the very large number of FM translators that have relied on these showings do not cause the same interference and signal degradation problems they predict as a result of LPFM second-adjacent waivers. NPR also opposes allowing LPFM applicants to make the same showings as FM translators. NPR argues that there are ''significant differences'' between the LPFM and FM translator services. However, it does not explain how these differences—the ability to originate programming or lack thereof, the highly local nature of the LPFM service, the relative inexperience of LPFM licensees when compared to FM translator licensees—would justify different waiver standards for FM translators and LPFM stations. We are not persuaded that the differences that NPR cites have any impact on whether a station will cause interference. Rather, the potential for interference is principally dependent on the propagation characteristics of the ''protected'' and ''interfering'' FM signals and the quality of the utilized FM receiver.

10. We will permit waiver applicants to demonstrate that ''no actual interference will occur'' in the same manner as FM translator applicants. Put another way, we will permit waiver applicants to show that ''no actual interference will occur'' due to ''lack of population'' and will allow waiver applicants to use an undesired/desired signal strength ratio methodology to define areas of potential interference when proposing to operate near another station operating on a second-adjacent channel. Although the LCRA does not require the Commission to incorporate for second-adjacent channels the FM translator regime that Congress incorporated for third-adjacent channel interference protection, as Prometheus notes the second-adjacent waiver provisions of the LCRA establish a regime similar to that governing FM translators. Given the discretion afforded by Congress to the Commission

for determining appropriate ''methods of predicting interference,'' our experience in connection with methods for doing so in the analogous context of FM translators, and the similarities between the regime established in sections 3(b)(2)(A) and (B) and the regime applicable to FM translator stations, we believe it is appropriate to grant waiver applicants the same flexibility as FM translator applicants to demonstrate that, despite predicted contour overlap, interference will not in fact occur due to an absence of population in the overlap area. We note that, like FM translator stations, LPFM stations operating pursuant to second-adjacent waivers may not cause any actual interference.

11. We also will permit waiver applicants to propose use of directional antennas in making these showings. This is consistent with our treatment of FM translator applicants and supported by the vast majority of commenters. We clarify that, like FM translator applicants, waiver applicants may use ''off the shelf'' antenna patterns and will not be required to submit information regarding the characteristics of the pattern with the construction permit application. In addition, as requested by Prometheus and Common Frequency, we will permit waiver applicants to propose lower ERPs and differing polarizations in order to demonstrate that their operations will not result in interference to any authorized radio service. We expect that this flexibility will facilitate the expansion of the LPFM service while still protecting the technical integrity of the FM band. In terms of proposals specifying lower ERPs, we will not accept proposals to operate at less than current LPFM minimum permissible facilities (i.e., power levels of less than 50 watts ERP at 30 meters HAAT, or its equivalent). Since the proposed operating parameters of a waiver applicant will be available in our Consolidated Database System (''CDBS'') and since we do not require other applicants seeking waivers of our technical rules to serve their waiver requests on potentially affected stations, we will not require an LPFM applicant seeking a second-adjacent waiver to serve its waiver request on any potentially affected station. We will, however, instruct the Media Bureau to identify specifically all potentially affected second-adjacent channel stations in the public notice that accepts for filing an application for an LPFM station that includes a request for a second-adjacent waiver.

12. We remind potential LPFM applicants that the LCRA permits the Commission to grant waivers only of second-adjacent, and not co- and first-adjacent, spacing requirements. The flexibility discussed above regarding lower power, polarization and directional patterns extends only to waiver applicants seeking to demonstrate that their proposed operations will not result in any second-adjacent channel interference. We also caution LPFM applicants against using this technical flexibility to limit the already small service areas of LPFM stations to such an extent that, while their LPFM applications are grantable, the LPFM stations will not be viable. As the Media Bureau noted recently ''the limitations on the maximum power of LPFM stations substantially reduce the number of potential listeners they can serve.'' The Media Bureau went on to note that ''[t]he low power of an LPFM station affects not only its geographic reach and coverage area, but also the quality of its signal and the ability of listeners to receive its signal consistently inside the station's coverage area.'' Finally, we take this opportunity to make clear the protection obligations of FM translators toward LPFM stations operating with lower powers, differing polarizations and/or directional antennas. To simplify matters and provide clear guidance to FM translator applicants, we will require FM translator modification applications and applications for new FM translators to treat such LPFM stations as operating with non-directional antennas at their authorized power.

13. We turn now to what happens if an LPFM station operating pursuant to a second-adjacent channel waiver causes interference. Section 3(b)(2)(B) provides a framework for handling an interference complaint resulting from an LPFM station operating pursuant to a second-adjacent waiver ''without regard to the location of the station receiving interference.'' Upon receipt of a complaint of interference caused by an LPFM station operating pursuant to a second-adjacent waiver, the Commission must notify the LPFM station ''by telephone or other electronic communication within 1 business day.'' The LPFM station must ''suspend operation immediately upon notification'' by the Commission that it is ''causing interference to the reception of any existing or modified full-service FM station.'' It may not resume operations ''until such interference has been eliminated or it can demonstrate * * * that the interference was not due to [its] emissions.'' The LPFM station, however, may ''make short test transmissions during the period of suspended operation to check the efficacy of remedial measures.''

14. In the *Fourth FNPRM,* we proposed to incorporate these provisions into our rules. We will do so. We believe including these provisions in the rules will provide a clear framework for the efficient resolution of interference complaints.

15. We also requested comment on whether to define a ''bona fide complaint'' for the purpose of triggering these interference remediation procedures. Prometheus urges us to do so and to handle interference complaints against LPFM stations operating pursuant to second-adjacent waivers in a manner similar to complaints against FM translators and similar to the former third adjacent channel remediation requirements. As we described in the *Fourth FNPRM,* for FM translators, § 74.1203(a) prohibits ''actual interference to * * *[t]he direct reception by the public of the off-the-air signals of any authorized broadcast station* * *.'' It specifies that ''[i]nterference will be considered to occur whenever reception of a regularly used signal is impaired by the signals radiated by'' the interfering FM translator station. An interfering FM translator station must remedy the interference or cease operation. The Commission has interpreted this rule broadly. It places no geographic or temporal limitation on complaints. It covers all types of interference. The reception affected can be that of a fixed or mobile receiver. The Commission also has interpreted ''direct reception by the public'' to limit actionable complaints to those that are made by bona fide listeners. Thus, it has declined to credit claims of interference or lack of interference from station personnel involved in an interference dispute. More generally, the Commission requires that a complainant ''be 'disinterested,' e.g., a person or entity without a legal stake in the outcome of the translator station licensing proceeding.'' The staff has routinely required a complainant to provide his name, address, location(s) at which FM translator interference occurs, and a statement that the complainant is, in fact, a listener of the affected station. Moreover, as is the case with other types of interference complaints, the staff has considered only those complaints of FM translator interference where the complainant cooperates in efforts to identify the source of interference and accepts reasonable corrective measures. Accordingly, when the Commission concludes that a bona fide listener has made an actionable complaint of uncorrected interference from an FM

translator, it will notify the station that ''interference is being caused'' and direct the station to discontinue operations.

16. We conclude that it is appropriate to handle complaints in a manner similar to that used to handle complaints of interference caused by FM translators. As we noted above, we believe that the LCRA affords the Commission the discretion to rely on our successful FM translator experience in implementing the interference protection regime for second-adjacent LPFM stations. Accordingly, we will adopt the same requirements for complaints that we apply in the FM translator context. As described above, that means that a complaint must come from a disinterested listener and must include the listener's name and address, and the location at which the interference occurs. We are unconvinced by NPR's argument that a listener complaint is unnecessary. While NPR is correct that section 3(b)(2)(B)(iii) refers simply to ''a complaint of interference'' and does not specify the source of such complaint, we find this statutory term to be ambiguous. We conclude that it may reasonably be interpreted to refer to listener complaints. We note that we have interpreted § 74.1203 of the rules to require that complaints of interference in the FM translator context be filed by listeners. We also note that the scope of the rule prohibiting translator stations from causing ''actual interference to * * * direct reception,'' and that of section 3(b)(2)(B) which prohibits LPFM stations from causing ''interference to the reception of an existing or modified full-service station,'' are essentially equivalent. The Commission previously has interpreted the ''direct reception'' language included in § 73.1203(a) as limiting actionable complaints to those that are made by bona fide listeners. We believe it is appropriate to interpret the ''reception'' language in section 3(b)(2)(B) of the LCRA as imposing this same limit.

17. Once the Commission receives a bona fide complaint of interference from an LPFM station operating pursuant to a second-adjacent waiver and notifies the LPFM station of the complaint, the LPFM station must ''suspend operation immediately'' and stay off the air until it eliminates the interference or demonstrates that the interference was not due to its emissions. We conclude that an LPFM station may demonstrate that it is not the source of the interference at issue by conducting an ''on-off'' test. ''On-off'' tests have been used by the FM translator and other services to determine whether identified transmissions are ''the source of interference.'' In addition, the Commission specifically authorized LPFM stations to use ''on-off'' tests for determining ''whether [third-adjacent interference] is traceable to [an] LPFM station.'' As the Commission did in that context, we require the full-service station(s) involved to cooperate in these tests.

B. Third-Adjacent Channel Interference Complaints and Remediation

18. As instructed by section 3 of the LCRA, in the *Fifth Report and Order* (''*Fifth R&O*''), we eliminated the third-adjacent channel spacing requirements. We then sought comment on the associated interference remediation obligations, set forth in section 7 of the LCRA, that Congress paired with this change. We conclude that section 7 of the LCRA creates two different LPFM interference protection and remediation regimes, one for LPFM stations that would be considered short-spaced under the third-adjacent channel spacing requirements in place when the LCRA was enacted, and one for LPFM stations that would be considered fully spaced under those requirements. We discuss this conclusion and each of the regimes below.

1. LPFM Interference Protection and Remediation Requirements

19. *Two Distinct Regimes.* Sections 7(1) and 7(3) of the LCRA both address the interference protection and remediation obligations of LPFM stations on third-adjacent channels. Only section 7(1) specifies requirements for ''low-power FM stations licensed at locations that do not satisfy third-adjacent channel spacing requirements * * *.'' With regard to such stations (''Section 7(1) Stations''), section 7(1) instructs the Commission to adopt ''the same interference protections that FM translator stations and FM booster stations are required to provide as set forth in Section 74.1203 of [the] rules.'' Section 7(3), in contrast, directs the Commission to require ''[LPFM] stations on third-adjacent channels * * * to address interference complaints within the protected contour of an affected station'' and encourages such LPFM stations to address ''all other interference complaints.'' In the *Fourth FNPRM,* we tentatively concluded that, through these two provisions, Congress intended to create two different interference protection and remediation regimes—one that applies to Section 7(1) Stations and one that applies to all other LPFM stations (''Section 7(3) Stations''). We explained that the intended regimes differed both with respect to the locations at which an affected station's signal is protected from third-adjacent interference from an LPFM station and the extent of the remediation obligations applicable when interference occurs at these locations. We sought comment on our tentative conclusion.

20. Commenters addressing this question support our tentative conclusion. Accordingly, we find that section 7 of the LCRA creates two different interference protection and remediation regimes—one that applies to Section 7(1) Stations and one that applies to Section 7(3) Stations. As we noted in the *Fourth FNPRM,* were we to conclude otherwise, Section 7(1) Stations would be subject to different and conflicting interference protection and remediation obligations. Specifically, under section 7(1), which incorporates the requirements for FM translators and boosters, Section 7(1) Stations must ''eliminate'' any actual interference they cause to the signal of any authorized station in areas where that station's signal is ''regularly used.'' Section 7(3), on the other hand, would obligate such stations only to ''address'' complaints of interference occurring within an affected station's protected contour. We conclude that this statutory interpretation is necessary to read section 7 as a harmonious whole.

21. As we noted in the *Fourth FNPRM,* we can also reasonably conclude that Congress intended to impose more stringent interference protection and remediation obligations on LPFM stations that are located nearest to full-service FM stations and, therefore, have a greater potential to cause interference. The LCRA provides greater flexibility by eliminating third-adjacent channel spacing requirements for LPFM stations, but counterbalances that flexibility with a prohibition on LPFM stations that would be short-spaced under such requirements causing any actual interference to other stations. Accordingly, our reading is consistent with the general licensing rule of counterbalancing flexible technical standards with more stringent interference remediation requirements.

22. *Retention of Third-Adjacent Channel Spacing Requirements for Reference.* We tentatively concluded that, although section 3(a) of the LCRA mandates the elimination of the third-adjacent channel spacing requirements, we should retain them solely for reference purposes in order to implement section 7(1) of the LCRA. We sought comment on this tentative conclusion and also on whether, if the spacing tables are retained in the rules,

to include them in § 73.807 or a different rule section.

23. Commenters addressing this issue agree that the rules should reference the former third-adjacent channel distance separation requirements, but are divided on the best approach. REC expresses concern that references to third-adjacent spacing in § 73.807 could confuse new applicants. Common Frequency asserts that it would be confusing to eliminate the third-adjacent spacing provisions, rename them, and then insert them in a table elsewhere in the rules.

24. We will retain the third-adjacent channel spacing provisions in § 73.807 for reference purposes only. It is necessary to reference the former third-adjacent channel spacing requirements in order to clarify which stations must adhere to the section 7(1) regime. We are sympathetic to commenters' concerns of confusion. However, we believe that licensees will find it easier and more convenient to have all the spacing standards (reference or otherwise) in one section of the rules. We make clear in the new version of § 73.807 that LPFM stations need not satisfy these standards, and that they are included solely to determine which third-adjacent interference regime applies.

25. *Applicability of sections 7(4) and (5) of the LCRA.* Sections 7(4) and (5) of the LCRA establish a number of protection and interference remediation requirements. These provisions mandate that the Commission allow LPFM stations on third-adjacent channels to collocate and establish certain complaint procedures and standards. In the *Fourth FNPRM,* we tentatively concluded these sections apply only to Section 7(3) Stations.

26. We affirm our tentative conclusion, which was supported by Prometheus, the sole commenter on this issue. We believe this is the most reasonable reading of these provisions. Sections 7(4) and (5) use the same ''low-power FM stations on third-adjacent channels'' language as section 7(3), not the more specific ''low-power FM stations licensed at locations that do not satisfy third-adjacent channel spacing requirements'' language set forth in section 7(1). In addition, as discussed above, Section 7(1) Stations are subject to the well-established and comprehensive interference protection and remediation regime set forth in § 74.1203 of the rules. We therefore will not apply sections 7(4) and 7(5), which establish discrete requirements inconsistent with the § 74.1203 regime, to Section 7(1) stations.

27. *Third-Adjacent Channel Interference Only.* We tentatively concluded that sections 7(1), (2), (3), (4) and (5) of the LCRA apply only to third-adjacent channel interference. We affirm our conclusion, which commenters support. Although Congress did not specify the type of interference to which these provisions apply, we believe this is the most reasonable reading. In each of these provisions, Congress refers specifically to LPFM stations on third-adjacent channels or LPFM stations that do not satisfy the third-adjacent channel spacing requirements. These references reflect a focus on LPFM stations causing interference to stations located on third-adjacent channels. Our conclusion is further supported by the fact that Congress separately addressed the possibility of second-adjacent channel interference in section 3 of the LCRA.

2. Regime Applicable to Section 7(1) Stations

28. *General Requirements.* Section 7(1) Stations are subject to the same interference protection and remediation regime applicable to FM translator and booster stations. These requirements, set forth in § 74.1203 of the rules, are more stringent than those currently applicable to LPFM stations. § 74.1203(a) prohibits ''actual interference to * * * [t]he direct reception by the public of the off-the-air signals of any authorized broadcast station * * *.'' It specifies that ''[i]nterference will be considered to occur whenever reception of a regularly used signal is impaired by the signals radiated by'' the interfering FM translator station. An interfering FM translator station must remedy the interference or cease operation. As previously noted, the rule has been interpreted broadly.

29. Southwestern Ohio Public Radio (''SOPR''), the only commenter to address this issue, comments that ''it appears that the requirements in Section 7(1) give the Commission very little leeway in its interpretation.'' Section 7(1) is explicit in its direction to ''provide the same interference protections that FM translator stations and FM booster stations are required to provide as set forth in Section 74.1203.'' There is no evidence in the statute or legislative history that Congress intended the § 74.1203 requirements to be merely a list of minimum criteria that could be supplemented or modified; indeed, the statute expressly says that the interference protections must be ''the same.'' Further, the LCRA refers to the particular version of § 74.1203 ''in effect on the date of enactment of this Act'' (i.e., January 4, 2011). Accordingly, we will apply the relevant sections of § 74.1203, without modification, to Section 7(1) Stations. We will interpret these provisions in the same manner as we have in the FM translator context. In addition, we will consider directional antennas, lower ERPs and/or differing polarizations to be suitable techniques for eliminating third-adjacent channel interference. FM translators have the flexibility to employ all of these options in their operations. Thus, permitting LPFM stations to use these same remedial techniques is consistent with Congress' decision to require the wholesale adoption of the well-established and comprehensive regime in § 74.1203 of the rules.

30. *Periodic Announcements.* We also requested comment on requiring newly constructed Section 7(1) Stations to make the same periodic announcements required of Section 7(3) Stations under section 7(2) of the LCRA. We questioned whether we could reasonably distinguish between listeners of stations that may experience interference as a result of the operations of Section 7(1) Stations and those that may experience interference as a result of the operations of Section 7(3) Stations for such purposes. We noted, however, that section 7(1) explicitly requires the Commission to ''provide the same [LPFM] interference protections that FM translator stations * * * are required to provide as set forth in section 74.1203 of its rules,'' and that § 74.1203 does not require an FM translator station to broadcast periodic announcements that alert listeners to the potential for interference. Thus, we asked commenters to address whether we could and, if so, whether we should impose the periodic announcement requirement on Section 7(1) Stations.

31. Commenters addressing this issue were divided. SOPR states that the Commission must strictly adhere to the requirements of § 74.1203, in accordance with the section 7(1) mandate, and therefore, periodic announcements should not be required of Section 7(1) Stations. Similarly, Common Frequency highlights the inconsistency of the Commission finding distinctions between Section 7(1) and 7(3) Stations, but then conversely stating that there is no reason to distinguish between Section 7(1) Stations and Section 7(3) Stations for purposes of periodic announcements. REC, on the other hand, argues that the section 7(2) periodic announcement requirement applies to Section 7(1) Stations. It believes ''that the differences in references to how a LPFM station operating on a third adjacent channel in respect to a full-service FM station may be due to how the 2010 version of the LCRA was marked-up by Congress,'' and

that Congress intended the periodic announcement requirement to apply to all LPFM stations constructed on third-adjacent channels.

32. We believe that Congress, in framing section 7, did not intend to apply the periodic announcement requirement to Section 7(1) Stations. If it had wished to apply this requirement to Section 7(1) Stations, it could have done so explicitly in the LCRA. Instead, Congress required our wholesale adoption of the well-established and comprehensive § 74.1203 regime for Section 7(1) Stations. That regime does not include any form of periodic announcements. We agree with Common Frequency that it is incongruous to find clear distinctions between the section 7(1) and 7(3) Station interference protection and remediation regimes, as we have done, but then to ignore these distinctions in this context. Accordingly, for the reasons discussed above, we will not impose a periodic announcement requirement on Section 7(1) Stations.

3. Regime Applicable to Other LPFM Stations

33. Section 7(3) of the LCRA requires the Commission to modify § 73.810 of the rules to require Section 7(3) Stations ''to address interference complaints within the protected contour of an affected station'' and encourage them to address all other interference complaints, including complaints ''based on interference to a full-service FM station, an FM translator station or an FM booster station by the transmitter site of a low-power FM station on a third-adjacent channel at any distance from the full-service FM station, FM translator station or FM booster station.'' As noted above, we conclude that sections 7(2), (4) and (5) apply only to Section 7(3) Stations. We discuss the general interference remediation requirements set forth in Section 7(3) and these other provisions below.

34. *''Addressing'' Complaints of Third-Adjacent Channel Interference.* Unlike section 7(1), section 7(3) does not specifically refer to § 74.1203 of the rules. While section 7(1) instructs the Commission to require Section 7(1) Stations ''to provide'' interference protections, section 7(3) merely instructs the Commission to require Section 7(3) Stations ''to address'' complaints of interference. Section 7(2) of the LCRA—which we conclude applies only to Section 7(3) Stations—further mandates that we require newly constructed Section 7(3) Stations on third-adjacent channels to cooperate in ''addressing'' any such interference complaints. Therefore, in the *Fourth FNPRM,* we sought comment on (1) what a Section 7(3) Station must do to ''address'' a complaint of third-adjacent channel interference; (2) whether to specify the scope of efforts which a Section 7(3) Station must undertake; (3) whether to relieve a Section 7(3) Station of its obligations in instances where the complainant does not reasonably cooperate with the Section 7(3) Station's remedial efforts; and (4) whether the more lenient interference protection obligations currently set forth in § 73.810 should continue to apply to Section 7(3) Stations.

35. Commenters offer varied interpretations of the actions a Section 7(3) Station must take to ''address'' a complaint of third-adjacent channel interference. SOPR argues that ''to address'' means ''to respond to the complaint with reasonable effort to remediate the interference based on accepted engineering practices and with the cooperation of the complainant.'' It urges the Commission to clearly specify the scope of required efforts. Common Frequency proposes that ''addressing'' interference complaints ''could mean visiting the impacted area, turning on the receiver in question, and shutting down temporarily.'' NPR, in contrast, contends that this phrase imposes the full scope of section 7(1) remediation requirements on Section 7(3) Stations when interference occurs within the protected contour of the affected station. Notwithstanding these divergent interpretations, we find unanimous support for relieving Section 7(3) Stations of their obligations in instances where a complainant does not reasonably cooperate with an LPFM station's remedial efforts. Finally, in lieu of applying the interference protection obligations currently set forth in § 73.810 to Section 7(3) Stations, one commenter suggests that we instead employ the current FM translator rules, which, it asserts, ''have worked for decades and [are] seen as 'tried and tested.'''

36. We find that it is most reasonable to conclude that the substantial differences between the language of sections 7(1) and 7(3) reflect Congress's intention to establish differing remediation regimes for these two classes of stations. Moreover we find a clear difference in meaning between the § 74.1203 obligation to ''eliminate'' interference and the lesser section 7(3) obligation to ''address * * * interference complaints.'' Accordingly, we will define ''address'' in accordance with the current version of § 73.810 of the rules, meaning ''an LPFM station will be given a reasonable opportunity to resolve all interference complaints.'' We will not require Section 7(3) Stations to cease operations while resolving interference complaints, and we decline to specify the scope of remedial efforts Section 7(3) Stations must undertake. Section 7(3) Stations fully comply with the Commission's former third-adjacent spacing requirements, a stringent licensing standard, which is based on a proven methodology for ensuring interference-free operations between nearby stations. Accordingly, similarly stringent interference remediation obligations are unnecessary. We expect Section 7(3) Stations, however, to make good faith and diligent efforts to resolve any complaints received. For example, a Section 7(3) Station may agree to provide new receivers to impacted listeners or to install filters at the receiver site. Section 7(3) Stations also may wish to consider colocation, a power reduction and/or other facility modifications (e.g., use of directional antennas or differing polarizations) to alleviate the interference. Finally, we will continue to consider a complaint resolved if the complainant does not reasonably cooperate with a Section 7(3) Station's investigatory and remedial efforts.

37. *Complaints.* Section 7(3) requires the Commission to provide notice to the licensee of a Section 7(3) Station of the existence of interference within 7 calendar days of the receipt of a complaint from a listener or another station. Further, section 7(5) of the LCRA expands the universe of interference complaints which Section 7(3) Stations must remediate. Section 7(5) states:

> The Federal Communications Commission shall —(A) permit the submission of informal evidence of interference, including any engineering analysis that an affected station may commission; (B) accept complaints based on interference to a full-service FM station, FM translator station, or FM booster station by the transmitter site of a low-power FM station on a third-adjacent channel at any distance from the full-service FM station, FM translator station, or FM booster station; and (C) accept complaints of interference to mobile reception.

38. We requested comment on whether any of the four criteria for bona fide complaints set forth in § 73.810(b) of the rules remain relevant. We tentatively concluded that section 7(5) of the LCRA requires us to delete §§ 73.810(b)(1) (bona fide complaint must allege interference caused by LPFM station that has its transmitter site located within the predicted 60 dBu contour of the affected station), (2) (bona fide complaint must be in form of affidavit and state the nature and

location of the alleged interference) and (3) (bona fide complaint must involve a fixed receiver located within the 60 dBu contour of the affected station and not more than 1 kilometer from the LPFM transmitter site). We asked commenters to address whether we should retain the remaining criterion set forth in § 73.810(b)(4), which requires a bona fide complaint to be received within one year of the date an LPFM station commenced broadcasts. We also sought comment on whether to establish certain basic requirements for complaints.

39. No commenter opposes our conclusion that section 7(5) of the LCRA mandates that we delete §§ 73.810(b)(1) and (b)(3) from our rules. One commenter, however, proposes that we add a provision limiting complaints to those involving interference within the 100 dBu contour of the affected station. With respect to § 73.810(b)(2) (bona fide complaint must be in form of affidavit and state the nature and location of the alleged interference), several commenters recommend that we retain some semblance of the former rule and also establish additional basic requirements for complaints. For instance, Athens Community Radio Foundation asserts that bona fide complaints should state the nature and location of the alleged interference, the call letters of the stations involved, and accurate contact information. Similarly, Common Frequency argues that an actionable complaint must specify the location and date of interference, the type of receiver, channel, time/day of interference, whether ongoing or intermittent, and contact information for the complainant. Several commenters also assert that the Commission should require complainants to file copies of their complaints with the Audio Division, and that the Commission should consider only complaints from bona fide listeners who are ''disinterested.'' Finally, those discussing it unanimously agree that we should retain the criterion set forth in § 73.810(b)(4), which requires a bona fide complaint to be received within one year of the date an LPFM station commenced broadcasts.

40. We will, as proposed, eliminate §§ 73.810(b)(1) and (b)(3) from our rules. These distance restrictions conflict with the explicit mandate of section 7(5) of the LCRA to ''accept complaints based on interference * * * *at any distance* from the full-service FM station, FM translator station, or FM booster station.'' In addition, the § 73.810(b)(3) fixed receiver limitation is inconsistent with section 7(5)(C) of the LCRA, which requires us to accept complaints of interference at fixed locations and to mobile reception.

41. In this same vein, we decline to adopt the proposal to limit complaints to those occurring within the 100 dBu contour of the affected station. We agree, however, with commenters' suggestions that we impose explicit, basic requirements for complaints. A list of minimum criteria likely will help LPFM stations quickly address issues while also curbing the risk of frivolous filings. Accordingly, while we will delete the § 73.810(b)(2) criterion that the complaint be in the form of an affidavit, we retain the requirement that the complaint state the nature and location of the alleged interference. We will also require complainants to specify: (1) The call signs of the LPFM station and the affected full-service FM, FM translator or FM booster station; (2) the type of receiver; and (3) current contact information. We strongly encourage listeners to file copies of the complaints with the Media Bureau's Audio Division to ensure proper oversight. LPFM stations also must promptly forward copies of complaints to the Audio Division for resolution. However, an affected station may forward copies of complaints that it receives to the Audio Division as a courtesy to the complainant listeners. When complainants fail to include all the necessary information listed above, Audio Division staff will take efforts to correct any deficiencies. We also limit actionable listener complaints to those that are made by bona fide ''disinterested'' listeners (e.g., persons or entities without legal, economic or familial stakes in the outcome of the LPFM station licensing proceeding). Finally, we will preserve the § 73.810(b)(4) criterion, which requires a bona fide complaint to be received within one year of the date an LPFM station commenced broadcasts with its currently authorized facilities. Any interference caused by a Section 7(3) Station should be detectable within one year after it commences such operations. This time restriction will reasonably limit uncertainty regarding the potential modification or cancellation of an LPFM station's license and such station's financial obligation to resolve interference complaints. We believe that the efficient, limited complaint procedure that we are adopting is fully consistent with the LCRA and fairly balances the interests of full-service broadcasters against the benefits of fostering the LPFM radio service.

42. *Periodic Broadcast Announcements.* Section 7(2) of the LCRA directs the Commission to amend § 73.810 of the rules to require a newly constructed Section 7(3) Station to broadcast periodic announcements that alert listeners to the potential for interference and instruct them to contact the station to report any interference. These announcements must be broadcast for a period of one year after construction. We sought comment on whether we should adopt specific announcement language and whether we should mandate the timing and frequency of these announcements.

43. Commenters agree that the Commission should provide some guidance regarding the text of the announcements. One commenter recommends that the Commission specify explicit uniform language. Other commenters state that the Commission should merely suggest language and allow operators of Section 7(3) Stations the flexibility to modify the wording. REC emphasizes that broadcasters need to have ''latitude to word the message in a way to get the points across without overwhelming listeners with technical jargon.''

44. With respect to the timing and frequency of the mandatory announcements, REC argues that we should aim to achieve ''a balance between educating radio listeners of changes in the 'dialscape' as a result of the new [LPFM] station while * * * not confus[ing] the listener or excessively burden[ing] the [LPFM] broadcaster.'' Jeff Sibert (''Sibert'') and Prometheus each urge us to address the announcements in a manner that is simple, flexible and imposes a minimum burden on new Section 7(3) Stations. One commenter suggests that we allow the affected full-power station to waive the Section 7(3) Station's periodic announcement requirement.

45. Several commenters recommend that we use the pre-filing and post-filing license renewal announcement schedule as a template. REC, in particular, suggests a very detailed schedule based on a modified version of the renewal announcement schedule. It argues that any bona fide interference will be discovered in the first month of the Section 7(3) Station's operation, and accordingly, it is necessary to air the highest frequency of announcements during the first month. Sibert asserts that the requirement to broadcast the announcement should be no greater than once per day between the hours of 6 a.m. and midnight for the first three months, and once per week during the same hours for the last nine months.

46. We agree that we should provide licensees of newly constructed Section 7(3) Stations explicit guidance on the language to be used in the periodic

announcements. Therefore, we will amend our rules to specify sample language that may be used in the announcements. Specific language will make it easier for licensees of new Section 7(3) Stations to comply with this section 7(2) requirement. We will not, however, mandate that licensees of Section 7(3) Stations follow the sample text verbatim, but rather, allow licensees the discretion to modify the exact wording, as the vast majority proposed. To ensure consistency, the announcement must, however, at a minimum: (1) Alert listeners of a potentially affected third-adjacent channel station of the potential for interference; (2) instruct listeners to contact the Section 7(3) Station to report any interference; and (3) provide contact information for the Section 7(3) Station. Further, the message must be broadcast in the primary language of both the newly constructed Section 7(3) Station and any third-adjacent station that could be potentially affected.

47. We will, as the commenters suggest, dictate the timing and frequency of the required announcements. We believe that an explicit schedule will promote compliance with this requirement. We also believe that the schedule specified below achieves the benefits of effectively notifying listeners of the potential for interference while minimizing the costs of doing so for the new Section 7(3) Station.

48. We agree with REC that any interference is likely to be detected within the first month of the new Section 7(3) Station's operation. Accordingly, during the first thirty-days after a new Section 7(3) Station is constructed, we direct such station to broadcast the announcements at least twice daily. One of these daily announcements shall be made between the hours of 7 a.m. and 9 a.m. or 4 p.m. and 6 p.m. The second daily announcement shall be made outside of these time slots. Between days 31 and 365 of operation, the station must broadcast the announcements a minimum of twice per week. The required announcements shall be made between the hours of 7 a.m. and midnight.

49. Finally, we decline to allow an affected full-power station to waive the newly constructed Section 7(3) Station's periodic announcement obligation, as one commenter suggests. Section 7(2) of the LCRA explicitly mandates that newly constructed Section 7(3) Stations broadcast periodic announcements. The announcement is intended to benefit listeners, by alerting them of the potential for interference. Allowing potentially affected stations to waive the announcements would be inconsistent with section 7(2) of the LCRA and deprive listeners of its intended benefits.

50. *Technical Flexibility.* Section 7(4) of the LCRA requires the Commission, to the extent possible, to ''grant low-power FM stations on third-adjacent channels the technical flexibility to remediate interference through the colocation of the transmission facilities of the low-power FM station and any stations on third-adjacent channels.'' In the *Fourth FNPRM,* we tentatively concluded that, other than eliminating the third-adjacent channel spacing requirements as mandated by section 3(a) of the LCRA, we need not modify or eliminate any other provisions of our rules to implement section 7(4).

51. Two commenters propose additional modifications to our rules in order to implement section 7(4). REC argues that LPFM stations should have the flexibility to co-locate with or operate from a site ''very close to the third-adjacent full-service station as long as no new short spacing is created, even if this means moving the transmitter site to a location that may be outside the current service contour of the LPFM station.'' REC points out that, under existing rules, such a change would constitute a ''major change'' and an applicant seeking authority to make such a change would have to do so during a filing window. We infer that REC would like us to modify our rules to clarify that we will treat as a ''minor change'' a proposal to move a Section 7(3) Station's transmitter site, including a move outside its current service contour, in order to co-locate or operate from a site close to a third-adjacent channel station and remediate interference to that station. We will adopt REC's proposed modification. We note that section 7(4) of the LCRA explicitly requires the Commission to grant ''low-power FM stations on third-adjacent channels the technical flexibility to remediate interference through the colocation of the transmission facilities of the low-power FM station and any stations on third-adjacent channels.'' We believe that REC's suggested expansion of the definition of ''minor change'' will provide Section 7(3) Stations the sort of ''technical flexibility'' that Congress intended. We also will treat as a ''minor change'' an LPFM proposal to locate ''very close'' to a third-adjacent channel station. Although the LCRA does not explicitly direct the Commission to employ ''flexible'' licensing standards in this context, colocation and ''very close'' locations can eliminate the potential for interference for exactly the same reason (i.e., they result in acceptable signal strength ratios between the two stations at all locations). Generally, this will limit LPFM site selections and relocations pursuant to this policy to transmitter within 500 meters of stations operating on third-adjacent channels. The approach we adopt will advance the overarching goal of section 7 to prevent third-adjacent channel interference by LPFM stations. Accordingly, we will modify § 73.870(a) of our rules to treat these moves as ''minor changes,'' and we will routinely grant applications for authority to make these moves, upon a showing of potential interference from the authorized site, and provided that the licensee would continue to satisfy all eligibility requirements and maintain any comparative attributes on which the grant of the station's initial construction permit was predicated.

52. If interference is remediated through colocation, Common Frequency recommends that we consider allowing ''flexible operating proposals,'' such as upgrades to LP250 if the colocation takes the LPFM transmitter far from the existing transmitter site, the use of different or directional antennas, and the use of close-by towers instead of colocation. We decline to permit Section 7(3) Stations seeking to remediate interference by co-locating their transmission facilities with those of an affected full-service FM station to operate at powers exceeding 100 watts ERP at 30 meters HAAT. We will, however, permit Section 7(3) Stations to propose lower powers, use of directional antennas and use of differing polarizations to remediate interference. This is consistent with our decision to afford applicants seeking second-adjacent waivers the flexibility to employ these methods.

4. Additional Interference Protection and Remediation Obligations

53. One additional provision of section 7—section 7(6)—requires the Commission to impose additional interference protection and remediation obligations on one class of LPFM stations. It directs the Commission to create special interference protections for ''full-service FM stations that are licensed in significantly populated States with more than 3,000,000 population and a population density greater than 1,000 people per square mile land area.'' The obligations apply only to LPFM stations licensed after the enactment of the LCRA. Such stations must remediate actual interference to full-service FM stations licensed to the significantly populated states specified

in section 7(6) and ''located on third-adjacent, second-adjacent, first-adjacent or co-channels'' to the LPFM station and must do so under the interference and complaint procedures set forth in § 74.1203 of the rules. In the *Fourth FNPRM,* we found that the section 7(6) interference requirements are, with one exception, unambiguous. We sought comment on whether to interpret the term ''States'' to include the territories and possessions of the United States. We noted that only New Jersey and Puerto Rico satisfy the population and population density thresholds set forth in section 7(6).

54. Commenters are divided how we should construe the term ''States.'' REC and SOPR argue that Congress did not intend to include Puerto Rico as a ''State'' for purposes of section 7(6). REC contends that, following lobbying from the New Jersey Broadcasters Association (''NJBA''), Congress amended the Act to include the current section 7(6), and that Congress intended this section to apply solely to the state of New Jersey. Arso Radio Corporation (''Arso''), in contrast, asserts that ''States'' should include the territories and possessions of the United States, and therefore, the more restrictive section 7(6) interference protections should apply to both New Jersey and Puerto Rico. Although Arso acknowledges that an examination of the legislative history ''does not yield any clues as to congressional intent regarding use of the word 'States,'" it insists that Congress intended to define the words ''States'' in the same way as it defined ''States'' in section 153(47) of the Communications Act of 1934, as amended (''Act''), which provides that the term ''State'' includes the District of Columbia and the Territories and possessions.

55. We recognize that the term ''States'' is susceptible to different interpretations. It is unclear from the statutory text whether Congress intended the term ''States'' to mean the definition of ''States'' as it appears in the Act, which includes all territories and possessions, or whether Congress intended to use the word ''State'' in its literal sense. We believe, however, that the best construction of this term, based on context and the current record before us, is that ''State'' means one of the 50 states. Congress knows how to implement its directives as amendments to the Communications Act, and chose not to do so in the LCRA. Thus, there is no basis for expanding on the common meaning of the term ''states'' here to include territories. We also agree with REC that New Jersey is ''in a unique situation where there are two significant out-of-state metro markets (New York and Philadelphia) on each side of the state.'' With the New York and Philadelphia Arbitron Metro markets dominating much of the state, full power radio stations in New Jersey generally operate with lower powers and smaller protected contours than other full power radio stations. This could make them uniquely susceptible to interference from LPFM and FM translator stations. Moreover, we note that this provision of the LCRA was introduced by Senator Lautenburg, the senior Senator from New Jersey. This legislative history provides additional support for our conclusion that the term ''States'' in section 7(6) was not intended to include territories.

C. Protection of Translator Input Signals

56. Section 6 of the LCRA requires the Commission to ''modify its rules to address the potential for predicted interference to FM translator input signals on third-adjacent channels set forth in Section 2.7 of the technical report entitled 'Experimental Measurements of the Third-Adjacent Channel Impacts of Low Power FM Stations, Volume One—Final Report (May 2003).''' Section 2.7 of this report finds that ''significant interference to translator input signals does not occur for [desired/undesired ratio] values of -34 dB or higher at the translator input.'' Section 2.7 sets out a formula (''Mitre Formula'') that allows calculation of the minimum LPFM-to-translator separation that will ensure a desired/undesired ratio equal to or greater than -34 dB.

57. In the *Fourth FNPRM,* we noted that the Commission requires LPFM stations to remediate actual interference to the input signal of an FM translator station but has not established any minimum distance separation requirements or other protection standards. Based on the language of section 6, which requires the Commission to ''address the potential for predicted interference,'' we tentatively concluded that our existing requirements regarding remediation of actual interference must be recast as licensing rules designed to prevent any predicted interference. No commenter suggested another interpretation of section 6 of the LCRA. Thus, we affirm our tentative conclusion that section 6 of the LCRA requires us to adopt rules designed to prevent predicted interference to FM translator input signals on third-adjacent channels.

58. In the *Fourth FNPRM,* we sought comment on whether we should require LPFM applicants to protect the input signals of only those translators receiving third-adjacent channel full-service FM station signals, or whether we also should require them to protect the input signals of translators that receive third-adjacent channel translator signals directly off-air. Commenters' opinions vary on this issue. Prometheus argues that the protections should be limited to translators receiving input signals from FM stations. Prometheus believes that any protections beyond those to translators receiving off-air signals from FM stations would violate section 5 of the LCRA, which requires the Commission to ensure that LPFM stations and FM translators remain ''equal in status.'' NPR and Western Inspirational, on the other hand, assert that the protections should extend to translators receiving input signals from other FM translators. NPR claims that, by its plain terms, section 6 of the LCRA requires protection of all signal inputs to translators. NPR notes that this interpretation is consistent with the Commission's current rule protecting translator input signals. Western Inspirational asserts that, with increased spectrum congestion, it has found it necessary for many of its translators to use an off-air input from another translator, not the originating FM station, in order to obtain a reliable input signal.

59. After considering the comments and reviewing the text of the LCRA, we conclude that LPFM applicants must protect the reception directly, off-air of third-adjacent channel input signals from any station, including full-service FM stations and FM translator stations. Section 6 of the LCRA asks the Commission to address predicted interference to ''FM translator input signals on third adjacent channels.'' This unqualified mandate is consistent with our rules, which require LPFM stations to operate without causing actual interference to the input signal of an FM translator or FM booster station.

60. We turn next to the issue of a predicted interference standard for processing LPFM applications. We adopt the basic threshold test proposed in the *Fourth FNPRM,* which received overwhelming support from commenters. This threshold test closely tracks the interference standard developed by Mitre but for the reasons stated below does not require an LPFM applicant to obtain the receive antenna technical characteristics that are incorporated into the Mitre Formula. It provides that an applicant for a new or modified LPFM construction permit may not propose a transmitter site within the ''potential interference area'' of any FM translator station that receives its input signal directly off-air from a full-service FM or FM translator station on a third-adjacent channel. For

these purposes, we define the ''potential interference area'' as both the area within 2 kilometers of the translator site and also the area within 10 kilometers of the translator site within the azimuths from -30 degrees to +30 degrees of the azimuth from the translator site to the site of the FM station being rebroadcast by the translator.

61. As proposed in the *Fourth FNPRM* and supported by commenters, we will permit an LPFM applicant proposing to locate its transmitter within the ''potential interference area'' to use either of two methods to demonstrate that LPFM station transmissions will not cause interference to an FM translator input signal. First, as indicated in Section 2.7 of the Mitre Report, an LPFM applicant may show that the ratio of the signal strength of the LPFM (undesired) proposal to the signal strength of the FM (desired) station is below 34 dB at all locations. Second, an LPFM applicant may use the equation provided in Section 2.7 of the Mitre Report. As requested by Prometheus, we also will permit an LPFM applicant to reach an agreement with the licensee of the potentially affected FM translator regarding an alternative technical solution.

62. We do not authorize FM translator receive antenna locations. However, we believe that most receive and transmit antennas are co-located on the same tower. Accordingly, we proposed to assume that the translator receive antenna is co-located with its associated translator transmit antenna. We received no comment on this proposal. We continue to believe that assuming colocation of translator receive and transmit antennas will facilitate the use of the methods described above. We noted that the Mitre Formula would require the horizontal plane pattern of the FM translator's receive antenna—information that is not typically available publicly or in CDBS. Therefore, we also proposed to allow the use of a ''typical'' pattern in situations where an LPFM applicant is not able to obtain this information from the FM translator licensee, despite reasonable efforts to do so. Both Prometheus and Common Frequency support this proposal. No commenter opposes it. Accordingly, we adopt our proposal to allow use of a ''typical'' pattern when an LPFM station makes reasonable efforts but is unable to obtain the horizontal plane pattern of an FM translator station from that station.

63. Prometheus proposes that we relieve an LPFM applicant of its obligation to protect an FM translator's input signal if, despite reasonable efforts to do so, the applicant is unable to determine the delivery method or input channel for that translator. We will not adopt this proposal because the LCRA requires us to ''address the potential for predicted interference'' in this context. We lack authority to adopt a processing rule that abdicates this responsibility. For this same reason, we also reject Prometheus' proposal to relieve an LPFM station applicant from this protection obligation if a translator licensee fails to maintain accurate and current Commission records regarding its primary station and input signal. In any event, we note that we specify the primary station call sign, frequency and community of license in FM translator authorizations. In addition, we require each FM translator licensee to identify its primary station when filing its renewal application. We strongly recommend that FM translator licensees update the Commission if they have changed their primary stations since they last filed renewal applications.

64. We proposed to dismiss as defective an LPFM application that specifies a transmitter site within the third-adjacent channel ''potential interference area'' but fails to include an exhibit demonstrating lack of interference to the off-air reception by that translator of its input signal. We proposed to permit an LPFM applicant to seek reconsideration of the dismissal of its application and to request reinstatement nunc pro tunc. We also proposed that an LPFM applicant seeking reconsideration and reinstatement nunc pro tunc demonstrate that its proposal would not cause any predicted interference using either the undesired/desired ratio or the Mitre Formula discussed above. Commenters support these proposals. We continue to believe it is appropriate to treat an application dismissed on these grounds the same as an application dismissed for violation of other interference protection requirements. Accordingly, we adopt our proposal to allow an applicant to seek reconsideration and reinstatement nunc pro tunc by making one of the showings discussed herein. In addition, consistent with our decision to permit applicants to do so at the application filing stage, we will permit applicants to reach an agreement with the licensee of the potentially affected FM translator regarding alternative technical solutions.

D. Other Rule Changes

65. The *Fourth FNPRM* proposed changes to our rules intended to promote the LPFM service's localism and diversity goals, reduce the potential for licensing abuses, and clarify certain rules. We sought comment on whether the proposed changes were consistent with the LCRA and whether they would promote the public interest. We discuss each proposed change in turn below.

1. Eligibility and Ownership

a. Requirement That Applicants Remain Local

66. The LPFM service is reserved solely for non-profit, local organizations. In the *Fourth FNPRM,* we expressed concern that, because our rules define ''local'' in terms of ''applicants'' and their eligibility to ''submit applications,'' applicants and licensees might not understand that the localism requirement extends beyond the application stage. We proposed to clarify this by revising § 73.853(b) to read: ''Only local applicants will be permitted to submit applications. For the purposes of this paragraph, an applicant will be deemed local if it can certify, at the time of application, that it meets the criteria listed below and if such applicant continues to satisfy the criteria at all times thereafter * * *.''

67. Prometheus and SOPR support our proposal. Prometheus notes that to require otherwise (i.e., to require that an organization be local only at the time it submits its application) ''would controvert the LCRA and the policies of the Commission.'' SOPR asserts that this clarification may prevent abuse. Catholic Radio Association (''CRA'') suggests language it believes will better achieve our policy objective.

68. Given the limited reach of LPFM stations, we continue to believe that LPFM entities must be local at all times and we will clarify that requirement by amending § 73.853(b). At CRA's suggestion, we will adopt language slightly different from that originally proposed. Our revised rule (with the new language underlined) will read: ''Only local *organizations* will be permitted to submit applications and *to hold authorizations in the LPFM service.* For the purposes of this paragraph, an *organization* will be deemed local if it can certify, *at the time of application,* that it meets the criteria listed below *and if it continues to satisfy the criteria at all times thereafter* * * *.'' We address changes we proposed to the criteria used to define ''local,'' later in this decision.

b. Cross-Ownership of LPFM and FM Translator Stations

69. From the outset, the Commission has prohibited common ownership of an LPFM station and any other media subject to the Commission's ownership

rules. This prohibition fosters one of the most important purposes of establishing the LPFM service—''to afford small, community-based organizations an opportunity to communicate over the airwaves and thus expand diversity of ownership.'' In the *Fourth FNPRM,* we sought comment on whether to allow LPFM station licensees to own or hold attributable interests in one or more FM translator stations. We noted that this could enable LPFM stations to expand their listenership and provide another way for FM translators to serve the needs of communities. We asked whether it was possible to achieve such benefits without changing the extremely local nature of the LPFM service. We further asked whether we should limit cross-ownership of FM translators and LPFM stations by, for example, requiring that (1) any cross-owned FM translator rebroadcast the programming of its co-owned LPFM station; (2) the 60 dBu contours of the co-owned LPFM and FM translator stations overlap; and/or (3) the co-owned LPFM and FM translator stations be located within a set distance or geographic limit of each other. Finally, we asked whether to permit an LPFM station to use alternative methods to deliver its signal to a commonly owned FM translator.

70. A few commenters oppose cross-ownership. These commenters express concerns about the impact of LPFM/FM translator cross-ownership on the local character of the LPFM service and the availability of spectrum for new LPFM stations. NPR points out that the Commission, in creating the LPFM service, considered but ultimately rejected the option of allowing cross-ownership of LPFM and other broadcast stations, finding that its interest in providing for new voices to speak to the community and providing a medium for new speakers to gain broadcasting experience would be best served by barring cross-ownership.

71. In contrast, many commenters support LPFM/FM translator cross-ownership. REC and Nexus/Conexus assert that cross-ownership would enable LPFM stations to better reach their intended communities. REC observes that FM translator stations owned by unrelated entities have been rebroadcasting LPFM signals for over a decade. REC does not believe that limited common ownership of FM translator and LPFM stations would change the nature of the LPFM service. National Lawyers Guild and Media Alliance state that translators might be useful if a terrain obstruction blocks an LPFM signal within the LPFM station's primary contour. Several commenters contend that cross-ownership could enhance localism because many communities are larger than the typical reach of an LPFM station's signal. They contend that FM translators could allow stations to serve their entire intended service area, such as a single county.

72. Most commenters qualify their support for cross-ownership, suggesting various limits or restrictions to ensure that any co-owned FM translator enhances an LPFM station's local mission. Commenters support (1) establishing a distance or geographic limit on FM translator cross-ownership, (2) requiring the service contours of co-owned LPFM and FM translator stations to overlap; (3) limiting the number of FM translators an LPFM licensee may own to a ''modest'' number, such as one or two; and/or (4) requiring co-owned translators to rebroadcast only the LPFM station. Commenters also support requiring an LPFM station to feed the FM translator with an off-air signal, the same delivery restriction that applies to non-reserved band FM translators.

73. We believe that commenters on both sides of this issue raise valid points. As many observe, use of FM translators to rebroadcast LPFM stations could be beneficial, improving local service to oddly-shaped communities and to rural communities that could receive, at best, only partial LPFM coverage. However, as others aptly note, cross-ownership without adequate safeguards poses a potential danger to the local character of the LPFM service. On balance, we believe that the benefits of FM translator ownership by LPFM licensees will outweigh any disadvantages, provided that we take steps to limit potential risks.

74. Accordingly, we will amend § 73.860 of our rules to allow LPFM/FM translator cross-ownership. We will limit cross-ownership, however, in order to prevent large-scale chains and ''leapfrogging'' into unconnected, distant communities. We adopt the following five limits on cross-ownership, which are intended to ensure that the LPFM service retains its extremely local focus. First, we will permit entities—other than Tribal Nation Applicants—to own or hold attributable interests in one LPFM station and a maximum of two FM translator stations. Second, we will require that the 60 dBu contours of a commonly-owned LPFM station and FM translator station(s) overlap. Third, we will require that an FM translator receive the signal of its co-owned LPFM station off-air and directly from the LPFM station, not another FM translator station. Fourth, we will limit the distance between an LPFM station and the transmitting antenna of any co-owned translator to 10 miles for applicants in the top 50 urban markets and 20 miles for applicants outside the top 50 urban markets. An LPFM station may use either its transmitter site or the reference coordinates of its community of license to satisfy these distance restrictions. Fifth, we will require the FM translator station to synchronously rebroadcast the primary analog signal of the commonly-owned LPFM station (or for ''hybrid'' stations, the digital HD–1 program-stream) at all times.

75. We believe that allowing cross-ownership of an LPFM station and up to two FM translator stations will provide maximum flexibility, while the requirement that these translators link directly to their commonly-owned LPFM station rather than to each other will prevent the type of chained-networks of concern to commenters. To keep the service provided by the LPFM/FM translator combinations locally focused, we will limit the placement of co-owned FM translators to conform to the same ten- and twenty-mile distances which define ''local'' applicants in the top 50 and all other markets, respectively. We believe that such a requirement is more easily understood and achieved than alternatives phrased in terms of a signal's ability to stay within political boundaries of a county or city. Our requirement that an FM translator rebroadcast the primary signal of its co-owned LPFM station addresses Grant County's concern that LPFM stations may begin to broadcast multiple digital streams and that stations operating in such a hybrid mode might use translators to network secondary, less locally-oriented programming rather than the station's primary program stream. We are aware of only one LPFM station currently operating in hybrid mode, so this issue is currently of limited applicability. Nevertheless, we adopt Grant County's suggestion that co-owned translators simultaneously rebroadcast the LPFM station's analog programming, as a forward-looking protection to preserve the service's local nature as more LPFM stations avail themselves of technological advances. We further agree with commenters that alternative signal delivery of LPFM signals to FM translators could regionalize LPFM service. Accordingly, we will require that an FM translator receive the signal of its co-owned LPFM station off-air and directly from the LPFM station itself in order to maintain the service's local character.

c. Ownership Issues Affecting Tribal Nations

76. We posed additional ownership-related questions in the *Fourth FNPRM,*

including whether Tribal Nations are eligible and, if not, whether they should be eligible to own LPFM stations. We also sought comment on whether they should be permitted to own more than one LPFM station and/or to own or hold an attributable interest in an LPFM station in addition to a full-power station. We address each of these proposals below.

77. *Basic Eligibility.* § 73.853 of the rules currently provides for the licensing of an LPFM station to a state or local government, but does not explicitly establish the eligibility of a Tribal Nation Applicant. Notwithstanding this omission, it is well established that Tribal Nations are inherently sovereign Nations, with the obligation to ''maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life,'' within their jurisdictions. The Commission, as an independent agency of the United States Government, has an historic federal trust relationship with Tribal Nations, and a longstanding policy of promoting Tribal self-sufficiency and economic development. To this end, the Commission has taken steps to aid in their efforts to provide educational and other programming to their members residing on Tribal Lands, as well as to assist them in acquiring stations for purposes of business and commercial development.

78. In view of our commitment to assist Tribal Nations in establishing radio service on Tribal lands and our consideration of whether to include a Tribal Nation selection criterion in the LPFM comparative analysis, in the *Fourth FNPRM* we proposed to recognize explicitly the eligibility of Tribal Nation Applicants to hold LPFM licenses. We proposed to rely on the definitions of the terms ''Tribal applicant'' and ''Tribal lands'' as they are currently defined in our rules governing full-power NCE FM licensing. By specifically cross-referencing the definition of ''Tribal applicant'' set forth in § 73.7000 of the rules, which includes a reference to the term ''Tribal coverage,'' we implicitly proposed to incorporate the definition of ''Tribal coverage'' set forth therein.

79. Commenters, including NPM and NCAI, supported without significant discussion the proposal to expand the LPFM eligibility rule to include Tribal Nation Applicants. No commenter opposed this proposal. Accordingly, we will amend § 73.853(a) to clarify that Tribal Nation Applicants are eligible to hold LPFM licenses. This rule amendment further underscores the Commission's commitment to recognize the sovereignty of Tribal Nations and to ensure their equal treatment under our rules. However, we will not, as originally proposed, rely on the definition of ''Tribal applicant'' or ''Tribal coverage'' currently used in the NCE FM context. The definition of ''Tribal coverage'' set forth in the NCE FM rules includes a coverage requirement and a requirement that the proposed station serve at least 2,000 people living on Tribal Lands. As NPM and NCAI note, the limited scope of LPFM coverage and the scattered populations on lands occupied by Tribal Nations warrant a departure from the definition of ''Tribal coverage'' set forth in § 73.7000. Unlike NPM and NCAI, however, we believe that not only the 2,000 person threshold but also the coverage requirements are unsuitable for the LPFM context. Instead, for LPFM licensing purposes, we will define a ''Tribal applicant'' by retaining the requirement that the applicant be a Tribe or entity that is 51 percent or more owned or controlled by a Tribe. Such action is consistent with the localism and diversity goals of the LPFM service and will better achieve our goal of assisting Tribal Nations in establishing radio service to their members on Tribal Lands. Tribal stations currently account for less than one-third of one percent of the more than 14,000 radio stations in the United States. Thus, it is self-evident that expanding Tribal radio ownership opportunities will help bring needed new service to chronically underserved communities. Moreover, restricting ownership to Tribes and Tribally controlled entities, which are obligated to preserve their histories, languages, cultures and traditions, will promote the licensing of stations to entities that are uniquely capable of providing radio programming tailored to local community needs and interests.

80. Finally, as NPM and NCAI propose, we will consider a Tribal Nation Applicant local throughout its Tribal lands, so long as such lands are within the LPFM's station's service area. We are persuaded that this better recognizes the sovereign status of Tribal Nations than our original proposal to consider a Tribal Nation Applicant local only if it proposed to locate the transmitting antenna of the proposed LPFM station on its Tribal lands. Moreover, this is consistent with the rules applicable to Tribal Nations and state and local governments operating full-service NCE–FM and Public Safety land mobile services.

81. *Ownership of Multiple LPFM stations.* The Commission currently prohibits entities from owning more than one LPFM station unless they are ''[n]ot-for-profit organizations with a public safety purpose.'' This prohibition is intended to further diversity of ownership and foster a local, community-based LPFM service. In the *Fourth FNPRM,* we sought comment on whether to permit Tribal Nation Applicants to seek more than one LPFM construction permit to ensure adequate coverage of Tribal lands. For instance, we noted that ownership of multiple LPFM stations might be appropriate if Tribal Nation Applicants seek to serve large, irregularly shaped or rural areas that could not be covered adequately with one LPFM station. We explained that we believed that permitting Tribal Nations to hold more than one LPFM license could advance the Commission's efforts to enhance the ability of Tribal Nations to produce programming tailored to their specific needs and cultures, and expand Tribal Nation LPFM station ownership opportunities. We questioned, however, whether we should limit ownership of multiple LPFM stations by a Tribal Nation Applicant to situations where channels also are available for other applicants, thereby eliminating the risk that a new entrant would be precluded from offering service. Finally, we sought comment on whether to implement this policy through amendment of § 73.855(a) of the rules or by rule waivers.

82. A number of commenters support Tribal Nation ownership of multiple LPFM stations on Tribal lands to permit more complete coverage than would be achieved with a single LPFM station. NPM and NCAI note that Tribal Nations already are eligible to own multiple LPFM stations as governmental entities under the public safety exception to our ban on multiple ownership of LPFM stations. They and REC believe Tribal Nations should also be able to own multiple LPFM stations for other noncommercial purposes.

83. Common Frequency, NLG and Media Alliance believe that multiple ownership by Tribal Nations is appropriate on Tribal lands, and in rural areas and small towns where there would be few other organizations interested in applying for LPFM stations. REC, however, would allow Tribal Nation Applicants to own or hold attributable interests in multiple LPFM stations only if Tribal lands constitute at least 50 percent of the land area covered by each additional LPFM station licensed to a Tribal Nation Applicant.

84. CRA, Matt Tuter (''Tuter'') and William Spry (''Spry'') urge us to eliminate the ban on multiple ownership of LPFM stations altogether.

CRA and Tuter contend that maintaining multiple ownership restrictions for all applicants except for Tribal Nation Applicants is mistaken ''because it proceeds from a false notion that only Tribal governments can serve the interests of Tribal Americans.'' Spry, on the other hand, argues that allowing multiple ownership of LPFM stations is no different than permitting cross-ownership of an LPFM station and FM translator stations. According to Spry, ''Multiple licenses are multiple licenses. The service should not matter.''

85. We will allow Tribal Nation Applicants to seek up to two LPFM construction permits to ensure adequate coverage of Tribal lands. Our rules already permit governments, including Tribal Nations, to own multiple LPFM stations for public safety purposes, provided that they designate one application as a priority and provided that non-priority applications do not face MX applications. Consistent with our decision above, we will permit each such co-owned LPFM station to retransmit its signal over two FM translator stations, creating the potential for a Tribal Nation Applicant to have attributable interests in a total of two LPFM stations and four FM translator stations. We believe that this action will significantly further opportunities for LPFM service by Tribal Nations to their members. We will not eliminate our prohibition on multiple ownership altogether as CRA, Tuter and Spry urge. In the *Fourth Report and Order* in this proceeding we found that limited licensing opportunities remain for future LPFM stations in many larger markets while abundant spectrum is available in the more sparsely populated areas where Tribal Nation stations would operate predominantly. Moreover, the voluminous record of this proceeding testifies to the unmet demand for community radio stations. Given the imbalance between spectrum supply and applicant demand in larger markets, eliminating the current prohibition entirely could undermine the LPFM service goal to promote diversity of ownership. Nor will we restrict Tribal Nation ownership of multiple LPFM stations as proposed by REC. Tribal Nation Applicants will need to satisfy our localism requirement in order to be eligible to hold LPFM licenses. We believe this will provide adequate assurance that Tribal Nation ownership of multiple LPFM stations furthers our goal of promoting service to Tribal lands and members.

86. Finally, we note that, in the past, the Commission has prohibited an LPFM applicant from filing more than one application in a filing window. In doing so, it relied upon the fact that ''no one may hold an attributable interest in more than one LPFM station'' and noted that ''a second application filed by an applicant in [a] window would be treated as a 'conflicting' application subject to dismissal under Section 73.3518.'' As discussed above, we are creating a limited exception to the ban on multiple ownership of LPFM stations for Tribal Nation Applicants. Accordingly, we will permit Tribal Nation Applicants to file up to two applications in a filing window.

87. *Cross-Ownership of LPFM and Full Power Stations.* We also sought comment on whether to permit a full-service radio station permittee or licensee that is a Tribal Nation Applicant to file for an LPFM station and hold an attributable interest in such station. As discussed previously, our rules prohibit cross-ownership in order ''to afford small, community-based organizations an opportunity to communicate over the airwaves and thus expand diversity of ownership.'' We stated that we believed that adding an exception for Tribal Nations would enhance their ability to provide communications services to their members on Tribal lands without significantly undermining diversity of ownership. We asked commenters to discuss whether such an exception should be limited to situations where the Tribal Nation Applicant demonstrates that it would serve currently unserved Tribal lands or populations.

88. Few commenters discussed this proposal. NPM, NCAI and Common Frequency express general support. CRA supports cross-ownership of LPFM and full-power stations but believes this option should be available to all applicants. REC supports the proposal but would impose certain cross-ownership restrictions.

89. After considering the comments, we do not believe that there is a sufficient record on which to modify our rules to provide for Tribal Nation cross-ownership of LPFM and full-service stations. The record at this time does not demonstrate that this is necessary or would provide significant public interest benefit. A Tribal Nation with an LPFM authorization may file at any time a rulemaking petition for a Tribal allotment, provided that it pledges to divest the LPFM station. Although we recognize that cross-ownership could permit a Tribal Nation to program separately for different audiences, we remain concerned that this type of cross-ownership might undermine the diversity goals of the LPFM service. It is also not clear, on the record before us, how it would advance our goal of expanding service to Tribal lands and members. Finally, the record did not identify a demonstrated need unique to Tribal Nations that this change would address. Accordingly, we decline at this time to adopt a cross-ownership exception that would allow a Tribal Nation Applicant to hold both LPFM and full-power radio station authorizations. A Tribal Nation Applicant that can demonstrate that a waiver would advance our LPFM goals, and advance our goal of expanding service to Tribal lands and members or is otherwise in the public interest, may seek a waiver of this ownership restriction. Moreover, in light of the trust relationship we share with federally recognized Tribal Nations, the Commission will endeavor, through efforts coordinated by the Office of Native Affairs and Policy and the Audio Division, to engage in further consultation with Tribal Nations and coordination with inter-Tribal government organizations on this cross-ownership issue.

d. Ownership of Student-Run Stations

90. Two commenters ask us to make changes to the exception to the cross-ownership prohibition for student-run stations, which is set forth in § 73.860(b) of the rules. Currently, we permit an accredited school that has a non-student-run full power broadcast station also to apply for an LPFM station that will be managed and operated by students of that institution, provided that the LPFM application is not subject to competing applications. The Commission dismisses the student-run LPFM application if competing applications are filed.

91. REC and Common Frequency propose that we consider applications for student-run stations even if there are competing applications, so that all applicants can participate in settlements and time sharing negotiations. We agree that it would serve the public interest to eliminate this automatic dismissal requirement. When the Commission first adopted this exception to the general prohibition on cross-ownership, it was seeking to strike a balance between an LPFM service comprised entirely of new entrants and one which would enable new speakers including students to gain experience in the broadcast field, even if their universities held other broadcast interests. The Commission believed that the exception properly balanced the interests of local groups in acquiring a first broadcast facility and of university licensees in providing a distinct media outlet for students. Our decision today, however,

alters the LPFM comparative process by adding a selection criterion for applicants with no other broadcast interests. Given this change, we believe it is appropriate to eliminate our limitation on eligibility for student-run LPFM applications by schools with non-student run full power broadcast stations.

92. Common Frequency also proposes that we allow university systems with multiple campuses serving distinct regions, such as those in New York, Georgia, and California, to apply for student-run LPFM stations at any campus without another station, provided that the 60 dBu service contours do not overlap. For example, Common Frequency argues that the newest campus of the University of California at Merced could benefit from a student-run LPFM station but cannot apply because the university owns full-power stations at other campuses. We do not believe that a rule change is needed, however, concerning multiple campuses. Under our rules, a local chapter of a national or other large organization is not attributed with the interests of the larger organization, provided that the local chapter is separately incorporated and has a distinct local presence and mission. In 2000, the Commission clarified that this LPFM attribution exception for ''local chapters'' applies to schools that are part of the same school system, including university systems with multiple campuses, provided that the ''local chapter'' seeks its own licenses. Thus, in Common Frequency's example, the University of California's ownership of full power broadcast stations licensed to separate campus institutions would not prevent the University of California at Merced from applying for an LPFM new station construction permit for a student-run station. We note, however, that ''local chapters'' of larger organizations that hold broadcast interests will not qualify for a ''new entrant'' point, as discussed below. Any broadcast interests held by the ''parent'' organization will be considered attributable for the purposes of this criterion only.

2. Selection Among Mutually Exclusive Applicants

93. The Commission accepts applications for new LPFM stations or major changes to authorized LPFM stations only during filing windows. After the close of an LPFM filing window, the Commission makes mutual exclusivity determinations with regard to all timely and complete filings. The staff then processes any applications not in conflict with any other application filed during the window, and offers applicants identified as MX with other applicants the opportunity to settle their conflicts. If conflicts remain, the Commission applies the LPFM point system. Specifically, under our current rules, the Commission awards one point to each applicant that has an established community presence, one point to each applicant that pledges to operate at least twelve hours per day, and one point to each applicant that pledges to originate locally at least eight hours of programming per day. The Commission takes the pledges made by applicants seriously. We will consider complaints that a licensee is not making good on a pledge it made during the application process and take appropriate enforcement action if we find a licensee has not followed through on its pledge. Moreover, as we noted in establishing the point system, ''As with other broadcast applications, the Commission will rely on certifications but will use random audits to verify the accuracy of the certifications.'' In the event of a tie, the Commission employs voluntary time sharing as the initial tie-breaker. As a last resort, the Commission awards each tied and grantable applicant an equal, successive and non-renewable license term of no less than one year, for a combined total eight-year term.

94. In the *Fourth FNPRM,* we proposed certain changes to our existing criteria, suggested that we award a point to Tribal Nation Applicants, and requested suggestions for new selection criteria that would improve the efficiency of the selection process. As discussed in more detail below, we adopt a revised point system. We will award one point to applicants for each of the following: (1) Established community presence; (2) local program origination; (3) main studio/staff presence (with an extra point going to those applicants making both the local program origination and main studio pledges); (4) service to Tribal lands by a Tribal Nation Applicant; and (5) new entry into radio broadcasting. We will continue to accept voluntary timeshare arrangements, and will continue to accept partial settlements not involving timeshare arrangements, as an additional means to eliminate ties, discourage gamesmanship in timesharing arrangements, and reduce involuntary timeshare outcomes. We eliminate successive timeshare arrangements as the last resort, and will instead allow remaining qualified applicants to share time designated in the manner described below. Finally, we revise our rules to extend mandatory time sharing to LPFM stations that meet the Commission's minimum operating requirements but do not operate 12 hours per day each day of the year.

a. Point System Structure, and Elimination of Proposed Operating Hours Criterion

95. REC and Prometheus each offer modifications to the current point system, but also submit alternative or enhanced methods by which to resolve MX groups. Each party maintains that the purpose of its proposed structure is to decrease the number of potential timeshares and successive licensees. Prometheus proposes a multistage ''waterfall evaluation process'' in which there are multiple opportunities for a single winner to emerge. It notes that, under this system, the Commission would be able to emphasize its ''top priority'' criteria by placing them in the first tier, and explains the process as follows:

> In this system, each criterion would be worth a single point and would be placed—according to priority—into one of several tiers. The Commission would first compare applications using only the criteria in ''Tier 1.'' If, after relying only on the criteria in Tier 1, a single applicant receives more points than any of its competitors, that winning applicant becomes the tentative selectee. However, in the event of a tie between two or more applicants with the most points, those tied applicants would then advance to Tier 2. Applicants with fewer points would be dismissed. These procedures would then be repeated to evaluate the remaining applicants using Tier 2 and, if necessary, Tier 3 criteria.

96. REC, on the other hand, suggests that we retain the established community presence and local programming criteria, and award additional points as follows:

—One point to any applicant that is a municipal or state agency eligible under Part 90 of the rules and provides emergency service;
—One point to any applicant that is an accredited school and will use the proposed LPFM station for a ''hands on'' educational experience in broadcasting;
—One point to any applicant proposing to broadcast children's programming for at least 3 hours per week;
—One point to any applicant that will maintain a main studio staff presence for at least 40 hours per week;
—One point to any applicant volunteering to maintain an online public file;
—One point to any applicant that is owned or controlled by a recognized Tribal Nation that currently has no attributable interests in any other broadcast facility, proposes a

transmitter site located within the boundaries of a Tribal Nation, and has not received a point under this criterion in connection with another LPFM station for which the applicant holds a construction permit or license;

—One point to any applicant that pledges to create a public access broadcasting regime that solicits and presents programming created by and directly submitted by members of the public within the proposed LPFM station's service contour; and

—One point to any applicant willing to accept a time share agreement in lieu of being allowed to broadcast full time.

97. We continue to believe that our basic points structure remains the most effective and efficient method of resolving mutual exclusivities. This conclusion is based in part on our recent experience with NCE applications filed during the 2007 and 2010 windows, where we have successfully resolved hundreds of groups of MX applications based on a very similar point system process. We decline to adopt Prometheus' proposed ''waterfall'' system. While doing so may reduce the likelihood of involuntary timesharing outcomes, we do not believe, as Prometheus suggests, that it would ''reduce the administrative complexity'' of the comparative process generally. Indeed, we believe that it would have the opposite effect, as it would also create the potential for ''waterfall'' levels of comparative analysis and re-analysis. For example, for every successful challenge to the tentative selection of an applicant in a tiered category, the Commission would be forced to re-evaluate the group as a whole to determine which applicant, if any, should proceed to the next tier. If the new applicant in the next tier was successfully challenged, the Commission would have to repeat the evaluation process. This outcome is much less efficient than the current points system, which allows the Commission to weigh all points claimed by all applicants simultaneously. Even if we were to conclude that this approach was administratively feasible, we believe that we would need a far more comprehensive record, developed through a supplemental rulemaking, before we could attempt to ''rank'' the LPFM selection criteria into ''tiers.''

98. As discussed below, however, we adopt some of the new criteria suggested by REC, which we believe will enhance the localism and diversity policies underlying the LPFM service and anticipate will reduce the number of involuntary timesharing outcomes. We reject the remaining criteria suggested by REC and others, as they fail to demonstrate any unmet need that warrants preferences for particular types of programming, would be difficult and time-consuming to administer or enforce, or would not substantially further the Commission's localism goals.

99. Finally, REC, Prometheus and others suggest that we eliminate the proposed operating hours criterion, noting that, because of automation software, ''even one-person LPFM stations easily meet this standard.'' We agree with the commenters that this criterion does not meaningfully distinguish among applicants. Thus, we eliminate it.

b. Established Community Presence

100. Currently, under the LPFM selection procedures for MX LPFM applications set forth in § 73.872 of the rules, the Commission awards one point to an applicant that has an established community presence. The Commission deems an applicant to have such a presence if, for at least two years prior to application filing, the applicant has been headquartered, has maintained a campus or has had three-quarters of its board members residing within ten miles of the proposed station's transmitter site. In the *Fourth FNPRM,* we proposed to revise the language of § 73.872(b)(1) to clarify that an applicant must have had an established local presence for a specified period of time prior to filing its application and must maintain that local presence at all times thereafter. We noted that while § 73.872(b)(1) currently does not include the requirement that an applicant maintain a local presence, we believed that was the only reasonable interpretation of the rule. Commenters that addressed this proposal agreed that this was a reasonable interpretation. Accordingly, we adopt this proposed revision.

101. In addition, we sought comment on other changes to the rule. First, we requested comment on whether to revise our definition of established community presence to require that an applicant have maintained such a presence for a longer period of time, such as four years. Commenters largely disagreed with this proposal, asserting that the duration of a nonprofit organization's existence is not indicative of its level of responsiveness to local concerns. Others noted that the proposal could ''shut out'' suitable applicants or have ''unintended discriminatory consequences.'' A few commenters, however, generally embraced our proposal to maintain the two-year threshold but supported an award of an additional point to applicants that have a substantially longer established community presence (e.g., four years).

102. We continue to believe that established local organizations are more likely to be aware of community needs and better able to ''hit the ground running'' upon commencement of broadcast operations. However, we are persuaded by commenters that organizations that have been established in the community for four years will not necessarily be more responsive to community needs or likely to establish a viable community radio station than those who have been present for two. We likewise agree that extending the length to four years may unnecessarily limit the pool of qualified organizations. Finally, parties supporting a ''bonus'' point for applicants with more established ties to the community failed to offer any demonstration of greater responsiveness supporting its adoption. Accordingly, we will retain the current two-year standard.

103. We also solicited comment on whether we should modify § 73.872(b)(1) to extend the established community presence standard to 20 miles in rural areas. We will adopt this modification as proposed. We note that the Commission extended the ''local'' standard in § 73.853(b) to 20 miles only for rural areas, based on a record indicating special challenges for rural stations. While many commenters support an extension of the established community presence standard to 20 miles in *all* areas, not just rural areas, we are unconvinced that limiting our extension of the standard to rural areas only is unduly harsh or will create disadvantages to applicants with geographically dispersed board member residences, as some commenters suggest.

104. Finally, we sought comment on whether to allow local organizations filing as consortia to receive one point under the established community presence criterion for each organization that qualifies for such a point. Most commenters rejected this proposal, noting that it would encourage gamesmanship and unethical behavior. Amherst Alliance and others state that they are ''deeply concerned that unethical LPFM applicants could manufacture 'paper partners' in order to gain a dramatic advantage over their rivals,'' predicting that the paper partners would eventually either leave the scene or simply ''rubber stamp'' the station operator's actions. Prometheus notes that the proposal could lead to discrimination, and potentially lead to a contest ''favoring the best connected,

best resourced groups'' in a given community. It further notes that non-consortium applicants competing with consortium applicants would almost always lose, even if the non-consortium applicants have received points that are arguably more ''directly related'' to a licensee's potential to serve its community. Finally, Common Frequency notes that the proposal would ''discourage diversity,'' effectively rewarding consortia organizations that hold similar viewpoints over single minority groups, such as foreign-language speakers and LGBT organizations.

105. The few commenters supporting the proposal note that the consortia proposal could speed up the licensing process by lessening the Commission's burden of sorting out MX applications, and would help avoid involuntary time sharing by applicants whose proposed programming formats are incompatible and likely to confuse potential audiences. To help deter potential abuse, Cynthia Conti (''Conti'') suggests that the Commission require consortia applicants to submit with their applications proof of their intention to coexist at their future station, such as a ''joint plan of action'' that would include descriptions of the participating organizations, their individual and collective intentions for the station, and a proposed programming schedule.

106. We are persuaded by commenters that the risk of licensing abuses and the potential for excluding unrepresented or underrepresented niche communities far outweigh potential service benefits or mere administrative efficiencies. Even if we were to require supporting documentation at the application stage, we would still have no reliable mechanism, given our limited administrative resources, to ultimately ensure that such consortia relationships are being meaningfully maintained throughout the license period. Thus, we do not adopt the consortia proposal.

c. Local Program Origination

107. The Commission currently encourages LPFM stations to originate programming locally by awarding one point to each MX applicant that pledges to provide at least eight hours per day of locally originated programming. The rules define ''local origination'' as ''the production of programming, by the licensee, within ten miles of the coordinates of the proposed transmitting antenna.'' In adopting the local program origination criterion, the Commission reasoned that ''local program origination can advance the Commission's policy goal of addressing unmet needs for community-oriented radio broadcasting'' and concluded that ''an applicant's intent to provide locally-originated programming is a reasonable gauge of whether the LPFM station will function as an outlet for community self-expression.''

108. In the *Fourth FNPRM,* we sought comment on whether to place greater emphasis on this selection factor by awarding two points for this criterion instead of the current one point. Alternatively, we sought comment on whether to impose a specific requirement that all new LPFM licensees provide locally-originated programming. We asked parties supporting such a requirement to explain why our prior finding that it was not necessary to impose specific requirements for locally originated programming no longer is valid and to identify problems or short-comings in the current LPFM licensing and service rules that such a change would remedy. We also asked parties supporting a locally-originated programming requirement to address potential constitutional issues.

109. Many commenters generally support the adoption of a locally originated programming obligation, but provide little or no analysis. Prometheus, which devotes the most significant discussion to this issue, would require every LPFM station to air at least 20 hours per week of locally originated programming, maintaining that such a requirement would more effectively ensure that a station would serve community needs, would be consistent with the Commission's policy goal of promoting localism, and would help remediate the ''drastic decline'' of local programming in the media. Prometheus asserts that today, approximately 20 percent of all licensed LPFM stations produce no local programming whatsoever, and states that, without such a requirement, a ''significant number'' of LPFM stations will not offer any local programming. It further maintains that a local program origination requirement is constitutionally sound, pointing to the fact that ''federal legislation, Commission decisions and Supreme Court precedent support the importance of local programming* * * and support Commission actions to adopt content-neutral broadcaster obligations that embrace substantial broadcaster discretion.'' In particular, Prometheus cites proceedings in which the Commission has regulated children's television and network programming.

110. Several commenters do not agree with Prometheus' position, instead arguing that local program origination should remain a comparative criterion. REC fears that ''during tough times,'' stations may not have the financial resources to generate 20 hours weekly of local programming. Other commenters observe that local program origination is ''an easily manipulated requirement,'' is of ''limited value'' with no enforcement mechanism in place, and is not necessarily more responsive to community needs than non-local content. Conti states that, ''given the concern over the constitutionality of requiring programming, the addition of a locally-originated programming requirement could make LPFM rules vulnerable to complaints'' and does not ''think it is worth the risk considering that the criterion does not necessarily result in its stated goal.''

111. After careful consideration of the record, we decline to impose a local program origination requirement. When we first created the LPFM service, we sought comment on whether to impose a local program origination requirement. We noted that listeners benefit from locally originated programming because it often reflects needs, interests, circumstances or perspectives that may be unique to a community. However, we also found that programming need not be locally originated to be responsive to local needs. Ultimately, we concluded that the nature of the LPFM service, combined with eligibility criteria and preferences, would ensure that LPFM licensees would provide locally originated programming or programming that would otherwise respond to local needs.

112. Nothing in the record persuades us that these findings are no longer valid. The Commission has consistently maintained that non-local programming can serve community needs. While Prometheus points to a decline in the production of local programming as support for a local program origination requirement, it has failed to counter the argument that non-locally produced programming *can* serve community needs. Indeed, as commenters have noted, non-local programming can serve the unique needs of a community. For instance, a foreign language station may carry programming ''from home,'' other LPFM stations may broadcast public affairs programming from a neighboring county, and still other LPFM stations may broadcast religious programming.

113. We also continue to believe that the nature of the service inherently ensures that LPFM stations will be responsive to community needs. The record supports this conclusion. Last year, in the *INC Report*, we noted several LPFM ''success'' stories in which LPFM stations were serving their

communities. Moreover, while Prometheus points to the fact that 20 percent of all LPFM licensees currently produce no locally originated programming as evidence of a local media crisis, we believe this is a ''glass half empty'' perspective, and are instead encouraged by the fact that 80 percent of all LPFM licensees *are* producing some local programming.

114. Moreover, given the current economic climate, we believe a local program origination requirement could unnecessarily restrict LPFM licensees and jeopardize their financial health. Many, if not all, of these stations are run by volunteers and operate on a shoestring budget. LPFM licensees often have difficulty finding underwriters to support their stations. Prometheus argues that LPFM stations could arguably afford to produce locally originated programming. However, our own records show that, as a whole, the LPFM service remains financially vulnerable. This is evidenced by the fact that, of the 1,286 LPFM construction permits granted out of the last LPFM application filing window, only 903 LPFM stations ultimately became fully licensed. Moreover, 84 of these station licenses now have either expired or been cancelled, with nearly half of these expirations/cancellations occurring in the last two years. Of the remaining 819 licensed stations, 26 are currently silent. Given these alarming statistics, we believe it is essential to provide LPFM licensees with maximum flexibility to choose their own programming as a measure to ensure their continued viability.

115. Finally, we recognize that Prometheus' support of a local program origination requirement is based on its belief that this option will most effectively further the Commission's goal of ensuring that the LPFM service will ''enhance locally focused community-oriented radio broadcasting.'' We agree that this goal is one of the bedrocks of the LPFM service. However, we find that there are better, alternative ways of furthering this goal without imposing further regulatory restrictions. Specifically, as discussed in more detail below, we believe we can better effectuate our localism goals by retaining a one-point preference for local program origination and supplementing that preference with two additional selection criteria that award points to those applicants best positioned to locally originate programming. Accordingly, given the lack of a clear record basis to support its adoption, we decline to adopt a program origination requirement for LPFM stations. In short, while our selection criteria seek to promote local origination, we believe the benefits of imposing it as a requirement are far outweighed by the costs to a financially vulnerable fledgling sector of the industry.

116. That said, we note that the comments filed in this proceeding reflect some misunderstanding of what constitutes ''locally originated programming'' under our previous orders, and we take this opportunity to provide additional guidance to current and prospective LPFM licensees. In the *Second Order on Reconsideration* in this docket, the Commission held that time-shifted, non-local, satellite-fed programming does not qualify toward the local origination pledge. Commenters indicate that some licensees believe that such programming is local provided that it is delivered in a way other than satellite. This inference is incorrect. Any non-local programming, whether delivered by satellite, over the Internet or other means, does not qualify as locally originated programming. Similarly, in the *Third Report and Order,* we clarified that repetitious automated programming does not meet the definition of local origination, and specifically stated that once a station has broadcast a program twice it can no longer count it as locally originated. According to commenters, some LPFM licensees believe that this is a daily restriction (i.e., cannot repeat programming more than twice in one *day*), while others believe that a program becomes ''new'' for local purposes if musical selections within a program are re-shuffled. Again, these inferences are incorrect. Once a station has broadcast a program twice it can *never* again be counted toward the local program origination pledge. Likewise, programs that have been ''tweaked'' or reorganized do not count toward the requirement if the underlying program has already been played twice. Generally speaking, locally originated programming—whether locally created content (e.g., live call-in shows or news programs), or locally curated content (e.g., a music program reflecting non-random song choices)—must involve a certain level of local *production* (i.e., creation of new content, in order for the programming to be considered locally originated). Each of the examples discussed above lacks this critical element. Our deliberations in this proceeding, including the clarification we provide today, have been consistent with this underlying principle. Accordingly, we will revise § 73.872 of our rules, as well as the FCC Form 318, to incorporate these clarifications.

d. Main Studio

117. REC, Common Frequency and Prometheus each suggest that we modify our rules to award one point to applicants that pledge to maintain a main studio with a staff presence. They assert that an organization that maintains a staffed main studio within the community served by its LPFM station will be better resourced to serve its community's needs. We agree. The local program origination selection criterion was created in part ''to encourage licensees to maintain production facilities and a meaningful staff presence within the community served by the station.'' The Commission has long held that the maintenance of a main studio is integral to a station's ability to serve community needs and produce programming that is responsive to those needs. As indicated by commenters, however, some licensees have chosen not to maintain a main studio and have instead originated programming using automated software, iPods, or CD players. While applicants claiming the local program origination point will retain the discretion to determine the origination point of their programming, we believe that a separate main studio criterion will better effectuate the intent underlying the creation of the local program origination pledge. Accordingly, we will award one point to any organization that pledges to maintain a meaningful staff presence (i.e., staffed by persons whose duties relate primarily to the station and not to non-broadcast related activities of licensee) in a publicly accessible main studio location that has local program origination capability for at least 20 hours per week between 7 a.m. and 10 p.m. Staff may be paid or unpaid, and staffing may alternate among individuals. We will not require stations to have ''management'' staff present during main studio hours. The main studio should be located within 10 miles of the proposed site for the transmitting antenna for applicants in the top 50 urban markets, and 20 miles for applicants outside the top 50 urban markets. We will require applicants to list the proposed main studio address in their applications, as well as the local telephone number to be maintained by the main studio at all times. Applicants failing to include this information will not receive credit for this point.

118. In addition, we will revise § 73.872 of our rules to provide that applicants that claim both the local program origination point and the main studio point will receive a total of three points. We find that the creation of this ''bonus'' point will more effectively

foster the production of focused community-oriented radio programming than would a general local program origination requirement, as it will reward those applicants best situated to further this goal in a meaningful way. We believe that an applicant that plans to originate programming from a main studio will be in a better position to provide programming reflecting community needs and interests than an applicant that will originate programming elsewhere. As the Commission has noted previously, the maintenance of a main studio in the station's community can help ''promote the use of local talent and ideas,'' can ''assure meaningful interaction between the station and the community,'' and can ''increase the ability of the station to provide information of a local nature to the community of license.'' Indeed, both our main studio rules and the LPFM service were created for the same purpose: to ensure that stations would serve as an outlet for community self-expression. The Commission implicitly recognized this nexus when it created the local program origination criterion as a way to ''advance the Commission's policy goal of addressing unmet needs for community oriented radio broadcasting'' and as a means to encourage licensees to maintain production facilities. Moreover, these attributes, of themselves, reflect our core vision of and animating purpose for community radio: licensees that make their stations accessible to their local communities and that are committed to responding to unmet local programming needs.

119. Many LPFM stations fulfill their local program origination commitments without the benefit of equipment and facilities that could be reasonably characterized as ''main studios.'' We also anticipate that some applicants in the upcoming LPFM window may conclude that maintaining and staffing a main studio is not feasible or necessary. On the other hand, the ''bonus'' point will provide a substantial incentive to applicants to assume these responsibilities notwithstanding the associated costs. It is also likely to permit resolution of mutual exclusivities based on Commission policy goals rather than complex tie-breaking procedures and also avoid voluntary and involuntary time sharing arrangements—outcomes that many commenters view negatively. Given commenters' general support of local program origination, our longstanding policy goal of ensuring that the LPFM service provides an outlet for local community voices, and the benefits that would result from implementation of a more robust point system that promotes this goal, we conclude that the record supports our award of a total of three points to those applicants that make *both* the local program origination and main studio pledges.

e. Tribal Nations

120. In the *Fourth FNPRM,* we sought comment on whether to give a point to Tribal Nation Applicants when they propose new radio services that primarily would serve Tribal lands. We proposed to modify § 73.872(b) of our rules to include a Tribal Nations criterion. As with our proposed revisions to the LPFM eligibility requirements set forth at § 73.853 of the rules, we proposed to rely on the definitions of the terms ''Tribal Applicant,'' ''Tribal Coverage,'' and ''Tribal Lands'' as they are currently defined in our rules for this comparative criterion.

121. Commenters largely supported the creation of a Tribal Nation criterion. As we stated in the *Fourth FNPRM,* we believe that adding this criterion will further our efforts to increase ownership of radio stations by Tribal Nation Applicants and enable Tribal Nation Applicants to serve the unique needs and interests of their communities. We find unpersuasive the argument of NPM and NCAI that we should create a ''Tribal Priority,'' i.e., a dispositive preference, for LPFM Tribal Applicants as the rules now provide for in the full power NCE and commercial radio services. The expansion of Tribal stations unquestionably advances our section 307(b) policies. However, as we have explained, Tribes, which hold sovereign responsibilities for the welfare and improvement of their Members, are well-positioned to advance the localism and diversity goals of the LPFM service. Thus, it is reasonable to treat this factor as we have the other comparative factors that also advance these same LPFM goals. Finally, we find no basis in the record for elevating this criterion to a dispositive factor. Accordingly, we adopt our proposal to create a Tribal Nation point criterion.

122. We will not, as originally proposed, rely on the definitions of ''Tribal Applicant'' or ''Tribal Coverage.'' For the reasons discussed above, we instead will define a ''Tribal Applicant'' as a Tribe or entity that is 51 percent or more owned and controlled by a Tribe. We will, however, require that any Tribal Nation Applicant claiming a point under the Tribal Nation criterion propose to locate the transmitting antenna for its proposed station on its Tribal lands. While NPM and NCAI oppose the imposition of such a requirement, arguing ''it is easy to imagine circumstances in which the site which delivers the best, most affordable service to Tribal Lands is a developed antenna site located near, but not on, Tribal Lands,'' we are not persuaded that this requirement will hinder the provision of LPFM service on Tribal lands. Many Tribal Nations occupy unserved or underserved areas. We believe it is highly unlikely that there will be developed antenna sites located near most Tribal lands. However, in the event that there is a developed antenna site near, but not on, the Tribal lands of a Tribal Nation Applicant and the Tribal Nation Applicant can demonstrate that the use of such site will better promote our goals of increasing ownership of radio stations by Tribal Nations and enabling Tribal Nations to serve the unique needs and interests of their communities, we will entertain requests to waive the requirement that the transmitting antenna for the proposed LPFM station be located on the Tribal lands of the Tribal Nation Applicant. Finally, we note that we will not, as REC proposes, require a Tribal Nation Applicant to have no attributable interests in any other broadcast facility in order to qualify for a point under the Tribal Nation criterion. We believe our adoption of a new entrant criterion adequately addresses the concerns underlying REC's proposal. At bottom, through its proposal, REC seeks to ensure that diversity of ownership remains an important goal underlying the LPFM service. By adopting a new entrant criterion, which awards a point to applicants with no attributable interests in other broadcast facilities, we retain an emphasis on diversity of ownership without deemphasizing the importance of promoting the provision of service by Tribal Nation Applicants to Tribal lands and citizens of Tribal Nations.

f. New Entrants

123. As discussed above, we are relaxing our ownership rules to allow LPFM licensees to own or apply for other broadcast interests. Among other things, we are allowing Tribal Nation Applicants to own up to two LPFM stations. In response to this revision, REC suggests that we only allow a Tribal Nation Applicant to claim a point under the Tribal Nations criterion if it is applying for its first LPFM station. We agree with REC's proposal to the extent that it suggests that multiple ownership should be a relevant factor in our analysis. Indeed, we raised this issue in the *Fourth FNPRM.* However, we

believe that a Tribal Nation Applicant should be eligible to receive a point under the Tribal Nation criterion regardless of whether or not it owns or has applied for other LPFM stations, and that any restriction of a Tribal Nation Applicant's eligibility to claim this point would run contrary to our commitment to increase the ownership of radio stations by Tribal Nations and to increase service to Tribal lands and citizens of Tribal Nations. However, we also believe that our selection process should encourage new entrants to broadcasting and foster a diverse range of community voices. We find that allocating a point to new entrants strikes the appropriate balance between these two competing goals. Likewise, adding a new entrants criterion addresses concerns raised by REC and Common Frequency regarding student-run stations. Accordingly, we will award one point to an applicant that can certify that it has no attributable interest in any other broadcast station.

g. Tiebreakers—Voluntary and Involuntary Time Sharing

124. As noted above, in the event the point analysis results in a tie, the Commission releases a public notice announcing the tie and gives the tied applicants the opportunity to propose voluntary time sharing arrangements. Some or all parties in an MX group may enter into a timeshare agreement and aggregate their points. Where applicants cannot reach either a universal settlement or a voluntary time sharing arrangement, the Commission awards each tied and grantable applicant in the MX group an equal, successive and non-renewable license term of no less than one year, for a combined total eight-year term.

125. Several commenters voiced dissatisfaction with both the voluntary and involuntary timesharing processes. REC asserts that we should eliminate point aggregation in voluntary time sharing because it ''can lead to discriminatory behavior intended to silence [other] voices * * *.'' As an alternative, it suggests that applicants move straight to an involuntary time sharing process in cases where parties cannot agree on a voluntary time share (without aggregating points) or other settlement arrangement. Under REC's proposed process, an applicant would have the option to select an ''involuntary time share trigger point'' as a points criterion. In the event of a tie in an MX group, the involuntary time share point would be reviewed. At this point, one of the following scenarios could take place: (1) If all or no applicants claim the point, then they would all proceed to the time share process; or (2) if one or some applicants claim the trigger point, then those claiming the point would proceed to the time share process and remaining applications would be dismissed. Under REC's proposal, applicants reaching the time sharing process would either voluntarily agree on a time sharing arrangement, or be subject to a ''last resort'' method that would allocate time to the top three applicants based on the date of the organization's establishment in the community (i.e., the applicant with the oldest community presence date would get the first opportunity to select its time share slot). REC notes that ''an effective time share group should have no more than three members.''

126. Brown Student Radio also argues that allowing a ''partial settlement'' for the purposes of aggregating points invites the potential for abuse in the LPFM licensing process, where dominant applicants can effectively ''squeeze out'' fellow timeshare applicants by forcing them to accept minimal and suboptimal air time. It cites two examples from the last LPFM filing window in which the dominant applicant in a timesharing arrangement claimed virtually all of the shared air time and left only the required minimum of 10 hours a week (during suboptimal air time) for the other applicants. As such, it urges the Commission to allow parties to partially settle, but without the benefit of aggregating points, or otherwise revise the share-time rules to increase the minimum number of hours that must be awarded to each party to a settlement. Brown Broadcast Services notes that settlements involving less than all of the MX parties were explicitly allowed for in the full-power NCE filing window of 2007, when the action resulted in a grantable singleton application and no new mutual exclusivities were created. Common Frequency likewise supports the use of partial settlements involving technical changes, and additionally suggests that the Commission set up an online settlement process that will allow competing applicants to monitor for potential gamesmanship.

127. While we are cognizant of the potential for gamesmanship in the voluntary timesharing process, we continue to believe that it is one of the most efficient and effective means of resolving mutual exclusivity among tied LPFM applicants. We are not persuaded that REC's proposal, which essentially eliminates voluntary timesharing as a tie breaker and replaces it with an involuntary time sharing regime, will better serve the public interest. We are doubtful that a group of unaffiliated applicants with different formats, budgets and levels of broadcast experience would work together to operate a station under a forced time sharing arrangement as successfully as a group of applicants that have voluntarily agreed to share time. We further believe that we must allow as much flexibility as possible for LPFM stations, especially those subject to time sharing arrangements, to allow them to build and maintain audiences. It is possible that some LPFM applicants may not desire to operate for more than a few hours a week, and in such cases, pooling resources with a timeshare applicant wishing to use more time would result in more diversity and more efficient use of spectrum. Accordingly, we will not revise our time sharing rules, and will continue to allow existing time share participants to reach voluntary arrangements that allow them to apportion the time as they see fit, subject to our requirements under § 73.872(c) of the rules. While we will not set up an online process designed specifically to monitor settlements, as Common Frequency suggests, we note that the Commission has recently upgraded CDBS to permit the electronic filing of pleadings. This feature makes electronically filed pleadings promptly available to the general public, thereby increasing the transparency of the broadcast licensing processes. We will require a party submitting a timeshare agreement or other settlement agreement to file it through CDBS. As such, parties to an MX group should be able to sufficiently monitor competing applications for any developments within their respective group.

128. We turn next to the suggestion that we entertain partial settlements. During the last LPFM filing window, we accepted partial ''technical'' settlements (i.e., technical amendments that eliminated all conflicts between at least one application and all other applications in the same MX group). Thus, through a technical settlement, the Commission can grant one or more applications immediately, with the remaining applicants in that MX group considered separately under the LPFM comparative criteria. These partial settlements worked well during the 2007 NCE FM filing window, where we granted dozens of settlements that resulted in the disposal of hundreds of applications. We will continue to accept such settlements in the upcoming LPFM window, as they provide an additional means for applicants to resolve mutual exclusivities. To provide increased flexibility to this process, we will also, as suggested by Brown Broadcast

Services, temporarily waive our rules to allow MX applicants to move to any available channel during the prescribed settlement period. Amendments proposing new channels will be processed in accordance with established first-come, first-served licensing procedures.

129. We agree with commenters that the system of serial license terms as a tie breaker of last resort has proven unworkable. Of the more than 1,200 construction permits granted in the LPFM service, not a single station currently holds an authorization for involuntary time sharing. While we have little historical data on involuntary timesharing outcomes from the last LPFM window, we presume this is the case either because (1) involuntary time share permittees did not want to invest in building out facilities that would be used by them for as little as one year, or (2) involuntary time share situations proved to be unworkable. To promote more efficient use of available LPFM frequencies, time shares under the final tie breaker will run concurrently and not serially. As suggested by CMAP and, to some extent REC, each party to the involuntary time share will be assigned an equal number of hours per week. We agree with REC that time share situations involving more than three parties may prove cumbersome. As REC proposes, we will limit involuntary time sharing arrangements under this final tie breaker to the three applicants that have been ''established'' in their respective communities for the longest periods of time. Accordingly, each applicant will be required to provide, as part of its application, its date of establishment. If more than three applications are tied and grantable, we will dismiss the applications of all but the three longest ''established'' applicants. We will offer these applicants an opportunity to voluntarily reach a time sharing arrangement. If they are unable to do so, we will ask these applicants to simultaneously and confidentially submit their preferred time slots to the Commission. To ensure that there is no gamesmanship, we will require that these applicants certify that they have not colluded with any other applicants in the selection of time slots. We will use the information provided by the applicants to assign time slots to them. The staff will give preference to the applicant with the longest ''established community presence.'' However, it will award time in units as small as four hours per day to accommodate competing demands for airtime to the maximum extent possible. We believe these procedures are a more sustainable and practical solution to involuntary time share arrangements than our previous measures, and will revise our rules and FCC Form 318 accordingly.

130. Turning to the final issues raised in the *Fourth FNPRM* on share time arrangements, we asked whether we should open a ''mini-window'' for the filing of applications for the abandoned air-time in such arrangements, rather than allowing remaining time share licensees to re-apportion the remaining air time. We did not receive any substantive comments voicing strong opinions on this proposal. We believe that opening such mini-windows would pose a great administrative burden on Commission staff. Such a burden would significantly outweigh the modest benefits that would be realized by filling such limited portions of a broadcast day with additional programming provided by a new timeshare licensee. Moreover, we believe that our adoption of the mandatory timesharing procedures discussed below will provide adequate opportunities to applicants that wish to apply for abandoned airtime. Accordingly, we do not adopt this proposal.

3. Operating Schedule

131. Currently, the Commission requires LPFM stations to meet the same minimum operating hour requirements as full-service NCE FM stations. Like NCE FM stations, LPFM stations must operate at least 36 hours per week, consisting of at least 5 hours of operation per day on at least 6 days of the week. However, while the Commission has mandated time sharing for NCE FM stations that meet the Commission's minimum operating requirements but do not operate 12 hours per day each day of the year, it has not done so for LPFM stations. We sought comment on whether we should extend such mandatory time sharing to the LPFM service. We noted that we believe that doing so could increase the number of broadcast voices and promote additional diversity in radio voices and program services.

132. Only CRA commented on this proposal. It urges the Commission to ''reject this impulse,'' noting that LPFM applicants need as much flexibility as possible to ensure the viability of these small stations. We continue to believe that this measure will increase the number of broadcast voices and promote additional diversity in radio voices and program services in the most administratively efficient manner. However, we find merit to CRA's concerns and will adopt this proposal with safeguards designed to ensure that LPFM licensees have as much opportunity and flexibility as needed to ensure their success. Specifically, in order to provide sufficient ''ramp up'' time, we will not accept applications to share time with any LPFM licensee that has been licensed and operating its station for less than three years. Accordingly, we adopt this proposal, with the modification just described.

4. Classes of Service

133. Currently, there are two classes of LPFM facilities: LP100 and LP10. To date, we have licensed only LP100 stations. In the *Fourth FNPRM,* we proposed to eliminate the LP10 class. We also sought comment on whether to create a new, higher power LP250 class. We specifically sought comment on how the creation of an LP250 class of LPFM facilities could be harmonized with the LCRA, which was ''presumably grounded on the current LPFM maximum power level.''

134. A number of LPFM proponents urge us to retain the LP10 class of service, arguing that it is needed to ensure that LPFM opportunities are available in urban areas. Other commenters advocate eliminating the LP10 class. They point out that, from an engineering standpoint, the LP10 class is spectrally inefficient. We agree that the existing LP10 class is an inefficient utilization of spectrum. LP10 stations offer more limited service but are more susceptible to interference than LP100 stations. Given the increasingly crowded nature of the FM band, we find it appropriate to take this into account. We also are concerned that the reach of LP10 stations would be too small for the stations to be economically viable. As the Media Bureau recently noted, even higher-powered LP100 stations have small service areas and are constrained in ''their ability to gain listeners'' and ''appeal to potential underwriters.'' Because we find that licensing LP10 stations would be an inefficient use of available spectrum and are concerned that LP10 stations would have an even higher failure rate than LP100 stations, we eliminate the LP10 station class.

135. Faced with the loss of the LP10 class, some commenters propose that we create other classes that would transmit at less than 100 watts. Many in the LPFM community support a proposal to replace the LP10 class with an LP50 class, which would allow licensees to transmit at any ERP from 1 to 50 watts. In support, they argue that LP50 stations would offer higher quality service than LP10 stations and may permit station locations closer to city centers. In contrast, NAB opposes creation of an LP50 class, arguing that such action would exceed the intent of Congress.

NAB also asserts that the proposal is not a logical outgrowth of the *Fourth Further Notice* and, therefore, is untimely. Finally, NAB asserts that, like the LP10 class of stations, an LP50 class would be ''technically inefficient.''

136. We will not create an LP50 class. In the *Fourth FNPRM,* we proposed to eliminate the LP10 class, retain the LP100 class and introduce a new LP250 class. We proposed these changes in order to address our concerns with the efficiency and viability of stations operating at powers at or below those authorized for LP100 stations. We agree with NAB that a decision to introduce a new LP50 class could not have been reasonably anticipated by all interested parties. Moreover, we believe that LP50 stations would suffer many of the same technical deficiencies as LP10 stations. Accordingly, we have decided not to adopt the proposed LP50 class.

137. The LPFM community offers broad support for the creation of a new LP250 class. These commenters cite benefits including improved LPFM station viability through better access to underwriting, more consistent signal coverage throughout the community served by the LPFM station, and the ability to serve areas of low population density and/or more distant communities. Several commenters, however, strenuously oppose the creation of an LP250 class. These commenters do not dispute the benefits cited by those supportive of an LP250 class. Instead, they argue that an LP250 class would pose a greater interference risk to full power stations, is unnecessary given the availability of 250 watt Class A licenses, would be a departure from the local character of the LPFM service, and goes beyond the intent of Congress in enacting the LCRA.

138. At this time, we will not adopt our proposal to create an LP250 class. Given the disagreement among commenters about, among other things, LP250 station location restrictions and technical parameters, we believe the issue of increasing the maximum facilities for LPFM stations requires further study. We note, however, that the LCRA does not contain any language limiting the power levels at which LPFM stations may be licensed. We also find unpersuasive NAB's and NPR's reliance on certain statements in the legislative history. These statements merely describe the rules governing LPFM service at the time Congress was considering the LCRA. Since we have decided not to adopt the proposal, we need not definitively resolve the question.

5. Removal of I.F. Channel Minimum Distance Separation Requirements

139. In the *Fourth FNPRM,* we noted that LPFM stations are currently required to protect full-service stations on I.F. channels while translator stations operating with less than 100 watts are not. To address this disparity, we proposed to remove I.F. protection requirements for LPFM stations operating with less than 100 watts. We noted that we believe the same reasoning that the Commission applied in exempting FM translator stations operating with less than 100 watts ERP from I.F. protection requirements would apply for LPFM stations operating at less than 100 watts ERP. These stations too are the equivalent of Class D FM stations, which are not subject to I.F. protection requirements. We further noted that FM allotments would continue to be protected on the I.F. channels based on existing international agreements. We sought comment on this proposal.

140. Commenters generally support removal of the I.F. protection requirements applicable to LPFM stations. Some ground their support in the need to put LPFM stations and translators on an ''equal footing'' while others assert that improvements in receiver technology render I.F. protection requirements unnecessary. NPR is the lone commenter urging retention of I.F. protection requirements. NPR infers an intent to retain the I.F. protections from the fact that Congress specifically addressed minimum distance separations but did not eliminate those related to I.F. We find NPR's argument unpersuasive. In the absence of explicit direction in the LCRA regarding I.F. protection requirements, and in light of the fact that Congress explicitly required retention of the co-channel and first- and second-adjacent channel spacing requirements, we believe that it is reasonable to read the statute not to require the Commission to retain I.F. protection requirements. Had Congress wished to ensure that the I.F. protections remained in place, we believe that it would have done so in the text of the LCRA.

141. NPR also requests that the Commission study the impact of its decision ''roughly 20 years ago'' to exempt from I.F. protection requirements FM translator stations operating with less than 100 watts ERP. NPR urges us to complete this study prior to acting on our proposal. Common Frequency asserts, however, that the Commission would have investigated I.F. interference by now if it had proved a problem. Common Frequency is correct. We have not received any recent complaints regarding I.F. interference from FM translators exempted from the I.F. protection requirements. Indeed, it is telling that NPR has not cited a single instance of such interference. Therefore, and in light of the fact that a receiver does not distinguish between the signal of an LPFM station or an FM translator, we find that the proposed change will not result in significant I.F. interference.

142. Accordingly, we adopt this proposal. We find this change necessary to ensure parity between LPFM stations and FM translator stations, which, for I.F. interference purposes, are indistinguishable. As requested by commenters, we will eliminate these requirements for LPFM stations operating at or below 100 watts ERP. We had originally proposed to exempt only LPFM stations operating at less than 100 watts ERP from the I.F. protection requirements. However, commenters pointed out that, if we adopted the proposal set forth in the *Fourth FNPRM,* LP100 stations would remain subject to I.F. protection requirements. These commenters argue that there is little difference between LPFM stations operating at 99 versus 100 watts ERP and urge us to eliminate the I.F. protection requirements for LPFM stations operating at 100 watts or less ERP. We agree. Moreover, since going forward we will license LPFM stations to operate at ERPs ranging from 50 watts to 100 watts, we find that eliminating the I.F. protection requirements for stations operating at 100 watts or less ERP is the more sensible choice.

E. Window Filing Process

143. Several commenters voiced concern about the timing and mechanics of the upcoming LPFM application filing window. Several LPFM advocates ask that ''adequate time'' be given for applicants to prepare their applications after adoption of the revised rules. Prometheus urges the Commission to give six to nine months lead time up to the filing window, maintaining that applicants need time to raise funds, hire a consulting engineer and assess spectrum availability. REC, on the other hand, opposes any ''artificial'' delay, stating that any delay between the issuance of final rules and the window should occur naturally. To some extent, this debate is moot as there is a substantial cushion of time organically built into the process for the final rules we adopt or modify today, as well as any related form changes. Moreover, to maximize LPFM filing opportunities it is critical for the Media Bureau to

complete substantially all of its processing of the pending FM translator applications prior to the opening of the LPFM window. Thus, the window will open approximately nine months from the effective date of the *Fifth Order on Reconsideration.* To help potential LPFM applicants prepare for the upcoming window, we announce a target date of October 15, 2013. However, we delegate authority to the Media Bureau to adjust this date in the event that future developments affect window timing. In sum, there will be ample time for all LPFM applicants to familiarize themselves with the rules and plan accordingly before the filing window opens.

144. Commenters also suggest multiple windows in order to ease the demand for affordable engineering assistance immediately before the opening of the window. Prometheus further suggests that we bifurcate the application into short and long forms, with second-adjacent waiver showings submitted in the long form. Prometheus argues that multiple filing windows and a short form/long form application process would help address the scarcity issue of qualified, affordable consulting engineers and allow more interested parties to file. Common Frequency echoes these concerns, reporting that in the 2007 NCE window ''[s]ome applicants could not file because they could not find engineers, and others were priced-out from applying because an engineer and lawyer could run as much as $5000.'' We recognize these concerns. Thus, in order to ease upfront technical burdens and engineering costs, we will accept a threshold second-adjacent waiver technical showing when an applicant seeks to make a ''no interference'' showing based on lack of population in areas where interference is predicted to occur. Under this procedure an applicant would use ''worst-case'' assumptions about the area of potential interference in combination with a USGS map or a Google map to demonstrate ''lack of population'' within this area. Applicants should be able to complete this simple showing without the use of a consulting engineer. In light of our adoption of this threshold showing, we see no need to bifurcate our application process into short and long forms or to open multiple filing windows. We believe that this alternative showing will ease some of the technical and financial burdens of application filing and will help ensure that new entrants in underserved communities are not ''priced out'' of the opportunity to file an LPFM application in the upcoming window. We further believe that these measures will help alleviate any obstacles applicants face due to an ''engineering shortage,'' as those applicants that choose to make the threshold showing will no longer need to hire a consulting engineer.

II. Procedural Matters

A. Final Regulatory Flexibility Analysis

145. As required by the Regulatory Flexibility Act (''RFA''), an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the *Fourth FNPRM* in MM Docket No. 99–25. The Commission sought written public comment on the proposals in the *Fourth FNPRM,* including comment on the IRFA. We received no comments specifically directed toward the IRFA. This Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.

146. *Need For, and Objectives of, the Proposed Rules.* This rulemaking proceeding was initiated to seek comment on how to implement certain provisions of the LCRA. The *Sixth R&O* amends certain technical rules to implement the LCRA. The *Sixth R&O* adopts the waiver standard for second-adjacent channel spacing waivers set forth in section 3(b)(2)(A) of the LCRA. It specifies the manner in which a waiver applicant can satisfy this standard and the manner in which the Commission will handle complaints of interference caused by LPFM stations operating pursuant to second-adjacent channel waivers. As required by section 7 of the LCRA, the *Sixth R&O* modifies the regimes applicable if an LPFM station causes third-adjacent channel interference. As specified by the LCRA, the *Sixth R&O* applies the protection and interference remediation requirements applicable to FM translator stations to those LPFM stations that would have been short-spaced under the third-adjacent channel spacing requirements eliminated in the *Fifth R&O* in MM Docket No. 99–25. The *Sixth R&O* states that the Commission will consider directional antennas, lower ERPs and/or differing polarizations to be suitable techniques for eliminating third-adjacent channel interference. The *Sixth R&O* applies the more lenient interference protection obligations currently applicable to LPFM stations that would have been fully-spaced under the third-adjacent channel spacing requirements eliminated in the *Fifth R&O* (''fully-spaced LPFM stations''). The *Sixth R&O* addresses the timing, frequency and content of the periodic broadcast announcements that newly constructed fully-spaced LPFM stations must make pursuant to section 7(2) of the LCRA. It revises the rules to treat as a ''minor change'' a proposal to move a fully-spaced LPFM station's transmitter outside its current service contour in order to co-locate or operate from a site close to a third-adjacent channel station and remediate interference to that station. Finally, the *Sixth R&O* implements section 6 of the LCRA, modifying the Commission's rules to address the potential for predicted interference to FM translator input signals from LPFM stations operating on third-adjacent channels. It adopts a basic threshold test designed to identify applications that are predicted to cause interference to FM translator input signals on third-adjacent channels and states that the Commission will dismiss any application that does not satisfy this threshold test as unacceptable for filing.

147. The *Sixth R&O* also makes a number of other changes to the Commission's rules to better promote localism and diversity, which are at the very heart of the LPFM service. It clarifies that the localism requirement set forth in § 73.853(b) of the rules applies not just to LPFM applicants but also to LPFM permittees and licensees. The *Sixth R&O* revises the rules to permit cross-ownership of an LPFM station and up to two FM translator stations but, at the same time, establishes a number of restrictions on such cross-ownership in order to ensure that the LPFM service retains its extremely local focus.

148. In the interests of advancing the Commission's efforts to increase ownership of radio stations by federally recognized Tribal Nations or entities owned or controlled by Tribal Nations, the *Sixth R&O* amends the Commission's rules to explicitly provide for the licensing of LPFM stations to Tribal Nation Applicants, and to permit Tribal Nation Applicants to own or hold attributable interests in up to two LPFM stations.

149. In addition, the Order modifies the point system that the Commission uses to select among MX LPFM applications. Specifically, the *Sixth R&O* eliminates the proposed operating hours criterion, revises the established community presence criterion, affirms the local program origination criterion, and adds new criteria related to maintenance and staffing of a main studio, offering by Tribal Nation Applicants of new radio services that primarily serve Tribal lands, and new entry into radio broadcasting. Given these changes, the *Sixth R&O* also revises the existing exception to the cross-ownership rule for student-run

stations. The *Sixth R&O* announces the Commission will continue to entertain partial ''technical'' settlements in the LPFM context and modifies the way in which involuntary time sharing works, shifting from sequential to concurrent license terms and limiting involuntary time sharing arrangements to three applicants. It adopts mandatory time sharing, which currently applies to full-service noncommercial educational translator stations but not LPFM stations.

150. Finally, the *Sixth R&O* eliminates the LP10 class of LPFM facilities and removes all of the I.F protection requirements applicable to LPFM stations except those established by international agreements.

151. *Summary of Significant Issues Raised by Public Comments in Response to the IRFA.* None.

152. *Description and Estimate of the Number of Small Entities to Which Rules Will Apply.* The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules. The RFA generally defines the term ''small entity'' as encompassing the terms ''small business,'' ''small organization,'' and ''small governmental entity.'' In addition, the term ''small Business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

153. *Radio Broadcasting.* The policies apply to radio broadcast licensees, and potential licensees of radio service. The SBA defines a radio broadcast station as a small business if such station has no more than $7 million in annual receipts. Business concerns included in this industry are those primarily engaged in broadcasting aural programs by radio to the public. According to Commission staff review of the BIA Publications, Inc. Master Access Radio Analyzer Database as of September 15, 2011, about 10,960 (97 percent) of 11,300 commercial radio stations have revenues of $7 million or less and thus qualify as small entities under the SBA definition. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

154. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the estimate of small businesses to which the rules apply does not exclude any radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

155. *FM translator stations and low power FM stations.* The policies adopted in the *Sixth R&O* affect licensees of FM translator and booster stations and low power FM (LPFM) stations, as well as potential licensees in these radio services. The same SBA definition that applies to radio broadcast licensees would apply to these stations. The SBA defines a radio broadcast station as a small business if such station has no more than $7 million in annual receipts. Currently, there are approximately 6,105 licensed FM translator stations and 824 licensed LPFM stations. In addition, there are approximately 646 applicants with pending applications filed in the 2003 translator filing window. Given the nature of these services, we will presume that all of these licensees and applicants qualify as small entities under the SBA definition.

156. *Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.* The *Sixth R&O* modifies existing requirements and imposes additional paperwork burdens. The *Sixth R&O* modifies the Commission's policy regarding waivers (''second-adjacent waivers'') of the second-adjacent channel minimum distance separations set forth in § 73.807 of the rules. As required by the LCRA, the *Sixth R&O* requires an applicant seeking a second-adjacent waiver to submit a showing that demonstrates that its proposed operations will not result in interference to any authorized radio service. The *Sixth R&O* specifies that a waiver applicant can make this showing in the same manner as an FM translator applicant (i.e., by showing that no interference will occur due to lack of population and using undesired/desired signal strength ratio methodology to narrowly define areas of potential interference). The *Sixth R&O* also permits certain applicants to propose to use directional antennas and/or differing antenna polarizations to make the required showing. The *Sixth R&O* mandates that complaints about interference from stations operating pursuant to second-adjacent waivers include certain information. For instance, a complaint must include the listener's name and address and the location at which the interference occurs. The *Sixth R&O* specifies that the Commission will treat as a ''minor change'' a proposal to move the transmitter site of an LPFM station operating pursuant to a second-adjacent waiver outside its current service contour in order to co-locate or operate from a site close to a second-adjacent channel station and remediate interference to that station.

157. The *Sixth R&O* modifies the regime governing complaints about and remediation of third-adjacent channel interference caused by LPFM stations. As required by the LCRA, the *Sixth R&O* modifies the requirements applicable to complaints about third-adjacent channel interference caused by stations that do not satisfy the third-adjacent minimum distance separations set forth in § 73.807 of the rules. It also permits such stations to propose to use directional antennas and/or differing antenna polarizations in order to eliminate third-adjacent channel interference caused by their operations. The *Sixth R&O* modifies the requirements applicable to complaints about third-adjacent interference caused by LPFM stations that satisfy the third-adjacent minimum distance separations set forth in § 73.807 of the rules and strongly encourages that such complaints be filed with the Media Bureau's Audio Division. As in the second-adjacent channel context, the *Sixth R&O* explains that the Commission will treat proposals from LPFM stations seeking to remediate third-adjacent channel by co-locating or operating from a site close to a third-adjacent channel station as ''minor changes.'' As required by the LCRA, the *Sixth R&O* requires newly constructed LPFM stations that satisfy the third-adjacent minimum distance separations set forth in § 73.807 of the rules to make periodic announcements. It also adopts requirements related to the timing and content of these announcements.

158. The *Sixth R&O* adopts certain New Jersey-specific provisions regarding complaints of interference. The *Sixth R&O* also adopts a threshold test to determine whether an LPFM applicant adequately protects translator input signals. In order to ensure that an LPFM applicant protects the correct input signal for an FM translator, the

Sixth R&O recommends that FM translator licensees update the Commission if they have changed their primary station since they last filed a renewal application. If an applicant proposes to locate its transmitter within the ''potential interference area'' for another station, the applicant must demonstrate that it will not cause interference by making one of three showings. The *Sixth R&O* provides that an applicant can make these same showings in the context of a petition for reconsideration and reinstatement nunc pro tunc.

159. The *Sixth R&O* modifies the rules governing eligibility to hold licenses for LPFM stations. Specifically, it alters the eligibility rule to authorize issuance of an LPFM license to a Tribal Nation Applicant. The *Sixth R&O* also revises the localism requirement to clarify that an LPFM applicant must certify that, at the time of application, it is local and must pledge to remain local at all times thereafter. In addition, the *Sixth R&O* revises the definition of ''local'' to specify that a Tribal Nation Applicant is considered ''local'' throughout its Tribal lands.

160. The *Sixth R&O* revises the rules to permit multiple ownership of LPFM stations by Tribal Nation Applicants and cross-ownership of LPFM and FM translator stations. As a result, the Commission is revising the ownership certifications set forth in FCC Form 318.

161. The *Sixth R&O* makes a number of changes to the point system used to select among MX applications for LPFM stations. It extends the established community presence standard from 10 to 20 miles in rural areas. The Commission is revising FCC Form 318 to reflect this change. The *Sixth R&O* also adopts four new points criteria. Specifically, it adopts a new main studio criterion and requires an applicant seeking to qualify for a point under this criterion to submit certain information (i.e., an address and telephone number for its proposed main studio) on FCC Form 318. In addition, the *Sixth R&O* specifies that the Commission will award a point to an LPFM applicant that makes both the local program origination and main studio pledges and adopts Tribal Nations and new entrant criteria. The Commission is revising FCC Form 318 to reflect these new criteria.

162. The *Sixth R&O* makes a number of changes related to time sharing. It adopts a requirement that parties submit voluntary time sharing agreements via the Commission's Consolidated Database System. It also revises the Commission's involuntary time sharing policy, shifting from sequential to concurrent license terms and limiting involuntary time sharing arrangements to three applicants. As a result of these changes, an LPFM applicant must submit, on FCC Form 318, the date on which it qualified as having an ''established community presence'' and may be required to submit information to the Commission regarding the time slots it prefers. Finally, the *Sixth R&O* adopts a mandatory time sharing policy similar to that applicable to full-service NCE FM stations. Applicants seeking to time-share pursuant to this policy must submit applications on FCC Form 318 and include an exhibit related to mandatory time sharing.

163. *Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.* The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

164. Consideration of alternative methods to reduce the impact on small entities is unnecessary because the passage of the LCRA required the Commission to make changes to a number of its technical rules. Moreover, the changes made to the Commission's non-technical rules benefit small businesses and existing LPFM licensees, offering them greater flexibility and additional licensing opportunities.

165. The LPFM service has created and will continue to create significant opportunities for small businesses, allowing them to develop LPFM service in their communities. To the extent that any modified or new requirements set forth in the *Sixth R&O* impose any burdens on small entities, we believe that the resulting impact on small entities would be favorable because the rules would expand opportunities for LPFM applicants, permittees, and licensees to commence broadcasting and stay on the air. Among other things, the *Sixth R&O* allows limited cross-ownership of LPFM and FM translator stations. This is prohibited under the current rules. Likewise, the *Sixth R&O* permits Tribal Nation Applicants to own or hold attributable interests in up to two LPFM stations to ensure adequate coverage of Tribal lands. Today, multiple ownership of LPFM stations is prohibited. The *Sixth R&O* also modifies the point system that the Commission uses to select among MX LPFM applications to award a point to an applicant that can certify that it has no attributable interest in any other broadcast station. Finally, the *Sixth R&O* extends mandatory time sharing to the LPFM service. If the licensee of an LPFM station does not operate the station 12 hours per day each day of the year, another organization may file an application to share-time with that licensee.

166. *Report to Congress.* The Commission will send a copy of the *Sixth R&O,* including this FRFA, in a report to be sent to Congress pursuant to the SBREFA. In addition, the Commission will send a copy of the *Sixth R&O,* including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Sixth R&O* and the FRFA (or summaries thereof) will also be published in the **Federal Register**.

B. Paperwork Reduction Act

167. The *Sixth R&O* contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (''PRA''). The requirements will be submitted to the Office of Management and Budget for review under section 3507(d) of the PRA. The Commission will publish a separate notice in the **Federal Register** inviting comments on the new information collection requirements adopted in this document. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. We describe impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA in Appendix B, *infra.*

C. Congressional Review Act

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

III. Ordering Clauses

169. *It is further ordered* that pursuant to the authority contained in sections 1, 4(i), 4(j), 303, 307, 309(j), and 316 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j),

303, 307, 309(j), and 316, and the Local Community Radio Act of 2010, Public Law 111–371, 124 Stat. 4072 (2011), this *Sixth Report and Order* is hereby *adopted* and Part 73 of the Commission's rules *is amended* as set forth in Appendix C, effective 30 days after publication in the **Federal Register**, except pursuant to paragraph 140 below.

170. *It is further ordered* that the rules adopted herein that contain new or modified information collection requirements that require approval by the Office of Budget and Management under the Paperwork Reduction Act *will become effective* after the Commission publishes a notice in the **Federal Register** announcing such approval and the relevant effective date.

171. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Sixth Report and Order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 73

Radio.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

■ 2. Section 73.807 is revised to read as follows:

§ 73.807 Minimum distance separation between stations.

Minimum separation requirements for LPFM stations are listed in the following paragraphs. Except as noted below, an LPFM station will not be authorized unless the co-channel, and first- and second-adjacent channel separations are met. An LPFM station need not satisfy the third-adjacent channel separations listed in paragraphs (a) through (c) of this section in order to be authorized. The third-adjacent channel separations are included for use in determining for purposes of § 73.810 which third-adjacent channel interference regime applies to an LPFM station. Minimum distances for co-channel and first-adjacent channel are separated into two columns. The left-hand column lists the required minimum separation to protect other stations and the right-hand column lists (for informational purposes only) the minimum distance necessary for the LPFM station to receive no interference from other stations assumed to be operating at the maximum permitted facilities for the station class. For second-adjacent channel, the required minimum distance separation is sufficient to avoid interference received from other stations.

(a)(1) An LPFM station will not be authorized initially unless the minimum distance separations in the following table are met with respect to authorized FM stations, applications for new and existing FM stations filed prior to the release of the public notice announcing an LPFM window period, authorized LPFM stations, LPFM station applications that were timely-filed within a previous window, and vacant FM allotments. LPFM modification applications must either meet the distance separations in the following table or, if short-spaced, not lessen the spacing to subsequently authorized stations.

Station class protected by LPFM	Co-channel minimum separation (km)		First-adjacent channel minimum separation (km)		Second and third adjacent channel minimum separation (km)
	Required	For no interference received from max. class facility	Required	For no interference received from max. class facility	Required
LPFM	24	24	14	14	None
D	24	24	13	13	6
A	67	92	56	56	29
B1	87	119	74	74	46
B	112	143	97	97	67
C3	78	119	67	67	40
C2	91	143	80	84	53
C1	111	178	100	111	73
C0	122	193	111	130	84
C	130	203	120	142	93

(2) LPFM stations must satisfy the second-adjacent channel minimum distance separation requirements of paragraph (a)(1) of this section with respect to any third-adjacent channel FM station that, as of September 20, 2000, broadcasts a radio reading service via a subcarrier frequency.

(b) In addition to meeting or exceeding the minimum separations in paragraph (a) of this section, new LPFM stations will not be autorized in Puerto Rico or the Virgin Islands unless the minimum distance separations in the following tables are met with respect to authorized or proposed FM stations:

Station class protected by LPFM	Co-channel minimum separation (km)		First-adjacent channel minimum separation (km)		Second and third adjacent channel minimum separation (km)—required
	Required	For no interference received from max. class facility	Required	For no interference received from max. class facility	
A	80	111	70	70	42
B1	95	128	82	82	53
B	138	179	123	123	92

Note to paragraphs (a) and (b): Minimum distance separations towards ''grandfathered'' superpowered Reserved Band stations are as specified. Full service FM stations operating within the reserved band (Channels 201–220) with facilities in excess of those permitted in § 73.211(b)(1) or (b)(3) shall be protected by LPFM stations in accordance with the minimum distance separations for the nearest class as determined under § 73.211. For example, a Class B1 station operating with facilities that result in a 60 dBu contour that exceeds 39 kilometers but is less than 52 kilometers would be protected by the Class B minimum distance separations. Class D stations with 60 dBu contours that exceed 5 kilometers will be protected by the Class A minimum distance separations. Class B stations with 60 dBu contours that exceed 52 kilometers will be protected as Class C1 or Class C stations depending upon the distance to the 60 dBu contour. No stations will be protected beyond Class C separations.

(c) In addition to meeting the separations specified in paragraphs (a) and (b), LPFM applications must meet the minimum separation requirements in the following table with respect to authorized FM translator stations, cutoff FM translator applications, and FM translator applications filed prior to the release of the Public Notice announcing the LPFM window period.

Distance to FM translator 60 dBu contour	Co-channel minimum separation (km)		First-adjacent channel minimum separation (km)		Second and third adjacent channel minimum separation (km)—required
	Required	For no interference received	Required	For no interference received	
13.3 km or greater	39	67	28	35	21
Greater than 7.3 km, but less than 13.3 km	32	51	21	26	14
7.3 km or less	26	30	15	16	8

(d) Existing LPFM stations which do not meet the separations in paragraphs (a) through (c) of this section may be relocated provided that the separation to any short-spaced station is not reduced.

(e)(1) *Waiver of the second-adjacent channel separations.* The Commission will entertain requests to waive the second-adjacent channel separations in paragraphs (a) through (c) of this section on a case-by-case basis. In each case, the LPFM station must establish, using methods of predicting interference taking into account all relevant factors, including terrain-sensitive propagation models, that its proposed operations will not result in interference to any authorized radio service. The LPFM station may do so by demonstrating that no actual interference will occur due to intervening terrain or lack of population. The LPFM station may use an undesired/desired signal strength ratio methodology to define areas of potential interference.

(2) *Interference.* (i) Upon receipt of a complaint of interference from an LPFM station operating pursuant to a waiver granted under paragraph (e)(1) of this section, the Commission shall notify the identified LPFM station by telephone or other electronic communication within one business day.

(ii) An LPFM station that receives a waiver under paragraph (e)(1) of this section shall suspend operation immediately upon notification by the Commission that it is causing interference to the reception of an existing or modified full-service FM station without regard to the location of the station receiving interference. The LPFM station shall not resume operation until such interference has been eliminated or it can demonstrate to the Commission that the interference was not due to emissions from the LPFM station. Short test transmissions may be made during the period of suspended operation to check the efficacy of remedial measures.

(f) Commercial and noncommercial educational stations authorized under subparts B and C of this part, as well as new or modified commercial FM allotments, are not required to adhere to the separations specified in this rule section, even where new or increased interference would be created.

(g) *International considerations within the border zones.* (1) Within 320 km of the Canadian border, LPFM stations must meet the following minimum separations with respect to any Canadian stations:

Canadian station class	Co-channel (km)	First-adjacent channel (km)	Second-adjacent channel (km)	Third-adjacent channel (km)	Intermediate frequency (IF) channel (km)
A1 & Low Power	45	30	21	20	4
A	66	50	41	40	7

Canadian station class	Co-channel (km)	First-adjacent channel (km)	Second-adjacent channel (km)	Third-adjacent channel (km)	Intermediate frequency (IF) channel (km)
B1	78	62	53	52	9
B	92	76	68	66	12
C1	113	98	89	88	19
C	124	108	99	98	28

(2) Within 320 km of the Mexican border, LPFM stations must meet the following separations with respect to any Mexican stations:

Mexican station class	Co-channel (km)	First-adjacent channel (km)	Second- and third-adjacent channel (km)	Intermediate frequency (IF) channel (km)
Low Power	27	17	9	3
A	43	32	25	5
AA	47	36	29	6
B1	67	54	45	8
B	91	76	66	11
C1	91	80	73	19
C	110	100	92	27

(3) The Commission will notify the International Telecommunications Union (ITU) of any LPFM authorizations in the US Virgin Islands. Any authorization issued for a US Virgin Islands LPFM station will include a condition that permits the Commission to modify, suspend or terminate without right to a hearing if found by the Commission to be necessary to conform to any international regulations or agreements.

(4) The Commission will initiate international coordination of a LPFM proposal even where the above Canadian and Mexican spacing tables are met, if it appears that such coordination is necessary to maintain compliance with international agreements.

■ 3. Section 73.809 is amended by revising paragraph (a) introductory text to read as follows:

§ 73.809 Interference protection to full service FM stations.

(a) If a full service commercial or NCE FM facility application is filed subsequent to the filing of an LPFM station facility application, such full service station is protected against any condition of interference to the direct reception of its signal that is caused by such LPFM station operating on the same channel or first-adjacent channel provided that the interference is predicted to occur and actually occurs within:

* * * * *

■ 4. Section 73.810 is revised to read as follows:

§ 73.810 Third adjacent channel interference.

(a) *LPFM Stations Licensed at Locations That Do Not Satisfy Third-Adjacent Channel Minimum Distance Separations.* An LPFM station licensed at a location that does not satisfy the third-adjacent channel minimum distance separations set forth in § 73.807 is subject to the following provisions:

(1) Such an LPFM station will not be permitted to continue to operate if it causes any actual third-adjacent channel interference to:

(i) The transmission of any authorized broadcast station; or

(ii) The reception of the input signal of any TV translator, TV booster, FM translator or FM booster station; or

(iii) The direct reception by the public of the off-the-air signals of any authorized broadcast station including TV Channel 6 stations, Class D (secondary) noncommercial educational FM stations, and previously authorized and operating LPFM stations, FM translators and FM booster stations. Interference will be considered to occur whenever reception of a regularly used signal on a third-adjacent channel is impaired by the signals radiated by the LPFM station, regardless of the quality of such reception, the strength of the signal so used, or the channel on which the protected signal is transmitted.

(2) If third-adjacent channel interference cannot be properly eliminated by the application of suitable techniques, operation of the offending LPFM station shall be suspended and shall not be resumed until the interference has been eliminated. Short test transmissions may be made during the period of suspended operation to check the efficacy of remedial measures. If a complainant refuses to permit the licensee of the offending LPFM station to apply remedial techniques which demonstrably will eliminate the third-adjacent channel interference without impairment to the original reception, the licensee is absolved of further responsibility for that complaint.

(3) Upon notice by the Commission to the licensee that such third-adjacent channel interference is being caused, the operation of the LPFM station shall be suspended within three minutes and shall not be resumed until the interference has been eliminated or it can be demonstrated that the interference is not due to spurious emissions by the LPFM station; *provided, however,* that short test transmissions may be made during the period of suspended operation to check the efficacy of remedial measures.

(b) *LPFM Stations Licensed at Locations That Satisfy Third-Adjacent Channel Minimum Distance Separations.* An LPFM station licensed at a location that satisfies the third-adjacent channel minimum distance separations set forth in § 73.807 is subject to the following provisions:

(1) *Interference Complaints and Remediation.* (i) Such an LPFM station is required to provide copies of all complaints alleging that its signal is causing third-adjacent channel interference to or impairing the reception of the signal of a full power FM, FM translator or FM booster station to such affected station and to the Commission.

(ii) A full power FM, FM translator or FM booster station shall review all complaints it receives, either directly or indirectly, from listeners regarding alleged third-adjacent channel interference caused by the operations of such an LPFM station. Such full power FM, FM translator or FM booster station shall also identify those that qualify as bona fide complaints under this section and promptly provide such LPFM station with copies of all bona fide complaints. A bona fide complaint:

(A) Must include current contact information for the complainant;

(B) Must state the nature and location of the alleged third-adjacent channel interference and must specify the call signs of the LPFM station and affected full power FM, FM translator or FM booster station, and the type of receiver involved; and

(C) Must be received by either the LPFM station or the affected full power FM, FM translator or FM booster station within one year of the date on which the LPFM station commenced broadcasts with its currently authorized facilities.

(iii) The Commission will accept bona fide complaints and will notify the licensee of the LPFM station allegedly causing third-adjacent channel interference to the signal of a full power FM, FM translator or FM booster station of the existence of the alleged interference within 7 calendar days of the Commission's receipt of such complaint.

(iv) Such an LPFM station will be given a reasonable opportunity to resolve all complaints of third-adjacent channel interference within the protected contour of the affected full power FM, FM translator or FM booster station. A complaint will be considered resolved where the complainant does not reasonably cooperate with an LPFM station's remedial efforts. Such an LPFM station also is encouraged to address all other complaints of third-adjacent channel interference, including complaints based on interference to a full power FM, FM translator or FM booster station by the transmitter site of the LPFM station at any distance from the full power, FM translator or FM booster station.

(v) In the event that the number of unresolved complaints of third-adjacent channel interference within the protected contour of the affected full power FM, FM translator or FM booster station plus the number of complaints for which the source of third-adjacent channel interference remains in dispute equals at least one percent of the households within one kilometer of the LPFM transmitter site or thirty households, whichever is less, the LPFM and affected stations must cooperate in an ''on-off'' test to determine whether the third-adjacent channel interference is traceable to the LPFM station.

(vi) If the number of unresolved and disputed complaints of third-adjacent channel interference within the protected contour of the affected full power, FM translator or FM booster station exceeds the numeric threshold specified in paragraph (b)(1)(v) of this section following an ''on-off'' test, the affected station may request that the Commission initiate a proceeding to consider whether the LPFM station license should be modified or cancelled, which will be completed by the Commission within 90 days. Parties may seek extensions of the 90-day deadline consistent with Commission rules.

(vii) An LPFM station may stay any procedures initiated pursuant to paragraph (b)(1)(vi) of this section by voluntarily ceasing operations and filing an application for facility modification within twenty days of the commencement of such procedures.

(2) *Periodic Announcements.* (i) For a period of one year from the date of licensing of a new LPFM station that is constructed on a third-adjacent channel and satisfies the third-adjacent channel minimum distance separations set forth in § 73.807, such LPFM station shall broadcast periodic announcements. The announcements shall, at a minimum, alert listeners of the potentially affected third-adjacent channel station of the potential for interference, instruct listeners to contact the LPFM station to report any interference, and provide contact information for the LPFM station. The announcements shall be made in the primary language(s) of both the new LPFM station and the potentially affected third-adjacent channel station(s). Sample announcement language follows:

On (date of license grant), the Federal Communications Commission granted (LPFM station's call letters) a license to operate. (LPFM station's call letters) may cause interference to the operations of (third-adjacent channel station's call letters) and (other third-adjacent channel stations' call letters). If you are normally a listener of (third-adjacent channel station's call letters) or (other third-adjacent channel station's call letters) and are having difficulty receiving (third-adjacent channel station call letters) or (other third-adjacent channel station's call letters), please contact (LPFM station's call letters) by mail at (mailing address) or by telephone at (telephone number) to report this interference.

(ii) During the first thirty days after licensing of a new LPFM station that is constructed on a third-adjacent channel and satisfies the third-adjacent channel minimum distance separations set forth in Section 73.807, the LPFM station must broadcast the announcements specified in paragraph (b)(2)(i) of this section at least twice daily. The first daily announcement must be made between the hours of 7 a.m. and 9 a.m., or 4 p.m. and 6 p.m. The LPFM station must vary the time slot in which it airs this announcement. For stations that do not operate at these times, the announcements shall be made during the first two hours of broadcast operations each day. The second daily announcement must be made outside of the 7 a.m. to 9 a.m. and 4 p.m. to 6 p.m. time slots. The LPFM station must vary the times of day in which it broadcasts this second daily announcement in order to ensure that the announcements air during all parts of its broadcast day. For stations that do not operate at these times, the announcements shall be made during the first two hours of broadcast operations each day. For the remainder of the one year period, the LPFM station must broadcast the announcements at least twice per week. The announcements must be broadcast between the hours of 7 a.m. and midnight. For stations that do not operate at these times, the announcements shall be made during the first two hours of broadcast operations each day.

(iii) Any new LPFM station that is constructed on a third-adjacent channel and satisfies the minimum distance separations set forth in § 73.807 must:

(A) notify the Audio Division, Media Bureau, and all affected stations on third-adjacent channels of an interference complaint. The notification must be made electronically within 48 hours after the receipt of an interference complaint by the LPFM station; and

(B) cooperate in addressing any third-adjacent channel interference.

■ 5. Section 73.811 is revised to read as follows:

§ 73.811 LPFM power and antenna height requirements.

(a) *Maximum facilities.* LPFM stations will be authorized to operate with maximum facilities of 100 watts ERP at 30 meters HAAT. An LPFM station with a HAAT that exceeds 30 meters will not be permitted to operate with an ERP greater than that which would result in a 60 dBu contour of 5.6 kilometers. In no event will an ERP less than one watt be authorized. No facility will be authorized in excess of one watt ERP at 450 meters HAAT.

(b) *Minimum facilities.* LPFM stations may not operate with facilities less than 50 watts ERP at 30 meters HAAT or the

equivalent necessary to produce a 60 dBu contour that extends at least 4.7 kilometers.

■ 6. Section 73.816 is amended by revising paragraphs (b) and (c) to read as follows:

§ 73.816 Antennas.

* * * * *

(b) Directional antennas generally will not be authorized and may not be utilized in the LPFM service, except as provided in paragraph (c) of this section.

(c)(1) Public safety and transportation permittees and licensees, eligible pursuant to § 73.853(a)(2), may utilize directional antennas in connection with the operation of a Travelers' Information Service (TIS) provided each LPFM TIS station utilizes only a single antenna with standard pattern characteristics that are predetermined by the manufacturer. Public safety and transportation permittees and licensees may not use composite antennas (i.e., antennas that consist of multiple stacked and/or phased discrete transmitting antennas).

(2) LPFM permittees and licensees proposing a waiver of the second-adjacent channel spacing requirements of § 73.807 may utilize directional antennas for the sole purpose of justifying such a waiver.

* * * * *

■ 7. Section 73.825 is amended by revising the Tables to paragraphs (a) and (b) to read as follows:

§ 73.825 Protection to reception of TV channel 6.

(a) * * *

FM channel number	LPFM to TV channel 6 (km)
201	140
202	138
203	137
204	136
205	135
206	133
207	133
208	133
209	133
210	133
211	133
212	132
213	132
214	132
215	131
216	131
217	131
218	131
219	130
220	130

(b) * * *

FM channel number	LPFM to TV channel 6 (km)
201	98
202	97
203	95
204	94
205	93
206	91
207	91
208	91
209	91
210	91
211	91
212	90
213	90
214	90
215	90
216	89
217	89
218	89
219	89
220	89

■ 8. Section 73.827 is revised to read as follows:

§ 73.827 Interference to the input signals of FM translator or FM booster stations.

(a) *Interference to the direct reception of the input signal of an FM translator station.* This subsection applies when an LPFM application proposes to operate near an FM translator station, the FM translator station is receiving its primary station signal off-air and the LPFM application proposes to operate on a third-adjacent channel to the primary station. In these circumstances, the LPFM station will not be authorized unless it is located at least 2 km from the FM translator station. In addition, in cases where an LPFM station is located within +/− 30 degrees of the azimuth between the FM translator station and its primary station, the LPFM station will not be authorized unless it is located at least 10 kilometers from the FM translator station. The provisions of this subsection will not apply if the LPFM applicant:

(1) Demonstrates that no actual interference will occur due to an undesired (LPFM) to desired (primary station) ratio below 34 dB at all locations,

(2) Complies with the minimum LPFM/FM translator distance separation calculated in accordance with the following formula: $d_u = 133.5$ antilog $[(P_{eu} + G_{ru} - G_{rd} - E_d)/20]$, where d_u = the minimum allowed separation in km, P_{eu} = LPFM ERP in dBW, G_{ru} = gain (dBd) of the FM translator receive antenna in the direction of the LPFM site, G_{rd} = gain (dBd) of the FM translator receive antenna in the direction of the primary station site, E_d = predicted field strength (dBu) of the primary station at the translator site, or

(3) Reaches an agreement with the licensee of the FM translator regarding an alternative technical solution.

Note to paragraph (a): LPFM applicants may assume that an FM translator station's receive and transmit antennas are collocated.

(b) An authorized LPFM station will not be permitted to continue to operate if an FM translator or FM booster station demonstrates that the LPFM station is causing actual interference to the FM booster station's input signal, provided that the same input signal was in use at the time the LPFM station was authorized.

(c) Complaints of actual interference by an LPFM station subject to paragraph (b) of this section must be served on the LPFM licensee and the Federal Communications Commission, Attention: Audio Division, Media Bureau. The LPFM station must suspend operations upon the receipt of such complaint unless the interference has been resolved to the satisfaction of the complainant on the basis of suitable techniques. Short test transmissions may be made during the period of suspended operations to check the efficacy of remedial measures. An LPFM station may only resume full operation at the direction of the Federal Communications Commission. If the Commission determines that the complainant has refused to permit the LPFM station to apply remedial techniques that demonstrably will eliminate the interference without impairment of the original reception, the licensee of the LPFM station is absolved of further responsibility for the complaint.

■ 9. Section 73.850 is amended by adding paragraph (c) to read as follows:

§ 73.850 Operating schedule.

* * * * *

(c) All LPFM stations, including those meeting the requirements of paragraph (b) of this section, but which do not operate 12 hours per day each day of the year, will be required to share use of the frequency upon the grant of an appropriate application proposing such share time arrangement. Such applications must set forth the intent to share time and must be filed in the same manner as are applications for new stations. Such applications may be filed at any time after an LPFM station completes its third year of licensed operations. In cases where the licensee and the prospective licensee are unable to agree on time sharing, action on the application will be taken only in connection with a renewal application for the existing station filed on or after June 1, 2019. In order to be considered

for this purpose, an application to share time must be filed no later than the deadline for filing petitions to deny the renewal application of the existing licensee.

(1) The licensee and the prospective licensee(s) shall endeavor to reach an agreement for a definite schedule of periods of time to be used by each. Such agreement must be in writing and must set forth which licensee is to operate on each of the hours of the day throughout the year. Such agreement must not include simultaneous operation of the stations. Each licensee must file the same in triplicate with each application to the Commission for initial construction permit or renewal of license. Such written agreements shall become part of the terms of each station's license.

(2) The Commission desires to facilitate the reaching of agreements on time sharing. However, if the licensees of stations authorized to share time are unable to agree on a division of time, the prospective licensee(s) must submit a statement with the Commission to that effect filed with the application(s) proposing time sharing.

(3) After receipt of the type of application(s) described in paragraph (c)(2) of this section, the Commission will process such application(s) pursuant to §§ 73.3561 through 73.3568 of this Part. If any such application is not dismissed pursuant to those provisions, the Commission will issue a notice to the parties proposing a time-sharing arrangement and a grant of the time-sharing application(s). The licensee may protest the proposed action, the prospective licensee(s) may oppose the protest and/or the proposed action, and the licensee may reply within the time limits delineated in the notice. All such pleadings must satisfy the requirements of Section 309(d) of the Act. Based on those pleadings and the requirements of Section 309 of the Act, the Commission will then act on the time-sharing application(s) and the licensee's renewal application.

(4) A departure from the regular schedule set forth in a time-sharing agreement will be permitted only in cases where a written agreement to that effect is reduced to writing, is signed by the licensees of the stations affected thereby, and is filed in triplicate by each licensee with the Commission, Attention: Audio Division, Media Bureau, prior to the time of the proposed change. If time is of the essence, the actual departure in operating schedule may precede the actual filing of the written agreement, provided that appropriate notice is sent to the Commission in Washington, DC, Attention: Audio Division, Media Bureau.

■ 10. Section 73.853 is amended by adding paragraph (a)(3), revising paragraph (b) introductory text, and adding paragraphs (b)(4) and (c) to read as follows:

§ 73.853 Licensing requirements and service.

(a) * * *

(3) Tribal Applicants, as defined in paragraph (c) of this section that will provide non-commercial radio services.

(b) Only local organizations will be permitted to submit applications and to hold authorizations in the LPFM service. For the purposes of this paragraph, an organization will be deemed local if it can certify, at the time of application, that it meets the criteria listed below and if it continues to satisfy the criteria at all times thereafter.

* * * * *

(4) In the case of a Tribal Applicant, as defined in paragraph (c) of this section, the Tribal Applicant's Tribal lands, as that term is defined in § 73.7000, are within the service area of the proposed LPFM station.

(c) A Tribal Applicant is a Tribe or an entity that is 51 percent or more owned or controlled by a Tribe or Tribes. For these purposes, Tribe is defined as set forth in § 73.7000.

■ 11. Section 73.855 is revised to read as follows:

§ 73.855 Ownership limits.

(a) No authorization for an LPFM station shall be granted to any party if the grant of that authorization will result in any such party holding an attributable interest in two or more LPFM stations.

(b) Notwithstanding the general prohibition set forth in paragraph (a) of this section, Tribal Applicants, as defined in § 73.853(c), may hold an attributable interest in up to two LPFM stations.

(c) Notwithstanding the general prohibition set forth in paragraph (a) of this section, not-for-profit organizations and governmental entities with a public safety purpose may be granted multiple licenses if:

(1) One of the multiple applications is submitted as a priority application; and

(2) The remaining non-priority applications do not face a mutually exclusive challenge.

■ 12. Section 73.860 is revised to read as follows:

§ 73.860 Cross-ownership.

(a) Except as provided in paragraphs (b), (c) and (d) of this section, no license shall be granted to any party if the grant of such authorization will result in the same party holding an attributable interest in any other non-LPFM broadcast station, including any FM translator or low power television station, or any other media subject to our broadcast ownership restrictions.

(b) A party that is not a Tribal Applicant, as defined in § 73.853(c), may hold attributable interests in one LPFM station and no more than two FM translator stations provided that the following requirements are met:

(1) The 60 dBu contours of the commonly-owned LPFM station and FM translator station(s) overlap;

(2) The FM translator station(s), at all times, synchronously rebroadcasts the primary analog signal of the commonly-owned LPFM station or, if the commonly-owned LPFM station operates in hybrid mode, synchronously rebroadcasts the digital HD–1 version of the LPFM station's signal;

(3) The FM translator station(s) receives the signal of the commonly-owned LPFM station over-the-air and directly from the commonly-owned LPFM station itself; and

(4) The transmitting antenna of the FM translator station(s) is located within 16.1 km (10 miles) for LPFM stations located in the top 50 urban markets and 32.1 km (20 miles) for LPFM stations outside the top 50 urban markets of either the transmitter site of the commonly-owned LPFM station or the reference coordinates for that station's community of license.

(c) A party that is a Tribal Applicant, as defined in § 73.853(c), may hold attributable interests in no more than two LPFM stations and four FM translator stations provided that the requirements set forth in paragraph (b) of this section are met.

(d) Unless such interest is permissible under paragraphs (b) or (c) of this section, a party with an attributable interest in a broadcast radio station must divest such interest prior to the commencement of operations of an LPFM station in which the party also holds an interest. However, a party need not divest such an attributable interest if the party is a college or university that can certify that the existing broadcast radio station is not student run. This exception applies only to parties that:

(1) Are accredited educational institutions;

(2) Own an attributable interest in non-student run broadcast stations; and

(3) Apply for an authorization for an LPFM station that will be managed and operated on a day-to-day basis by students of the accredited educational institution.

(e) No LPFM licensee may enter into an operating agreement of any type, including a time brokerage or management agreement, with either a full power broadcast station or another LPFM station.

■ 13. Section 73.870 is amended by revising paragraph (a) introductory text to read as follows:

§ 73.870 Processing of LPFM broadcast station applications.

(a) A minor change for an LPFM station authorized under this subpart is limited to transmitter site relocations of 5.6 kilometers or less. These distance limitations do not apply to amendments or applications proposing transmitter site relocation to a common location filed by applicants that are parties to a voluntary time-sharing agreement with regard to their stations pursuant to § 73.872 paragraphs (c) and (e). These distance limitations also do not apply to an amendment or application proposing transmitter site relocation to a common location or a location very close to another station operating on a third-adjacent channel in order to remediate interference to the other station; provided, however, that the proposed relocation is consistent with all localism certifications made by the applicant in its original application for the LPFM station. Minor changes of LPFM stations may include:

* * * * *

■ 14. Section 73.871 is amended by revising paragraphs (c)(1), (5), and (6) and adding paragraph (c)(7) to read as follows:

§ 73.871 Amendment of LPFM broadcast station applications.

* * * * *

(c) * * *

(1) Filings subject to paragraph (c)(5) of this section, site relocations of 5.6 kilometers or less for LPFM stations;

* * * * *

(5) Other changes in general and/or legal information;

(6) Filings proposing transmitter site relocation to a common location submitted by applications that are parties to a voluntary time-sharing agreement with regard to their stations pursuant to § 73.872 (c) and (e); and

(7) Filings proposing transmitter site relocation to a common location or a location very close to another station operating on a third-adjacent channel in order to remediate interference to the other station.

* * * * *

■ 15. Section 73.872 is amended by revising paragraphs (b), (c) introductory text, (c)(4), (d), and (e) to read as follows:

§ 73.872 Selection procedure for mutually exclusive LPFM applications.

* * * * *

(b) Each mutually exclusive application will be awarded one point for each of the following criteria, based on certifications that the qualifying conditions are met and submission of any required documentation:

(1) *Established community presence.* An applicant must, for a period of at least two years prior to application and at all times thereafter, have qualified as local pursuant to § 73.853(b). Applicants claiming a point for this criterion must submit any documentation specified in FCC Form 318 at the time of filing their applications.

(2) *Local program origination.* The applicant must pledge to originate locally at least eight hours of programming per day. For purposes of this criterion, local origination is the production of programming by the licensee, within ten miles of the coordinates of the proposed transmitting antenna. Local origination includes licensee produced call-in shows, music selected and played by a disc jockey present on site, broadcasts of events at local schools, and broadcasts of musical performances at a local studio or festival, whether recorded or live. Local origination does not include the broadcast of repetitive or automated programs or time-shifted recordings of non-local programming whatever its source. In addition, local origination does not include a local program that has been broadcast twice, even if the licensee broadcasts the program on a different day or makes small variations in the program thereafter.

(3) *Main studio.* The applicant must pledge to maintain a publicly accessible main studio that has local program origination capability, is reachable by telephone, is staffed at least 20 hours per week between 7 a.m. and 10 p.m., and is located within 16.1 km (10 miles) of the proposed site for the transmitting antenna for applicants in the top 50 urban markets and 32.1 km (20 miles) for applicants outside the top 50 urban markets. Applicants claiming a point under this criterion must specify the proposed address and telephone number for the proposed main studio in FCC Form 318 at the time of filing their applications.

(4) *Local program origination and main studio.* The applicant must make both the local program origination and main studio pledges set forth in paragraphs (b)(2) and (3) of this section.

(5) *Diversity of ownership.* An applicant must hold no attributable interests in any other broadcast station.

(6) *Tribal Applicants serving Tribal Lands.* The applicant must be a Tribal Applicant, as defined in § 73.853(c), and the proposed site for the transmitting antenna must be located on that Tribal Applicant's ''Tribal Lands,'' as defined in § 73.7000. Applicants claiming a point for this criterion must submit the documentation set forth in FCC Form 318 at the time of filing their applications.

(c) *Voluntary time-sharing.* If mutually exclusive applications have the same point total, any two or more of the tied applicants may propose to share use of the frequency by electronically submitting, within 90 days of the release of a public notice announcing the tie, a time-share proposal. Such proposals shall be treated as minor amendments to the time-share proponents' applications, and shall become part of the terms of the station authorization. Where such proposals include all of the tied applications, all of the tied applications will be treated as tentative selectees; otherwise, time-share proponents' points will be aggregated.

* * * * *

(4) Concurrent license terms granted under paragraph (d) of this section may be converted into voluntary time-sharing arrangements renewable pursuant to § 73.3539 by submitting a universal time-sharing proposal.

(d) *Involuntary time-sharing.* (1) If a tie among mutually exclusive applications is not resolved through voluntary time-sharing in accordance with paragraph (c) of this section, the tied applications will be reviewed for acceptability. Applicants with tied, grantable applications will be eligible for equal, concurrent, non-renewable license terms.

(2) If a mutually exclusive group has three or fewer tied, grantable applications, the Commission will simultaneously grant these applications, assigning an equal number of hours per week to each applicant. The Commission will determine the hours assigned to each applicant by first assigning hours to the applicant that has been local, as defined in § 73.853(b), for the longest uninterrupted period of time, then assigning hours to the applicant that has been local for the next longest uninterrupted period of time, and finally assigning hours to any remaining applicant. The Commission will offer applicants an opportunity to voluntarily reach a time-sharing agreement. In the event that applicants cannot reach such agreement, the

Commission will require each applicant subject to involuntary time-sharing to simultaneously and confidentially submit their preferred time slots to the Commission. If there are only two tied, grantable applications, the applicants must select between the following 12-hour time slots 3 a.m.–2:59 p.m., or 3 p.m.–2:59 a.m. If there are three tied, grantable applications, each applicant must rank their preference for the following 8-hour time slots: 2 a.m.–9:59 a.m., 10 a.m.–5:59 p.m., and 6 p.m.–1:59 a.m. The Commission will require the applicants to certify that they did not collude with any other applicants in the selection of time slots. The Commission will give preference to the applicant that has been local for the longest uninterrupted period of time. The Commission will award time in units as small as four hours per day. In the event an applicant neglects to designate its preferred time slots, staff will select a time slot for that applicant.

(3) Groups of more than three tied, grantable applications will not be eligible for licensing under this section. Where such groups exist, the Commission will dismiss all but the applications of the three applicants that have been local, as defined in § 73.853(b), for the longest uninterrupted periods of time. The Commission then will process the remaining applications as set forth in paragraph (d)(2) of this section.

(4) If concurrent license terms granted under this section are converted into universal voluntary time-sharing arrangements pursuant to paragraph (c)(4) of this section, the permit or license is renewable pursuant to §§ 73.801 and 73.3539.

(e) *Settlements.* Mutually exclusive applicants may propose a settlement at any time during the selection process after the release of a public notice announcing the mutually exclusive groups. Settlement proposals must comply with the Commission's rules and policies regarding settlements, including the requirements of §§ 73.3525, 73.3588 and 73.3589. Settlement proposals may include time-share agreements that comply with the requirements of paragraph (c) of this section, provided that such agreements may not be filed for the purpose of point aggregation outside of the 90 day period set forth in paragraph (c) of this section.

■ 16. Section 73.873 is revised to read as follows:

§ 73.873 LPFM license period.

(a) Initial licenses for LPFM stations will be issued for a period running until the date specified in § 73.1020 for full service stations operating in the LPFM station's state or territory, or if issued after such date, determined in accordance with § 73.1020.

(b) The license of an LPFM station that fails to transmit broadcast signals for any consecutive 12-month period expires as a matter of law at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.

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Part VI

Environmental Protection Agency

California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years; Notice

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9768–1]

California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years

SUMMARY: The Environmental Protection Agency (EPA) is granting the California Air Resources Board's (CARB's) request for a waiver of Clean Air Act preemption to enforce its Advanced Clean Car (ACC) regulations. The ACC combines the control of smog and soot causing pollutants and greenhouse gas (GHG) emissions into a single coordinated package of requirements for passenger cars, light-duty trucks and medium-duty passenger vehicles (and limited requirements related to heavy-duty vehicles). The ACC program includes revisions to California's Low Emission Vehicle (LEV) program as well as its Zero Emission Vehicle (ZEV) program. By today's decision, EPA has also determined that CARB's amendments to the ZEV program as they affect 2017 and prior model years (MYs) are within the scope of previous waivers of preemption granted to California for its ZEV regulations. In the alternative, EPA's waiver of preemption for CARB's ACC regulations includes a waiver of preemption for CARB's ZEV amendments as they affect all MYs, including 2017 and prior MYs. In addition, EPA is including CARB's recently adopted ''deemed to comply'' rule for GHG emissions in today's waiver decision. This decision is issued under section 209(b) of the Clean Air Act (the ''Act''), as amended.

DATES: Petitions for review must be filed March 11, 2013.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2012–0562. All documents and public comments in the docket are listed on the *www.regulations.gov* Web site. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, 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 holidays. The telephone number for the Reading Room is (202) 566–1744. The Air and Radiation Docket and Information Center's Web site is *http://www.epa.gov/oar/docket.html.* The electronic mail (email) address for the Air and Radiation Docket is: *a-and-r-Docket@epa.gov,* the telephone number is (202) 566–1742 and the fax number is (202) 566–9744.

FOR FURTHER INFORMATION CONTACT: Specific questions may be addressed to David Dickinson, Office of Transportation and Air Quality, Compliance Division (6405J–NLD), EPA, 1200 Pennsylvania Ave. NW., Washington, DC 20460, telephone: (202) 343–9256, email: *Dickinson.David@epa.gov.*

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VII. Statutory and Executive Order Reviews

I. Executive Summary

Today, as Assistant Administrator of the EPA's Office of Air and Radiation, I am granting California's request for a waiver of Clean Air Act preemption for California's ACC that combines the control of smog and soot causing pollutants and GHG emissions into a single coordinated package of requirements for MY 2015 through 2025 passenger cars (PCs), light-duty trucks (LDTs), medium-duty passenger vehicles (MDPVs), and limited requirements related to heavy-duty vehicles (HDVs). The ACC program regulations include revisions to both California's LEV and ZEV programs. By letter dated June 27, 2012, CARB submitted a request (CARB waiver request) that EPA grant a waiver of preemption under section 209(b) of the Clean Air Act (CAA), 42 U.S.C. 7543(b) for the revisions to the LEV program (LEV III).[1] CARB also sought confirmation that the amendments to the ZEV program are within the scope of prior waiver decisions issued by EPA, or in the alternative requested a waiver for these revisions (the LEV III and ZEV amendments, together known as the ACC, are considered as CARB's waiver request). By letter dated December 7, 2012, CARB submitted additional information (CARB supplemental request) to EPA requesting that EPA consider as part of CARB's pending ACC waiver request the CARB's Executive Officer adopted ''deemed to comply'' regulation.[2] CARB's ''deemed to comply'' regulation, adopted by CARB's Board on November 15, 2012 and final action taken by CARB's Executive Officer on December 6, 2012, allows automobile manufacturers to demonstrate compliance with CARB's GHG standards by complying with

[1] CARB waiver request at EPA–HQ–OAR–2012–0562–0004. The cover letter to CARB's Waiver Request is at EPA–HQ–OAR–2012–0562–0004.

[2] CARB supplemental request at EPA–HQ–OAR–2012–0562–0374.

EPA's GHG standards which were published for those MYs.

By today's decision we are confirming that CARB's ZEV amendments, as they affect 2017 and prior MYs are within the scope of previous ZEV waivers. EPA also finds that the entire ACC program meets the criteria for a waiver of Clean Air Act preemption and thus we are granting a waiver for CARB's ACC program. Included in EPA's full waiver are CARB's ''deemed to comply'' regulations, and the ZEV regulations as they affect 2017 and prior MYs.

The legal framework for this decision stems from the waiver provision first adopted by Congress in 1967, and later modified in 1977. Congress established that there would be only two programs for control of emissions from new motor vehicles—EPA emission standards adopted under the Clean Air Act, and California emission standards adopted under state law. Congress accomplished this by preempting all state and local governments from adopting or enforcing emission standards for new motor vehicles, while at the same time providing that California could receive a waiver of preemption for its emission standards and enforcement procedures. Other states can only adopt standards that are identical to California's standards. This struck an important balance that protected manufacturers from multiple and different state emission standards, and preserved a pivotal role for California in the control of emissions from new motor vehicles. Congress recognized that California could serve as a pioneer and a laboratory for the nation in setting new motor vehicle emission standards. Congress intentionally structured this waiver provision to restrict and limit EPA's ability to deny a waiver. The provision was designed to ensure California's broad discretion to determine the best means to protect the health and welfare of its citizens.

Section 209(b) specifies that EPA must grant California a waiver if California determines that its standards are, in the aggregate, at least as protective of the public health and welfare as applicable federal standards. EPA may deny a waiver only if it makes at least one of three findings specified under the Clean Air Act (including whether California's ''protectiveness finding'' noted above is arbitrary and capricious). Therefore, EPA's role upon receiving a request for waiver of preemption from California is to determine whether it is appropriate to make any of the three findings specified by the Clean Air Act and if the Agency cannot make at least one of the three findings then the waiver must be granted. The three waiver criteria are properly seen as criteria for a denial—EPA must grant the waiver unless at least one of three criteria for a denial is met. This is different from most waiver situations before the Agency, where EPA typically determines whether it is appropriate to make certain findings necessary for granting a waiver, and if the findings are not made then a waiver is denied. This reversal of the normal statutory structure embodies and is consistent with the congressional intent of providing deference to California to maintain its own new motor vehicle emissions program.

The three criteria for denial of a waiver are: first, whether California's determination that its standards are, in the aggregate, at least as protective as applicable federal standards is arbitrary and capricious (Section 209(b)(1)(A)); second, whether California has a need for such standards to meet compelling and extraordinary conditions (Section 209(b)(1)(B)); and third, whether California's standards are consistent with Section 202(a) of the Clean Air Act (Section 209(b)(1)(C)). EPA and the Court of Appeals for the District of Columbia Circuit have consistently interpreted section 209(b) as placing the burden on the opponents of a waiver to demonstrate that one of the criteria for a denial has been met.[3]

If California acts to amend a previously waived standard or accompanying enforcement procedure, the amendment may be considered within the scope of a previously granted waiver provided that it does not undermine California's determination that its standards in the aggregate are as protective of public health and welfare as applicable federal standards, does not affect its consistency with section 202(a) of the Clean Air Act, and raises no new issues affecting EPA's previous waiver decisions.[4]

In this case, California is combining three sets of motor vehicle emission standards into a single ACC waiver request. The standards are complimentary in the way they address interrelated ambient air quality needs and climate change. EPA has previously granted a series of waiver and within the scope decisions regarding CARB's LEV, ZEV and GHG emission programs.[5]

As part of EPA's public comment process for CARB's ACC waiver request, we have received comments from: several states and organizations representing states; health and environmental organizations; industry; and other stakeholders.[6] The vast majority of comments EPA received were in support of the waiver. EPA received opposition to certain elements of the waiver, including a joint comment submitted by the Association of Global Automakers and the Alliance of Automobile Manufacturers (Manufacturers or Manufacturers comment).[7] We also received opposition to the ACC waiver request from the National Automobile Dealers Association (NADA or Dealers, or NADA comment).[8]

After a thorough evaluation of the record, we have determined that the waiver opponents have not met their burden of proof in order for us to deny the CARB's waiver request under any of the three criteria in section 209(b)(1). EPA also confirms that CARB's ZEV amendments, as they affect the 2017 and earlier MYs are within the scope of previous waivers of preemption. In the alternative, EPA's waiver of preemption for CARB's ACC regulations includes a

[3] *Motor and Equipment Manufacturers Ass'n* v. *EPA (MEMA I),* 627 F.2d 1095, 1120–1121 (D.C. Cir. 1979).

[4] Decision Documents accompanying within the scope of waiver determinations in 66 FR 7751 (January 25, 2001) at p. 5 and 51 FR 12391 (April 10, 1986) at p. 2, *see also, e.g.,* 46 FR 36742 (July 15, 1981).

[5] EPA's LEV waiver decisions are found at 58 FR 4166 (January 13, 1993); 64 FR 42689 (August 5, 1999); 68 FR 19811 (April 22, 2003); 70 FR 22034 (April 28, 2005); and 75 FR 44951 (July 30, 2010). EPA's GHG waiver decisions are found at 73 FR 12156 (March 6, 2008) (GHG waiver denial); 74 FR 32744 (July 8, 2009) (GHG waiver); and 76 FR 34693 (June 14, 2011) (This prior within the scope decision included CARB's prior ''deemed to comply'' regulation for the 2012–2016 MYs). EPA's most recent ZEV waiver decisions are found at 71 FR 78190 (December 28, 2006); and 76 FR 61095 (October 3, 2011).

[6] EPA received support for CARB's waiver request, in the form of oral testimony and/or written comment (all docket references are to EPA–HQ–OAR–2012–0562–XXXX, with the last four numbers associated with each comment) from: Environmental Defense Fund (EDF)—0025 and 0353, the National Association of Clean Air Agencies (NACAA)—0028, American Lung Association—0029, Advanced Engine Systems Institute—0030, Environment America—0031, Consumer Federation of America (CFA)—0032, Manufacturers of Emission Control (MECA)—0033, Natural Resources Defense Council (NRDC)—0347, South Coast Air Quality Management District (SCAQMD)—0346, Sierra Club—0348, Northeast States for Coordinated Air Uses Management (NESCAUM)—0350, New York State Department of Environmental Conservation—0351, Consumers Union—0354, and Union of Concerned Scientists—0355. EPA also received similar comment at the waiver public hearing, transcript found at EPA–HQ–OAR–2012–0562–0026.

[7] EPA–HQ–OAR–2012–0562–0349. EPA also received written comment from Toyota Motor North America (Toyota) at EPA–HQ–OAR–2012–0562–0372 which notes that ''Toyota could be forced to employ a variety of costly marketing programs to ensure compliance if the market does not accept ZEV technology in the volumes anticipated by California.'' Toyota notes that its further concerns are expressed in detail in the Manufacturers comments.

[8] EPA–HQ–OAR–2012–0562–0352.

waiver of preemption for CARB's ZEV amendments as they affect all MYs, including 2017 and prior MYs.

II. Background

A. California's Advanced Clean Car Program for New Motor Vehicles

As further explained below, CARB has adopted amendments to title 13, California Code of Regulations (CCR), and has established a single coordinated package that includes amendments to three sets of regulations regulating emissions from new PCs, LDTs, MDPVs, and certain HDVs: [9] the LEV regulation which includes two components—standards relating to criteria pollutants and standards to regulate GHG emissions, and the ZEV program.

This single ACC program combines the control of smog-causing pollutants and GHG emissions into a coordinated package of amendments and requirements for MY 2015 through 2025 in order to address near and long term smog issues within California and identified GHG emission reduction goals. The program also includes amended ZEV regulations and a Clean Fuels Outlet regulation. These additional program elements are designed to address these goals as well.[10] The ACC program, together, provides the regulated manufacturers with the ability to plan and integrate their product designs in order to meet applicable CARB emission requirements.

In order to achieve further emission reductions from the light- and medium-duty fleet, CARB adopted several amendments that represent a strengthening of its ongoing LEV regulations, including: a reduction of fleet average emissions of new PCs, LDTs, and MDPVs to super ultra-low-emission vehicle (SULEV) levels by 2025; replacement of separate non-methane organic gas (NMOG) and oxides of nitrogen (NO_X) standards with combined NMOG plus NO_X standards, which provides automobile manufacturers with additional flexibility in meeting the new stringent standards; an increase of full useful life durability requirements from 120,000 miles to 150,000 miles, which guarantees vehicles sustain these extremely low emission levels longer; a backstop to assure continued production of super-ultra-low-emission vehicles after partial-zero-emission vehicles (PZEVs) as a category are moved from the ZEV regulations to the LEV regulations in 2018; more stringent particulate matter (PM) standards for light- and medium-duty vehicles, which will reduce the health effects and premature deaths associated with these emissions; zero fuel evaporative emission standards for PCs and LDTs, and more stringent standards for medium- and heavy-duty vehicles (MDVs); and, more stringent supplemental federal test procedure (SFTP) standards for PC and LDTs, which reflect more aggressive real world driving and, for the first time, require MDVs to meet SFTP standards.

The second component of CARB's LEV III regulations includes amendments to its GHG emission standards. CARB's GHG standards for the 2017 through 2025 MYs are designed to respond to California's identified goals of reducing GHG emissions to 80 percent below 1990 levels by 2050 and in the near term to reduce GHG levels to 1990 levels by 2020. As such, CARB's GHG amendments: reduce new light-duty CO_2 emissions from new light-duty regulatory MY 2016 levels by approximately 34 percent by MY 2025, and from about 251 grams of CO_2 per mile to 166 grams, based on the projected mix of vehicles sold in California; set emission standards for CO_2, CH_4, and N_2O; establish footprint based CO_2 emission standards, as distinguished from the current California GHG requirement of a fleet average GHG standard (this will allow manufacturers' new vehicle fleet CO_2 emissions to fluctuate according to their car-truck composition and sales according to vehicle footprint and will align the requirement with current federal GHG requirements); provide credits toward the CO_2 standard if a manufacturer reduces refrigerant emissions from the vehicle's air conditioning system; provide credits toward the ZEV standards if a manufacturer over complies with the LEV III GHG fleet requirement; provide credits towards the CO_2 standards if a manufacturer produces full size pickups with high efficiency drive trains; provide credits for deployment of technologies that reduce off-cycle CO_2 emissions; and require upstream emissions from zero-emission vehicles to be counted towards a manufacturer's light-duty vehicle GHG emissions. CARB's GHG emission regulations also include an optional compliance path whereby manufacturers may demonstrate compliance with CARB's GHG emission regulations by complying with applicable EPA GHG emission requirements.

Lastly, CARB's ACC regulations include amendments to its ZEV regulations that can be described within two timeframes: (1) MY 2012 through 2017; and (2) MY 2018 and beyond. CARB's stated goal for amendments to the current ZEV regulation through MY 2017 is to make corrections and clarifications to its regulations and to enable manufacturers to successfully meet the 2018 and later MY requirements. These amendments include: A provision of compliance flexibility whereby carry forward credit limitations for ZEVs were removed, allowing manufacturers to bank ZEV credits indefinitely for use in later years (the flexibility also included slightly reducing the 2015 through 2017 credit requirement for intermediate volume manufacturers (IVM, less than 60,000 vehicles produced each year), to allow them to better prepare for requirements in 2018, and included a provision that allows ZEVs placed in any state that has adopted the California ZEV regulation to count towards the ZEV requirement through 2017 (i.e. extending the ''travel provision'' for BEVs through 2017); an adjustment of credits and allowances; and an addition of a new vehicle category (collectively ''BEVx'' vehicles) as a compliance option for manufacturers to meet up to half of their minimum ZEV requirement.

CARB's stated goal for its amendments affecting 2018 and subsequent MYs is the commercialization of ZEVs and ''transitional zero-emission vehicles (TZEV; commonly a plug-in hybrid electric vehicle—PHEV). California would achieve this objective by simplifying its regulation and pushing higher production volumes which in turn would achieve cost reductions. These amendments include: an increased ZEV requirement for 2018 and subsequent MYs that pushes ZEVs and TZEVs to more than 15 percent of new sales by 2025; the removal of PZEV (near-zero emitting conventional technologies) and advanced technology PZEV (AT PZEV, typically non-plug-in HEVs) credits as compliance options for manufacturers; an allowance for manufacturers to use banked PZEV and AT PZEV credits earned in 2017 and previous MYs, but discount the credits, and place a cap on usage in 2018 and subsequent MYs; amended manufacturer size definitions that bring all but the smallest manufacturers under the full ZEV requirements by MY 2018; a m*odified credit system that b*ases credits for ZEVs on range, with 50 mile

[9] Medium-duty vehicles (MDVs) are vehicles in California's regulations between 8,500 and 114,000 lbs GVWR that are also called Class 2b/Class 3 vehicles. These vehicles are generally termed Heavy-duty vehicles under EPA's regulations.

[10] CARB's Clean Fuel Outlet Regulation is not subject to preemption under section 209 of the Clean Air Act.

BEVs earning 1 credit each and 350 Mile FCVs earning 4 credits each (the range of credit reflects the utility of the vehicle (i.e. the zero emitting miles it may travel) and its expected timing for commercialization) along with a simplified and streamlined TZEV credits system; a modified ''travel'' provision that ends the travel provision for BEVs after MY 2017and extends the travel provision for FCVs; and provisions allowing manufacturers who systematically over comply with the LEV III GHG fleet standard to offset a portion of their ZEV requirement in 2018 through 2021 MYs only.

B. EPA's Consideration of CARB's Request

By letter dated June 27, 2012, CARB submitted a request (CARB waiver request) seeking a waiver of Section 209(a)'s prohibition for its ACC standards.[11] On August 31, 2012, a **Federal Register** notice (FR Notice) was published announcing an opportunity for hearing and comment on CARB's request.[12] EPA held a public hearing in Washington, DC on September 19, 2012. The written comment period closed on October 19, 2012.

EPA's FR Notice on CARB's waiver request asked for comment on several matters. Since CARB had submitted a within the scope request for its ZEV amendments as they affect both the 2012–2017 MYs and 2018 and subsequent MYs, EPA invited comment on the following issues: first, should California's ZEV amendments, as they affect the 2012–2017 MYs and/or the 2018 and later MYs, be considered under the within the scope criteria or should they be considered under the full waiver criteria?; second, to the extent part or all of those ZEV amendments should be considered as a within the scope request, do such amendments meet the criteria for EPA to confirm that they are within the scope of prior waivers? EPA also solicited comment in the event that EPA cannot confirm that some or all of CARB's ZEV amendments are within the scope of previous waivers. We also requested comment on all aspects of the full waiver analysis with regard to the ACC program (the LEV III criteria pollutant and GHG regulations, and the ZEV amendments to the extent EPA does not consider them under the within the scope analysis noted above). Therefore, we asked commenters to consider the following three criteria: whether (a) California's determination that its motor vehicle emission standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards is arbitrary and capricious, (b) California needs such standards to meet compelling and extraordinary conditions, and (c) California's standards and accompanying enforcement procedures are consistent with section 202(a) of the Clean Air Act.

Because CARB noted (in its waiver request and in its incorporated Board Resolution 12–11) its commitment to propose a ''deemed to comply'' rule for its GHG standards shortly after EPA finalized its light-duty vehicle GHG emission standards, EPA specifically invited comment on CARB's waiver request in light of CARB's explicit plans concerning adoption of a ''deemed to comply'' provision into its LEV III GHG standards.

III. Analysis of Preemption Under Section 209 of the Clean Air Act

A. Clean Air Act Preemption Provisions

Section 209(a) of the Act provides:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.[13]

Section 209(b)(1) of the Clean Air Act requires the Administrator, after an opportunity for public hearing, to waive application of the prohibitions of section 209(a) for any State that has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor engines prior to March 30, 1966, if the State determines that its State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.[14] However, no such waiver shall be granted by the Administrator if she finds that: (A) The protectiveness determination of the State is arbitrary and capricious; (B) the State does not need such State standards to meet compelling and extraordinary conditions; or (C) such State standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act. In previous waiver decisions, EPA has stated that Congress intended EPA's review of California's decision-making be narrow. This has led EPA to reject arguments that are not specified in the statute as grounds for denying a waiver:

> The law makes it clear that the waiver requests cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.[15]

Thus, my consideration of all the evidence submitted concerning a waiver decision is circumscribed by its relevance to those questions that I may consider under section 209(b).

B. Deference to California

In previous waiver decisions, EPA has recognized that the intent of Congress in creating a limited review based on the section 209(b)(1) criteria was to ensure that the federal government did not second-guess state policy choices. This has led EPA to state:

> It is worth noting * * * I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to ''catch up'' to some degree with newly promulgated standards. Such an approach * * * may be attended with costs, in the shaped of reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe I am required to give very substantial deference to California's judgments on this score.[16]

EPA has stated that the text, structure, and history of the California waiver provision clearly indicate both a congressional intent and appropriate EPA practice of leaving the decision on ''ambiguous and controversial matters of

[11] EPA–HQ–OAR–2012–0562–0004.

[12] 77 FR 53199 (August 31, 2012).

[13] Clean Air Act (CAA) section 209(a), 42 U.S.C. § 7543(a).

[14] CAA section 209(b), 42 U.S.C. § 7543(b). California is the only State which meets section 209(b)(1)'s requirement for obtaining a waiver. *See* S. Rep. No. 90–403 at 632 (1967).

[15] 36 FR 17458 (Aug. 31, 1971). Note that the more stringent standard expressed here, in 1971, was superseded by the 1977 amendments to section 209, which established that California must determine that its standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.

[16] 40 FR 23103–23104; *see also* LEV I (58 FR 4166), January 13, 1993)Decision Document at 64.

public policy'' to California's judgment.[17]

The House Committee Report explained as part of the 1977 amendments to the Clean Air Act, where Congress had the opportunity to restrict the waiver provision, it elected instead to explain California's flexibility to adopt a complete program of motor vehicle emission controls. The amendment is intended to ratify and strengthen the California waiver provision and to affirm the underlying intent of that provision, i.e., to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.[18]

C. Burden of Proof

In *Motor and Equip. Mfrs Assoc.* v. *EPA,* 627 F.2d 1095 (D.C. Cir. 1979) (*MEMA I*), the U.S. Court of Appeals stated that the Administrator's role in a section 209 proceeding is to:

> consider all evidence that passes the threshold test of materiality and * * * thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which Congress intended a denial of the waiver.[19]

The court in *MEMA I* considered the standards of proof under section 209 for the two findings necessary to grant a waiver for an ''accompanying enforcement procedure'' (as opposed to the standards themselves): (1) Protectiveness in the aggregate and (2) consistency with section 202(a) findings. The court instructed that ''the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.'' [20]

The court upheld the Administrator's position that, to deny a waiver, there must be 'clear and compelling evidence' to show that proposed procedures undermine the protectiveness of California's standards.[21] The court noted that this standard of proof also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.[22]

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. As we explained in the GHG waiver decision, although *MEMA I* did not explicitly consider the standards of proof under section 209 concerning a waiver request for ''standards,'' as compared to accompanying enforcement procedures, there is nothing in the opinion to suggest that the court's analysis would not apply with equal force to such determinations. [23] EPA's past waiver decisions have consistently made clear that: ''[E]ven in the two areas concededly reserved for Federal judgment by this legislation—the existence of compelling and extraordinary' conditions and whether the standards are technologically feasible—Congress intended that the standards of EPA review of the State decision to be a narrow one.''[24]

Finally, opponents of the waiver bear the burden of showing that the criteria for a denial of California's waiver request has been met. As found in *MEMA I,* this obligation rests firmly with opponents of the waiver in a section 209 proceeding, holding that: ''[t]he language of the statute and it's legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.'' [25]

The Administrator's burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated, Ahere, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as 'arbitrary and capricious.'' [26] Therefore, the Administrator's burden is to act ''reasonably.''[27]

D. Comments Received on EPA's Application of the Section 209(b) Criteria

The Dealers provided a series of suggestions on several threshold issues for how EPA should evaluate CARB's ACC waiver request. While the ACC regulatory components are interrelated, the Dealers state that EPA should evaluate them separately by applying each of the three waiver criteria under section 209(b).[28]

This commenter also suggests that it is CARB's burden to make a determination that its standards are at least as protective of the public health and welfare as any applicable federal standards, and to determine that the standards are technologically feasible.[29] This commenter also suggests that Congress allowed for a limited waiver only if California is able to show that its standards are necessary to address ''the unique problems facing [the state] as a result of its climate and topography.'' [30]

In addition, the Dealers suggest that a decision to deny a CARB waiver request only need meet a ''preponderance of the evidence'' standard. This commenter maintains that such a standard would preserve the traditional presumption in favor of CARB's protectiveness determination while affording EPA or those opposed to the waiver the ability to uphold section 209's general preemption. The commenter suggests that EPA mischaracterizes the *MEMA* decision within its prior GHG waiver decision when EPA stated ''there is nothing in the opinion to suggest that the court's analysis would not apply with equal force to such determinations.'' [31] The commenter states that because the Court opined that the ''preponderance of the evidence standard governs the inquiry into technological feasibility,'' and the Court determined that the appropriate standard of proof ''must take into account the nature of risk of error involved in any given decision'' it is therefore appropriate that EPA must use its discretion to determine the appropriate standard when evaluating a waiver request under each element of

[17] 40 FR 23104; 58 FR 4166.

[18] *MEMA I,* 627 F.2d at 1110 (citing H.R.Rep. No 294, 95 Cong., 1st Sess. 301–02 (1977).

[19] *MEMA I,* 627 F.2d at 1122.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] 74 FR 32748

[24] *See, e.g.,* 40 FR 21102–103 (May 28, 1975).

[25] *MEMA I,* 627 F.2d at 1121.

[26] *Id.* at 1126.

[27] *Id.*

[28] NADA does not address the application of the three waiver criteria to CARB's LEV III criteria pollutant regulations .

[29] NADA comment at 3.

[30] *Id.*

[31] 74 FR 32748. EPA notes that the language following this statement, in the same paragraph of the GHG waiver decision, states ''EPA's past waiver decisions have consistently made clear that: ''[E]ven in the two area concededly reserved for Federal judgment by this legislation—the existence of compelling and extraordinary conditions and whether the standards are technologically feasible—Congress intended that the standards of EPA review of the State decision to be a narrow one.''

Section 209(b). To settle the question of the appropriate burden of proof the commenter cites *International Harvester* v. *Ruckelshaus* wherein the decision over burden of proof is informed by an analysis that balances the cost of a wrong decision on feasibility against the gains of a correct one: ''These costs include the risk of grave maladjustments * * * and the impact on jobs and the economy from a decision which is only partially accurate * * * against the environmental savings.''

With regard to the Dealers' first suggestion that EPA should separately apply the waiver criteria to each of the ACC regulatory components (*e.g.,* GHG emission standards and ZEV), EPA notes that each part of CARB's regulations are subject to EPA waiver review. As such, by today's decision we address any adverse comments in that regard. However (and as explained in further detail under EPA's analysis of each waiver criteria below), we believe the Dealers fundamentally misunderstand the specific language of the section 209(b), its congressional history, and EPA's past administrative waiver practice. For example, although EPA would typically examine whether CARB's regulation of each pollutant is as stringent as any applicable federal standard, we nevertheless recognize both the statutory language and legislative history that requires EPA to consider the protectiveness of a CARB standard ''in the aggregate'' of all emission standards covering that particular industry category (*e.g.,* light-duty vehicles, etc). Furthermore, under the second waiver criterion of section 209(b), EPA continues to evaluate whether those opposed to a waiver have demonstrated that CARB no longer experiences compelling and extraordinary conditions. As such, for any standard or set of standards presented to EPA for waiver consideration, EPA's evaluation continues to be whether CARB has a need for its motor vehicle emission program to address the underlying compelling and extraordinary conditions. This is further explained in our discussion of this waiver criterion. Similarly, although the Dealers might suggest that EPA only be obligated to determine whether each of CARB's ACC regulatory components, in isolation, is consistent with section 202(a) we believe the better approach is to determine the technological feasibility of each standard in the context of the entire regulatory program for the particular industry category. In this case, we believe CARB has in fact recognized the interrelated, integrated approach the industry must take in order to address the regulatory components of the ACC program. As noted above, the House Committee Report explained as part of the 1977 amendments to the Clean Air Act that California was to be afforded flexibility to adopt a *complete* program of motor vehicle emission controls (emphasis added). As such, EPA believes that Congress intended EPA to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.[32] EPA believes this intent extends to CARB's flexibility in designing its motor vehicle emission program and evaluating the aggregate effect of regulations within the program.

With regard to CARB's initial burden in submitting a waiver request to EPA, we believe this commenter misreads both section 209(b) along with the case law and legislative history it cites. California is only required to make a protectiveness finding as a threshold matter before submitting its waiver request to EPA. Section 209(b) of the Clean Air Act plainly states that ''The Administrator shall, * * *, waive application of this section* * *., if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that * * *.'' Nothing on the face of section 209(b) requires California to make affirmative findings or showings under section 209(b)(1)(B) or (C). The *MEMA I* decision cited to by the commenter does not support the suggestion that CARB must initially make an affirmative determination or showing beyond the protectiveness determination. Of course, whether or not CARB has such a burden, CARB has clearly provided in its initial waiver request considerable support for its view that its waiver request meets the requirements of section 209(b)(1)(B) and (C).[33]

EPA continues to believe that the burden of proof for each waiver criteria lies on the opposing party. As earlier explained, this is inherent in the statutory provision that requires EPA to grant a waiver unless it makes one of the specific negative findings listed in section 209(b)(1).

The language of the statute and its legislative history indicate that California's regulations, and California's determination that they comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing, and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.[34]

Further, pertinent legislative history evinces Congressional intent to place the burden of proof on the party opposing a waiver. This appears most dramatically from the debates on the floor of the House over two alternative versions of the statutory language. One, sponsored by the relevant legislative committee, would have permitted the federal government, upon application showing by California, to set special California standards if certain conditions were met. The second, which was sponsored by the entire California delegation, see 113 Cong. Rec. H 14428 (Cong. Moss) (daily ed. Nov. 2, 1967), and eventually adopted on the floor, would have required the federal government to waive preemption of standards promulgated by California unless certain findings were made. Despite the understandable efforts of some sponsors of the committee language to portray the differences between the two versions as purely verbal the majority of the House clearly disagreed. 113 Cong. Rec. H 14404 (Cong. Herlong); H 14432 (Cong. Rogers) (daily ed. Nov. 2, 1967). Sponsors of the language eventually adopted (the language sponsored by the California delegation) referred repeatedly to their intent to make sure that no ''Federal bureaucrat'' would be able to tell the people of California what auto emission standards were good for them, as long as they were stricter than Federal standards. 113 Cong. Rec. H 14393 (Cong. Sess); H 14395 (Cong. Smith); H 14396 (Cong. Holffield); H 14399 (Cong. Hosmer); H 14408 (Cong. Roybal); H 14409 (Cong. Reinicke); H 14429 (Cong. Wlson) (daily ed. Nov. 2, 1967). Thus, at the close of the debate, the House rejected language that would have imposed the burden of proof on California and instead accepted language that which places the burden on those who allege, in effect, that EPA's GHG emission standards are adequate to California's needs. They also viewed the change as necessary to their intent to preserve the California state auto emission control program in its original form, see HR. Rep. No. 728, 90th Cong. 1st Se. 96–97 (1967) (separate views of Congressmen Moss and Van Deerlin), 113 Cong. Rec. H 14415 (daily ed. Nov. 2, 1967) (Cong.

[32] H.R. Rep No. 294, 95 Cong., 1st sess. 301–02 (1977).

[33] CARB waiver request and supporting attachments.

[34] *MEMA I,* 627 F.2d at 1121.

Van Deerlin) and to continuing the national benefits that might flow from allowing California to continue to act as a pioneer in this field. 113 Cong. Rec. H 14407 (Cong. Moss) (daily ed. Nov. 2, 1967); S 16395 (daily ed. Nov. 14, 1967) (Senator Murphy). These points had also previously been made by the Senate Public Works Committee in reporting out waiver language identical to that eventually adopted by the House. S. Rep. No. 403, 90th Cong. 1st Sess. 32–33 (1967).

As also explained in *MEMA I:*

> Legislative history makes clear that the burden of proof lies with the parties favoring denial of the waiver. Petitioners lost the battle they now wage twelve years ago when Congress specifically declined to adopt a provision which would have imposed on California the burden to demonstrate that it met the waiver requirements. As noted, the Senate version of the Air Quality Act of 1967 contained the language which was ultimately adopted by Congress. It vested the power to make the protectiveness determination in California and sharply restricted the Secretary's role in a waiver proceeding. The Senate Report explained that under the proposal the ''Secretary is required to waive application unless he finds'' one of the factual circumstances set out in section 209(b)(1)(A)–(C). S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967).

Finally, with regard to the Dealers' arguments about the burden of proof, we believe it necessary to differentiate between two separate questions: 1) who has the burden of proof; and 2) what is the appropriate level of proof? A discussion of who holds the burden of proof is addressed above. Below is a discussion regarding the appropriate ''level'' of proof. EPA agrees with the Dealers that EPA has the discretion to determine the appropriate level of proof, and we are guided by the language of the statute, relevant case law, and our prior administrative practice.

With regard to the standard of proof applicable to CARB's protectiveness determination, EPA rejects any contention that the standard should be anything other than ''clear and compelling evidence.'' The language of section 209(b)(1)(A) requires that the Administrator find that CARB's protectiveness determination is ''arbitrary and capricious'' suggesting that EPA or others that may oppose the waiver must demonstrate that CARB's factual findings lacked any acceptable reasoning. As noted above, the *MEMA I* court upheld the Administrator's position that, to deny a waiver, there must be 'clear and compelling evidence' to show that proposed procedures undermine the protectiveness of California's standards.[35] The court noted that this standard of proof also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.[36] EPA believes there is no reason to jettison the precedent along with its past administrative waiver practice merely because CARB seeks a waiver for ''standards'' as opposed to ''accompanying enforcement procedures.''

With respect to the second and third waiver criteria of section 209(b); however, EPA is also guided by the principles of deference noted above and by case law, as explained below in EPA's examination of technological feasibility. As the commenter notes, in the GHG waiver EPA reasoned that *MEMA I*'s holding on the applicable standard of proof should be extended to waiver of standards. EPA continues to believe that it is appropriate to impose a standard of preponderance of evidence on the proponent of denial of a waiver of standards, for the second and third waiver criteria. This standard would also be similar to the standard in civil matters. ''This view of the standard of proof dictates the standard normally adopted in civil matters, a preponderance of the evidence.''[37] EPA also believes that it should apply such a standard in a way that accords with congressional intent to provide California with the broadest possible discretion in setting regulations that it finds protective of the public health and welfare[38] while limiting EPA's review to a narrow role that provides substantial deference to the State.[39]

Further, EPA agrees with the commenter that in making its determination, EPA should be mindful of the risk of error involved.[40] But this does not change the burden of proof. ''The Administrator is not entitled to ignore the evidence adduced at the hearing. He must consider all evidence that passes the threshold test of materiality and he must thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which Congress intended denial of the waiver.''[41]

In sum, based on the statutory structure of section 209(b)(1) and legislative history, the burden of proof falls on those who wish EPA to deny the waiver.

IV. California's Within the Scope Request for its Zero Emission Vehicle Amendments

CARB's waiver request sought confirmation from EPA that the ZEV amendments (2012 ZEV Amendments), as they relate to 2017 and prior MYs are within the scope of existing waivers. The ACC waiver request also sought confirmation that the 2012 ZEV amendments as they relate to 2018 and later MYs are within the scope of existing waivers, or, in the alternative, meets the criteria for a full waiver.

A. Chronology

California's initial ZEV program was included as part of its first low-emission vehicle program known as LEV I. The ZEV component of this program had a ZEV sales requirement starting with the 1998 MY and phasing in to a 10 percent sales requirement by the 2003 MY. EPA issued a waiver of preemption for these regulations on January 13, 1993.[42] CARB subsequently amended the ZEV regulations in March, 1996, by eliminating the ZEV sales requirement for the 1998–2002 MYs and retaining the 10 percent sales requirement for the 2003 and later MYs. EPA issued a within the scope determination for these amendments on January 5, 2001.[43] CARB again amended the ZEV regulations in 1999, 2001, and 2003 and on December 21, 2006, EPA waived preemption for these amendments through the 2011 MY.[44] The 2006 EPA action included a within the scope decision for certain components of the regulations and a full waiver authorization for other components. Specifically, EPA determined that certain provisions of the 1999–2003 amendments to the ZEV regulations affecting 2006 and prior MYs were within the scope of previous waivers of preemption. EPA's 2006 decision concurrently granted California's request for a waiver of preemption to enforce certain provisions of the ZEV regulations as they affected 2007 through 2011 MY vehicles. EPA also stated that that although we believed it appropriate to grant a full waiver of preemption for the 2007 MY, we also believed it appropriate to consider the 2007 MY regulations (with one exception noted) as within the scope of previous waivers of preemption, as they applied to certain vehicles that were

[35] *Id.*

[36] *Id.*

[37] *International Harvester* v. *Ruckelshaus,* 478 F 2d 615, 643 (D.C. Cir.) (*International Harvester).*

[38] *MEMA I,* 627 F. 2d at 1122.

[39] 40 FR 23103–104.

[40] *MEMA I,* 627 F.2d at 1122.

[41] *Id.*

[42] 58 FR 4166 (January 13, 1993).

[43] 66 FR 7751 (January 25, 2001).

[44] 71 FR 78190 (December 28, 2006).

already subject to the pre-existing ZEV regulations. The 2006 waiver decision did not make any findings or determinations with regard to CARB's ZEV regulations as they pertained to the 2012 and later MYs. On October 3, 2011, EPA determined that additional CARB amendments to the ZEV regulations, as they affected 2011 and prior MYs, were within the scope of previous waivers for the ZEV regulations (or in the alternative qualified for a new waiver). At that time EPA also granted a waiver allowing California to enforce the ZEV amendments as they affected 2012 and later MYs.[45]

B. CARB's ZEV Amendments

CARB's stated goal for the 2012 ZEV amendments, as they affect the ZEV regulation through MY 2017, was to make minor corrections and clarifications and to enable manufacturers to successfully meet the 2018 and later MY ZEV requirements. As such, the 2012 ZEV amendments included compliance flexibility provisions, adjustment of credits and allowances, and the addition of a new vehicle category that can earn credits to help manufacturers satisfy their sales requirement.

The compliance flexibility provisions include several modifications to the ZEV program credit and travel provisions. The limitations on carry forward credits for ZEVs are removed, allowing for indefinite banking of ZEV credits. The travel provision for credits from ZEV sales in Section 177 states is extended through 2017. Travel provision credits limit the credits manufacturers need to generate to those necessary for California, no matter how many states adopt the ZEV program under Section 177. Vehicles sold in section 177 states generate credits for California and vice versa under the travel provisions. The travel provision amendments allow for the continued travel of ZEV credits through MY 2017. Carry forward credits for ZEVs were previously limited to two additional model years. This limitation is removed by the 2012 amendments, allowing manufacturers to bank credits for all future model years. This modification is a flexibility to enable automakers to comply with the 2018 and later provisions.

In addition, the 2012 ZEV amendments provide for an adjustment of credits and allowances to incentivize longer-term technology. For example, the credits for Type V ZEVs (fuel cell vehicles with range of 300 miles or greater) are increased. Finally, the 2012 ZEV amendments create the addition of a new vehicle category that includes two new near-ZEV vehicle types: Type I.5x and Type IIx. These vehicles are plug-in hybrid electric vehicles (PHEVs) with more capable electric drive systems, but smaller engines that are not expected to be used often and have diminished performance. These vehicles can be used to meet up to one half of a manufacturer's minimum ZEV credit requirement. These vehicles will be eligible for the same credits as current Type I.5 (2.5 credits) and Type II (3 credits) and will qualify for travel provision credits through 2017.

Separately, CARB's stated goal for its 2012 ZEV amendments, as they affect 2018 and later MYs, is to achieve the commercialization of ZEVs and near-ZEVs such as PHEVs (with sales of approximately 15 percent of the new car market in California by 2025) by simplifying the regulation and pushing technology to higher volume production in order to achieve cost reductions. The amendments cover six major areas: increased ZEV requirements phased-in through 2025; the removal of ''commercialized'' technology from the ZEV program; amended manufacturer size definitions, ownership requirements and transitions; a modified credit system, a modified travel provision; and a new opportunity for manufacturers to generate additional ZEV credits via over compliance with applicable GHG emission standards during this time period.

The increased ZEV credit requirements are equivalent to approximately 15 percent ZEV and near-ZEV sales by 2025. This sales level is deemed by CARB to be the threshold at which costs will decrease due to volume effects. The credit requirement is being ramped up from the current program's static level of 16 percent total, which includes PZEVs and AT PZEVs. The new requirement consists of a 2 percent minimum ZEV and 2.5 percent minimum TZEV (4.5 percent total) requirement, ramping up to 16 percent minimum ZEV and 6 percent minimum TZEV (22 percent total) requirement in 2025 and beyond. The 2012 ZEV amendment revisions to credit calculations for ZEVs and TZEVs result in a projected market share of 15.4 percent of new sales in 2025.

Under the previous ZEV mandate, credits were allowed for PZEV-certified vehicles and HEVs which are not plugged in. CARB is removing these vehicle types from the credit scheme in MY 2018 and later. Remaining credits that are banked can continue to be used, but with discounts and caps applied.

Manufacturer size definitions have been amended to apply full ZEV mandate to all but the smallest manufacturers. Manufacturer sales volumes will be combined if joint ownership exceeds 33.4 percent and the transition period for manufacturers changing size categories has been modified. Under this system, 97 percent of the light-duty market will be covered by the ZEV mandate.

Currently, manufacturers with sales volumes exceeding 60,000 units in California are classified as large volume manufacturers (LVM). This modification reduces the threshold to 20,000 units, which will bring most manufacturers under the full ZEV mandate. This modification is being made because many of these current intermediate vehicle manufactures (IVMs) have a large market presence outside California. Remaining IVMs will be allowed to comply with the ZEV mandate with no restrictions on ZEV technology type, meaning an IVM can fully comply with TZEVs, but not PZEVs or AT PZEVs.

Additionally, ownership thresholds for treatment of automakers as one entity are being modified to more closely align them with GHG fleet regulations and changes are being made to the lead time provisions as manufacturers move between size classes.

CARB also modified its credit system. ZEV credits are based on range and technology reflecting utility of the vehicle and expected timing for commercialization. BEVs with a 50-mile range earn one credit and FCVs with 350 miles of range earn four credits each. Up to half a manufacturer's credit requirement may be met with more capable PHEVs which are meant to operate mainly as EVs, but are equipped with a small range-extending engine.

TZEVs, which are essentially PHEVs of the type available today such as the Chevrolet Volt have simplified credits based on electric range and a minimum requirement of 10 miles all-electric on the US06 test cycle. The TZEV credit ranges from a minimum of 0.2 to a maximum of 1.3 with a greater than 80 mile range.

Excess credits earned and banked from PZEVs and AT PZEVs will be discounted in 2018 and later years. Their use will then be limited to 25 percent of a manufacturer's TZEV requirement. No portion of the ZEV requirement may be met with banked credits. Smaller manufacturers (IVMs) will not have their credits capped for 2018 or 2019. In 2020 and later, the IVM cap will be 25 percent, but applied to their combined ZEV/TZEV requirement.

[45] 76 FR 61095 (October 3, 2011).

CARB has also modified the credit levels for various ZEV types. The current tiered CARB system, which encouraged manufacturers to design vehicles to meet a given range threshold is replaced with an equation that calculates credits based on the UDDS electric driving range.

In addition, CARB has modified its ''travel provisions.'' The travel provision, which allows for the sale of a qualifying vehicle in a Section 177 state to count towards a manufacturer's credit requirement in California, ends for BEVs after 2017. Since FCVs are far behind BEVs in development and market penetration, travel credits are extended for FCVs. California intends to extend travel credits until sufficient refueling infrastructure exists to support FCVs in the market.

Lastly, the 2012 ZEV amendments provide that automakers who over comply with the LEVIII GHG standard may use the extra GHG reductions to offset a portion of their ZEV requirement in MYs 2018 through 2021. Manufacturers may offset 50 percent of their ZEV mandate in 2018, ramping down to 30 percent in 2021, subject to certain requirements.

C. EPA's Determination Regarding the Appropriateness of CARB's Within the Scope Request for the 2012 ZEV Amendments

CARB primarily relies upon EPA's prior waiver and within the scope findings to demonstrate the appropriateness of applying the within the scope criteria to its 2012 ZEV amendments. In EPA's 2006 waiver determination, EPA stated that it will conduct a two-part inquiry when considering whether CARB amendments to a previously waived regulation fall within the scope of the previously granted waiver or whether the amendments require a new waiver:

> EPA believes it is important to distinguish between the threshold issue of whether CARB's amendments should be subjected to either the within-the-scope criteria or the full waiver, and separately determining whether the same amendments actually meet the applicable criteria for actually confirming the within-the-scope request or granting a full waiver of federal preemption.
>
> In determining the threshold question, EPA will consider whether the amendments make minor technical revisions or provide compliance flexibility on the one hand or whether the amendments add new or more stringent pollutant standards or new motor vehicle categories on the other.[46]

With regard to the 2017 and earlier MYs, following the precedent noted above, CARB maintains that the 2012 ZEV amendments create no new issues affecting the previous waiver determinations concerning the ZEV program and that the 2012 ZEV amendments do not undermine CARB's original protectiveness determination and the ZEV regulations remain consistent with section 202(a). With regard to the 2018 and later MYs, CARB maintains that the within the scope criteria are appropriate since the overall ZEV credit requirement for MYs 2018 through 2022 is less burdensome than the currently waived program.

EPA received comment from the Manufacturers stating agreement that the amendments to the MYs 2009 through 2017 ZEV regulations qualify for a within the scope determination since the amendments increase the flexibility available to manufacturers to comply with those standards and otherwise lessen the burdens placed on manufacturers. However, the Manufacturers did not agree that the amendments to the ZEV regulation for 2018 and later MYs properly fall under the within the scope review. The commenter notes that in addition to the increase in the minimum ZEV credit requirements in 2018 MY and beyond, the CARB amendments also eliminate certain vehicle types (e.g., PZEVs and AT PZEVs) that were previously accepted towards compliance with the ZEV requirements during this time period. In addition, the Manufacturer notes that the changes to CARB's travel provisions are significant and raise serious compliance concerns.

The Dealers commented generally that the ZEV waiver should be denied, but raised no specific concerns about a within-the-scope determination for MYs 2012–2017.

Therefore, EPA has received no explicit comment suggesting that EPA reject CARB's request for confirmation that EPA evaluate the 2012 ZEV amendments as they affect the 2017 MY and earlier. EPA believes that it is appropriate to evaluate such amendments (which provide compliance flexibilities) under the within the scope criteria and applies such criteria below. However, with respect to the 2018 and later MYs, EPA agrees with the commenters that CARB's 2012 ZEV amendments have, in total, added to the level of stringency and compliance obligations. Therefore, EPA does not believe it is appropriate to apply within the scope analysis to the ZEV amendments as they apply in the 2018 and later MYs. As explained below, because EPA is applying the full waiver criteria for the 2012 ZEV amendments as they pertain to the 2018 and later MYS, EPA will in the alternative also examine the revisions for the 2017 and earlier MYs using the full waiver criteria.

D. Application of the Within the Scope Waiver Criteria to CARB's 2012 ZEV Amendments Regarding 2017 and Earlier MYs

1. Public Health and Welfare

Under section 209(b)(1)(A) of the Act, EPA cannot grant a waiver if the Agency finds that CARB was arbitrary and capricious in its determination that its State standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards. Similarly, under the criteria for a within the scope determination, the CARB amendments to an existing program may be considered within-the-scope of a previously granted waiver provided that the amendments do not undermine California's determination that its standards in the aggregate are as protective of public health and welfare as applicable Federal standards. Thus, in the within the scope context CARB may rely on the ''protectiveness determination'' that the Board made at the time of the initial regulations (the regulations which subsequently received a waiver of federal preemption from EPA) and then CARB must only demonstrate why the protectiveness determination has not been undermined by CARB's amendments or any other intervening events such as the adoption of EPA regulations since the initial waiver of federal preemption.

CARB asserts that its 2012 ZEV amendments as applied to MYs 2009 to 2017 are a critical component of the ACC package that will result in fleet standards that are at least as protective as would exist under federal standards. The Board resolved ''that the Board hereby determines that the proposed regulations approved for adoption herein will not cause the California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.'' [47]

EPA received no comments suggesting that CARB's request should be denied on the basis of CARB failing to meet its burden associated with the protectiveness findings under section 209(b)(1)(A) of the Clean Air Act.

Therefore, based on the record before us, we cannot find that CARB's 2012 ZEV amendments, as the affect 2017 and earlier MYs, would undermine CARB's prior protectiveness determinations nor would it cause the California motor

[46] Decision Document accompanying waiver determination in 71 FR 78190 (December 28, 2006).

[47] CARB Resolution 12–11 at EPA–HQ–OAR–2012–0562–0005.

vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.

2. Consistency With Section 202(a)

Under section 209(b)(1)(C), EPA cannot grant California its waiver request if the Agency finds that California standards and accompanying enforcement procedures are not consistent with section 202(a) of the Clean Air Act. Previous waivers of federal preemption have stated that California's standards are not consistent with section 202(a) if there is inadequate lead time to permit the development of technology necessary to meet those requirements, given appropriate consideration to the cost of compliance within that time. California's accompanying enforcement procedures would also be inconsistent with section 202(a) if the federal and California test procedures were inconsistent.

The scope of EPA's review of whether California's action is consistent with section 202(a) is narrow. EPA has previously found that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with the federal test procedure.[48]

As previously noted, CARB maintains that the 2012 ZEV amendments, as they pertain to the 2017 and previous MYs, provide manufacturers with additional flexibility without increasing on balance the overall stringency of the preexisting ZEV requirements. EPA has received no comments explicitly questioning the feasibility of the amendments as they apply to these MYs. In the discussion below, EPA addresses the limited comments regarding the technological feasibility concerns with regard to 2018 and later MYs and EPA provides further analysis of the general technological feasibility concerns in the full waiver discussion. With regard to whether test procedures are consistent, CARB notes that the federal Tier 2 regulations require manufacturers to measure emissions from ZEVs in accordance with the California test procedures.[49] In addition, EPA has not received comment suggesting the test procedures are inconsistent. Therefore, based on the record before us, we cannot deny CARB's within the scope request for 2017 and prior MYs based on an inconsistency with section 202(a).

3. New Issues

As noted above, included in the within the scope criteria, is a determination of whether the amendments raise new issues affecting the previous waiver decisions. As previously noted, EPA examines any new information when reviewing whether CARB's amendments affect the ZEV program's consistency with section 202(a). If the amendments had increased the stringency of the standards upon the manufacturers (for the specific model years being reviewed in the within the scope analysis), or if the amendments had regulated or subjected new types of vehicles to be included in the ZEV program (or in this instance regulated the same vehicle types but for model years not previously waived by EPA), or added additional pollutants to the program, then likely new issues would have been created. However, in this instance no party has presented evidence that new issues exist for MYs 2017 and earlier as a result of the 2012 ZEV amendments. Therefore, EPA cannot deny CARB's request for a within the scope determination for MYs 2017 and earlier based on this criterion.

Therefore, based on the record before us, we cannot deny CARB's request for confirmation that its 2012 ZEV amendments, as they affect the 2017 and earlier MYs, are within the scope of previous waiver determinations. As such, we confirm CARB's request regarding the 2012 ZEV amendments as they affect 2017 and earlier MYs.

V. Consideration of Advanced Clean Car Regulations Under the Full Waiver Criteria

CARB's ACC program regulations include revisions to both California's LEV and ZEV programs. CARB's request seeks a waiver of preemption under section 209(b) of the Clean Air Act (CAA), 42 U.S.C. 7543(b) for the revisions to the LEV III program. CARB's request also seeks a waiver for the ZEV amendments included in the ACC program regulations. Subsequent to CARB's initial ACC waiver request, CARB's Executive Officer took action to formally adopt a ''deemed to comply'' regulation affecting the GHG component of the ACC package. CARB submitted this additional information to EPA and requested that EPA consider the ''deemed to comply'' regulation as part of CARB's pending ACC waiver request. EPA's application of the section 209(b) waiver request, including the ''deemed to comply'' regulation, is set forth below.

A. California's Protectiveness Determination

Section 209(b)(1)(A) of the Clean Air Act requires EPA to deny a waiver if the Administrator finds that California was arbitrary and capricious in its determination that its State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. EPA recognizes that the phrase ''States standards'' means the entire California new motor vehicle emissions program. Therefore, as explained below, when evaluating California's protectiveness determination, EPA compares the California-to-Federal standards. That comparison is undertaken within the broader context of the previously waived California program, which relies upon protectiveness determinations that EPA have previously found were not arbitrary and capricious.[50]

Traditionally, EPA has evaluated the stringency of California's standards relative to comparable EPA emission standards.[51] That evaluation follows the instruction of section 209(b)(2), which states: ''If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of [209(b)(1)].''

To review California's protectiveness determination in light of section 209(b)(2), EPA conducts its own analysis of the newly adopted California standards to comparable applicable Federal standards. The comparison quantitatively answers whether the new

[48] *See MEMA I,* at 1126.

[49] CARB waiver request at 29, citing 40 CFR 86.1811–04(n).

[50] In situations where there are no Federal standards directly comparable to the specific California standards under review, the analysis then occurs against the backdrop of previous waivers which determined that the California program was at least as protective of the federal program ((LEV II + ZEV) + GHG). See 71 FR 78190 (December 28, 2006), Decision Document for Waiver of Federal Preemption for California Zero Emission Vehicle (ZEV) Standards (December 21, 2006).

[51] 36 FR 17458 (Aug. 31, 1971). (''The law makes it clear that the waiver requests cannot be denied unless the specific finding designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.''). The ''more stringent'' standard expressed here in 1971 was superseded by the 1977 amendments to section 209, which established that California's standards must be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. The stringency standard remains, though, in section 209(b)(2).

standards are more or less protective than the Federal standards. That comparison of the newly adopted California standards to the applicable Federal standards is conducted in light of prior waiver determinations. That is, the California-to-Federal analysis is undertaken within the broader context of the previously waived California program, which relies upon protectiveness determinations that EPA has not found arbitrary and capricious.[52]

A finding that California's determination was arbitrary and capricious under section 209(b)(1)(A) must be based upon '''clear and compelling evidence' to show that proposed [standards] undermine the protectiveness of California's standards.'' [53] Even if EPA's own analysis of comparable protectiveness or that suggested by a commenter might diverge from California's protectiveness finding, that is not a sufficient basis on its own for EPA to make a section 209(b)(1)(A) finding that California's protectiveness finding is arbitrary and capricious.[54]

CARB has made a series of protectiveness determinations with regard to its ACC program. California made a protectiveness determination with regard to the 2012 ZEV and LEV amendments in CARB's Resolution 12–11, finding that the amendments would not cause the California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.[55] CARB noted that this protectiveness determination is the logical extension of the comparable findings that were found to be sufficient in the analyses of California's previous protectiveness determinations for its ZEV, LEV, and GHG regulations.[56] As explained in CARB's waiver request, the ACC program will result in reductions of both criteria pollutants and GHG emissions that, in the aggregate, are more protective than the pre-existing federal standards. CARB's Resolution 12–11 also sets forth the Board finding that ''It is appropriate to accept compliance with the 2017 through 2025 MY National Program as compliance with California's GHG emission standards up through the 2017 through 2025 MYs, once U.S. EPA issues their Final Rule on or after its current July 2012 planned release, provided that the GHG reductions set forth in U.S. EPA's December 1, 2011 Notice of Proposed Rulemaking for 2017 through 2025 model year passenger vehicles are maintained, except that California shall maintain its own reporting requirements.'' Further, CARB's Resolution 12–21 sets forth that the CARB staff ''prepared three separate Regulatory Notices * * * for these amendments [LEV III/GHG and ZEV] and presented them to the Board with a single coordinated analysis of emissions, costs, and associated environmental impacts and benefits.[57] CARB's Resolution 12–21 also resolves that the ''recitals and findings contained in Resolution 12–11, are incorporated by reference herein.'' [58]

In addition, at the time CARB adopted the ''deemed to comply'' regulation, the CARB Board found that such amendments do not undermine the Board's previous determination that the regulation's emission standards, other emission related requirements, and associated enforcement procedures are, in the aggregate, at least as protective of public health and welfare as applicable federal standards and are consistent with section 209 of the Clean Air Act.[59] Therefore, subsequent to the finalization of EPA's GHG regulation (August 31, 2012), and as part of the CARB Board's adoption of the ''deemed to comply'' rule on November 15, 2012, the Board resolved and determined ''that the proposed regulations approved for adoption herein will not cause California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.'' [60]

With regard to criteria pollutants, CARB notes that the primary fleet average emission requirement, beginning in 2015, declines every year to a fleet average NMOG plus NO_X emission standard of 0.030 g/mi in 2025. CARB notes that this is clearly more stringent than the current federal Tier 2 fleet average NO_X emission requirement with its implied fleet average NMOG and plus NO_X requirement. In addition, the LEV III PM standards 3 mg/mi and 1 mg/mi are also significantly more stringent than the federal Tier 2 p.m. standards. CARB also notes that while there is no criteria emissions benefit with its ZEV requirements in terms of vehicle (tank-to-wheel—TTW) emissions since the LEV III criteria pollutant fleet standard is responsible for the emission reductions, but CARB notes that in terms of upstream emission impacts (well-to-wheel—WTW) there are emission reductions achieved from the ZEV requirements. There are no comparable federal standards.

CARB also notes that with regard to GHG emissions, the ACC program as a whole would provide major reductions in GHG emissions (e.g., by 2025 CO_2 emissions would be reduced by almost 14 million metric tonnes (MMT) per year, which is 12 percent from baseline levels). CARB's ACC waiver request, notes that the federal GHG standards do not become more stringent in the 2017–2025 MYs, as CARB's do. However, CARB states that it understands more stringent standards will ''soon be finalized.''

At the time the Board adopted the ''deemed to comply'' amendments it had before it the ''Staff Report: Initial Statement of Reasons demonstrating that if a National Program standard was theoretically applied only to California new vehicle sales alone, it might create a GHG deficit of roughly two million tons compared to the California standards.[61] CARB notes that there might be a GHG emission deficit if the National Program applied in California, and thus CARB's GHG emission standards are at least as stringent as the EPA GHG emission standards.

1. Comments on CARB's Protectiveness Determination

The Dealers commented on CARB's protectiveness determinations for both its GHG emission standards and its ZEV regulations. At the outset, NADA claims that EPA must conduct a separate preemption waiver evaluation for each set of standards in the ACC program

[52] In situations where there are no Federal standards directly comparable to the specific California standards under review, the analysis then occurs against the backdrop of previous waivers which determined that the California program was at least as protective of the federal program ((LEV II + ZEV) + GHG). See 71 FR 78190 (December 28, 2006), Decision Document for Waiver of Federal Preemption for California Zero Emission Vehicle (ZEV) Standards (December 21, 2006).

[53] *MEMA I,* 627 F.2d at 1122.

[54] ''Once California has come forward with a finding that the procedures it seeks to adopt will not undermine the protectiveness of its standards, parties opposing the waiver request must show that this finding is unreasonable.'' *MEMA I,* 627 F.2d at 1124.

[55] *See* CARB's Resolution 12–11, EPA–HQ–OAR–2012–0562–0006 at 22. EPA notes that the CARB Board also resolved that it found that separate California standards and test procedures are necessary to meet compelling and extraordinary conditions. *Id.* at 23.

[56] CARBS's waiver request at 13, citing 76 FR 61095 (October 3, 2011), 68 FR 19811 (April 22, 2003), and 74 FR 32744 (July 8, 2009), respectively.

[57] CARB Resolution 12–21 at 7.

[58] *Id.* at 10.

[59] *See* CARB's Resolution 12–35; EPA–HQ–OAR–2012–0562–0374.

[60] *Id.* at p. 9.

[61] EPA–HQ–OAR–2012–0562–0374 at 3. CARB also notes that to the extent a manufacturer chooses not to exercise their National Program compliance option in California this would actually provide additional GHG benefits in California, so compliance in California can never yield fewer cumulative greenhouse gas reductions from the industry wide fleet certified in California.

(e.g., LEV III criteria pollutants, GHG, and ZEV). EPA notes that NADA did not address the preemption waiver request for the CARB LEV III standards.

In the context of considering the ACC standards individually, NADA states that EPA must reject CARB's GHG preemption waiver request because CARB's finding is premature. NADA maintains that CARB has not conducted the necessary investigation to support is protectiveness determination because EPA has now finalized its GHG emission standards. NADA claims that CARB's determination should measure the standards that exist at the time EPA makes its waiver decision. NADA contends that rather than allowing CARB to look at the program as a whole, CARB must be required to examine each standard before the Agency, including the GHG standards at issue. In the alternative, the commenter suggests that CARB's protectiveness determination is arbitrary and capricious since CARB itself cites the absence of the federal GHG standards as reason for its protectiveness determination. Finally, the commenter argues that CARB's conclusions are not backed by facts or analysis and contradict the actuality that emissions from other parts of the world and the United States affect global concentrations, and therefore concentrations in California. The Dealers state that it therefore follows that GHG concentrations in California will be reduced by a greater amount if reductions occur on a nationwide basis, rather than just statewide. Thus by definition, CARB standards for limiting GHG emissions from California cars are less protective than the applicable federal standards.

CARB's supplemental comments, in response to NADA's claims, note that California demonstrated that it was reasonable for the Board to determine that the California standards ''as submitted'' are, in the aggregate, as or more stringent than the applicable federal standards.[62] CARB suggests this was a relatively simple determination at the time of CARB's June 2012 waiver request because: (1) EPA's proposed 2017–2025 MY GHG standards were not finalized; (2) EPA had not proposed or finalized a 1 mg/mile PM standard and other criteria pollutant improvements for 2015 and later MYs; and (3) EPA has no ZEV program that may achieve an additional incremental wells-to-wheels criteria pollutant reduction. CARB states that this prior and timely Board determination remains sound despite the now finalized EPA GHG standards because (2) and (3) remain true and because EPA GHG standards: (1) do not account for upstream GHG emissions as does California's GHG program; (2) include vehicle multipliers for natural gas vehicles, effectively diluting federal standards vis a vis California's; and (3) contains relaxed criteria for GHG credits for mild hybrid-electric vehicle trucks, which also dilutes the federal standard. CARB also notes that to the extent manufacturers choose the EPA GHG standard compliance path to demonstrate compliance with California standards that results in essentially equal reductions (as stringent) of GHG emissions in California. Separately, CARB states that NADA's attempt to exclude CARB's LEV III standards from the ''in the aggregate'' protectiveness determination cannot be countenanced since this would render the phrase ''in the aggregate'' superfluous.

In addition, within CARB's Resolution 12–35, adopted on November 15, 2012, CARB addresses two issues raised by NADA's comments to EPA. CARB's Resolution 12–35 notes the question of whether the CARB Board failed to make a finding that California's passenger vehicle program remains as protective as applicable federal standards given the proposed ''deemed to comply'' rule on September 14, 2012 and also notes the question whether California's program is no longer as protective given the 2017 through 2025 MY National Program. First, it states that it sufficiently addressed NADA's protectiveness issues in its November 14, 2012 supplemental submittal to EPA. Within this submission, CARB noted that it was reasonable for the Board to determine that the California standards *as submitted* are, in the aggregate, as or more stringent that the applicable federal standards. CARB maintains that at the time of its June 2012 waiver submittal its protectiveness determination was a fairly simple one since EPA's 2017–2025 GHG standards were not finalized, EPA had not proposed nor finalized a 1 mg/mile PM standard and other criteria pollutant improvements for 2015 and later MYs, and EPA has no ZEV program that may achieve an additional incremental wells-to-wheels criteria pollutant reduction. CARB notes that the Board's determination remains solid despite the now finalized National Program rule because EPA still has no LEV III criteria pollutant/PM equivalent requirements and because EPA's GHG standards do not account for upstream GHG emissions as do California's, and because the National Program includes vehicle multipliers for natural gas vehicles and relax criteria for GHG credits for mild hybrid electric vehicle trucks.

EPA also received comment regarding CARB's protectiveness determination for its ZEV standards. The Dealers suggest that CARB failed to adequately provide a protectiveness determination, and such a determination is drawn into question given CARB's stated conclusions that there is no TTW emission benefits from ZEV and that the ZEV regulation does not provide any additional GHG emission reductions beyond the GHG standards. The Dealers claim that CARB's failure to make a protectiveness determination regarding its ZEV standard is inherently arbitrary and capricious.

CARB states that contrary to NADA's assertion that it must make an individual protectiveness determination regarding its ZEV amendments CARB believes that requiring California to show that each standard (including the ZEV standard) is at least as protective in the aggregate would in effect ignore the phrase ''in the aggregate'' in section 209(b). CARB states that is why it made one protectiveness determination. CARB notes that purpose of the ZEV regulation is to commercialize the technologies needed to meet long term goals even beyond the emission reductions anticipated by the LEV III program.[63]

2. Is California's protectiveness determination arbitrary and capricious?

As described above, EPA's traditional analysis has been to evaluate California's protectiveness determination by comparing the new California standards, or amendments, to applicable EPA emission standards for the same pollutants. EPA notes that the ''more stringent'' standard expressed in 1971 was superseded by the 1977 amendments to section 209, which established that California's standards must be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. As noted above, this was intended to afford California the broadest possible discretion in designing is motor vehicle emission program. The comparison is undertaken within the broader context of the previously waived California program, which relies upon protectiveness determinations that EPA have previously found were not arbitrary and capricious.

[62] CARB submitted comment on November 14, 2012 (CARB supplemental comment). EPA–HQ–OAR–2012–0562–0373.

[63] CARB's supplemental comments at 3–4. CARB also references table 6.2 of its Initial Statement of Reasons (ISOR) that details the well to wheel emissions benefits of the ZEV program compared to the LEV III program. EPA–HQ–OAR–2012–0562–0008.

EPA believes that the Dealers misapply our prior statement, made in EPA's 2009 GHG waiver decision, that the most straightforward reading of the comparison called for by the statute, between California and Federal standards, is an ''apples to apples'' comparison.[64] The stated purpose of the ''apples to apples'' phrase was to determine what the ''applicable'' Federal standards are for purposes of evaluating a protectiveness determination, in response to comments that the federal CAFE standards adopted by NHTSA should be considered applicable federal standards for purposes of this wavier criterion. EPA explained in the GHG waiver decision that ''The term 'applicable' has to refer to what Federal standards apply, and the most straightforward meaning is that they apply in the same way that the California standards apply, by setting limits on emissions of air pollutants.'' Therefore, given the uniqueness of a CARB waiver request that includes interrelated standards applicable to the same vehicle category EPA believes CARB's approach of making one protectiveness determination for its ACC program is a reasonable approach permitted under section 209(b).[65] Although section 209(b)(2) informs EPA of the conclusion it must draw if each standard is at least as stringent as the comparable federal standard, EPA notes the protectiveness determination that CARB presents in a waiver request typically includes an implicit or explicit in the aggregate protectiveness determination since CARB typically examines whether its new standards (plural) undermine previous protectiveness determinations, which EPA evaluated in prior waiver decisions. In this context, once CARB presents an in the aggregate protectiveness determination EPA believes it appropriate to initially evaluate such standards in a side-by-side comparison with applicable Federal standards and then determine whether such standards are, in the aggregate, as protective as applicable Federal standards.

In the context of CARB's ACC standards this side-by-side analysis is simple. EPA has already determined that California was not arbitrary and capricious in its determination that the pre-existing California standards for light-duty vehicles and trucks, known as LEV II, is at least as protective as comparable federal standards, known as the Tier II standards.[66] In this instance, CARB has finalized new and more stringent criteria pollutant standards (LEV III) while the Tier II standards remain in place at the federal level. In the absence of newer EPA standards since the time of its prior waiver for CARB's LEV II standards there is a clear rational basis for CARB's determination that its standards will be at least as protective of human health and welfare as applicable federal standards.

The Dealer's comments assert that CARB's protectiveness determination was premature because that assessment occurred before EPA finalized its own GHG emission standards. However, EPA believes that CARB's initial protectiveness determination (submitted to EPA in CARB's June 2012 waiver request) was not premature and was appropriate given the EPA standards in effect at that time. At the time CARB submitted its waiver request, EPA's GHG emission standards for the 2017 through 2025 MYs were the same for those MYs as for MY 2016, while CARB's were becoming more and more stringent over that period; therefore, CARB's protectiveness finding was reasonable at that time.

Subsequent to EPA's promulgation of its final GHG standards, in the context of CARB's ''deemed to comply'' regulation, CARB has provided an updated protectiveness determination (see Resolution 12–35) regarding the California GHG emission standards, in terms of the underlying benefits of CARB's program. EPA finds California to be correct in its determination that the ''deemed to comply'' regulation does not undermine CARB's determination that its regulations are in the aggregate as protective as EPA's standards. CARB's regulation will achieve, in the aggregate, equal or even additional GHG emission reductions in California relative to federal GHG standards, even if manufacturers choose to comply with the California regulations by complying with EPA's GHG emission standards. As noted above, EPA's National Program standards do not account for upstream GHG emissions as do California's and EPA's GHG standards includes vehicle multipliers for natural gas vehicles and relax criteria for GHG credits for mild hybrid electric vehicle trucks. EPA also believes that CARB correctly notes that even with the ''deemed to comply'' amendments, one or more manufacturers could still choose to continue demonstrating compliance in California under the existing California regulations. To the extent manufacturers choose EPA's GHG standards as the compliance path—in California—the California standard, by definition would yield at least, essentially equivalent GHG reductions, so California's standards cannot be less stringent.

The Dealers seem to suggest that with EPA's GHG standards there will be a greater reduction of GHG emissions compared to the California GHG emission standards. California's protectiveness determination applies only to the protectiveness of CARB's emission standards, in California, compared to applicable federal standards. EPA believes that the Dealers ignore the obvious, that all stakeholders, including California, recognize the need for reductions of GHG emissions, as well as emissions of other pollutants, on a national basis. The federal GHG emission standards, applied in 50 states, will generally result in more emission reductions than CARB standards applied solely in California. If California were required to achieve equal emission results (with reductions counted only in California) to a federal program this would render 209(b) unusable. The relevant comparison is between the emission reductions achieved in California under the California program versus the emission reductions in California under the comparable federal program. Emissions reductions in other states are not considered, which is appropriate because the waiver decision affects only California's emission standards, not the federal standards that exist regardless of EPA's decision. EPA believes, and the record contains no evidence otherwise, that the reductions due to CARB's GHG emission standards in California versus the reductions of the comparable federal GHG emission standards in California, demonstrates that CARB's GHG emission standards are at least as protective as applicable federal standards. EPA notes that NADA raised similar arguments in the context of EPA's within the scope waiver decision, issued on June 14, 2011, for CARB's GHG emission amendments that included a ''deemed to comply'' provision for GHG emission standards during the 2012 through 2016 MYs. EPA noted ''Thus, at the very least, compliance with California's GHG standards under the revised regulations will result in the same, if not more, emission reductions than would occur in the absence of the California standards. NADA provides no evidence that CARB's standards are less protective than the applicable Federal

[64] *See* 74 FR at 32750.

[65] EPA also notes that CARB has provided complete information and determinations that even in the context of comparing individual standards their standards are as protective of public health and welfare as applicable Federal standards.

[66] 68 FR 19811 (April 22, 2003) and Decision Document for Waiver of Federal Preemption for Low Emission Vehicle Amendments (LEV II) (April 11, 2003).

standards. As such, NADA fails to present any evidence or make any showing that the amendments undermine California's previous determination that its standards, in the aggregate, are at least as protective of public health and welfare as applicable Federal standards.'' [67]

With regard to CARB's ZEV amendments EPA believes that CARB has provided a reasoned basis for their determination that the ZEV regulations are as protective or public health and welfare as comparable federal requirements, which for ZEV are nonexistent. In EPA's 2006 ZEV waiver proceeding, EPA conducted its traditional analysis to compare California's newly enacted ZEV standards to a similar lack of applicable federal standards. At that time California found, and EPA deemed reasonable, that the addition of the ZEV standards did not render California's LEV II program, for which a waiver had previously been granted, less protective than the federal Tier II program. In addressing the Alliance of Automobile Manufacturers' petition for reconsideration with respect to this issue, EPA stated that ''the words 'standards' and 'in the aggregate' in section 209(b)(1)(A) * * *, at minimum, include all the standards relating to the control of emissions for a category of vehicles (*e.g.,* passenger cars, etc.) subject to CARB regulation, particularly where the standards are designed to respond to the same type of pollution.'' [68] California's ZEV and GHG emission standards are an addition to its LEV program. EPA has not received any comment to suggest that the existence of either of these additional regulatory components undermines the protectiveness of CARB's LEV III emission standards. Although the Dealers suggest that ''consumers facing a CARB-constrained mix at their local dealership may elect to buy a CARB-exempted brand, to purchase a late-model used vehicle, or defer vehicle purchases altogether,'' EPA believes that the Dealers have failed to present any legal argument as to why EPA should take this into consideration within the waiver criteria. We also find that the Dealers have failed to provide evidence, under any standard of proof, as to whether such outcomes would ultimately impair the protectiveness of CARB's emission standards. EPA believes it is appropriate, and certainly reasonable, for CARB to evaluate its standards in the aggregate when the nature of its regulations are interrelated and the regulations are submitted to EPA as one ACC program. Although NADA suggests that CARB failed to make an individual protectiveness determination for its ZEV standards, EPA believes this is of no significance in light of the overall protectiveness of CARB's emission standards and the lack of an applicable federal ZEV program. The Dealers mere contentions, which CARB reasonably refutes in its supplement comments,[69] that there is no criteria emission benefit from the ZEV proposal in terms of TTW emissions, and that the ZEV regulation does not provide GHG emission reductions in addition to the LEV III GHG regulation, suggest no reason to find that CARB's ACC program is any less protective of public health and welfare because of the existence of such ZEV standards.

3. Section 209(b)(1)(A) Conclusion

Based on the record before EPA, we cannot find that CARB was arbitrary and capricious in its finding that the California ACC program standards, including the LEV III criteria pollutant and GHG emission standards along with its ZEV amendments are, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

B. Does California need its standards to meet compelling and extraordinary conditions?

Under section 209(b)(1)(B) of the Act, EPA cannot grant a waiver if EPA finds that California ''does not need such State standards to meet compelling and extraordinary conditions.'' EPA has traditionally interpreted this provision as requiring a consideration of whether California needs a separate motor vehicle program to meet compelling and extraordinary conditions. However in EPA's March 6, 2008 denial of CARB's GHG waiver request (GHG waiver denial), EPA limited this interpretation to California's motor vehicle standards that are designed to address local or regional air pollution problems. EPA determined that the traditional interpretation was not appropriate for standards designed to address a global air pollution problem and its effects and that it was appropriate to address such standards separately from the remainder of the program. EPA then found that California did not need such standards to meet compelling and extraordinary conditions. The interpretation adopted in the March 6, 2008 waiver denial was before EPA for reconsideration when CARB resubmitted its GHG waiver request and EPA announced a new opportunity for hearing and public comment on February 12, 2009.[70]

Set forth below is a summary of EPA's departure from the traditional interpretation of section 209(b)(1)(B) in the GHG waiver denial along with EPA's return to the traditional interpretation (confirmed today) in EPA's waiver of preemption of CARB's GHG standards on July 8, 2009 (GHG waiver).[71] Because EPA received comment suggesting that CARB's GHG and ZEV standards do not meet the requirements of section 209(b)(1)(B), EPA believes it useful to recount the interpretive history associated with both GHGs and traditional local and regional air pollutants to explain why EPA believes that section 209(b)(1)(B) should be applied in the same manner for all air pollutants.

As explained below, EPA finds that the opponent of the ACC waiver has not met its burden of demonstrating why CARB no longer has a need for its motor vehicle emissions program under EPA's interpretation of section 209(b)(1)(B). Although EPA is not adopting the Dealers suggested interpretation, EPA also finds that the opponent of the waiver has not met its burden of demonstrating that CARB does not have the need for either its GHG or ZEV standards.

1. EPA's March 6, 2008 GHG Waiver Denial

In the March 6, 2008 waiver denial, EPA provided its reasoning for changing its long-standing interpretation of this provision, as it pertains to California standards designed to address global air pollution. EPA described its longstanding interpretation in some detail, stating that:

> Under this approach EPA does not look at whether the specific standards at issue are needed to meet compelling and extraordinary conditions related to that air pollutant. For example, EPA reviewed this issue in detail with regard to particulate matter in a 1984 waiver decision.[72] In that waiver proceeding, California argued that EPA is restricted to considering whether California needs its own motor vehicle program to meet compelling and extraordinary conditions, and not whether any given standard is necessary to meet such conditions. Opponents of the waiver in that proceeding argued that EPA was to consider whether California needed

[67] 76 FR 34693, 34696 (June 14, 2011).

[68] Decision Document for Waiver of Federal Preemption for California's Zero Emission Vehicle (ZEV) Standards (December 21, 2006) and EPA's August 13, 2008 Response to Petition for Administrative Reconsideration of EPA's ZEV Waiver Decision (through the 2011 Model Year) published on December 28, 2006.

[69] *See* CARB supplemental comments at 3–4.

[70] 74 FR 7040 (February 12, 2009).

[71] 74 FR 32744 (July 9, 2009).

[72] 49 FR 18887 (May 3, 1984).

these PM standards to meet compelling and extraordinary conditions related to PM air pollution.

The Administrator agreed with California that it was appropriate to look at the program as a whole in determining compliance with section 209(b)(1)(B). One justification of the Administrator was that many of the concerns with regard to having separate state standards were based on the manufacturers' worries about having to meet more than one motor vehicle program in the country, but that once a separate California program was permitted, it should not be a greater administrative hindrance to have to meet further standards in California. The Administrator also justified this decision by noting that the language of the statute referred to ''such state standards,'' which referred back to the use of the same phrase in the criterion looking at the protectiveness of the standards in the aggregate. He also noted that the phrase referred to standards in the plural, not individual standards. He considered this interpretation to be consistent with the ability of California to have some standards that are less stringent than the federal standards, as long as, per section 209(b)(1)(A), in the aggregate its standards were at least as protective as the federal standards.

The Administrator further stated that in the legislative history of section 209, the phrase ''compelling and extraordinary circumstances'' refers to ''certain general circumstances, unique to California, primarily responsible for causing its air pollution problem,'' like the numerous thermal inversions caused by its local geography and wind patterns. The Administrator also noted that Congress recognized ''the presence and growth of California's vehicle population, whose emissions were thought to be responsible for ninety percent of the air pollution in certain parts of California.'' [73] EPA reasoned that the term compelling and extraordinary conditions ''do not refer to the levels of pollution directly.'' Instead, the term refers primarily to the factors that tend to produce higher levels of pollution—''geographical and climatic conditions (like thermal inversions) that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems.'' [74]

The Administrator summarized that under this interpretation the question to be addressed in the second criterion is whether these ''fundamental conditions'' (i.e. the geographical and climate conditions and large motor vehicle population) that cause air pollution continued to exist, not whether the air pollution levels for PM were compelling and extraordinary, or the extent to which these specific PM standards will address the PM air pollution problem.[75]

However in the GHG waiver denial, EPA limited this interpretation to California's motor vehicle standards that are designed to address local or regional air pollution problems. EPA determined that the traditional interpretation was not appropriate for standards designed to address a global air pollution problem and its effects.[76]

With respect to a global air pollution problem like elevated concentrations of GHGs, EPA's GHG waiver denial found that the text of section 209(b)(1)(B) was ambiguous and did not limit EPA to this prior interpretation. In addition, EPA noted that the legislative history supported a decision to ''examine the second criterion specifically in the context of global climate change.'' The legislative history:

> [I]ndicates that Congress was moved to allow waivers of preemption for California motor vehicle standards based on the particular effects of local conditions in California on the air pollution problems in California. Congress discussed ''the unique problems faced in California as a result of its climate and topography.'' H.R. Rep. No. 728, 90th Cong. 1st Sess., at 21 (1967). See also Statement of Cong. Holifield (CA), 113 Cong. Rec. 30942–43 (1967). Congress also noted the large effect of local vehicle pollution on such local problems. See, e.g., Statement of Cong. Bell (CA) 113 Cong. Rec. 30946. In particular, Congress focused on California's smog problem, which is especially affected by local conditions and local pollution. See Statement of Cong. Smith (CA) 113 Cong. Rec. 30940–41 (1967); Statement of Cong. Holifield (CA), id. at 30942. See also, *MEMA I,* 627 F. 2d 1095, 1109 (DC Cir., 1979) (noting the discussion of California's ''peculiar local conditions'' in the legislative history). Congress did not justify this provision based on pollution problems of a more national or global nature in justifying this provision.[77]

Relying on this, and without any further significant discussion of either congressional intent or how this new approach properly furthered the goals of section 209(b), EPA determined that it was appropriate to:

> [R]eview California's GHG standards separately from the remainder of its motor vehicle emission control program for purposes of section 209(b)(1)(B). In this context it is appropriate to give meaning to this criterion by looking at whether the emissions from California motor vehicles, as well as the local climate and topography in California, are the fundamental causal factors for the air pollution problem—elevated concentrations of greenhouse gases—apart from the other parts of California's motor vehicle program, which are intended to remediate different air pollution concerns.

EPA then applied this interpretation to the GHG standards at issue in that waiver proceeding. Having limited the meaning of this provision to situations where the air pollution problem was local or regional in nature, EPA found that California's GHG standards do not meet this criterion. EPA also found that the elevated concentrations of GHGs in California are similar to concentrations elsewhere in the world, and that local conditions in California such as the local topography and climate and the number of motor vehicles in California are not the determinant factors causing the elevated GHG concentrations found in California and elsewhere. Thus, EPA found that California did not need its GHG standards to meet compelling and extraordinary conditions, and denied the GHG waiver.

EPA also considered an alternative interpretation, where EPA would consider ''the effects in California of this global air pollution problem in California in comparison to the rest of the country, again addressing the GHG standards separately from the rest of California's motor vehicle program.'' Under this alternative interpretation, EPA considered whether the impacts of global climate change in California were significant enough and different enough from the rest of the country such that California could be considered to need its GHG standards to meet compelling and extraordinary conditions. EPA determined that the waiver should be denied under this alternative interpretation as well.

2. EPA's July 9, 2009 GHG Waiver

In EPA's July 9, 2009 GHG waiver, the Agency determined that the better approach was to review California's need for its new motor vehicle emissions program as a whole to meet compelling and extraordinary conditions, and not to apply this criterion to specific standards, or to limit it to standards designed to address only local or regional air pollution problems. EPA reasoned that the traditional approach to interpreting this provision was the best approach for considering a waiver directed to GHG emission standards, as well as a waiver for standards directed to address local or regional air pollution problems.[78]

[73] *Id.* at 18890.

[74] 73 FR 12156, 12159–60.

[75] 73 FR at 12159–60.

[76] EPA recently reaffirmed that the traditional interpretation still applied for motor vehicle standards designed to address air pollution problems that are local or regional in nature. 71 FR 78190, 78192 (December 28, 2008); *see also* 71 FR 78190 and Decision Document for Waiver of Federal Preemption for California Zero Emission Vehicle Standards, at 34.

[77] 73 FR at 12161.

[78] The traditional interpretation of section 209(b)(1)(B) is certainly not ''unambiguous precluded'' by the language of the statute. See *Entergy Corp.* v. *Riverkeeper, Inc.,* 129 S.Ct. 1498 (2009) (''That view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the

Therefore, EPA rejected the interpretation that was applied in the March 6, 2008 waiver denial and stated it should no longer be followed.

EPA reasoned that the traditional interpretation was the most straightforward reading of the text and legislative history of section 209(b). Congress decided in 1977 to allow California to promulgate individual standards that are not as stringent as comparable federal standards, as long as the standards are ''in the aggregate, at least as protective of public health and welfare as applicable federal standards.'' This decision by Congress requires EPA to allow California to promulgate individual standards that, in and of themselves, might not be considered needed to meet compelling and extraordinary circumstances, but are part of California's overall approach to reducing vehicle emissions to address air pollution problems.

Further, we noted that EPA is to determine whether California's protectiveness determination is arbitrary and capricious under section 209(b)(1)(A), and whether California does not need ''such State standards'' to meet compelling and extraordinary conditions under section 209(b)(1)(B). The natural reading of these provisions led EPA to consider the same group of standards that California considered in making its protectiveness determination. While the words ''in the aggregate'' are not specifically mentioned in section 209(b)(1)(B), EPA explained that it does refer to the need for ''such State standards,'' rather than ''each State standard'' or otherwise indicate a standard-by-standard analysis.

We also noted that EPA's GHG waiver denial had determined that this provision was appropriately interpreted to consider California's standards as a group for standards designed to address local or regional air pollution problems, but should be interpreted in the opposite fashion for standards designed to address global air pollution problems. The text of the provision, however, draws no such distinction, and provides no indication other than Congress intended a single interpretation for this provision, not one that varied based on the kind of air pollution problem at issue.

EPA also explained that the GHG waiver denial had considered the legislative history, and determined that Congress was motivated by concern over local conditions in California that led to local or regional air pollution problems, and from this EPA determined that Congress intended to allow California to address these kinds of local or regional air pollution problems, but no others. However, upon a reexamination of the legislative history EPA found that the determination noted above ignores the main thrust of the text and legislative history of section 209(b), and improperly reads too much into an absence of discussion of global air pollution problems in the legislative history. The structure of section 209, both as adopted in 1967 and as amended in 1977, is notable in its focus on limiting the ability of EPA to deny a waiver, and thereby preserves discretion for California to construct its motor vehicle program as it deems appropriate to protect the health and welfare of its citizens. The legislative history indicates Congress quite intentionally restricted and limited EPA's review of California's standards, and its express legislative intent was to ''provide the broadest possible discretion [to California] in selecting the best means to protect the health of its citizens and the public welfare.'' [79] The DC Circuit recognized that ''[t]he history of the congressional consideration of the California waiver provision, from its original enactment up through 1977, indicates that Congress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program. In short, to act as a kind of laboratory for innovation. * * * For a court [to limit California's authority] despite the absence of such an indication would only frustrate the congressional intent.'' [80]

EPA also determined that it was fully consistent with the expressed intention of Congress to interpret section 209(b)(1)(B) the same way both for standards designed to address local and regional air pollution problems, and standards designed to address global air pollution problems. Congress intended to provide California the broadest possible discretion to develop its motor vehicle emissions program. Neither the text nor the legislative history of section 209(b) indicates that Congress intended to limit this broad discretion to a certain kind of air pollution problem, or to take away all discretion with respect to global air pollution problems.[81] In addition, EPA reasoned that applying the traditional interpretation to GHG standards does not change the basic nature of the compromise established by Congress—California could act as the laboratory for the nation with respect to motor vehicle emission control, and manufacturers would continue to face just two sets of emissions standards—California's and EPA's.

EPA further explained that this interpretation was consistent with Congressional purpose, as compared to the interpretation adopted in the GHG waiver denial relied on the discussion in the legislative history of local conditions in California leading to air pollution problems like ozone. While this was properly read to support the view that section 209(b) should be interpreted to address California's need for a motor vehicle program as a whole, the GHG waiver denial went further and inferred that by discussing such local conditions, Congress also intended to limit California's discretion to only these kinds of local or regional air pollution problems. The GHG waiver denial pointed to no particular language in the legislative history or the text of section 209(b) indicating such, instead, congressional intent to limit California's discretion was inferred from the discussion of local conditions. However, basing a limitation on such an inference is not appropriate given the express indication that Congress intended to provide California the ''broadest possible discretion'' in selecting the best means to protect the health of its citizens and the public welfare.

Additionally, EPA explained that the text of section 209(b) and the legislative history, when viewed as a whole, led to the conclusion that the interpretation adopted in the GHG waiver denial should be rejected. The better way to interpret this provision is to apply the traditional interpretation to the evaluation of California's GHG standards for motor vehicles. If California needs a separate motor vehicle program to address the kinds of compelling and extraordinary conditions discussed in the traditional

courts. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843–844 (1984).'') (''It seems to us, therefore, that the phrase ''best available,'' even with the added specification ''for minimizing adverse environmental impact,'' does not unambiguously preclude cost-benefit analysis.''). *Carrow* v. *Merit Systems Protection Board,* 564 F.3d 1359 (Fed. Cir. 2009) (''[W]e are obligated to give controlling effect to [agency's] interpretation if it is reasonable and is not contrary to the unambiguously expressed intent of Congress'', citing *Entergy Corp.*).

[79] H.R. Rep. No. 294, 95th Cong., 1st Sess. 301–302 (1977). *See MEMA I,* 627 F. 2d at 1110–11.

[80] *MEMA I,* 627 F. 2d at 1111.

[81] This broad interpretation of section 209(b) is similar to the broad reading the Court provided to section 302(g) of the Clean Air Act when it held that the term ''air pollutant'' included greenhouse gases, rejecting among other things the argument that Congress limited the term to apply only to certain kinds of air pollution. *Massachusetts* v. *EPA,* 549 US 497, 532 (2007) (footnote 26).

interpretation, then Congress intended that California could have such a program. Congress also intentionally provided California the broadest possible discretion in adopting the kind of standards in its motor vehicle program that California determines are appropriate to address air pollution problems that exist in California, whether or not those problems are local or regional in nature, and to protect the health and welfare of its citizens. The better interpretation of the text and legislative history of this provision is that Congress did not intend this criterion to limit California's discretion to a certain category of air pollution problems, to the exclusion of others. In this context it is important to note that air pollution problems, including local or regional air pollution problems, do not occur in isolation. Ozone and PM air pollution, traditionally seen as local or regional air pollution problems, occur in a context that to some extent can involve long range transport of this air pollution or its precursors. This long-range or global aspect of ozone and PM can have an impact on local or regional levels, as part of the background in which the local or regional air pollution problem occurs.

EPA further stated that this approach does not make section 209(b)(1)(B) a nullity, as some had suggested. EPA must still determine whether California does not need its motor vehicle program to meet the compelling and extraordinary conditions discussed in the legislative history. If that is the case, then a waiver would be denied on those grounds, but that was not the case at that point. EPA observed that conditions in California may one day improve such that it no longer had the need for a separate motor vehicle program and that the statute contemplates that such improvement is possible. In addition, we noted that the opponents of a waiver always have the ability to raise their legal, policy, and other concerns in the State administrative process, or through judicial review in State courts. We concluded, however, that Congress provided EPA a much more limited role under section 209(b) in considering objections raised by opponents of a waiver.

3. Response to Comments Received

CARB states in its Waiver Support Document that the relevant inquiry under section 209(b)(1)(B) is whether California needs it own motor vehicle pollution control program to meet compelling and extraordinary conditions and not whether any particular standard is needed to meet such conditions. CARB notes that EPA has consistently determined that the phrase ''compelling and extraordinary conditions'' refers to:

> * * * Certain general circumstances, unique to California, primarily responsible for causing its air pollution [including] * * * geographical and climate factors [as well as] * * * the presence and growth of California's vehicle population, whose emissions were thought to be responsible for ninety percent of the air pollution problem in certain parts of California.

CARB also submits that the 2012 ZEV and LEV amendments (the ACC program) meet the same compelling and extraordinary conditions justifying previous waivers (e.g., the South Coast and San Joaquin Air basins continue to experience some of the worst air quality in the nation and that California has an ongoing need for dramatic emission reductions generally and from passenger cars specifically). CARB also submits that as in 1967, EPA's previous waivers have noted that California continued to have geographic and climatic conditions that, when combined with the large numbers and high concentrations of automobiles, created a serious air pollution problem.

EPA received only one comment requesting a denial of the waiver for the GHG and ZEV standards based on the grounds of section 209(b)(1)(B)—that ''such State does not need such State standards to met compelling and extraordinary conditions.'' This commenter raised specific objections to both the GHG and ZEV elements of CARB's ACC program but none of them addressed whether California's geographic, climactic and air quality conditions remain the same as they were under prior waiver determinations.[82]

4. CARB's GHG Emission Standards

With regard to CARB's GHG standards, the Dealers state there is no need and no discernible environmental benefit from such standards because of EPA's GHG regulations for motor vehicles that CARB has agreed to accept as compliance for its own program. According to the commenter, this amounts to a legal admission that CARB does not need its own GHG standards. In addition, because manufacturers are already under a legal obligation to comply with the NHTSA/EPA 2017–2025 GHG standards there is no environmental benefit associated with separate CARB GHG standards. This commenter cited 1967 legislative history as support that Congress decided that federal preemption of new vehicle emission standards would be available for California but only where California promulgated standards necessary to address ''the unique problems facing the state.''[83] Had Congress intended to give California discretion to adopt whatever standards it liked, without any consideration as to whether these standard are 'needed,' Congress would have omitted Sec. 209(b)(1)(B) altogether.'' This commenter also suggests that the ''alternative arguments'' in the 2009 GHG waiver decision, wherein California's need for its GHG standards standing alone was evaluated, should also be applied here. As such, this commenter suggests that since CARB does not intend to rely on its own regulations to meet environmental goals there can be no ''rational connection'' between the CARB's regulation and the state's air quality issues. Finally, the commenter notes that CARB's statement that a waiver ''will remain an important backstop in the event the national program is weakened or terminated'' is an identified ''political need'' outside the scope of Section 209.

CARB, in response to NADA's comments referenced above, states that while there may not be binding precedent that requires EPA to treat California's program as a whole in reviewing the need for specific standards, it previously has demonstrated that EPA's longstanding administrative practice to review the need for separate standard standards in the context of the ongoing compelling and extraordinary conditions justifying California's motor vehicle program remains sound.

CARB also notes that its commitment to accept compliance with the federal GHG emission standards is no different from the numerous times that EPA has followed California's lead—blazing a new trail as a laboratory for innovation—by catching up to or harmonizing with California's standards. In addition, rather than viewing CARB's actions an impermissible political backstop, CARB maintains that its actions are simply furthering the Congressional design of Section 209(b): to ensure that California can protect public health and welfare by ensuring its ability to separately implement and enforce necessary emission reductions through its own regulatory mechanisms. Therefore CARB can continue to set standards that in the first instance are more stringent, then may become as stringent and subsequently—under the NADA hypothetical—become more stringent should EPA lessen the stringency of the

[82] NADA at 7–9, 12–14.

[83] H.R. Rep. No. 90–728 (1967), at 22.

federal GHG emission standards. In addition, CARB points to NADA's concession by acknowledging that CARB's standards must be as or more stringent—i.e., as protective as—the federal standards.

As discussed above, EPA believes that the better interpretation of the section 209(b)(1)(B) criterion is the traditional approach of evaluating California's need for a separate motor vehicle emission program to meet compelling and extraordinary conditions. Applying this approach with the reasoning noted above, with due deference to California, I cannot deny the waiver.

CARB has repeatedly demonstrated the need for its motor vehicle program to address compelling and extraordinary conditions in California. As discussed above, the term compelling and extraordinary conditions ''does not refer to the levels of pollution directly.'' Instead, the term refers primarily to the factors that tend to produce higher levels of pollution—geographical and climatic conditions (like thermal inversions) that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems. California still faces such conditions. For example, as stated in CARB's waiver request and additional written comment, California and particularly the South Coast and San Joaquin Valley Air Basins continue to experience some of the worst air quality in the nation and continue to be in non-attainment with national ambient air quality standards (NAAQS) for $PM_{2.5}$ and ozone.[84] In its recent announcement of new $PM_{2.5}$ ambient air quality standards, EPA projected that only seven of approximately 3,000 counties in the country may require state or local action to reduce fine particle pollution in order to meet the new standards by 2020. All seven counties are in California.

Further, EPA has not received any adverse comments suggesting that California no longer needs a separate motor vehicle emissions program to address the various conditions that lead to serious and unique air pollution problems in California.

Based on the record, I am unable to identify any change in circumstances or any evidence to suggest that the conditions that Congress identified as giving rise to serious air quality problems in California no longer exist. Therefore, using the traditional approach of reviewing the need for a separate California program to meet compelling and extraordinary conditions, I cannot deny the ACC waiver request (including the GHG and ZEV components, along with LEV III criteria pollutants) based on this criterion.

To the extent that it is appropriate to examine the need for CARB's GHG standards to meet compelling and extraordinary conditions, as EPA discussed at length in its 2009 GHG waiver decision, California does have compelling and extraordinary conditions directly related to regulations of GHG. EPA's prior GHG waiver contained extensive discussion regarding the impacts of climate change in California.[85] In addition, CARB has submitted additional evidence in comment on the ACC waiver request that evidences sufficiently different circumstances in California.[86] CARB notes that ''Record-setting fires, deadly heat waves, destructive storm surges, loss of winter snowpack—California has experienced all of these in the past decade and will experience more in the coming decades. California's climate—much of what makes the state so unique and prosperous—is already changing, and those changes will only accelerate and intensify in the future. Extreme weather will be increasingly common as a result of climate change. In California, extreme events such as floods, heat waves, droughts and severe storms will increase in frequency and intensity. Many of these extreme events have the potential to dramatically affect human health and well-being, critical infrastructure and natural systems.'' [87] CARB provides a summary report on the third assessment from the California Climate Change Center (2012) [88] which describes dramatic sea level rises and increases in temperatures. The Commenter does not take issue with that analysis, but instead relies on the existence of the federal GHG standards and the ''deemed to comply'' language to claim that there is no need for CARB's GHG standards. Separate from EPA's stated interpretation and determinations noted above, EPA believes that the commenter does not appropriately appreciate the role that Congress envisioned California to play as an innovative laboratory that may set standards that EPA may ultimately harmonize with or that California or EPA may otherwise accept compliance with the others emission program as compliance with their own. EPA's longstanding interpretation of section 209(b)(1)(B) is that EPA does not look at whether the specific standards at issue are needed to meet compelling and extraordinary conditions related to that air pollutant. As explained above, EPA reviewed this issue in some detail in both EPA's 2008 GHG waiver denial and subsequent 2009 GHG waiver decision and EPA continues to believe that our traditional interpretation is appropriate. The structure of section 209, both as adopted in 1967 and as amended in 1977, is notable in its focus on limiting the ability of EPA to deny a waiver, and thereby preserves discretion for California to construct it motor vehicle program as it deems appropriate to protect the health and welfare of its citizens.[89] EPA has previously considered NADA's argument that CARB no longer has a need for its GHG emission standards once CARB adopts a ''deemed to comply'' provision. In EPA's within the scope decision in 2011, where EPA considered CARB's previous ''deemed to comply'' provision applicable to the 2012 through 2016 MYs, EPA stated:

> NADA's comments do not indicate that, as a result of the amendments, California no longer needs a separate motor vehicle emissions program to address compelling and extraordinary conditions in California, or provide any indication that EPA's prior determination on this issue is undermined in any way. Therefore, its comments do not show that California's amendments raise any new issues relevant to EPA's initial waiver decision.
>
> Moreover, although NADA's comments reference the words of the section 209(b)(1)(B), ''need * * * to meet compelling and extraordinary circumstances'' criterion, they do not appear to be directed towards the geographical or climatological conditions that are being referred to by the words ''compelling and extraordinary circumstances.'' Instead, NADA's comments appear to be directed at the stringency of the greenhouse gas standards. The stringency of California's standards is at issue in section 209(b)(1)(A), where Congress addressed the comparison of California standards to federal standards, but it is not an issue under section 209(b)(1)(B). As noted in EPA's underlying waiver decision, section 209(b)(1)(A) calls for a review of California standards ''in the aggregate,'' and EPA can only deny a waiver if it finds that California was arbitrary and capricious in its finding that ''its standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.'' EPA notes that the language of section 209(b)(1)(A) clearly indicates Congress's determination that EPA review the effect of stringency on the protectiveness of California's standards ''in

[84] 76 FR 40652, 40654 (July 11, 2011).

[85] 74 FR 32744, 32764–7265.

[86] EPA–HQ–OAR–2012–0562–0371.

[87] *Id.*

[88] Our Changing Climate 2012 Vulnerability & Adaptation to the Increasing Risks from Climate Change in California. Publication # CEC–500–2012–007. Posted: July 31, 2012; available at *http://www.climatechange.ca.gov/adaptation/third_assessment/*.

[89] *See* H.R. Rep. No. 294, 95th Cong., 1st Sess. 301–302 (1977).

the aggregate,'' and that EPA cannot deny a waiver on the grounds of protectiveness if California standards are at least equally protective as Federal standards. ''Redundancy'' is not the criterion; it is whether California's standards are, in the aggregate, at least as protective as applicable Federal standards. Furthermore, NADA does not address California's standards ''in the aggregate'' and, as noted above, does not provide any evidence to suggest, even with regard to California's greenhouse gas standards, that California was arbitrary and capricious in its finding that its standards are at least as protective as comparable federal standards. The stringency issue raised by NADA is not relevant under section 209(b)(1)(B), and it would be inconsistent with the intent of Congress to deny a waiver or a within-the-scope determination based on section 209(b)(1)(B) for reasons Congress clearly addressed and clearly determined should not be the basis for a denial under section 209(b)(1)(A). NADA's comments, therefore, do not raise any new issues regarding our preexisting waiver for California greenhouse gas emission standards.[90]

EPA believes this interpretation of section 209(b)(1)(B) continues to be appropriate and therefore finds that CARB's GHG emission standards cannot be denied a waiver based on NADA's argument that there is no need for such standards given the existence of EPA GHG emission standards.

5. CARB's ZEV Emission Standards

The Dealers also requested that EPA deny a waiver of CARB's ZEV standards for MY 2018 and beyond because they were not necessary to meet compelling and extraordinary circumstances, under the section 209(b)(1)(B) criterion.[91] According to the commenter, the ''compelling and extraordinary conditions'' in California today are nothing like they were when Congress first enacted section 209. In addition, the commenter notes that CARB claims no criteria emissions benefit from the ZEV standards in terms of vehicle TTW emissions and subsequently notes several problems with CARB's upstream WTW emissions analysis and projected benefits. For example, the commenter disputes CARB's assumptions that reductions of fuel production by refineries will result from reductions in fuel consumption by the vehicle fleet in California. According to the commenter, refineries in California could simply shift fuel production to address either off-shore or out-of state needs. The commenter further states that CARB has not and cannot show that its ZEV standards will achieve any reductions in criteria pollutants. With respect to the relationship between the GHG and ZEV programs, the commenter also states that the ZEV standards do not provide any additional GHG emission benefits beyond the underlying GHG standards and the ZEV standards are therefore not necessary to meet any potential compelling and extraordinary conditions associated with GHG emissions from new motor vehicles. In addition, the commenter suggests that because CARB is providing a variety of compliance flexibilities, including over compliance with GHG standards producing ZEV credits and other alternative compliance path options, confirms that the underlying ZEV mandates are not ''necessary.''

CARB notes in its written response that to the extent commenters question California's need for additional criteria pollutant reductions from its new motor vehicle fleet, there remains no question that such reductions are essential to meet federal health-based ambient air quality standards. CARB notes that California and particularly the South Coast and San Joaquin Valley Air Basins continue to experience some of the worst air quality in the nation and continue to be in non-attainment with national ambient air quality standards (NAAQS) for $PM_{2.5}$ and ozone.[92] California's unique geographical and climatic conditions, and the tremendous growth in its on- and off-road vehicle population, which moved Congress to authorize the state to establish separate on-road motor vehicle standards in 1967 and off-road engine standards in 1990, still exist today.[93] In addition, CARB provides extensive evidence of its current and serious air quality problems and the increasingly stringent health-based air quality standards and federally required state planning efforts to meet those standards firmly in order to establish the need for the additional emission reductions from its motor vehicle emissions program.[94]

As stated above, EPA believes that the better interpretation of the section 209(b)(1)(B) criterion is the traditional approach of evaluating California's need for a separate motor vehicle emission program to meet compelling and extraordinary conditions. The issue of whether any particular standard provides comparable emission reductions is not a relevant criterion under section 209(b)(1)(B). Applying this approach with the reasoning noted above, with due deference to California, I cannot deny the waiver.

As discussed in their written comments, CARB has repeatedly demonstrated the need for its motor vehicle program to address compelling and extraordinary conditions in California. As discussed above, the term compelling and extraordinary conditions ''does not refer to the levels of pollution directly. Instead, the term refers primarily to the factors that tend to produce higher levels of pollution—geographical and climatic conditions (like thermal inversions) that, when combined with large numbers and high concentrations of automobiles, create serious air pollution problems. California still faces such conditions. For example, California and particularly the South Coast and San Joaquin Valley Air Basins continue to experience some of the worst air quality in the nation and continue to be in non-attainment with national ambient air quality standards (NAAQS) for $PM_{2.5}$ and ozone.[95] In addition, EPA believes, and the record does not otherwise indicate, the underlying geographical and climatic conditions continue to exist in California and continue to give rise to serious air quality problems.

EPA has not received any adverse comments suggesting that California no longer needs a separate motor vehicle emissions program to address the various conditions that lead to serious and unique air pollution problems in California.

Based on the record, I am unable to identify any change in circumstances or any evidence to suggest that the conditions that Congress identified as giving rise to serious air quality problems in California no longer exist. Therefore, using the traditional approach of reviewing the need for a separate California program to meet compelling and extraordinary conditions, I cannot deny the ACC waiver request (including the GHG and ZEV components, along with LEV III criteria pollutants) based on this criterion.

As CARB notes in its waiver request, the goal of the CARB Board in directing CARB staff to redesign the ZEV regulation was to focus primarily on zero emission drive—that is BEV, FCV, and PHEVs in order to move advanced, low GHG vehicles from demonstration phase to commercialization. CARB also analyzed pathways to meeting California's long term 2050 GHG reduction targets in the light-duty vehicle sector and determined that ZEVs would need to reach nearly 100 percent

[90] 76 FR 34693, 34697–34698 (June 14, 2011).

[91] NADA at 13.

[92] 76 FR 40652, 40654 (July 11, 2011). CARB waiver request at 17–18.

[93] 74 FR 32744, 32762 (July 8, 2009); 76 FR 77515, 77518 (December 13, 2011).

[94] EPA–HQ–OAR–2012–0562–0371.

[95] 76 FR 40652, 40654 (July 11, 2011).

of new vehicle sales between 2040 and 2050. CARB also notes that the ''critical nature of the LEV III regulation is also highlighted in the recent effort to take a coordinated look at strategies to meet California's multiple air quality and climate goals well into the future. This coordinated planning effort, *Vision for Clean Air: A Framework for Air Quality and Climate Planning (Vision for Clean Air)*[96] demonstrates the magnitude of the technology and energy transformation needed from the transportation sector and associated energy production to meet federal standards and the goals set forth by California's climate change requirements. In addition to considering the level of change needed to implement the current SIP and reduce GHG emissions by 80 percent below 1990 levels by 2050, the 2032 attainment date for the 0.075 ppm standard set in 2008 was used as an interim target. Adopted or pending rules, such as the LEV III regulation, were considered essential as baseline reductions assumed for the future, yet California identified still more transformative changes to achieve the 2032 and 2050 targets. The *Vision for Clean Air* effort illustrates that in addition to the cleanup of passenger vehicles (at issue here) as soon as possible as required in the LEV III regulation, transition to zero- and near-zero emission technologies in all on- and off-road engine categories is necessary to achieve the coordinated goals.

Therefore, EPA believes that CARB's 2018 and later MY ZEV standards represent a reasonable pathway to reach these longer term goals. Under EPA's traditional practice of affording CARB the broadest discretion possible, and deferring to CARB on its policy choices, we believe there is a rational connection between California ZEV standards and its attainment of long term air quality goals. Whether or not the ZEV standards achieve additional reductions by themselves above and beyond the LEV III GHG and criteria pollutant standards, the LEV III program overall does achieve such reductions, and EPA defers to California's policy choice of the appropriate technology path to pursue to achieve these emissions reductions. The ZEV standards are a reasonable pathway to reach the LEV III goals, in the context of California's longer term goals.

6. CARB's PM Standards

EPA received comments suggesting that the PM standards promulgated within California's LEV III regulation were infeasible. The Manufacturers in particular commented that the technological feasibility of the one milligram per mile PM standard, that commences its phase in starting with the 2025 MY, has not been demonstrated (this issue is discussed below in the Section VI). The Manufacturers appear to raise issue with whether additional PM emission reductions from light-duty vehicles are needed since they represent so small a fraction of the PM inventory in California. CARB's supplemental comments assert that ''while PM emission from LDVs are not a major contributor to the inventory, they are a significant contributor to urban pollution and human exposure, particularly near heavily travelled roadways, many of which are located in major urban centers in areas classified as non-attainment for health based PM ambient air quality standards.'' CARB also notes that the exact amount of pollution reduced through any given emission standard and the cost-effectiveness of any particular California standards are not waiver criteria and therefore not relevant to EPA's determination.

EPA does not believe that it is necessarily the Manufacturers' contention that the PM standards are not needed to meet compelling and extraordinary conditions. Nevertheless, EPA believes it appropriate to note, once again, that the compelling and extraordinary conditions Congress identified as giving rise to serious air quality problems continue to give rise to the need for a separate California new motor vehicle emissions program. EPA believes this includes CARB's serious PM air quality problems. EPA agrees that the PM standards will result in reductions in PM emissions, however small. It is not appropriate for EPA to second-guess CARB's policy choices, including how best to address their air quality concerns.

7. Section 209(b)(1)(B) Conclusion

With respect to the need for California's state standards to meet compelling and extraordinary conditions, I continue to apply the traditional interpretation of the waiver provision. As stated in the GHG waiver decision,[97] the best way to interpret this provision is to determine whether California continues to have compelling and extraordinary conditions giving rise to a need for its own new motor vehicle emission program. Congress did not use this criterion to limit California's discretion to a certain category of air pollution problems, nor does EPA believe this criterion limits California's discretion to adopt or retain emission standards that are similar to EPA's standards. In addition, it is inappropriate for EPA to second guess CARB's policy choices and objectives in adopting ZEV standards designed to achieve long term emission benefits as well as projected to reasonably achieve some reduction in criteria pollutant emissions.

Under this interpretation and application of this criterion, EPA cannot find that the opponents of the waiver have demonstrated that California does not need its state standards to meet compelling and extraordinary conditions. The opponents of the waiver have not adequately demonstrated that California no longer has a need for its motor vehicle emission program. Therefore, I determine that I cannot deny CARB's ACC waiver request under section 209(b)(1)(B).

C. Are the California ACC standards consistent with Section 202(a) of the Clean Air Act?

EPA has reviewed the information submitted to the record of this proceeding to determine whether the parties opposing, or seeking a deferral of, this waiver request have met their burden to demonstrate that the ACC standards are not consistent with section 202(a). In its initial Waiver Request, CARB submitted information and argument that the ACC standards are consistent with section 202(a). CARB notes that in developing the LEV III requirements it considered several factors (e.g., technical feasibility, lead time available to meet the requirements, and the cost of compliance and the technical and resource challenges manufacturers face in complying with the requirement to simultaneously reduce criteria and GHG emissions). CARB notes that that criteria emissions elements of LEV III occur over an 11-year period (2015 through 2025) while the GHG emission element is implemented over a 9-year period from 2017 through 2025. CARB sets forth its belief that both the stringency and implementation schedules for its PM standards are technologically feasible within the available lead time. With regard to LEV III GHG regulations, CARB noted that California coordinated with the EPA and NHTSA on technical and economic areas, and CARB has

[96] EPA–HQ–OAR–2012–0562–0371 at 5–6, citing *Vision for Clean Air: A Framework for Air Quality and Climate Planning,* June 27, 2012,

[97] 74 FR 32766. EPA incorporates this prior GHG waiver decision, and associated reasoning and interpretations, into today's waiver decision.

moved in parallel with the federal rulemaking in terms of stringency of the standards and lead time for compliance. CARB maintains that the standards and lead time are technologically feasible ''even before CARB proposes to amend its LEV III GHG regulations to allow National Program compliance to serve as compliance in California. It will be undeniably true should California adopt its ''deemed to comply'' rule as planned.'' [98] With regard to the ZEV amendments, CARB noted the lack of objections from the regulated parties during CARB's rulemaking and the regulated parties' announcements of their planned ability to comply.

The Manufacturers have submitted information and argument that their members see no way to measure and meet the 1 mg/mile PM standard beginning in 2025 (as part of the LEV III standards) and ask EPA to withhold issuing a waiver for this standard at this time. The Manufactures have commented that they do not oppose California's GHG emission standards for the 2017 through 2025 MYs but suggests that EPA should grant California's waiver request after CARB has finalized its regulatory amendments to allow for a national compliance option.[99] Finally, while the Manufacturers agree that CARB's ZEV amendments, as they affect 2017 and earlier MYs, are within the scope of existing waivers, they are opposed to granting the waiver for the ZEV program past the 2017 MY based on argument that those standards will not be feasible either in California or in the individual Section 177 States given the status of the infrastructure and the level of consumer demand for ZEVs.

EPA also received comment from the Dealers suggesting that EPA should not grant California a waiver for its GHG emission standards past MY 2021 since the technical capabilities after that time are uncertain. In addition, like the Manufacturers, NADA does not oppose CARB's ZEV amendments through the 2017 MY. However, NADA believes CARB's ZEV amendments, as they affect 2018 and later MYs, raise serious technological feasibility concerns including their economic feasibility (including their marketability when compared to non-ZEV vehicles). EPA's analysis of the consistency of the CARB standards with section 202(a) of the Act follows.

1. Historical Approach

Under section 209(b)(1)(C), EPA must deny California's waiver request if the Agency finds that California standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act. The scope of EPA's review under this criterion is narrow. EPA has previously stated that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with the federal test procedure.[100] Previous waivers of federal preemption have stated that California's standards are not consistent with section 202(a) if there is inadequate lead time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to the cost of compliance within that time.[101] California's accompanying enforcement procedures would be inconsistent with section 202(a) if the federal and California test procedures conflict, i.e., if manufacturers would be unable to meet both the California and federal test requirements with the same test vehicle.[102]

EPA does not believe that there is any reason to review these criteria any differently for EPA's evaluation of California's ACC program request. There is nothing inherently different about how ACC control technologies should be reviewed when making a determination about technological feasibility or consistency of test procedures.

In the ACC waiver proceeding, opponents of the waiver have presented evidence for EPA's consideration which they believe will require EPA to make the finding of inconsistency with section 202(a), and therefore require EPA to deny or defer granting all or parts of the waiver request (*e.g.,* a deferral on the 2025 and later MY phase-in of the 1 mg/mile PM standard of LEV III, a denial of the GHG emission standards for MY 2022 and later, and a denial of the 2018 through 2025 MY ZEV requirements or a deferral on the 2021 and later MYs). As noted above, the commenters believe this finding should be made on one or more grounds, including: there exists either a lack of information or certainty of technological solutions based on the remoteness in time from the implementation of the standards; that there are questions of economic feasibility and marketability, including consumer demand; that technological consistency must include consideration of feasibility in section 177 states; and, that either the cost effectiveness of certain standards is unreasonable or that the standards are not needed for air quality purposes. EPA's process for evaluating lead time is discussed immediately below and in subsequent parts of this section. The industry opponents also raise arguments based on the cost of compliance with the standards (including cost-effectiveness), which will be discussed below and in other parts of this section. To the extent the commenters raise questions about the need for CARB's PM standards and that it could be the basis for EPA's waiver consideration, we address such concerns in the discussion above concerning section 209(b)(1)(B). EPA has already addressed the Dealers suggestions that CARB's ZEV requirements are not needed within the same discussion.

Regarding lead time, EPA historically has relied on two decisions from the U.S. Court of Appeals for the D.C. Circuit for guidance regarding the lead time requirements of section 202(a). Section 202(a) provides that an emission standard shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance. In *Natural Resources Defense Council* v. *EPA* (*NRDC*), 655 F.2d 318 (DC Cir. 1981), the court reviewed claims that EPA's PM standards for diesel cars and light trucks were either too stringent or not stringent enough. In upholding the EPA standards, the court concluded:

> Given this time frame [a 1980 decision on 1985 model year standards]; we feel that there is *substantial room for deference* to the EPA's expertise in projecting the likely course of development. The essential question in this case is the pace of that development, and absent a revolution in the study of industry, defense of such a projection can never possess the inescapable

[98] At the time of CARB's waiver request EPA's GHG emission rule had not yet been finalized. Subsequent to EPA's final rule CARB has adopted the deemed to comply and has provided the regulation for EPA's consideration. *See also* CARB Resolution 12–11 at 20.

[99] The Manufacturers note that both the federal and the California GHG emission standards provide for a comprehensive mid-term evaluation of the MYs 2022–2025. Therefore, the Manufacturers clearly state that ''Any amendments to California's GHG emission standards made as a result of the mid-term evaluation will require analysis to determine whether the amendments fall within the scope of this waiver, or, if not, whether they qualify for a separate waiver under Section 209(b) of the Clean Air Act.

[100] *MEMA I,* 627 F.2d at 1126.

[101] *See e.g.,* 38 FR 30136 (November 1, 1973) and 40 FR 30311 (July 18, 1975).

[102] To be consistent, the California certification test procedures need not be identical to the Federal test procedures. California procedures would be inconsistent, however, if manufacturers would be unable to meet both the state and Federal test requirements with the same test vehicle in the course of the same test. *See, e.g.,* 43 FR 32182, (July 25, 1978).

logic of a mathematical deduction. We think that the EPA will have demonstrated the reasonableness of its basis for projection if it answers any theoretical objections to the [projected control technology], identifies the major steps necessary in refinement of the technology, and offers plausible reasons for believing that each of those steps can be completed in the time available (emphasis added).[103]

Another key case addressing the lead time requirements of section 202(a) is *International Harvester* v. *Ruckelshaus* (*International Harvester*), 478 F 2.d 615 (DC Cir. 1979). In *International Harvester,* the court reviewed EPA's decision to deny applications by several automobile and truck manufacturers for a one-year suspension of the 1975 emission standards for light-duty vehicles. In the suspension proceeding, the manufacturers presented data which, on its face, showed little chance of compliance with the 1975 standards, but which, at the same time, contained many uncertainties and inconsistencies regarding test procedures and parameters. In a May 1972 decision, the Administrator applied an EPA methodology to the submitted data, and concluded that ''compliance with the 1975 standards by application of present technology can probably be achieved,'' and so denied the suspension applications.[104] In reviewing the Administrator's decision, the court found that the applicants had the burden of coming forward with data showing that they could not comply with the standards, and if they did, then EPA had the burden of demonstrating that the methodology it used to predict compliance was sufficiently reliable to permit a finding of technological feasibility. In that case, EPA failed to meet this burden.

With respect to lead time, the court in *NRDC* pointed out that the court in *International Harvester* ''probed deeply into the reliability of EPA's methodology'' because of the relatively short amount of lead time involved (a May 1972 decision regarding 1975 MY vehicles, which could be produced starting in early 1974), and because ''the hardship resulting if a suspension were mistakenly denied outweigh the risk of a suspension needlessly granted.'' [105] The *NRDC* court compared the suspension proceedings with the circumstances concerning the diesel standards before it: ''The present case is quite different; 'the base hour' for commencement of production is relatively distant, and until that time the probable effect of a relaxation of the standard would be to mitigate the consequences of any strictness in the final rule, not to create new hardships.'' [106] The *NRDC* court further noted that *International Harvester* did not involve EPA's predictions of future technological advances, but an evaluation of presently available technology.

EPA also evaluates CARB's request in light of congressional intent regarding the waiver program generally. This is consistent with the motivation behind section 209(b) to foster California's role as a laboratory for motor vehicle emission control, in order ''to continue the national benefits that might flow from allowing California to continue to act as a pioneer in this field.'' [107]

For these reasons, EPA believes that California must be given substantial deference when adopting motor vehicle emission standards which may require new and/or improved technology to meet challenging levels of compliance. This deference was discussed in an early waiver decision when EPA approved the waiver request for California's 1977 MY standards:

Even on this issue of technological feasibility I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the Federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to 'catch up' to some degree with newly promulgated standards. Such an approach to automotive emission control might be attended with costs, in the shape of a reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency, under the statutory scheme outlined above I believe I am required to give very substantial deference to California's judgment on that score.'' [108]

CARB, while maintaining that the *NRDC* approach is the correct measurement here, commented that the technological sophistication of ZEVs currently being produced is anticipated to continue to advance, making commercial production and compliance of these vehicles by MY 2018 and later more feasible. CARB also notes that the only relevance of costs in a section 209(b) waiver proceeding is in the context of technological feasibility. ''Past waiver determinations have made clear that for the cost of compliance to be found excessive it would need to be ''very high'' such that the cost to customers who purchased a complying vehicle would be doubled or tripled.[109] Additionally, the relevance of the cost of compliance analysis is limited to the question of whether such costs will adversely affect the timing of an emission standard.'' [110]

Under *NRDC,* when compliance with CARB standards is phased-in over a lengthy time period, the reasonableness of a projection of technological feasibility can be based on answering any theoretical objections to the projected control technology; identifying the major steps necessary in refinement of the technology; and offering plausible reasons for believing that each of those steps can be completed in the time available.[111] EPA's review of the evidence on the technological feasibility of CARB's ACC standards, in particular the standards which EPA received comment, follows.

Congress has stated that the consistency requirement of section 202(a) relates to technological feasibility.[112] Section 202(a)(2) states, in part, that any regulation promulgated under its authority ''shall take effect after such period as the Administrator finds necessary to permit the development and application of the relevant technology, considering the cost of compliance within that time.'' Section 202(a) thus requires the Administrator to first review whether adequate technology already exists, or if it does not, whether there is adequate time to develop and apply the technology before the standards go into effect.

In *MEMA I,* the court addressed the cost of compliance issue at some length in reviewing a waiver decision. According to the court:

Section 202's cost of compliance concern, juxtaposed as it is with the requirement that the Administrator provide the requisite lead

[103] *Natural Resources Defense Council* v. *EPA,* 655 F.2d 318, 331. (emphasis added)

[104] *International Harvester* v. *Ruckelshaus,* 478 F 2d. 615, 626.

[105] *NRDC,* 655 F.2d 318, 330.

[106] *Id.* The ''hardships'' referred to are hardships that would be created for manufacturers able to comply with the more stringent standards being relaxed late in the process.

[107] 40 FR 23102, 23103 (waiver decision citing views of Congressman Moss and Senator Murphy) (May 28, 1975).

[108] *Id.* at 23103.

[109] 74 FR 32744, 32774 (July 8, 2009).

[110] CARB's waiver request at 25–26. *MEMA I,* 627 F.2d at 1105, 1114 n. 40 (''[T]he 'cost of compliance' consideration relates to the timing of standards and procedures.'') CARB notes that EPA has recognized that the only relevance of costs is their impact on timing, e.g. ''Manufacturers do not contend that the cost of compliance will be significantly reduced by extending lead time beyond the minimal period required for compliance.'' (36 FR 17459 (August 31, 1971)).

[111] *NRDC,* 655 F.2d 318, 331.

[112] H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 301 (1977).

time to allow technological developments, refers to the economic costs of motor vehicle emission standards and accompanying enforcement procedures. *See* S. Rep. No. 192, 89th Cong., 1st Sass. 5–8 (1965); H.R. Rep. No. 728 90th Cong., 1st Sass. 23 (1967), *reprinted in* U.S. Code Cong. & Admin. News 1967, p. 1938. It relates to the timing of a particular emission control regulation rather than to its social implications. Congress wanted to avoid undue economic disruption in the automotive manufacturing industry and also sought to avoid *doubling or tripling* the cost of motor vehicles to purchasers. It, therefore, requires that the emission control regulations be technologically feasible within economic parameters. Therein lies the intent of the cost of compliance requirement (emphasis added).[113]

Previous waiver decisions are fully consistent with *MEMA I,* which indicates that the cost of compliance must reach a very high level before the EPA can deny a waiver. Therefore, past decisions indicate that the costs must be excessive to find that California's standards are inconsistent with section 202(a).[114] It should be noted that, as with other issues related to the determination of consistency with section 202(a), the burden of proof regarding the cost issue falls upon the opponents of the grant of the waiver.

Consistent with *MEMA I,* the Agency has evaluated costs in the waiver context by looking at the actual cost of compliance in the time provided by the regulation, not the regulation's cost-effectiveness. The appropriate level of cost-effectiveness is a policy decision of California that is considered and made when California adopts the regulations, and EPA, historically, has deferred to these policy decisions. EPA has stated in this regard, ''the law makes it clear that the waiver request cannot be denied unless the specific findings designated in the statute can be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209 * * *.'' [115] Thus, EPA will look at the compliance costs for manufacturers in developing and applying the technology and not at cost effectiveness when making a waiver decision.

2. LEV III Criteria Pollutant Standards

California has adopted new standards for exhaust emissions of non-methane organic gases (NMOG), NO_X, and PM, as well as evaporative emissions standards. These standards phase in beginning with MY 2015. The LEV III standards are similar, in many respects, in structure to those in the existing federal Tier 2 program. As with the Tier 2 program, the proposed standards would apply to all light-duty vehicles (LDVs, or passenger cars, light-duty trucks (LDT1s, LDT2s, LDT3s, and LDT4s)) below 8,500 pounds GVWR (Gross Vehicle Weight Rating), and Medium-Duty Passenger Vehicles, or MDPVs (8,500 to 10,000 lbs GVWR). Based on our review of the LEV III criteria pollutant standards, and because EPA did not receive any comments objecting to CARB's LEV III criteria pollutant standards, with the exception of the PM standard issue discussed below, we find it unnecessary to provide a full written review whether such standards are consistent with section 202(a), as those opposing the waiver have clearly not met their burden regarding the issue, and we otherwise cannot make a finding that such standards are inconsistent with section 202(a).

a. Particulate Matter Standards

The Manufacturers generally note that testing for and complying with the revised particulate matter standards will present significant burdens on the industry. In short, the Manufacturers recommend that EPA withhold issuing a waiver for the MY 2025 PM standard. While noting that the phase in of the 3 mg/mile FTP PM standard beginning in MY 2017 will be very challenging, they nevertheless state that the Manufacturers are optimistic that vehicles will achieve this level with time. Recognizing that there are long lead time changes, the Manufacturers appear to be agreeing with CARB's planned phased-in approach starting in the 2017 MY. Also, the Manufacturers are not objecting to EPA issuing a waiver for the 3 mg/mile PM standards based on their stated testing concerns.

However, the Manufacturers believe the 1 mg/mile PM standard, which begins its phase-in starting in the 2025 MY, raises further feasibility issues. Based on their knowledge of PM measurement and vehicle PM control technology, the Manufacturers state that their members ''see no way to both measure and meet this standard.'' The Manufacturers believe that setting a standard that is unachievable today is inappropriate, and they do not believe EPA should issue a waiver for these standards at this time.

Finally, the Manufacturers note that there is ample time to revisit the waiver request without interfering with CARB's implementation of standards should they be deemed feasible (during CARB's planned review of the standard).

CARB's supplemental comments note that the LEV III PM standards are based on a particular concern for their impact on public health and safety. As noted in their LEV III Technical Support Document, CARB acknowledges that while PM emissions from LDVs are not a major contributor to the inventory, they are a significant contributor to urban pollution and human exposure. CARB also notes that the exact amount of pollution reduced and the cost-effectiveness of particular California standards is not relevant to EPA's waiver determination.

What is relevant, CARB maintains, is that thirteen years of lead time (from the date of its adopted regulations to the first model year of the phase-in standards in 2025) are provided to improve the test procedure and for industry to incorporate needed improvements to their engines and fuel systems. CARB maintains that it has consistently demonstrated PM measurement capability at 1 mg/mi using new test procedures under development by EPA under 40 CFR Part 1066.[116] CARB suggests that EPA apply the rationale of *NRDC* and find that CARB has identified barriers to implementation of needed technologies and a viable path to overcome these barriers. For example, CARB states test data that they have presented demonstrates PM levels from current port fuel injected (PFI) engines below 1 mg/mi and from late model gasoline direct injection engines (GDI) approaching 1 mg/mi. CARB expects further technical improvements over the extensive lead time provided.[117] CARB has also identified that some of the low carbon technologies with proven track records that are most likely to be used (to meet GHG emission requirements) are: Advanced port fuel injection engines, GDI engines, boosted and downsized engines, clean diesel engines, hybrid, and plug-in hybrid technology among others. CARB notes

[113] *MEMA I* at 1118 (emphasis added). *See also id.* at 1114 n. 40 (A[T]he 'cost of compliance' criterion relates to the timing of standards and procedures.).

[114] *See, e.g.,* 47 FR 7306, 7309 (Feb. 18, 1982), 43 FR 25735 (Jun. 14, 1978), and 46 FR 26371, 26373 (May 12, 1981).

[115] 36 FR 17158 (August 31, 1971). *See also* 40 FR 23102, 23104; 58 FR 4166 (January 7, 1993), LEV Waiver Decision Document at 20.

[116] CARB notes that EPA has identified areas of improvement to Part 1066 it intends to evaluate in cooperation with CARB and industry (see pp. 54–59 of CARB's Technical Support Document at: *http://www.arb.ca.gov/regact/2012/leviighg2012/levappp.pdf*).

[117] *Id.* at P–8 through P–20. CARB's Board has provided direction to its staff (Resolution 12–11 at 21) to conduct a review of the 1 mg/mi PM standard in the 2015 timeframe and report back to the Board its results.

that each of these technologies will have a particular impact on PM emissions. CARB notes that many of these technologies may be able to currently meet 2025 MY PM standards and that further improvements are reasonable. For example: (1) CARB's Technical Support Document states ''Some current, well-maintained PFI-equipped LDVs emit PM mass levels below 1 mg/mi. For example, published research reports PM emissions rates for both PFI ULEV and SULEV vehicles of approximately 0.7 mg/mi or much less over the Federal Test Procedure (FTP or FTP–75) cycle'' and (2) ''Car makers who choose to pursue gasoline-fueled, CO_2 friendlier GDI internal combustion engines for their future vehicles will have two principal technical solutions for further reduction of PM mass emissions. One solution can utilize next generation state-of-the-art engines (e.g., start-stop system where the ICE automatically shuts down and starts up at idle) with optimized fuel injection strategies (e.g., spray-guided central injector) at nearly no net cost increase. The second solution employs post-combustion control in the form of the gasoline particle filter (GPF) at an additional cost.'' [118]

b. EPA's Response to Comments

As explained below, EPA believes CARB presents a proper view of how lead time should be evaluated, for purposes of waiver review by EPA, and that CARB has provided reasonable responses to any theoretical objections to the projected control technology; identified the major steps necessary in refinement of the technology; and offered plausible reasons for believing that each of those steps can be completed in the time available.

We also believe that CARB has properly set forth the role of EPA in reviewing California standards which require new and/or improved technology to meet challenging levels of compliance. EPA is not setting its own standards under section 202(a) of the Clean Air Act, rather EPA's role within its waiver review is more limited and takes place in the context of deference that Congress envisioned for California. This deference was discussed in an early waiver decision when EPA approved the waiver request for California's 1977 model year standards:

> Even on this issue of technological feasibility I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the Federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to 'catch up' to some degree with newly promulgated standards. Such an approach to automotive emission control might be attended with costs, in the shape of a reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency, under the statutory scheme outlined above I believe I am required to give very substantial deference to California's judgment on that score.[119]

Regarding the feasibility of the CARB 1 mg/mile PM standard that commences its phase-in starting with the 2025 MY, EPA believes that it is proper to review this through the *NRDC* prism. In other words, EPA believes it appropriate to provide substantial room for deference to CARB's projections. Although the Manufacturers have raised a variety of concerns they have not provided any data or other information to demonstrate why the pathways and steps identified by CARB are unreasonable. EPA believes having given appropriate deference that CARB has reasonably projected possible pathways to address the theoretical concerns with the 2025 phased-in PM standard, including concerns relating to testing capability. The Manufacturers have provided no data or other information to demonstrate why CARB's identified path of improvements in testing technology and procedures is not feasible in the lead time provided. Similarly, the Manufacturers have provided no data or other information to demonstrate why CARB's identified technology solutions and possible refinements are infeasible, especially given the amount of lead time provided. Given the amount of lead time provided by CARB and their identified paths for improvements, EPA believes the opponents to the waiver have not met their burden of proof in regards to the PM standards commencing in MY 2025.

Therefore, based on the record before us, EPA cannot find that the opponents of the PM standard in 2025 have met their requisite burden of proof to demonstrate that such standards are inconsistent with section 202(a). Thus EPA cannot deny CARB's ACC waiver request on this basis.

3. LEV III GHG Emission Standards

CARB has worked closely with EPA and NHTSA throughout the development of the MY 2017–2025 GHG emission standards and has moved in parallel with the agencies in setting standards that are essentially equivalent in terms of lead time and stringency. CARB projects that its GHG emissions standards for MYs 2017–2025 will reduce fleet average CO_2 levels by about 34 percent from MY 2016 levels of 251 g/mile down to about 166 g/mile, based on the projected mix of vehicles sold in California. The basic structure of the GHG standards is consistent with that of EPA's GHG standards. CARB uses two vehicle categories, passenger cars and light trucks. CARB projects that the standards will reduce car CO_2 emissions by approximately 4.9%/year, reduce truck CO_2 emissions by approximately 4.1%/year (the truck CO_2 standard target curves move downward at approximately 3.5%/year through the 2016–2021 period and about 5%/year from 2021–2025), and reduce combined light-duty CO_2 emissions by approximately 4.5%/year from 2016 through 2025.

CARB notes that the CO_2 emission reduction estimates are approximate because the required emission level to achieve compliance with the standards for each vehicle manufacturer depends on each manufacturer's ultimate sales mix of vehicles.[120] Within the two categories, the CO_2 standard targets for vehicle models sold by each automaker are indexed to the vehicles' footprint, which is calculated as each vehicle model's wheelbase times its average track width. As a result of this regulatory structure, the precise CO_2 emission rates that will result from the standards in each year from 2017 through 2025 will depend on the ultimate sales-weighted mix of vehicles (i.e., according to vehicle sales in each category and the footprint of the models) sold in each year.

CARB also adopted separate nitrous oxide (N_2O) and methane (CH_4) standards that are harmonized with the standards EPA first adopted in the MY 2012–2016 rulemaking. As with the EPA program, manufacturers may use CO_2 credits to meet the N_2O and CH_4 standards on a CO_2-equivelent basis.

CARB includes most of the flexibilities established by EPA for MYs 2017–2025. CARB includes averaging, banking, and trading provisions which allow for 5-year credit carry-forward and 3-year credit carry-back and credit trading between manufacturers. Manufacturers may generate air conditioning system credits through system efficiency improvements, low refrigerant leakage designs, and use of low global warming potential

[118] *Id.*

[119] 40 FR 23102, 23103 (May 28, 1975).

[120] EPA–HQ–OAR–2012–0562–0011 at ES–6.

refrigerants. Manufacturers may generate up to 18.8 g/mile CO_2-equivalent credit for cars and 24.4 g/mile CO_2-equivelent credits for trucks from air conditioning system improvements. CARB also moved to harmonize air conditioning system test procedures with EPA, replacing the A/C idle test requirement with the AC17 test procedure.

In addition CARB adopted off-cycle credits provisions similar to those adopted by EPA, which provide credits to manufacturers based on real world improvements in CO_2 emissions not captured on the 2-cycle test procedure. CARB adopted a list of pre-approved credits that manufacturers may claim by using pre-approved technologies. As with the EPA program, off-cycle credits based on the pre-approved credits list is capped at 10 g/mile. CARB also provides full-size pickup truck technology credits of 10 or 20 g/mile per vehicle depending on the level of technology employed, similar to the EPA program. Manufacturers may generate technology incentive credits by using hybrid technologies or by meeting performance-based criteria over a specified minimum percentage of full size pickup truck production.

The EPA and CARB programs differ in their treatment of advanced technology vehicles, specifically plug-in hybrids, battery electric vehicles, and fuel cell vehicles. EPA's program encourages the production of these advanced technology vehicles in two ways; by providing incentive multipliers for these technologies and by not counting the upstream emissions associated with electric operation for the first several model years of the program.[121] CARB does not provide a multiplier incentive or allow for the use of a 0 g/mile compliance value. CARB explains that incentives are not needed for plug-in hybrids, battery electric vehicles, and fuel cell vehicles under their GHG program because the California ZEV program requires manufacturers to produce vehicles using these technologies.

In its Final Statement of Reasons, CARB reiterated its commitment, as directed by Board Resolution 12–11, to accept compliance with EPA's GHG emission standards for MY 2017–2025 as compliance with California's GHG standards if CARB determines that EPA's final rule preserves the GHG reduction benefits set forth in EPA's proposed rule.[122] CARB also notes their plan to adopt a ''deemed to comply'' rule within their waiver request to EPA. EPA stated in the **Federal Register** notice announcing the opportunity for hearing and comment on CARB's June 27, 2012 ACC waiver request that ''EPA invites comment on all aspects of CARB's waiver request, and specifically invites comment on CARB's waiver request in light of CARB's plans concerning adoption of a ''deemed to comply'' provision into its LEV III GHG standards. This will allow EPA to consider any ''deemed to comply'' provision and comments on it when taking action on CARB's request for a waiver.'' [123]

On September 14, 2012, CARB proposed amendments to their program to permit compliance based on compliance with EPA's GHG standards. In its discussion of the differences between the EPA and CARB programs with regard to the treatment of advanced technology vehicles, CARB notes that manufacturers will have the option to comply with the federal program and utilize the EPA accounting provisions for these vehicles.[124] On November 15, 2012, the Air Resources Board agreed to accept compliance with federal standards as equivalent to compliance with California's, approving the amendment for ''deemed to comply.'' [125] On December 7, 2012, CARB submitted additional information to EPA noting that CARB had approved further amendments to the ACC program, including the ''deemed to comply'' regulation, and therefore California has met its commitment to the National Program. CARB requested that EPA consider and take action on these amendments concurrent with the request set forth in CARB's June 27, 2012 ACC waiver request.[126]

a. Comments on CARB's 2017 Through 2025 GHG Emission Standards

CARB's waiver request notes that in 2010, President Barack Obama directed EPA and NHTSA to work with California to develop GHG fleet standards for MY 2017 through 2025 light-duty vehicles. In response, the three agencies developed the Interim Joint Technical Assessment Report (TAR), released in September 2010. The TAR was major milestone in the technical work done collaboratively by EPA, NHTSA, and CARB. CARB held four public technical workshops covering topics of efficiency, mass-reduction, and safety technology; collaborative technical contract work (e.g., with FEV, Ricardo, Lotus); and extensive meetings with a wide range of stakeholders to gather input. This collaboration ensured that the three agencies had a common set of technical information on which to inform their proposals, allowing the agencies to develop standards that are harmonized in terms of their stringency.

CARB further notes that the feasibility analysis underlying its standards is based on several existing and emerging technologies that increase engine and transmission efficiency, reduce vehicle energy loads, improve auxiliary and accessory efficiency, and that would increasingly electrify vehicle subsystems with hybrid and electric drivetrains. The technology assessment conducted by CARB for the MY 2017–2025 standards builds on the original technical basis established in the previous rulemakings for California's MY 2009–2016 and federal MY 2012–2016 standards. CARB notes that several individual technologies offer substantial CO_2 reduction potential and that many of the technologies have only seen limited deployment in new vehicle models.[127]

In its Initial Statement of Reasons staff report, CARB highlights several CO_2 reduction technologies that manufacturers can employ to meet the standards.[128] The list of technologies cited by CARB is very similar to the list of technologies considered by EPA and NHTSA in evaluating standards for MYs 2017–2025.[129] Vehicle road load and accessory energy loads can be improved, for example, through mass reduction, improved accessories, electric power steering, improved aerodynamics, and low rolling resistance tires. CARB notes several considerable opportunities for engine efficiency improvements. Engine efficiency technologies include turbo charging and downsizing, gasoline direct injection, continuously variable valve lift, cylinder deactivation, and diesel-fueled engines. CARB also describes transmission efficiency improvements important in allowing the operation of the engine in its lowest fuel consumption operating points more frequently. These include more gears

[121] EPA allows a 0 g/mile compliance value to be used for vehicles sold in MY2017–2021 and caps the cumulative number of vehicles that a manufacturer may use the 0 g/mile compliance value for in MYs 2022–2025.

[122] California Air Resources Board, EPA–HQ–OAR–2012–0562–0021, at 16.

[123] 77 FR 53199, 53200 (August 31, 2012).

[124] Air Resources Board, EPA–HQ–OAR–2012–0562–0011, at 135.

[125] CARB Resolution 12–35 (November 15, 2012).

[126] EPA–HQ–OAR–2012–0562–0374.

[127] California Air Resources Board, EPA–HQ–OAR–2012–0562–0011, at 102–103.

[128] California Air Resources Board, EPA–HQ–OAR–2012–0562–0011, at 103–108.

[129] Joint Technical Support Document: Final Rulemaking for 2017–2025 Light-duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, Chapter 3, EPA–420–R–12–901, August 2012.

(e.g., 8 speed transmissions), closer gear ratio spacing, optimized controls, and dual clutch transmissions that allow essentially the same efficiency as manual transmissions.

CARB's analysis also includes various hybrid systems that offer significant potential CO_2 reductions through the elimination of engine idling, reduction in fuel consumption during deceleration, reduction of acceleration power requirement through launch assist, and the recovery of vehicle energy losses through regenerative braking during deceleration. Finally, CARB also includes emerging electric drive technologies including plug-in hybrids, electric, and hydrogen fuel cell vehicles.

EPA received several comments on CARB's waiver request generally supporting the California GHG standards as feasible and consistent with CAA section 202(a). The Environmental Defense Fund (EDF) and the Natural Resources Defense Council (NRDC) commented that CARB coordinated with EPA and NHTSA in the development of the GHG standards and the California GHG standards are aligned with the federal GHG standards in terms of stringency and lead time. EDF further commented that EPA received letters from 13 automakers supporting the federal GHG standards, and based on this coordination and support EPA can only determine that the CARB GHG standards are feasible.[130]

EPA received comments from the Dealers that EPA should not provide a waiver to California for the MY 2022–2025 GHG standards because the standards for these years are not consistent with CAA section 202(a). The commenter states that by committing to a mid-term evaluation in its own GHG program, EPA has already determined that ''technological capabilities after MY 2022 are too remote to be accurately predicted.'' The commenter argues that it is inappropriate for CARB to obtain a waiver for years where it cannot demonstrate technological feasibility regardless of the fact that California has agreed to participate in the mid-term review. The Dealers assert that by agreeing to participate in the mid-term evaluation, CARB ''has admitted that the technological feasibility of its GHG standards for MYs 2022–2025 is not knowable at this time.''

As part of the waiver decision process, CARB's supplemental comments provided a response to comments submitted by NADA, including a response to NADA's comments regarding the feasibility of the MY 2022–2025 standards.[131] CARB comments that NADA concerns are not supported by relevant case law and should be dismissed. CARB comments that NADA is disregarding decades of precedent that clearly sets out the appropriate ''technological feasibility'' analysis under section 202(a). Citing *Natural Resources Defense Council* v. *U.S. Environmental Protection Agency,* (1981) 655 F.2d 318, 331, CARB notes CAA section 202(a) has historically been interpreted to allow for projections of likely future technological development. Such projections do not need to ''possess the inescapable logic of a mathematical deduction.'' Instead, such a projection is considered sufficient if it ''answers any theoretical objections to the [projected technology], identifies the major steps necessary in refinement of the technology, and offers plausible reasons for believing that each of those steps can be completed in the time available.'' Moreover, where the requirements of a standard are phased in over a lengthy period of time it bears on the likelihood of a proper finding of technological feasibility. CARB notes that the great length of time provided—until after MY 2022—supports a finding of technological feasibility under *NRDC,* and would be in line with past EPA waiver decisions.

b. EPA Response to Comments

EPA disagrees with NADA's characterization of the mid-term review as it relates to the technological feasibility of the standards for MYs 2022–2025. As discussed in the final rule for the EPA's GHG emission standards, EPA has found that its standards are technologically feasible under CAA section 202(a), based on available information regarding technology and costs.[132] EPA could not have adopted the standards for MYs 2022–2025 if it did not find the standards to be consistent with CAA section 202(a) which requires EPA to consider issues of technological feasibility, cost, and available lead-time.[133] As EPA discusses in the final rule in response to comments, ''EPA does not agree that the mid-term evaluation is legally required, or that the standards adopted today would be arbitrary and capricious or without substantial evidence to support them absent such a mid-term evaluation. The final rule and supporting information and analysis amply justify the reasonableness and appropriateness of the final GHG standards adopted by EPA, irrespective of the provisions for a mid-term evaluation.'' [134] EPA is committed to conducting a mid-term evaluation for MYs 2022–2025 in close coordination with NHTSA and CARB given the long time frame in implementing standards out to MY 2025 and given NHTSA's obligation to conduct a separate rulemaking in order to establish final standards for vehicles for those years.[135] With respect to the waiver, however, EPA believes that NADA's reference to the mid-term review does not demonstrate technological infeasibility (or any requisite level of uncertainty) or that the CARB standards are inconsistent with section 202(a), particularly given that the CARB standards are closely aligned to those adopted by EPA. In addition, compliance with EPA's GHG standards will be deemed to be compliance with CARB's GHG standards. EPA agrees with CARB's response to the NADA concerns and believes that a reasonable technology path forward has been projected in support of the MY 2022–2025 standards, which is further supported by the substantial amount of lead-time provided for these standards. EPA believes that the substantial amount of lead-time provided also accords with a finding of technological feasibility under *NRDC,* and would be in line with past EPA waiver decisions.

EPA did not receive any additional comments on the waiver decision regarding the technology assessment or cost analysis done by CARB in support of their GHG standards. CARB has adopted GHG standards that are closely aligned to those adopted by EPA for MYs 2017–2025. In EPA's final rule establishing the MY 2017–2025 standards, EPA concluded that the standards are feasible in the lead time provided and the costs are reasonable, as required under Section 202(a) of the CAA.[136] The technical basis for the standards was developed jointly by EPA, NHTSA, and CARB. The methodology and underlying data used by CARB to assess technologies and costs, as summarized above, are very similar and in many cases the same as those used by EPA to assess the standards.[137] The extended lead time

[130] EDF's comment at EPA–HQ–OAR–2012–0562–0025 and 0353; and NRDC's comment at EPA–HQ–OAR–2012–0562–0347.

[131] EPA–HQ–OAR–2012–0562–0373 at 8.

[132] 77 FR 62880–62882 and 62777.

[133] See 77 FR 62671–62673 for discussion on EPA statutory authority.

[134] 77 FR 62786.

[135] 77 FR 62784–62788.

[136] 77 FR 62624.

[137] See 77 FR 62702–62713 for a description of the EPA and NHTSA joint technology and cost assessment. More detail is provided in the joint Technical Support Document for the rule.

provides the necessary time for manufacturers to combine individual technologies, many of which are currently available, into optimized packages and apply them across their vehicle fleets.

It is also important to note that the EPA and CARB GHG programs are very similar in terms of the structure of the programs and flexibilities contained in the programs. The CO_2 standards are attribute-based fleet average standards, based on vehicle footprint curves that are identical. The programs include averaging, banking, and trading provisions. Both GHG programs offer credits for air conditioning system improvements, off-cycle CO_2 reductions, and full-size pickup truck technology incentives. Both GHG programs contain the same N_2O and CH_4 standards and essentially the same provisions for small volume manufacturer and small businesses.

There are some aspects of the CARB program that differ from the EPA program but, as discussed below, EPA does not believe that these differences change the feasibility of the standards in any significant way. CARB has explained in detail how these standards can be met using technologies that are reasonably expected to be available in the regulatory timeframe. NADA does not substantially undermine this explanation.

CARB estimated an average per vehicle cost in MY 2025 of $1,340 without the new ZEV requirements and $1,840 with the new ZEV requirements. In its final rule, EPA estimated an average per vehicle cost of about $1,800 in MY 2025 for the EPA GHG standards. Both agencies conclude that these up-front per vehicle costs will be more than offset by consumer fuel savings over the life of the vehicles.

Perhaps the most significant differences between the CARB and EPA vehicle programs involve the new California ZEV requirements which mandate use of ZEV-type technologies for a portion of a manufacturer's fleet, and therefore may alter the technology pathways that manufacturers might otherwise choose to meet the GHG standards. EPA has reviewed the consistency of the ZEV requirements with section 202(a) separately below

The CARB and EPA programs also differ in the treatment of vehicles capable of electric operation. EPA provides an advanced technology incentive multiplier through MY 2021 to encourage the increased sales of plug-in hybrids (PHEVs), electric vehicles (BEVs), and fuel cell vehicles (FCVs). CARB does not provide advanced technology incentive credits for these vehicles because these types of vehicles are required under the ZEV program and an incentive is not necessary. CARB also accounts for upstream emissions from electric operation starting in MY 2017 while EPA phases in upstream accounting for MY 2022–2025 vehicles after vehicle sales thresholds are exceeded. These differences mean that PHEVs, BEVs, and FCVs do not receive as much credit in the CARB program compared to the EPA program. However, these vehicles still offer significantly lower CO_2 levels in the CARB program compared to more conventional technologies, lowering a manufacturer's CO_2 fleet average.

There are other minor differences between the CARB and EPA programs but EPA does not believe the differences have a significant impact on feasibility. Many of the differences in the programs arise from changes EPA made to various provisions between the proposal and final rules in response to comments. CARB delineates these minor differences in the Initial Statement of Reasons for their proposal to accept compliance with EPA's GHG emission standards as compliance with California's GHG emission standards (aka ''deemed to comply'').[138] These include revisions to the off-cycle credits, air conditioning system credits, and full-size pick-up credits. While most of the changes made by EPA in its final rule directionally provide somewhat more flexibility to manufacturers, the changes do not ultimately change the level of credits potentially available. CARB concludes and EPA agrees that the programs remain sufficiently comparable.

Finally, as discussed below, most if not all manufacturers will very likely opt to comply with the California program by complying with the EPA GHG emission standards, as permitted by the ''deemed to comply'' regulation. Therefore, the small differences between the programs will not in such cases have any practical implications for manufacturers. As CARB notes in its waiver request, ''Throughout the development of the LEV III GHG regulations, California coordinated with the EPA and NHTSA on technical and economic areas, and CARB has moved in parallel with the federal rulemaking in terms of stringency of the standards and lead time for compliance.'' Given this coordination, commenters have not shown that the LEV III GHG regulations are technologically infeasible or that the lead time provided is inadequate.

The Manufacturers note that they do not oppose California's request for a Section 209(b) waiver for its GHG emission standards but state that it would not be appropriate for the waiver to be granted until after California has finalized its regulatory amendments to allow for a national compliance option.[139] ''This national compliance option is integral to the commitment letters the industry and California signed in July 2011 and to the single national GHG/fuel economy program all stakeholders sought to achieve.''

As noted above, CARB notified EPA by letter dated December 7, 2012 that CARB has approved further amendments to its ACC program, including the ''deemed to comply'' regulation.[140] Included in CARB's December 7, 2012 letter to EPA is CARB's ''Final 'Clean' Version of California's 2017–2025 Advanced Clean CAR Program, including its Passenger Vehicle Greenhouse Gas Regulations and LEV/GHG Test Procedures, and its ZEV regulations and Test Procedures'' all as amended December 6, 2012.[141]

EPA has not received any comment, based on its August 31, 2012 **Federal Register** Notice, that CARB's ''deemed to comply'' regulation raises any issues regarding technological feasibility. EPA did receive comment from the Manufacturers requesting that EPA not grant CARB a waiver for its GHG emission standards until after CARB has finalized their ''deemed to comply'' regulations. Today's waiver applies to CARB's final regulation as adopted on December 6, 2012.

After review of the information in this proceeding, EPA believes that those opposing the waiver have not met their burden of showing that compliance with California's GHG standards is infeasible, even without the deemed to comply provision, based upon the current and future availability of the described technologies in the lead-time provided and considering the cost of compliance. The CARB technical information presented in this record clearly indicates that these requirements are feasible. In addition, California's regulations include a ''deemed to comply'' provision which provides further strong support for this view. EPA therefore determines that those opposing the waiver have not met the

[138] EPA–HQ–OAR–2012–0562–0374 at 6–13.

[139] The Manufacturers note that California does not believe that another waiver request is necessary once the amendments are finalized, further supporting its request to wait until after CARB finalizes its rule.

[140] *See* CARB's Resolution 12–35 (November 15, 2012) at EPA–HQ–OAR–2012–0562–0374 (attachment 64), Executive Order R–12–016 (December 6, 2012) at EPA–HQ–OAR–2012–0562–0374 (attachment 66).

[141] *See* EPA–HQ–OAR–2012–0562–0374 (attachment 65).

burden of producing the evidence necessary for EPA to find that California's GHG standards, including the ''deemed to comply'' provision, are not consistent with Section 202(a).

4. California's ZEV Amendments as They Affect 2018 Through 2025 Model Years

As noted above, after a thorough review of CARB's ZEV amendments, we have determined that such amendments, as they affect 2017 and earlier MYs, are within the scope of previous waivers of preemption. However, EPA recognizes that such amendments add significant new requirements, as they affect 2018 and later MYs, and therefore such amendments are reviewed under the full waiver criteria.

a. Comments on CARB's ZEV Amendments

CARB notes in its waiver request that to date, all vehicle manufacturers operating in California are in full compliance with the ZEV mandate. Nearly 5,600 ZEVs (BEVs and FCVs) are in operation statewide and 380,000 AT PZEVs are also in operation. Fuel cell vehicle and infrastructure is progressing with several automakers moving toward commercialization sometime after 2015. Cumulatively, automakers plan to have 50,000 FCVs operational in California by 2017, according to CARB.[142] CARB also notes that most manufacturers have near-term production plans to meet or over comply with the regulatory requirements through MY 2017. In addition, recently a number of manufacturers have announced aggressive production plans for PHEVs and BEVs for the next three MYs. CARB maintains that these announcements reflect technological advancement in lithium-ion battery technology and a general shift in customer demand and concern about environmental stewardship. CARB provides a table in its waiver request that summarizes manufacturers' current ZEV and TZEV program commitments, by technology category and as publicly stated.[143] CARB suggests that the table reveals that nearly every manufacturer will be introducing BEV and PHEV products within the next one to three years, and five manufacturers will commercially introduce FCVs by 2015. CARB states that the technological sophistication of ZEVs currently being produced is anticipated to advance, making commercial production and compliance of these vehicles by MY 2018 and later more feasible. A new feature of the ZEV amendments is that manufacturers will be allowed to use a variety of battery and fuel cell vehicle technologies to comply with the ZEV requirement, making compliance still more feasible. Finally, CARB notes that during its rulemaking proceedings for the adopting of the 2012 ZEV amendments they did not receive any comments questioning the overall technological feasibility of the amended standards.

With regard to the manufacturer costs associated with the ZEV emission requirements CARB states that the ''ZEV regulation must be considered in conjunction with the proposed LEV III amendments. Vehicles produced as a result of the ZEV regulation are part of a manufacturer's light-duty fleet and are therefore included when calculating fleet averages for compliance with the LEV III GHG amendments. Because the ZEVs have ultra-low GHG emission levels that are far lower than non-ZEV technology, they are a critical component of automakers' LEV III GHG standard compliance strategies. As such the ZEV program cost is considered as the difference in complying with the LEV III GHG fleet standard without the proposed amendments to the ZEV regulation versus with the proposed amendments to the ZEV regulation. Assuming that all of the associated direct manufacturing and ICMs are passed on to consumers, the average incremental price increase that results from the proposed LEV III GHG fleet standards and proposed ZEV regulation over the 2017 through 2025 timeframe will differ from the average increase resulting from compliance with only the LEV III GHG amendments. The average incremental vehicle price due to proposed LEV III GHG standards, but with no amendments to the current ZEV regulation, in 2025 is expected to be $1,340. The average incremental vehicle price considering the proposed LEV III GHG fleet standards and the proposed ZEV requirements in 2025 MY increases to $1,840, a $500 incremental increase. * * * In the broader context of the overall fleet, the ultra-low GHG ZEV technology is a major component of compliance with the LEV III GHG fleet standards for the overall light duty fleet. In that fleet context, the overall cost of the ZEV program is the difference in costs between the ''GHG-plus-ZEV'' and the ''GHG only'' scenarios.'' [144]

EPA has also received comment from several consumer and environmental groups that support CARB's ZEV amendments. The Consumer Federation of America (CFA) provided comment that ''California's ability to set these strong standards is vitally important to the advancement of the auto industry and for meeting consumer demand for cleaner and more efficient cares in states across the nation. Consumers understand the benefits and have consistently voiced support for California's leadership on clean car standards. In fact, CFA's latest poll on the subject found that ''more than 70% of Americans support states being allowed to continue setting tailpipe emission standards that, as a result, increase fuel economy for motor vehicles.'' This commenter also provides the latest from a *Consumer Reports* poll on the subject, including ''Seventy-five percent of California consumers think California should require automakers to build fleets that include increasing numbers of zero emission vehicles including electric and hydrogen fuel cell cars.'' [145] EPA received comment from Consumer Reports/Consumers Union (Consumer Reports) in support of CARB's ACC program and notes the survey above. In addition, Consumer Reports notes that vehicle manufacturers are already offering plug-in hybrids and BEVs, with new models appearing all the time. ''Consumers, particularly in California, are very open to buying alt-fuel vehicles. Importantly, some of the cleanest vehicles or alt-fuel vehicles are also proving very satisfying to vehicle owners.'' [146] EPA also received oral testimony from Calvert Investments noting that CARB's ACC program will help drive innovation, investment, and job creation and thus they strongly support both the LEV III (including GHG standards) and ZEV requirements in the ACC program. ''Customers want and in an increasing number of countries require cleaner cars and trucks, to go further on every gallon of gas, while cutting back on GHG emissions that contribute to climate change. Companies that fail to embrace relevant new technologies, from improving mileage for conventional internal combustion engines to developing hybrid, electric, and fuel cell vehicles, are putting themselves at risk.'' [147]

In addition, EPA received comment from NRDC that provided specific input on the criterion for consistency with CAA Section 202(a). NRDC states that the forecasted ZEV sales in California exceed ZEV requirements. In a report jointly published with NRDC, auto industry analysts Baum and Associates

[142] *See* CARB's Initial Statement of Reasons (ISOR), EPA–HQ–OAR–2012–0562–0008 at 11.

[143] CARB waiver request at 27–28.

[144] CARB's ISOR at pp. 62–63.

[145] EPA–HQ–OAR–2012–0562–0032.

[146] EPA–HQ–OAR–2012–0562–0354.

[147] EPA Hearing Transcript at 83. EPA–HQ–OAR–2012–0562–0026.

projected potential ZEV sales from 2015 to 2020. The 2012 ZEV amendments expect ZEV sales of about 75,000 vehicles in MY 2018 and 130,000 vehicles in 2020. The Baum Associates assessment, conducted before the ZEV amendments were proposed, projected ZEV sales of as much as 160,000 in MY 2018 and 180,000 in MY 2020. Baum and Associates also forecasts on an ongoing basis for the introduction of new ZEV models into the marketplace in the next few years, demonstrating the technical feasibility of ZEV technologies today. The Baum and Associates forecasts are based on detailed information about supplier and OEM production plans. NRDC compared the Baum and Associates forecast for BEVs, PHEVs, and FCVs to the ZEV and TZEV production announcements included by CARB in their waiver request. NRDC found that there are even more models that will be introduced than identified by CARB.[148]

EPA received comment both from the Manufacturers and the Dealers stating their objections to CARB's ZEV amendments as they affect 2018 and later MYs. The Manufacturers provide essentially three arguments for their assertion that the ZEV regulations are infeasible, particularly when applied individually in section 177 States. (The Manufacturers state that the amendments before EPA require an increasing number of ZEVs in California and each of the section 177 States.)[149] The Manufacturers claim that: 1) the infrastructure for BEVs will not be sufficient by MY 2018 to support increased sales of BEVS and that CARB has not explained how it determined that the infrastructure and the level of consumer demand in the Section 177 States will be sufficient to justify the ending of the travel provisions for ZEVs after MY 2017; 2) the cost of the ZEV program far exceeds its environmental benefits, especially when compared to the LEV III and GHG programs in terms of cost per ton of CO_2 removed: and 3) the current data on consumer demand for ZEVs indicates that it will not be feasible to meet the sales requirements for 2018 MY and beyond. In conjunction with this third argument the Manufacturers contend that the market for these types of vehicles has not developed as quickly as anticipated and therefore there is no basis to conclude that BEV sales will reach required levels by 2025. (The Manufacturers also state that it is ''highly unlikely that the required infrastructure and level of consumer demand for ZEVs will be sufficient by MY 2018 in either California or in the individual Section 177 States to support the ZEV sales requirements mandated by CARB.) Because of these concerns the Manufacturers suggest that EPA deny the ZEV waiver for 2018 and later MYs, or at least defer the program for MY 2021 and later, until California, EPA, and the auto industry have conducted a mid-term review of ZEV similar to the GHG program.

As noted above, the Manufacturers provide EPA with current vehicle sales and registration data. These data include current sales figures for hybrids (approximately 3% of annual sales nationally and approximately 6.1% in California according to registration data). The Manufacturers note that registration of hybrids in section 177 states is far lower. The Manufacturers maintain that the low sales numbers are due substantially to the increased cost relative to traditional vehicles, and that the demand for BEVs in section 177 States is particularly ''sluggish.'' However, the comments EPA received did not include forecasts, projections, data, or other evidence to support the Manufacturer's conclusions about future ZEV sales, or in particular, to demonstrate that the CARB ZEV requirements are infeasible.

The Dealers maintain that technological feasibility requires that not only certain technologies be possible, but they also be ''economically achievable.''[150] The Dealers maintain that in order for ZEV vehicles to be marketable they must: (1) Be at least as safe as comparable conventionally-fueled vehicles, (2) offer a range comparable to conventionally-fueled vehicles, (3) offer a refueling time comparable to conventionally-fueled vehicles, (4) offer similar performance and capacities, and (5) come to market at a cost comparable to conventionally-fueled vehicles. The Dealers maintain that CARB's estimates that ZEVs and TZEVs that will cost approximately $10,000 more than comparable traditional vehicles, with at best no performance advantages, are by definition not feasible as they will be unable to compete in the marketplace.

CARB provides several responses to the comments submitted by the Manufacturers. In terms of the applicability of section 177 within EPA's section 209 waiver deliberations, and consideration of the technological feasibility of CARB's amendments adopted in such states, CARB notes that the proper scope of EPA's inquiry is limited by the express terms of section 209(b). This is well illustrated both in past waiver determinations and in case law.[151] While CARB discredits the view that EPA should consider the feasibility of ZEV in other states, it also notes that charging infrastructure in states other than California does not seem to be a concern as both Nissan and General Motors are currently marketing advanced technology vehicles nationally, and Ford will begin 50-state marketing in early 2013. EPA notes that although it is unclear whether the Manufacturers are contesting the current or future adequacy of infrastructure in California (other than a sentence that states it is ''highly unlikely''), CARB nevertheless sets forth that there is much activity in the field of electric vehicle charging infrastructure, and that public charging programs are being funded by the California Energy Commission, U.S. DOE EV Everywhere program, the U.S. DOE EV Project, and other programs to address the needs of plug in vehicles. CARB also states that it appears that charging infrastructure is sufficient and efforts underway to address infrastructure needs (through the programs noted above and CARB's own ZEV Executive Order) are focused on highest priority charging locations, namely multi-family dwellings and workplace charging.

CARB also responds to concerns expressed about the feasibility of ZEV vehicles in terms of consumer demand. They note that current sales data for plug in vehicles show sales growing rapidly—faster than conventional hybrids grew when they were first launched. CARB states that these early sales data, aggressive programs for community readiness, public education, infrastructure development and

[148] EPA–HQ–OAR–2012–0562–0347. *See* Baum and Mui, ''The Zero Emission Vehicle Program: An Analysis of Industry's Ability to Meet the Standards'', May 2010. Available at *http://docs.nrdc.org/energy/files/ene_10070701a.pdf.*

[149] EPA believes the Manufacturers have mischaracterized the nature of CARB's waiver request. CARB has only submitted its own ACC regulations to EPA and it has not submitted, nor has any other State submitted, section 177 state regulations.

[150] NADA points to CARB's waiver request at 25 wherein CARB states ''It is well established that EPA will find a regulation to be technically feasible if 'a reasonable basis [exists] that a new technology will be available and economically achievable.'' However, NADA fails to reference CARB's subsequent (and EPA believe the appropriate view of cost) statement on the same page: ''The only relevance of costs in a Section 209(b) waiver proceeding is in the context of technological feasibility. Past waiver determinations have made clear that for the cost of compliance to be found excessive it would need to be 'very high' such that the cost to consumers when purchased a complying vehicle would be doubled or tripled.''

[151] CARB's supplemental comments at 6. *See* 49 FR 18887, 18889 (May 3, 1984) and 58 FR 4166 (January 7, 1993). *See also MEMA I* 627 F.2d 1095, 1114–20 (Administrator properly declined to review potential anti-trust and constitutional implications of CARB regulations under 209(b)).

incentives are in place to support as much as possible consumer acceptance and adoption of ZEV technologies. CARB also notes that the Dealers comments in this regard can be addressed by examining relevant case law and EPA's past application of the law. CARB notes that the Dealers' statement that it is inappropriate for EPA to grant a waiver unless the Agency can ''demonstrate technological feasibility for all the years in which those standards would be in effect'' is disregarding decades of waiver precedent that clearly sets out the appropriate ''technological feasibility'' analysis under section 202(a).'' Section 202(a) has historically been interpreted to allow for projections of likely future technological development. Such projections do not need to 'possess the inescapable logic of a mathematical deduction.' Instead, such a projection is considered sufficient if it ''answers any theoretical objections to the [projected technology], identifies the major steps necessary in refinement of the technology, and offers plausible reasons for believing that each of those steps can be completed in the time available.'' [152]

CARB also addresses the Dealers' stated concerns about the marketability of ZEVs.[153] CARB notes that a more appropriate measure of ZEV market success and growth potential is to examine the recent years when ZEVs have actually been available to consumers. In the last two years, with the introduction of Nissan Leaf, Ford Focus EV, Honda Fit EV, Mitsubishi IMiEV, and others, BEV sales have grown 228 percent.[154] As discussed below, CARB also points to the Joint Technical Assessment Report (TAR), which was developed by EPA, NHTSA, and CARB, and released in September 2010.

CARB states that the Dealers disregard well established law and create their own definition of ''technological feasibility'' in suggesting that EPA consider in its assessment a comparison of ZEVs and conventional vehicles on cost, safety, and performance features such as range and refueling time. CARB relies upon cost (*MEMA I* at 1118), performance (*International Harvester* at 641–647), and durability (*NRDC* at 333–335). CARB states:

> The ZEVs produced for the regulation will meet the same safety requirements that conventionally fueled vehicles meet. They already achieve acceleration and power characteristics expected on traditional vehicles and have demonstrated adequate durability. Range and refueling times are characteristics not traditionally taken into consideration. The automakers are targeting range for battery electric vehicles that match up with the vast majority of daily driving needs or most consumers (typical trips and typical daily needs are under 30 miles). For fuel cell vehicles, automakers have demonstrated range capability equal to or greater than conventionally fueled vehicles. With regard to refueling time, BEV drivers look at refueling differently; 30 seconds a day at home to plug in (with charging occurring overnight or while at work) and have a full range daily instead of visiting a gasoline station weekly is characterized as much more convenient. Fuel cell vehicles refuel in about the same amount of time as a gasoline car. By all of these measures ZEVs are more than technologically feasible for commercialization, certainly so with the abundant nine to 12 years of lead time for the 2022–2025 model years that are the focus of the comments.[155]

CARB also relies upon the projections and explanations submitted with its initial waiver request and notes that the Dealers are taking issue with standards that do not come into effect until after a lengthy lead time. In addition to CARB's waiver request projections and explanations noted at the outset of this section CARB also provides an explanation of the Joint Technical Assessment Report (TAR), which was developed by EPA, NHTSA, and CARB, and released in September 2010. The report concluded ''electric drive vehicles including hybrid(s) * * * battery electric vehicles * * * plug-in hybrid(s) * * * and hydrogen fuel cell vehicles * * * can dramatically reduce petroleum consumption and GHG emissions compared to conventional technologies * * *. The future rate of penetration of these technologies into the vehicle fleet is not only related to future GHG and corporate average fuel economy (CAFE) standards, but also to future reductions in HEV/PHEV/EV battery costs, [and] the overall performance and consumer demand for the advance technologies * * *.'' [156]

CARB notes that the TAR stated that ''* * * [A] number of the firms suggested that in the 2020 timeframe their U.S. sales of HEVs, PHEVs, and EVs combined could be on the order of 15–20 percent of their production.'' [157]

Lastly, CARB addresses the Manufacturers' comments regarding the cost-effectiveness of CARB ZEV amendments, in terms of cost per ton of CO_2 removal, in a manner similar to its response to the section 177 arguments—that such comments are irrelevant to EPA's 209(b) waiver consideration. CARB notes EPA's 2009 GHG waiver decision wherein EPA described the appropriate cost of compliance analysis under section 202(a): ''Consistent with *MEMA I,* the Agency has to evaluate costs in the waiver context by looking at the actual cost of compliance in the time provided by the regulation, not the regulation's cost effectiveness. Cost effectiveness is a policy decision of California that is considered and made when California adopts the regulations, and EPA, historically, has deferred to these policy decision * * *.The issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209.''[158]

In addition to the above facts, we believe additional information can help inform our review of the required increases in the sale of PHEVs, BEVS, and FCVs in California during the 2018 through 2025 timeframe.

EPA reviewed two additional studies of the market potential of ZEVs from the Electric Power Research Institute (EPRI) and the U.S. Energy Information Administration's Annual Energy Outlook (AEO) that are relevant to CARB's ZEV mandate. EPRI, a leading electric utility research organization published a July 2011 technical report, Transportation Electrification, A Technology Overview,[159] which presents three market projection scenarios for EVs and PHEVs. The scenarios project a range of Low, Medium, and High sales volumes. The

[152] CARB supplemental comments at 8, citing *NRDC v EPA,* 655 F.2d 318, 331.

[153] CARB notes that it is important to recognize that the ZEV regulations do not place requirements on dealers to offer for sale or sell ZEVs; rather the requirement is on the automakers. Since the obligation to sell and place ZEVs in service falls to the automakers, it is the automakers' responsibility to make the subject cars marketable and sellable by the dealers.

[154] CARB supplemental comments at 11, citing Natural Resources Defense Council post (October 31, 2012) attached as item 52 to supplemental comments.

[155] CARB's supplemental comments at 12.

[156] EPA, 2010. United States Environmental Protection Agency, National Highway Safety and Traffic Administration and California Air Resources Board. September 2010. ''Interim Joint Technical Assessment Report: Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2017–2025'' (p. vii). *http://www.epa.gov/otaq/climate/regulations/ldv-ghg-tar.pdf.*

[157] *Id.* at 2–5.

[158] CARB's supplemental comments at 9, citing 74 FR 32744, 32775 (July 8, 2009). CARB provides additional information explaining how the ZEV program was considered in conjunction with the LEV program and that the ZEV regulation remains an important part of California's plans to reach attainment of health based air quality standards.

[159] EPRI, Transportation Electrification, A Technology Overview, 2011 Technical Report, EPRI 1021334, July 2011. *Http://www.epri.com/abstracts/pages/productabstract.aspx?ProductID=000000000001021334.*

EPRI projection for national EV and PHEV sales in 2018 ranges from a low of 500,000 vehicles to a high of 1,920,000 vehicles. In 2025, the EPRI projections range from a low of 1,144,000 to a high of 5,073,000 vehicles. The Low projection mimics the historical market penetration of HEVs from 2000 through 2008, applying their rate of sales growth to PHEVs and EVs. The Medium projection is based on a ''ground up'' analysis of sales projections derived from PHEV and EV product announcements and production estimates. These projections are extrapolated past 2015 based on the aforementioned product announcements and the past sales performance of HEVs. The High projection is based on the average of the top third (more optimistic) of publicly available sales projections from several sources. In each of EPRI's three cases, projected PHEV and EV national sales far exceed CARB's ZEV mandate. EPA acknowledges that the EPRI study did not specifically project California sales but we believe it reasonable to assume that the supply of and demand for such vehicles will be significantly greater in California (and to some extent in section 177 states with ZEV programs) than it will be in states without a ZEV mandate. The EPRI study indicates that it would take less than 25 percent of the total national sales of ZEV in the Low scenario in order to exceed the necessary ZEV sales percentages during the 2018 through 2025 timeframe in California.

The U.S. Energy Information Administration (AEO) also analyzed two scenarios of market penetration for PHEVs and EVs in their Annual Energy Outlook 2012 (AEO2012).[160] AEO's reference case indicates a national market potential of around 165,000 EVs and PHEVs in 2018 which is more than twice the CARB ZEV requirement. In 2025, the AEO reference case indicates a national market potential of 283,000 ZEVs, which still exceeds CARB's proposed ZEV requirement of nearly 271,000. AEO's reference case assumes EV technology cost, especially batteries, remains high through 2030. AEO's High Technology Battery case, assumes the Department of Energy's (DOE) battery cost goals are met in 2015. Generally, these battery costs are more comparable to battery costs used by CARB and EPA in the 2010 Joint Technical Assessment Report (TAR)[161] than those used in the reference case. The AEO High Technology Battery case indicates a market potential of ZEVs in 2018 as 805,000 units, increasing to 1,394,000 in 2025. As with the EPRI study above, using the projections of the AEO High Technology Battery case, it would take less than 25 percent of the total national sales of ZEV to exceed the necessary ZEV sales percentages during the 2018 through 2025 timeframe in California.

While both the EPRI and AEO market projections are for national sales, EPA believes it is reasonable to assume that a significant percentage of these vehicles will be sold in California as has been the past practice with HEVs and EVs.

b. EPA's Response to Comments

After a review of the information in this proceeding, EPA has determined that the opponents of the ZEV standards have not demonstrated that the necessary increase in PHEV and ZEV sales necessary to meet the ZEV standards in the 2018 through 2025 MYs is infeasible. A review of the record, indicates that compliance with the ZEV standards, as they affect the 2018 through 2025 MYs, is feasible giving consideration to cost and lead time available. CARB has answered any theoretical objections to the projected technology, identified the major steps necessary in refinement of the technology, and offers plausible reasons for believing that each of those steps can be completed in the time available. This assessment is based upon the current technology available along with projected improvements in technology and expected cost reductions (in addition to continuing increases in consumer demand in response to preferences for advance technologies, fuel savings, available and improved infrastructure, incentives, regulatory mandates, etc) and given the significant lead time provided. As discussed in detail below, EPA cannot find that those opposing the waiver request have met their burden of showing that California's regulations are inconsistent with section 202(a). Therefore, we cannot deny the waiver on that ground.

Basic Feasibility of ZEV Technology

At the outset we note that manufacturers are meeting the ZEV requirements today. As CARB noted in its waiver request, most manufacturers have near-term production plans to meet or over comply with regulatory requirements through 2017. More importantly, a number of manufacturers have clearly demonstrated the feasibility of ZEV technology with in-production or planned PHEV, BEV and FCV models within the next few years. Manufacturers are also afforded the flexibility to determine the appropriate mix between BEVs and FCVs. We note that no commenter suggested that the underlying technology is not available today nor is there any evidence in the record that contradicts CARB's assertions that improvements and technology path moving forward will continue in the ZEV area in regards to range and other capabilities. The objections raised by those opposing the waiver on this point have to do less with the basic feasibility of ZEVs than with their acceptability/marketability, supporting infrastructure, and cost.

Regarding the lead time provided by California to meet the ZEV phase-in requirements, the commenters have not met their burden to show that the lead time is insufficient. While the commenters noted general concerns about marketability, infrastructure and cost they made no claims that inadequate lead time exists or that CARB's requirements would be feasible if more lead time were provided.

Regarding the cost component of the technological feasibility test, EPA believes that the opponents of the waiver have not met their burden to show that the ZEV standards are not technologically feasible because of excessive cost. As noted above, EPA has traditionally examined whether the necessary technology exists today, and if not, what is the cost of developing and implementing such technology. To the extent it is appropriate for EPA to continue to examine the cost of implementing ZEV technology, CARB estimates that by 2025 the incremental cost of a ZEV or TZEV is expected to rapidly decline, yet remain approximately $10,000 (high end estimate) higher than a conventional vehicle.[162] The Manufacturers note that CARB's analysis provides an incremental cost of $12,900 in MY 2020.[163] Under EPA's traditional analysis of cost in the waiver context, because such cost does not represent a ''doubling or tripling'' of the vehicle cost, such cost is not excessive nor does it represent an infeasible standard.[164] Moreover, though EPA believes that it is not necessary or appropriate for EPA to evaluate how manufacturers choose to

[160] U.S. Energy Information Administration, Annual Energy Outlook 2012, Data Tables, Table 57 accessed 12/13/12 at *http://www.eia.gov/oiaf/aeo/tablebrowser/#release=AEO2012&subject=0-AEO2012&table=48-AEO2012&region=1–0&cases=hp2012-d022112a.*

[161] ''Interim Joint Technical Assessment Report: Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2017–2025,'' September 2010.

[162] CARB waiver request at 6.

[163] Manufacturers' comments at 16.

[164] *MEMA I* at 1118.

allocate the incremental costs of ZEVs over their respective California fleets. CARB has identified one methodology of speeding the cost over the entire fleet with a resulting incremental cost of approximately $500, which is well within acceptable cost levels. EPA notes that manufacturers and dealers have many possible strategies available to spread the cost of the ZEV requirement beyond ZEV purchasers, but that such strategies are within the market choices of the manufacturers and dealers. Although EPA received comment that a manufacturer may have to employ costly marketing strategies if consumers do not otherwise accept ZEV vehicles, we do not believe such statements evidence standards that are infeasible. EPA also notes the likely existence of additional incentive programs that will further enable the marketability of ZEV vehicles from a cost perspective.

Relevance of Section 177 States on Consistency Analysis

The opponents of CARB's ZEV amendments, as they affect 2018 and later MYs, rely upon the implications of the adoption of CARB's ZEV amendments in section 177 states and resulting feasibility concerns. EPA's longstanding interpretation of section 209(b) and its relationship with section 177, is that it is not appropriate under section 209(b)(1)(C) to review California regulations, submitted by CARB, through the prism of adopted or potentially adopted regulations by section 177 states. EPA believes the language of section 209(b) is intended to apply solely to whether California's regulations can be denied a waiver under the criteria of section 209(b). State regulations promulgated under section 177, which are promulgated by separate state agencies under their own authority, and which have not been submitted to EPA for waiver review, are not a proper focus of review for our determination regarding whether California's state regulations meet the requirements under section 209(b). Section 177, and the state statutes authorizing state action under section 177, is separate provisions with their own requirements, and those opposed to state regulations promulgated under section 177 would need to take action under those provisions in those states.

An issue that arose during EPA's consideration of California's waiver request for its 1990 LEV standards was whether EPA could consider in its waiver decision the impact and implications of other states adopting the California standards under section 177. EPA concluded that section 209(b) does not authorize the agency to consider the impacts of actions or potential actions taken by other states under section 177 in reviewing a waiver request by California for its state standards.[165] EPA also received comment, during a 1978 waiver review that EPA must consider each of the criteria of section 209(b) of the Act in light of the possibility that eligible States may impose the emission control requirements, for which a waiver has been granted, under section 177. A commenter further argued that EPA could not grant a waiver unless and until we could make an affirmative finding that the basic market demand could be satisfied in all States eligible to adopt and enforce the California standards under section 177. We did not agree with the commenters' interpretation of EPA's responsibilities under section 209(b). ''That section authorizes me to deny California a waiver only if I have determined that California does not meet the given criteria; it does not require me in granting a waiver to consider the impacts of actions taken by other States under section 177* * *'' EPA continued ''The legislative history behind the Clean Air Act Amendments of 1977 [the amendments that added section 177] contains no statement to the contrary.'' [166] More significantly, the legislative history behind the amendments to section 209(b) specifically states that the intent of these amendments was * * * ''to ratify and strengthen the California waiver provision and to affirm the underlying intent of that provision, i.e. to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.'' [167] EPA also determined that Congress already had balanced the burdens on manufacturers by selecting the language they did for section 177 and believed that such authority should not place an undue burden on the vehicle manufacturers. EPA is also guided by the District of Columbia Circuit's discussion of section 177 and section 209: ''Rather than being faced with 51 different standards, as they had feared, or with only one as they had sought, manufacturers must cope with two regulatory standards under the legislative compromise embodied in section 209(a).[168]

EPA also believes it important to clarify that the record and the comments do not indicate that the CARB Board based its technological feasibility analysis, in order to determine the ability of manufacturers to meet CARB's standards within California, on the existence of any travel provisions or other regulatory provisions which may allow a manufacturer to take credit for certain ZEV sales outside of California.

Manufacturer Contentions Regarding Cost-Effectiveness

With regard to the Manufacturers' contention that CARB's ZEV regulation is not cost-effective in terms of the cost per ton of removing CO_2, EPA agrees with California's argument that case law clearly precludes EPA's consideration of this issue within the waiver context. Consistent with the court in *MEMA* I, the Agency has previously evaluated costs in the waiver context by looking at the actual cost of compliance in the lead time provided by the regulation, not the regulation's cost effectiveness.[169] As noted previously, EPA has clearly stated that ''The issue of whether a proposed California requirement is likely to result in only marginal improvement in air quality not commensurate with its cost or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209 * * *.'' [170] EPA has consistently afforded deference to CARB's policy judgments and has recognized that ''The structure and history of the California waiver provision clearly indicate both a Congressional intent and an EPA practice of leaving the decision on ambiguous and controversial matters of public policy to California's judgment.'' [171] To the extent the Manufacturers are raising general concerns regarding the cost associated with the ZEV technology and meeting applicable ZEV requirements, EPA has addressed this above.

[165] 58 FR 4166 (January 13, 1993), and LEV Decision Document at pp. 185–186. *See* ''State and Federal Standards of Mobile Source Emissions: Published by the National Research Council, 2006 at 81, 83. ''In contrast to section 209(b) in which Congress explicitly assigned EPA the role of approving waiver of federal preemption for California standards, in section 177, Congress did not assign EPA any role in approving adoption of California by other states. As EPA itself stated, 'language requiring that other States request and receive authorization from EPA is noticeable absent.''

[166] *See* H.R. Rep. No. 95–294, 95th Cong. 1st Sess. 14, 23, 26, 207–217, 301–302, 209–311 (1977); H.R. Rep. No. 95–564, 95th Cong., 1st Sess. 156, 158, 170 (1977).

[167] 43 FR 1829 (January 12, 1978), *citing* H.R. Rep No. 95–294, 95th Cong., 1st Sess. 301–302 (1977).

[168] *Engine Manufacturers Association v EPA,* 88 F3d 1075, 1080 (DC Cir. 1996).

[169] 36 FR 17158 (August 31, 1971). *See also* 74 FR 3232744, 32775 (July 8, 2009).

[170] *Id.*

[171] 40 FR 23102, 23104 (May 18, 1975). *See also* Decision Document accompanying waiver determination in 58 FR 4166 (January 13, 1993).

Consumer Demand

With respect to the consumer demand issues raised, we note that the record, based on comment from the Manufacturers and the Dealers, is insufficient to meet the burden of proof to counter the current and projected consumer demand evidence supplied by CARB and the other commenters supporting the waiver. EPA did not receive any evidence or data from commenters to refute the projections made by CARB or other commenters. Although the Dealers maintain that CARB's point that BEV and even FCVs are being marketed today is not sufficient to demonstrate the demand for hundreds of thousands of ZEVs that will be required to be produced by 2025, the Dealers only turn to the history of the ZEV program. We believe such history is instructive. However, it does not meet the burden of proof required to demonstrate that the ZEV requirements are technologically infeasible looking forward, given the substantial amount of lead time before the standards take effect and the steps that manufacturers and dealers can take to facilitate compliance with these standards (e.g. rebates and other incentives). In addition, we note that PHEV and ZEV costs are projected to decrease as demand increases and regulatory floors are established. EPA believes CARB easily meets the historical test of whether their emission standards result in ''doubling or tripling'' of costs as applied in *MEMA I* noted above. EPA has heard directly from consumer groups that express confidence that demand for advance technology vehicles exists today and continues to grow. In addition to this evidence, EPA also believes that the analyses of future ZEV market potential, noted above, provide additional evidence that CARB's projections are supportable. Moreover, while marketability is an important issue for Manufacturers and Dealers, it is questionable how relevant it is to basic technological feasibility. As discussed above, there is no real question about the basic feasibility of this technology, and that the cost of each vehicle, if carried across a Manufacturer's entire sales line, is not as high as to implicate basic feasibility. That matter of how Manufacturers and Dealers choose to market these vehicles is one of market choice, as Manufacturers and Dealers attempt to maximize sales at the expense of other Manufacturers and Dealers. That the industry as a whole will experience increased costs, and that such increased costs will create marketability issues, is clear. But these are not so significant to implicate the technological feasibility of the vehicles for purposes of a waiver determination.

Infrastructure

The Manufacturers' recommendation that EPA deny a waiver for the 2018 and later ZEV amendments is based largely on an argument surrounding lack of market demand (discussed above) and infrastructure in the section 177 states. The comments state, ''* * * while California's infrastructure and consumer market may be developing to the point where at some time in the future the introduction of the number of ZEVs required under the California regulations may be feasible in that State, the same is not true of all the Section 177 States that have adopted ZEV.'' [172]

However, as explained above, EPA has determined in previous waiver actions that section 209(b) does not authorize the Agency to consider the impacts of actions or potential actions taken by other states under section 177 in reviewing a waiver request. CARB provided considerable evidence of state and federal efforts and programs underway to ensure that the infrastructure needed for the ZEV program in California is available. The Manufacturers and Dealers do not take issue specifically with CARB's assertions regarding the infrastructure that has been, and will be, put in place to meet these requirements in California. Therefore, based on the record before me those opposing the waiver on this basis have not met their burden of proof.

Dealers' List of Feasibility Criteria

Lastly, EPA responds to the laundry list of requirements that the Dealers maintain is required in order for ZEVs to be marketable and thus for the ZEV regulations to be technologically feasible. The Dealers fail to provide any evidence to support their assertions nor do they refute the legal arguments and evidence otherwise in the record. For example, the Dealers fail to provide any evidence that ZEV vehicles are not as safe as the conventionally-fueled (conventional) vehicles of the same size. EPA agrees with CARB's statements that ZEV vehicles will meet the same safety requirements that conventional vehicles must meet. In any case, while EPA takes safety into consideration when examining the feasibility of emission standards, this basic feasibility does not require an examination of the relative safety of each vehicle.

With regard to performance—many ZEVs already achieve acceleration and power characteristics expected on conventional vehicles. In addition, the Dealers provide no evidence that ZEVs lack performance characteristics that are essential for basic feasibility of the vehicle. ZEVs on the market today span a wide range of performance capability. The Mitsubishi iMiEV is a small four seat electric city car.[173] Nissan's Leaf offers 5 seats and a size comparable to a Nissan Versa.[174] Tesla's Model S is a larger sedan with luxury and performance comparable to other luxury sedans. Tesla's Roadster is a high performance two-seater EV.[175] Finally, Toyota's RAV4 EV is an electric version of their popular RAV4 SUV.[176] All these vehicles are designed to compete favorably on a performance basis with conventional cars in the same class.

EPA has not historically taken into consideration the range and refueling times. Moreover, NADA does not present any evidence or data to suggest necessary ranges and refueling times deemed essential by consumers. Nor do the Dealers provide evidence that BEVs are not now, and cannot be in the lead time permitted, be manufactured in a manner to be above these necessary ranges and times. Evidence in the record suggests that many consumers average drive trips and refueling expectations are well within the capacity of current ZEV technology. EPRI analyzed a ''National Household Travel Survey'' that found: about 95% of daily driving is under 90 total miles; about 80% of daily driving is under 40 total miles; about 65% of daily driving is under 20 miles; and, there seems to be little variation in daily driving habits between many factors such as weekday/weekend, seasons, rural/urban, income, etc.[177]

EPA also notes that additional lead time is abundant, from nine to twelve years for the 2022–2025 timeframe for further developments to technology that can reasonably be expected.

c. Conclusion on Technological Feasibility

After its review of the information in this proceeding, EPA has determined that the industry opponents have not met the burden of producing the evidence necessary for EPA to find that California's LEV III/GHG standards and ZEV emission standards (as finalized on

[172] Manufacturers comment at 13.

[173] *http://www.mitsubishicars.com/MMNA/jsp/imiev/12/trims.do.*

[174] *http://www.nissanusa.com/leaf-electric-car/key-features.*

[175] *http://www.teslamotors.com/goelectric#.*

[176] *http://www.toyota.com/rav4ev/specs.html.*

[177] EPRI: Transportation Statistics Analysis for Electric Transportation, Technical Update EPRI #1021848, Dec 2011.

December 6, 2012) are not consistent with Section 202(a).

5. Consistency of Certification Test Procedures

CARB notes that the test procedures for certifying ZEVs, AT PZEVs, and PZEVs are contained in the ZEV and LEV Standards and Test Procedures incorporated by reference in section 1962.1(h) and 1962.2(h) and are largely un-amended by the 2012 ZEV rulemaking. The federal Tier 2 regulations require manufacturers to measure emissions from ZEVs in accordance with the California test procedures. Accordingly there are no inconsistencies between the federal and California test procedures that would preclude a manufacturer from conducting one set of tests to demonstrate compliance with federal and California certification requirements. EPA has received no adverse comment or evidence of test procedure inconsistency and therefore we cannot deny the waiver on this basis.

6. Relevance of the Energy Policy and Conservation Act (EPCA) to the Waiver Decision

EPA received comment from the Dealers that CARB's waiver request for its GHG emission standards should be denied because CARB's standards are in direct conflict with EPCA. The Dealers note ''EPCA expressly preempts state GHG emission standards because such laws relate to fuel economy standards.'' [178]

As EPA has stated on numerous occasions, section 209(b) of the Clean Air Act limits our authority to deny California's requests for waivers to the three criteria therein, and EPA has refrained from denying California's requests for waivers based on any other criteria. Where the Court of Appeals for the District of Columbia Circuit has reviewed EPA decisions declining to deny waiver requests based on criteria not found in section 209(b), the court has upheld and agreed with EPA's determination.[179]

Evaluation of whether California's GHG standards are preempted, either explicitly or implicitly, under EPCA, is not among the criteria listed under section 209(b). EPA may only deny waiver requests based on the criteria in section 209(b), and inconsistency with EPCA is not one of those criteria. In considering California's request for a waiver, I therefore have not considered whether California's standards are preempted under EPCA. As in previous waiver decisions, the decision on whether to grant the waiver is based solely on the criteria in section 209(b) of the Clean Air Act and this decision does not attempt to interpret or apply EPCA or any other statutory provision.

VI. Decision

The Administrator has delegated the authority to grant California section 209(b) waivers of preemption to the Assistant Administrator for Air and Radiation. After review of the information submitted by CARB and other parties to this Docket, I find that those opposing the waiver request have not met the burden of demonstrating that California's regulations do not satisfy one or more of the three statutory criteria of section 209(b). For this reason, I am granting California's waiver request to enforce its ACC emission regulations, including the ''deemed to comply'' rule for GHG emissions. EPA also determines that CARB's amendments to the ZEV program as they affect 2017 and prior MYs are within the scope of previous waivers of preemption granted to California for its ZEV regulations. In the alternative, EPA's waiver of preemption for CARB's ACC regulations includes a waiver of preemption for CARB's ZEV amendments as they affect all MYs, including 2017 and prior MYs.

My decision will affect not only persons in California but also persons outside the State who would need to comply with California's GHG emission regulations. For this reason, I hereby determine and find that this is a final action of national applicability.

Under section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by March 11, 2013. Under section 307(b)(2) of the Act, judicial review of this final action may not be obtained in subsequent enforcement proceedings.

VII. Statutory and Executive Order Reviews

As with past waiver decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, 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 rule, for purposes of 5 U.S.C. 804(3).

Dated: December 27, 2012.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. 2013–00181 Filed 1–8–13; 8:45 am]

BILLING CODE 6560–50–P

[178] Dealers at 10.

[179] *See Motor and Equipment Manufacturers Ass'n* v. *Nichols,* 142 F.3d 449, 462–63, 466–67 (DC Cir. 1998), *MEMA I* at 1111, 1114–20.

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Part VII

Department of Homeland Security

Coast Guard

46 CFR Parts 2, 24, 30, et al.
Seagoing Barges; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Parts 2, 24, 30, 70, 90, 91, and 188

[Docket No. USCG–2011–0363]

RIN 1625–AB71

Seagoing Barges

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to revise several vessel inspection and certification regulations to align them with a statutory definition of ''seagoing barge'' and with an exemption from inspection and certification requirements for certain seagoing barges. The proposed revisions are intended to eliminate ambiguity in existing regulations, to reduce the potential for confusion among the regulated public, and to help the Coast Guard perform its maritime safety and stewardship missions.

DATES: Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before March 11, 2013 or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by docket number USCG–2011–0363 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* (202) 493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Mr. William Abernathy, Vessel and Facility Operating Standards Division (CG–OES–2), Coast Guard; telephone (202) 372–1363, email *William.J.Abernathy@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:

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I. Public Participation and Request for Comments

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

A. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2011–0363), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an email address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and insert ''USCG–2011–0363'' in the ''Search'' box. Click on ''Submit a Comment'' in the ''Actions'' column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments.

B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* and insert ''USCG–2011–0363'' in the ''Search'' box. Click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

C. Privacy Act

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

D. Public Meeting

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

II. Abbreviations

CFR Code of Federal Regulations
DFR Direct final rule
DHS Department of Homeland Security
E.O. Executive order
FR **Federal Register**
NPRM Notice of proposed rulemaking
OCMI Officer in Charge, Marine Inspection
Pub. L. Public Law
Sec. Section
Stat. Statute
U.S.C. United States Code

III. Regulatory History

On December 14, 2011, the Coast Guard published a direct final rule (DFR) entitled ''Seagoing Barges.'' 76 FR 77712. The DFR relied on 33 CFR 1.05–55, which sets the parameters for Coast Guard's issuance of DFRs and stipulates that a DFR will be withdrawn if Coast Guard receives any adverse comment from the public. It further defines an ''adverse'' comment as one that ''explains why the rule would be inappropriate * * *, or would be ineffective or unacceptable without a change.'' 33 CFR 1.05–55(f). After publication of the DFR, we received two adverse comments from the same commenter, who said the rule would be ineffective without change. Those comments can be viewed by following the instructions under the ''Viewing comments and documents'' section of this NPRM. Accordingly, we withdrew the DFR with a notice published on April 6, 2012, and at the same time stated our intention to reconsider the changes in a notice of proposed rulemaking (NPRM). 77 FR 20727. This NPRM is substantively identical to the withdrawn DFR, except insofar as the NPRM has been modified to take the DFR's adverse comments into account.

IV. Background, Basis, and Purpose

The statutory basis for this NPRM is 46 U.S.C. 3306, which requires the Secretary of Homeland Security to prescribe regulations for Coast Guard-inspected vessels, and Executive Order (E.O.) 12988, Civil Justice Reform, section 3(a), which obligates Federal agencies to eliminate ambiguity in existing regulations. The Secretary's authority under 46 U.S.C. 3306 is delegated to the Coast Guard in DHS Delegation No. 0170.1 paragraph (92)(b). The purpose of this NPRM is to propose regulatory revisions that are intended to align Coast Guard regulations with current statutory language, thereby eliminating ambiguity that could cause confusion among the regulated public. That ambiguity arose as the result of two statutory changes that affect how seagoing barges are defined and regulated.

First, seagoing barges were once defined by law as non-self-propelled vessels of 100 gross tons and over that proceed on voyages on the high seas or ocean. In 1983, as part of a comprehensive revision of the shipping statutes in Title 46, U.S. Code, Congress provided a new definition of ''seagoing barge'' in 46 U.S.C. 2101(32): A non-self-propelled vessel of at least 100 gross tons making voyages beyond the statutorily defined Boundary Line.[1] In 1997, the Coast Guard amended 46 CFR 90.10–36 to align that section's definition of seagoing barge. Nevertheless, two Coast Guard regulations continue to use the pre-1983 definition.

Second, under 46 U.S.C. 3301(6), all seagoing barges must be inspected by the Coast Guard. Accordingly, seagoing barges have been subject to Coast Guard inspection and certification regulations in 46 CFR, subchapter I. However, in 1993, Congress added 46 U.S.C. 3302(m) to exempt a seagoing barge from the section 3301(6) inspection requirement, if the barge is ''unmanned'' *and* ''does not carry'' either a ''hazardous material as cargo'' *or* ''a flammable or combustible liquid, including oil, in bulk.''

Since the addition of section 3302(m), the Coast Guard has required seagoing barges to be inspected and certificated only if they are not subject to the exemption provided by that statute. Nevertheless, some owners or operators of unmanned barges that carry neither hazardous nor flammable/combustible materials voluntarily continue to undergo inspection and to maintain certification. This may reflect a rational business judgment, enabling the barge to switch quickly to service that is not eligible for exemption, for example to make an occasional voyage with hazardous cargo onboard. However, because eight Coast Guard regulations refer to the inspection and certification of seagoing barges without explicitly mentioning the section 3302(m) exemption, it is possible that some barge owners and operators continue to have their barges inspected and certificated only because they are unaware of the exemption. This would cause them, and Coast Guard inspectors, some unnecessary expense.

V. Discussion of Comments on the Withdrawn Direct Final Rule

During the comment period for the DFR, we received two submissions from the same commenter. We determined these to be adverse comments within the meaning of 33 CFR 1.05–55(f) and accordingly withdrew the DFR on April 6, 2012. 77 FR 20727.

The first submission related to the 46 U.S.C. 3302(m)(2) exemption from vessel inspection requirements for unmanned seagoing barges that carry neither a hazardous material as cargo, nor ''a flammable or combustible liquid, including oil, in bulk.'' Our DFR amended Coast Guard regulations to specify that barges to which the exemption apply are not required to undergo Coast Guard inspection or maintain certification. Those amendments did not define the volume of material that would constitute ''in bulk.'' The commenter said our rule would be ineffective without such a definition. We agree that, without more fully defining ''in bulk,'' it could be difficult for the regulated public and for the Coast Guard to know whether or not a particular barge can take advantage of the section 3302(m) exemption. The commenter pointed out that since 1996, the Coast Guard has had a policy of inspecting seagoing barges if they carry bulk flammable or combustible liquids, for the barge's own use—for example to operate an on board crane—and not as cargo, so long as the quantity of liquid amounts to at least 250 barrels. (We have placed in the docket a copy of an internal Coast Guard message dated April 18, 1996, establishing that policy.) The 250-barrel threshold is also used to define at what point a facility that transfers ''oil or hazardous material in bulk'' comes within the scope of 33 CFR part 154. 33 CFR 154.100(a). Although the commenter did not explicitly endorse adoption of the 250-barrel standard for determining the applicability of the section 3302(m) exemption, we think it is sensible to do so and our proposed rule defines ''in bulk'' as meaning a quantity, either as cargo or for the barge's operational use, of at least 250 barrels.

The second submission related to the introductory paragraph of the 46 U.S.C. 3302(m) exemption for ''unmanned'' seagoing barges that carry neither hazardous material nor flammable/combustible liquid in bulk. Our DFR amended Coast Guard regulations to specify that barges to which the exemption apply are not required to undergo Coast Guard inspection or maintain certification. Those amendments did not define when a vessel will be considered ''unmanned.'' The commenter said the rule would be ineffective without such a definition. He pointed out that even when the Coast Guard Officer in Charge, Marine Inspection (OCMI) determines that a seagoing barge needs no one on board to operate or navigate the barge, the OCMI allows persons to go on board the barge

[1] 46 U.S.C. 103, which refers to 33 U.S.C. 151. The Boundary Line is an ''identifiable line[] dividing inland waters of the United States from the high seas * * *. [Boundary Lines] may not be located more than twelve nautical miles seaward of the base line from which the territorial sea is measured. These lines may differ in position for the purposes of different statutes.'' 33 U.S.C. 151(b). The locations of Boundary Lines for different portions of the U.S. coastline are defined in Coast Guard regulations, 46 CFR part 7.

to prepare it for transfer or offloading, a practice known as ''permissive manning.'' Coast Guard regulations, 46 CFR 15.501 and 15.801, authorize the Coast Guard OCMI to set the manning requirements for particular vessels, ''after consideration of the applicable laws, the regulations in [46 CFR part 15], and all other factors involved, such as: Emergency situations, * * * cargo carried, * * * degree of automation, use of labor saving devices, and the organizational structure of the vessel.'' 46 CFR 15.501(b). The OCMI may use this discretionary authority to allow permissive manning so that the barge can fulfill its function by transferring or offloading the cargo it has carried. Permissive manning is inherently temporary in nature. Therefore, we do not think temporary permissive manning should determine whether a barge is considered ''manned'' or ''unmanned'' for purposes of the section 3302(m) exemption. Consequently, in this proposed rule, we would define ''unmanned'' as ''unmanned for the purposes of barge operation or navigation.''

VI. Discussion of the Proposed Rule

This proposed rule would amend eight Coast Guard regulations that refer to seagoing barges.

Six of the regulations contain tables that summarize inspection and certificating requirements for various vessel types. The tables appear in 46 CFR 2.01–7, 24.05–1, 30.01–5, 70.05–1, 90.05–1, and 188.05–1. The tables indicate requirements that apply to seagoing barges without making note of the inspection exemption provided by 46 U.S.C. 3302(m), which Congress added in 1993. Public Law 103–206, 107 Stat. 2419. As first set forth in the withdrawn DFR, we are proposing to amend all of these tables to make it clear that seagoing barges are not subject to inspection and certification requirements if they are unmanned for the purposes of operating or navigating the barge, and carry neither a hazardous material as cargo nor a flammable or combustible liquid, including oil, in bulk quantities of 250 barrels or more.

We are also proposing to amend 46 CFR 90.05–25 and 91.01–10 to replace definitions of ''seagoing barge'' that are based on that term's pre-1983 statutory definition. Section 90.05–25 would incorporate the definition of seagoing barge contained in 46 CFR 90.10–36, which was amended in 1997 to align with the 1983 language of 46 U.S.C. 2101(32). Section 91.01–10 would be revised to incorporate that same 1983 language. As discussed in part IV of this preamble, before 1983 the ''seagoing'' nature of seagoing barges depended on whether or not a barge made ''voyages on the high seas or ocean.'' Since 1983, however, 46 U.S.C. 2101(32) has defined ''seagoing'' to mean that the barge makes voyages ''beyond the Boundary Line.'' The proposed amendments are structured differently from the amendments made to 46 CFR 90.05–25 and 91.01–10 in the DFR, but substantively would have the same impact; in both cases sections 90.05–25 and 91.01–10 would be aligned with 46 U.S.C. 2101(32). The two sections would also be revised to make it clear that only seagoing barges that are ineligible for the 46 U.S.C. 3302(m) exemption need to be inspected and certified by the Coast Guard.

VII. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 (''Regulatory Planning and Review'') and 13563 (''Improving Regulation and Regulatory Review'') 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 proposed rule has not been designated a ''significant regulatory action'' under section 3(f) of E.O. 12866. Accordingly, the proposed rule has not been reviewed by the Office of Management and Budget (OMB). A regulatory assessment follows:

This proposed rule would align 46 CFR 90.05–25, 46 CFR 91.01–10, and the vessel inspection tables in 46 CFR parts 2, 24, 30, 70, 90, and 188 with the current statutory definition of ''seagoing barge,'' (''a non-self-propelled vessel of at least 100 gross tons * * * making voyages beyond the Boundary Line;'' 46 U.S.C. 2101(32)), and with the current statutory exemption for seagoing barges from inspection and certification when the barges are unmanned and not carrying hazardous material as cargo, or a flammable or combustible liquid, including oil, in bulk; 46 U.S.C. 3302(m).

Based on 46 U.S.C. 2101(32) and 46 U.S.C. 3302(m), seagoing barges that do not need inspection are those that meet all of the following characteristics:

1. Coastwise or oceans route;
2. 100 gross tons or greater;
3. Unmanned as determined by the OCMI; and
4. Not carrying hazardous material as cargo, or a flammable or combustible liquid, including oil, in bulk.

Because the Coast Guard would be aligning the text of the regulations with 46 U.S.C. 3302(m), only barges that are manned, or carrying hazardous material as cargo or a flammable or combustible liquid, including oil, in bulk would be inspected. We would define barges carrying hazardous material in bulk as those that carry 250 barrels (10,500 gallons) or more, whether or not they are carrying this material as cargo or for the barge's own operational use. It has been Coast Guard policy since 1996 to set 250 barrels as the threshold for considering cargo to be carried ''in bulk,'' and we use that threshold in 33 CFR 154.100(a). The alignment made by this proposed rule, if promulgated, is therefore consistent with Coast Guard policy and regulatory definitions of ''in bulk.'' If owners or operators choose to inspect barges that are exempt from inspection, these owners or operators do so voluntarily and would voluntarily incur the cost. Therefore, this proposed rule would not impose any additional cost to the industry.

The benefit of this proposed rule would be in eliminating regulatory ambiguity and aligning regulatory language with that of current statutes. It is Coast Guard policy not to require the inspection of seagoing barges that are eligible for the 46 U.S.C. 3302(m) exemption. Therefore, we expect the proposed rule would not have additional beneficial impacts (or cost savings) for industry.

B. Small Entities

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

As previously discussed, this proposed rule would align 46 CFR 90.05–25, 46 CFR 91.01–10, and the vessel inspection table in 46 CFR parts 2, 24, 30, 70, 90, and 188 with the current statutory definition of ''seagoing

barge'' and with the current statutory exemption for certain seagoing barges from inspection and certification.

This proposed rule, if promulgated, would not result in additional costs for small entities because the Coast Guard is aligning the text of the regulations with current statutory language. The Coast Guard currently does not require the inspection of 46 U.S.C. 3302(m)-exempt seagoing barges, so this proposed rule would impose no additional impacts (costs or cost savings) to small entities.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment to the Docket Management Facility at the address under **ADDRESSES**. In your comment, explain why you think it qualifies and how and to what degree this rule would economically affect it.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult Mr. William Abernathy at (202) 372–1363 or by email at *William.J.Abernathy@uscg.mil*. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

D. Collection of Information

This proposed rule would call for no new collection of information nor would it alter an existing collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

E. Federalism

A rule has implications for federalism under E.O. 13132, Federalism, if it has 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. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

G. Taking of Private Property

This proposed rule would not cause a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

H. Civil Justice Reform

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

I. Protection of Children

We have analyzed this proposed rule under E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed 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.

J. Indian Tribal Governments

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

K. Energy Effects

We have analyzed this proposed rule under E.O. 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 E.O. 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

L. Technical Standards

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

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

M. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under the ''Public Participation and Request for Comments'' section of this preamble. This proposed rule is categorically excluded under section 2.B.2, figure 2–1, paragraph (34)(a) and (d) of the Instruction. This proposed rule involves amendments to regulations which are editorial or procedural and regulations concerning documentation and inspection of vessels. We seek any comments or

information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects

46 CFR Part 2

Marine safety, Reporting and recordkeeping requirements, Vessels.

46 CFR Part 24

Marine safety.

46 CFR Part 30

Cargo vessels, Foreign relations, Hazardous materials transportation, Penalties, Reporting and recordkeeping requirements, Seamen.

46 CFR Part 70

Marine safety, Passenger vessels, Reporting and recordkeeping requirements.

46 CFR Part 90

Cargo vessels, Marine safety.

46 CFR Part 91

Cargo vessels, Marine safety, Reporting and recordkeeping requirements.

46 CFR Part 188

Marine safety, Oceanographic research vessels.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 46 CFR parts 2, 24, 30, 70, 90, 91, and 188 as follows:

PART 2—VESSEL INSPECTIONS

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

Authority: Sec. 622, Pub. L. 111–281; 33 U.S.C. 1903; 43 U.S.C. 1333; 46 U.S.C. 2110, 3103, 3205, 3306, 3307, 3703; 46 U.S.C. Chapter 701; E.O. 12234, 45 FR 58801, 3 CFR, 1980 Comp., p. 277; Department of Homeland Security Delegation No. 0170.1. Subpart 2.45 also issued under the Act Dec. 27, 1950, Ch. 1155, secs. 1, 2, 64 Stat. 1120 (*see* 46 U.S.C. App. Note prec. 1).

2. In § 2.01–7, Table 2.01–7(a) is revised to read as follows:

§ 2.01–7 Classes of vessels (including motorboats) examined or inspected and certificated.

(a) * * *

TABLE 2.01–7(a)

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(1) Motor, all vessels except seagoing motor vessels ≥300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or	All vessels >15 gross tons carrying freight-for-hire, except those covered by columns 2 and 3. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 2.01–7(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(2) Motor, seagoing motor vessels ≥300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All ferries <100 gross tons carrying more than 6 passengers and all ferries ≥100 gross tons that carr y at least 1 passenger. (iii) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels, including recreational vessels, not engaged in trade. This does not include vessels covered by columns 2 and 3, and vessels engaged in the fishing industry.	All vessels not covered by columns 2, 3, 4, 6, and 7.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 2.01–7(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(3) Non-self-propelled vessels <100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] (E) Carry more than 12 passengers on an international voyage. (F) Carry more than 6 passengers and are ferries.	All manned barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by column 3.	None.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1 11 12]
(4) Non-self-propelled vessels ≥100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(iii) All vessels that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] (E) Carry more than 12 passengers on an international voyage. (F) Carry at least 1 passenger and are ferries.	All seagoing barges except a seagoing barge that is covered by column 2 or 3, or that is unmanned for the purposes of operating or navigating the barge, and that carries neither a hazardous material as cargo nor a flammable or combustible liquid, including oil, in bulk quantities of 250 barrels or more.	All barges carrying passengers or passengers-for-hire except those covered by columns 3 and 6.	All seagoing barges engaged in oceanographic research.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1 11 12]
(5) Sail [13] vessels ≤700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 2.01–7(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vehicles not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels, not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(6) Sail [13] vessels >700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying passengers or passengers-for-hire, except rec reational vessels.[7] (ii) All ferries that carry at least 1 passenger.	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	None	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 2.01–7(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(7) Steam, vessels ≤19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew.	All tugboats and towboats. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 2.01–7(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(8) Steam, vessels >19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vehicles not engaged in trade.	All vessels not covered by columns 2, 3, 6, and 7.	None	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 2.01–7(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				

Key to symbols used in this table: ≤ means less than or equal to; > means greater than; < means less than; and ≥ means greater than or equal to.

Footnotes:

[1] Where length is used in this table, it means the length measured from end to end over the deck, excluding sheer. This expression means a straight line measurement of the overall length from the foremost part of the vessel to the aftermost part of the vessel, measured parallel to the centerline.

[2] Subchapters E (Load Lines), F (Marine Engineering), J (Electrical Engineering), N (Dangerous Cargoes), S (Subdivision and Stability), and W (Lifesaving Appliances and Arrangements) of this chapter may also be applicable under certain conditions. The provisions of 49 CFR parts 171 through 179 apply whenever packaged hazardous materials are on board vessels (including motorboats), except when specifically exempted by law.

[3] Public nautical schoolships, other than vessels of the Navy and Coast Guard, must meet the requirements of part 167 of subchapter R (Nautical Schools) of this chapter, Civilian nautical schoolships, as defined by 46 U.S.C. 1331, must meet the requirements of subchapter H (Passenger Vessels) and part 168 of subchapter R (Nautical Schools) of this chapter.

[4] Subchapter H (Passenger Vessels) of this chapter covers only those vessels of 100 gross tons or more, subchapter T (Small Passenger Vessels) of this chapter covers only those vessels of less than 100 gross tons, and subchapter K (Small Passenger Vessels) of this chapter covers only those vessels less than 100 gross tons carrying more than 150 passengers or overnight accommodations for more than 49 passengers.

[5] Vessels covered by subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter, where the principal purpose or use of the vessel is not for the carriage of liquid cargo, may be granted a permit to carry a limited amount of flammable or combustible liquid cargo in bulk. The portion of the vessel used for the carriage of the flammable or combustible liquid cargo must meet the requirements of subchapter D (Tank Vessels) in addition to the requirements of subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter.

[6] Any vessel on an international voyage is subject to the requirements of the International Convention for Safety of Life at Sea, 1974 (SOLAS).

[7] The terms ''passenger(s)'' and ''passenger(s)-for-hire'' are as defined in 46 U.S.C. 2101(21)(21a). On oceanographic vessels, scientific personnel onboard shall not be deemed to be passengers nor seamen, but for calculations of lifesaving equipment, etc., must be counted as persons.

[8] Boilers and machinery are subject to examination on vessels over 40 feet in length.

[9] Under 46 U.S.C. 441 an oceanographic research vessel '' * * * being employed exclusively in instruction in oceanography or limnology, or both, or exclusively in oceanographic research, * * *. Under 46 U.S.C. 443, ''an oceanographic research vessel shall not be deemed to be engaged in trade or commerce.'' If or when an oceanographic vessel engages in trade or commerce, such vessel cannot operate under its certificate of inspection as an oceanographic vessel, but shall be inspected and certified for the service in which engaged, and the scientific personnel aboard then become persons employed in the business of the vessel.

[10] Bulk dangerous cargoes are cargoes specified in table 151.01–10(b); in table 1 of part 153, and in table 4 of part 154 of this chapter.

[11] For manned tankbarges, see § 151.01–10(c) of this chapter.

[12] See § 151.01–15, 153.900(d), or 154.30 of this chapter as appropriate.

[13] Sail vessel means a vessel with no auxiliary machinery on board. If the vessel has auxiliary machinery, refer to motor vessels.

PART 24—GENERAL PROVISIONS

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

Authority: 46 U.S.C. 2113, 3306, 4104, 4302; Pub. L. 103–206; 107 Stat. 2439; E.O. 12234; 45 FR 58801, 3 CFR, 1980 Comp., p. 277; Department of Homeland Security Delegation No. 0170.1.

■ 4. In § 24.05–1(a), Table 24.05–1(a) is revised to read as follows:

§ 24.05–1 Vessels subject to the requirements of this subchapter.

(a) * * *

TABLE 24.05–1(a)

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels. [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(1) Motor, all vessels except seagoing motor vessels ≥300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew.	All vessels >15 gross tons carrying freight-for-hire, except those covered by columns 2 and 3. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 24.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels. [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(2) Motor, seagoing motor vessels ≥300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All ferries <100 gross tons carrying more than 6 passengers and all ferries ≥100 gross tons that carry at least 1 passenger. (iii) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels, including recreational vessels, not engaged in trade. This does not include vessels covered by columns 2 and 3, and vessels engaged in the fishing industry.	All vessels not covered by columns 2, 3, 4, 6, and 7.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(3) Non-self-propelled vessels <100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7]	All manned barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by column 3.	None	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1 11 12]

TABLE 24.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels. [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(E) Carry more than 12 passengers on an international voyage. (F) Carry more than 6 passengers and are ferries.				
(4) Non-self-propelled vessels ≥100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(iii) All vessels that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] (E) Carry more than 12 passengers on an international voyage. (F) Carry at least 1 passenger and are ferries.	All seagoing barges except a seagoing barge that is covered by column 2 or 3, or that is unmanned for the purposes of operating or navigating the barge, and that carries neither a hazardous material as cargo nor a flammable or combustible liquid, including oil, in bulk quantities of 250 barrels or more.	All barges carrying passengers or passengers-for-hire except those covered by columns 3 and 6.	All seagoing barges engaged in oceanographic research.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1 11 12]
(5) Sail [13] vessels ≤700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that—	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 24.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels. [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vehicles not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels, not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(6) Sail.[13] vessels >700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying passengers or passengers-for-hire, except recreational vessels.[7] (ii) All ferries that carry at least 1 passenger.	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	None	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(7) Steam, vessels ≤19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or	All tugboats and towboats. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 24.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels. [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vessels not engaged in trade (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				

TABLE 24.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels. [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(8) Steam, vessels >19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries.	All vessels not covered by columns 2, 3, 6, and 7.	None	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 24.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels. [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(iv) These regulations do not apply to— (A) Recreational vehicles not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				

Key to symbols used in this table: ≤ means less than or equal to; > means greater than; < means less than; and ≥ means greater than or equal to.

Footnotes:

[1] Where length is used in this table, it means the length measured from end to end over the deck, excluding sheer. This expression means a straight line measurement of the overall length from the foremost part of the vessel to the aftermost part of the vessel, measured parallel to the centerline.

[2] Subchapters E (Load Lines), F (Marine Engineering), J (Electrical Engineering), N (Dangerous Cargoes), S (Subdivision and Stability), and W (Lifesaving Appliances and Arrangements) of this chapter may also be applicable under certain conditions. The provisions of 49 CFR parts 171 through 179 apply whenever packaged hazardous materials are on board vessels (including motorboats), except when specifically exempted by law.

[3] Public nautical schoolships, other than vessels of the Navy and Coast Guard, must meet the requirements of part 167 of subchapter R (Nautical Schools) of this chapter, Civilian nautical schoolships, as defined by 46 U.S.C. 1331, must meet the requirements of subchapter H (Passenger Vessels) and part 168 of subchapter R (Nautical Schools) of this chapter.

[4] Subchapter H (Passenger Vessels) of this chapter covers only those vessels of 100 gross tons or more, subchapter T (Small Passenger Vessels) of this chapter covers only those vessels of less than 100 gross tons, and subchapter K (Small Passenger Vessels) of this chapter covers only those vessels less than 100 gross tons carrying more than 150 passengers or overnight accommodations for more than 49 passengers.

[5] Vessels covered by subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter, where the principal purpose or use of the vessel is not for the carriage of liquid cargo, may be granted a permit to carry a limited amount of flammable or combustible liquid cargo in bulk. The portion of the vessel used for the carriage of the flammable or combustible liquid cargo must meet the requirements of subchapter D (Tank Vessels) in addition to the requirements of subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter.

[6] Any vessel on an international voyage is subject to the requirements of the International Convention for Safety of Life at Sea, 1974 (SOLAS).

[7] The terms ''passenger(s)'' and ''passenger(s)-for-hire'' are as defined in 46 U.S.C. 2101(21)(21a). On oceanographic vessels, scientific personnel onboard shall not be deemed to be passengers nor seamen, but for calculations of lifesaving equipment, etc., must be counted as persons.

[8] Boilers and machinery are subject to examination on vessels over 40 feet in length.

[9] Under 46 U.S.C. 441 an oceanographic research vessel ''* * * being employed exclusively in instruction in oceanography or limnology, or both, or exclusively in oceanographic research, * * *. Under 46 U.S.C. 443, ''an oceanographic research vessel shall not be deemed to be engaged in trade or commerce.'' If or when an oceanographic vessel engages in trade or commerce, such vessel cannot operate under its certificate of inspection as an oceanographic vessel, but shall be inspected and certified for the service in which engaged, and the scientific personnel aboard then become persons employed in the business of the vessel.

[10] Bulk dangerous cargoes are cargoes specified in table 151.01–10(b); in table 1 of part 153, and in table 4 of part 154 of this chapter.

[11] For manned tankbarges, see § 151.01–10(c) of this chapter.

[12] See § 151.01–15, 153.900(d), or 154.30 of this chapter as appropriate.

[13] Sail vessel means a vessel with no auxiliary machinery on board. If the vessel has auxiliary machinery, refer to motor vessels.

PART 30—GENERAL PROVISIONS

■ 5. The authority citation for part 30 continues to read as follows:

Authority: 46 U.S.C. 2103, 3306, 3703; Pub. L. 103–206, 107 Stat. 2439; 49 U.S.C. 5103, 5106; Department of Homeland Security Delegation No. 0170.1; Section 30.01–2 also issued under the authority of 44 U.S.C. 3507; Section 30.01–05 also issued under the authority of Sec. 4109, Pub. L. 101–380, 104 Stat. 515.

■ 6. In § 30.01–5, Table 30.01–5(d) is revised to read as follows:

§ 30.01–5 Application of regulations—TB/ALL.

* * * * *

(d) * * *

TABLE 30.01–5(d)

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Ocean-ographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(1) Motor, all vessels except seagoing motor vessels ≥300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew.	All vessels >15 gross tons carrying freight-for-hire, except those covered by columns 2 and 3. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 30.01–5(d)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Ocean-ographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(2) Motor, seagoing motor vessels ≥300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All ferries <100 gross tons carrying more than 6 passengers and all ferries ≥100 gross tons that carry at least 1 passenger. (iii) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels, including recreational vessels, not engaged in trade. This does not include vessels covered by columns 2 and 3, and vessels engaged in the fishing industry.	All vessels not covered by columns 2, 3, 4, 6, and 7.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(3) Non-self-propelled vessels <100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or. (D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7]	All manned barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by column 3.	None	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151 [1 11 12]

TABLE 30.01–5(d)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Ocean-ographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(E) Carry more than 12 passengers on an international voyage. (F) Carry more than 6 passengers and are ferries.				
(4) Non-self-propelled vessels ≥100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(iii) All vessels that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] (E) Carry more than 12 passengers on an international voyage. (F) Carry at least 1 passenger and are ferries.	All seagoing barges except a seagoing barge that is covered by column 2 or 3, or that is unmanned for the purposes of operating or navigating the barge, and that carries neither a hazardous material as cargo nor a flammable or combustible liquid, including oil, in bulk quantities of 250 barrels or more	All barges carrying passengers or passengers-for-hire except those covered by columns 3 and 6	All seagoing barges engaged in ocean-ographic research	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151 [1 11 12]
(5) Sail [13] vessels ≤700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 30.01–5(d)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Ocean-ographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessel.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vehicles not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels, not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(6) Sail [13] vessels >700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying passengers or passengers-for-hire, except recreational vessels.[7] (ii) All ferries that carry at least 1 passenger.	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	None	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(7) Steam, vessels ≤19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or	All tugboats and towboats. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 30.01–5(d)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Ocean-ographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(8) Steam, vessels >19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that—	All vessels not covered by columns 2, 3, 6, and 7.	None	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 30.01–5(d)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Ocean-ographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vehicles not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel[6] in addition to the crew, as restricted by the definition of passenger.[7]				

Key to symbols used in this table: ≤ means less than or equal to; > means greater than; < means less than; and ≥ means greater than or equal to.
Footnotes:

[1] Where length is used in this table, it means the length measured from end to end over the deck, excluding sheer. This expression means a straight line measurement of the overall length from the foremost part of the vessel to the aftermost part of the vessel, measured parallel to the centerline.

[2] Subchapters E (Load Lines), F (Marine Engineering), J (Electrical Engineering), N (Dangerous Cargoes), S (Subdivision and Stability), and W (Lifesaving Appliances and Arrangements) of this chapter may also be applicable under certain conditions. The provisions of 49 CFR parts 171 through 179 apply whenever packaged hazardous materials are on board vessels (including motorboats), except when specifically exempted by law.

[3] Public nautical schoolships, other than vessels of the Navy and Coast Guard, must meet the requirements of part 167 of subchapter R (Nautical Schools) of this chapter, Civilian nautical schoolships, as defined by 46 U.S.C. 1331, must meet the requirements of subchapter H (Passenger Vessels) and part 168 of subchapter R (Nautical Schools) of this chapter.

[4] Subchapter H (Passenger Vessels) of this chapter covers only those vessels of 100 gross tons or more, subchapter T (Small Passenger Vessels) of this chapter covers only those vessels of less than 100 gross tons, and subchapter K (Small Passenger Vessels) of this chapter covers only those vessels less than 100 gross tons carrying more than 150 passengers or overnight accommodations for more than 49 passengers.

[5] Vessels covered by subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter, where the principal purpose or use of the vessel is not for the carriage of liquid cargo, may be granted a permit to carry a limited amount of flammable or combustible liquid cargo in bulk. The portion of the vessel used for the carriage of the flammable or combustible liquid cargo must meet the requirements of subchapter D (Tank Vessels) in addition to the requirements of subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter.

[6] Any vessel on an international voyage is subject to the requirements of the International Convention for Safety of Life at Sea, 1974 (SOLAS).

[7] The terms ''passenger(s)'' and ''passenger(s)-for-hire'' are as defined in 46 U.S.C. 2101(21)(21a). On oceanographic vessels, scientific personnel onboard shall not be deemed to be passengers nor seamen, but for calculations of lifesaving equipment, etc., must be counted as persons.

[8] Boilers and machinery are subject to examination on vessels over 40 feet in length.

[9] Under 46 U.S.C. 441 an oceanographic research vessel ''* * * being employed exclusively in instruction in oceanography or limnology, or both, or exclusively in oceanographic research, * * *. Under 46 U.S.C. 443, ''an oceanographic research vessel shall not be deemed to be engaged in trade or commerce.'' If or when an oceanographic vessel engages in trade or commerce, such vessel cannot operate under its certificate of inspection as an oceanographic vessel, but shall be inspected and certified for the service in which engaged, and the scientific personnel aboard then become persons employed in the business of the vessel.

[10] Bulk dangerous cargoes are cargoes specified in table 151.01–10(b); in table 1 of part 153, and in table 4 of part 154 of this chapter.

[11] For manned tankbarges, see § 151.01–10(c) of this chapter.

[12] See § 151.01–15, 153.900(d), or 154.30 of this chapter as appropriate.

[13] Sail vessel means a vessel with no auxiliary machinery on board. If the vessel has auxiliary machinery, refer to motor vessels.

* * * * *

PART 70—GENERAL PROVISIONS

■ 7. The authority citation for part 70 continues to read as follows:

Authority: 46 U.S.C. 3306, 3703; Pub. L. 103–206, 107 Stat. 2439; 49 U.S.C. 5103, 5106; E.O. 12234, 45 FR 58801, 3 CFR, 1980 Comp., p. 277; Department of Homeland Security Delegation No. 0170.1; Section 70.01–15 also issued under the authority of 44 U.S.C. 3507.

■ 8. In § 70.05–1, Table 70.05–1(a) is revised to read as follows:

§ 70.05–1 United States flag vessels subject to the requirements of this subchapter.

(a) * * *

TABLE 70.05–1(a)

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Ocean-ographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(1) Motor, all vessels except seagoing motor vessels ≥300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or	All vessels >15 gross tons carrying freight-for-hire, except those covered by columns 2 and 3. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 70.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Ocean-ographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(2) Motor, seagoing motor vessels ≥300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All ferries <100 gross tons carrying more than 6 passengers and all ferries ≥100 gross tons that carry at least 1 passenger. (iii) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew.	All vessels, including recreational vessels, not engaged in trade. This does not include vessels covered by columns 2 and 3, and vessels engaged in the fishing industry.	All vessels not covered by columns 2, 3, 4, 6, and 7.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 70.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Ocean-ographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(C) Fishing vessels not engaged in ocean or coastwise service may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(3) Non-self-propelled vessels <100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] (E) Carry more than 12 passengers on an international voyage. (F) Carry more than 6 passengers and are ferries.	All manned barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by column 3.	None	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1 11 12]
(4) Non-self-propelled vessels >100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(iii) All vessels that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] (E) Carry more than 12 passengers on an international voyage. (F) Carry at least 1 passenger and are ferries.	All seagoing barges except a seagoing barge that is covered by column 2 or 3, or that is unmanned for the purposes of operating or navigating the barge, and that carries neither a hazardous material as cargo nor a flammable or combustible liquid, including oil, in bulk quantities of 250 barrels or more.	All barges carrying passengers or passengers-for-hire except those covered by columns 3 and 6.	All seagoing barges engaged in oceanographic research.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1 11 12]

TABLE 70.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Ocean-ographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(5) Sail [13] vessels ≤700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vehicles not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew.	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 70.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Ocean-ographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(C) Fishing vessels, not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(6) Sail [13] vessels >700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying passengers or passengers-for-hire, except recreational vessels.[7] (ii) All ferries that carry at least 1 passenger.	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	None	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(7) Steam, vessels ≤19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or	All tugboats and towboats. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 70.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Ocean-ographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(8) Steam, vessels >19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or	All vessels not covered by columns 2, 3, 6, and 7.	None	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 70.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Ocean-ographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vehicles not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				

Key to symbols used in this table: ≤ means less than or equal to; > means greater than; < means less than; and ≥ means greater than or equal to.

Footnotes:

[1] Where length is used in this table, it means the length measured from end to end over the deck, excluding sheer. This expression means a straight line measurement of the overall length from the foremost part of the vessel to the aftermost part of the vessel, measured parallel to the centerline.

[2] Subchapters E (Load Lines), F (Marine Engineering), J (Electrical Engineering), N (Dangerous Cargoes), S (Subdivision and Stability), and W (Lifesaving Appliances and Arrangements) of this chapter may also be applicable under certain conditions. The provisions of 49 CFR parts 171 through 179 apply whenever packaged hazardous materials are on board vessels (including motorboats), except when specifically exempted by law.

[3] Public nautical schoolships, other than vessels of the Navy and Coast Guard, must meet the requirements of part 167 of subchapter R (Nautical Schools) of this chapter, Civilian nautical schoolships, as defined by 46 U.S.C. 1331, must meet the requirements of subchapter H (Passenger Vessels) and part 168 of subchapter R (Nautical Schools) of this chapter.

[4] Subchapter H (Passenger Vessels) of this chapter covers only those vessels of 100 gross tons or more, subchapter T (Small Passenger Vessels) of this chapter covers only those vessels of less than 100 gross tons, and subchapter K (Small Passenger Vessels) of this chapter covers only those vessels less than 100 gross tons carrying more than 150 passengers or overnight accommodations for more than 49 passengers.

[5] Vessels covered by subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter, where the principal purpose or use of the vessel is not for the carriage of liquid cargo, may be granted a permit to carry a limited amount of flammable or combustible liquid cargo in bulk. The portion of the vessel used for the carriage of the flammable or combustible liquid cargo must meet the requirements of subchapter D (Tank Vessels) in addition to the requirements of subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter.

[6] Any vessel on an international voyage is subject to the requirements of the International Convention for Safety of Life at Sea, 1974 (SOLAS).

[7] The terms ''passenger(s)'' and ''passenger(s)-for-hire'' are as defined in 46 U.S.C. 2101(21)(21a). On oceanographic vessels, scientific personnel onboard shall not be deemed to be passengers nor seamen, but for calculations of lifesaving equipment, etc., must be counted as persons.

[8] Boilers and machinery are subject to examination on vessels over 40 feet in length.

[9] Under 46 U.S.C. 441 an oceanographic research vessel ''* * * being employed exclusively in instruction in oceanography or limnology, or both, or exclusively in oceanographic research, * * *. Under 46 U.S.C. 443, ''an oceanographic research vessel shall not be deemed to be engaged in trade or commerce.'' If or when an oceanographic vessel engages in trade or commerce, such vessel cannot operate under its certificate of inspection as an oceanographic vessel, but shall be inspected and certified for the service in which engaged, and the scientific personnel aboard then become persons employed in the business of the vessel.

[10] Bulk dangerous cargoes are cargoes specified in table 151.01–10(b); in table 1 of part 153, and in table 4 of part 154 of this chapter.

[11] For manned tankbarges, see § 151.01–10(c) of this chapter.

[12] See § 151.01–15, 153.900(d), or 154.30 of this chapter as appropriate.

[13] Sail vessel means a vessel with no auxiliary machinery on board. If the vessel has auxiliary machinery, refer to motor vessels.

* * * * *

PART 90—GENERAL PROVISIONS

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

Authority: 46 U.S.C. 3306, 3703; Pub. L. 103–206, 107 Stat. 2439; 49 U.S.C. 5103, 5106; E.O. 12234, 45 FR 58801, 3 CFR, 1980 Comp., p. 277; Department of Homeland Security Delegation No. 0170.1.

■ 10. In § 90.05–1, Table 90.05–1(a) is revised to read as follows:

§ 90.05–1 Vessels subject to requirements of this subchapter.

(a) * * *

TABLE 90.05–1(a)

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(1) Motor, all vessels except seagoing motor vessels >300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels >100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vessels not engaged in trade.	All vessels >15 gross tons carrying freight-for-hire, except those covered by columns 2 and 3. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 90.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(2) Motor, seagoing motor vessels >300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All ferries <100 gross tons carrying more than 6 passengers and all ferries ≥100 gross tons that carry at least 1 passenger. (iii) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels, including recreational vessels, not engaged in trade. This does not include vessels covered by columns 2 and 3, and vessels engaged in the fishing industry.	All vessels not covered by columns 2, 3, 4, 6, and 7.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(3) Non-self-propelled vessels <100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or	All manned barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by column 3.	None	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1 11 12]

TABLE 90.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] (E) Carry more than 12 passengers on an international voyage. (F) Carry more than 6 passengers and are ferries.				
(4) Non-self-propelled vessels ≥100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(iii) All vessels that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] (E) Carry more than 12 passengers on an international voyage. (F) Carry at least 1 passenger and are ferries.	All seagoing barges except a seagoing barge that is covered by column 2 or 3, or that is unmanned for the purposes of operating or navigating the barge, and that carries neither a hazardous material as cargo nor a flammable or combustible liquid, including oil, in bulk quantities of 250 barrels or more.	All barges carrying passengers or passengers-for-hire except those covered by columns 3 and 6.	All seagoing barges engaged in oceanographic research.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1 11 12]
(5) Sail [13] vessels ≤700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries.	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 90.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vehicles not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels, not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(6) Sail [13] vessels >700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying passengers or passengers-for-hire, except recreational vessels.[7] (ii) All ferries that carry at least 1 passenger.	All vessels carrying dangerous cargoes, when required by 46 CFR part 9.	None	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(7) Steam, vessels ≤19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or	All tugboats and towboats. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 90.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				

TABLE 90.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(8) Steam, vessels >19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vehicles not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew.	All vessels not covered by columns 2, 3, 6, and 7.	None.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 90.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				

Key to symbols used in this table: ≤ means less than or equal to; > means greater than; < means less than; and ≥ means greater than or equal to.

Footnotes:

1 Where length is used in this table, it means the length measured from end to end over the deck, excluding sheer. This expression means a straight line measurement of the overall length from the foremost part of the vessel to the aftermost part of the vessel, measured parallel to the centerline.

2 Subchapters E (Load Lines), F (Marine Engineering), J (Electrical Engineering), N (Dangerous Cargoes), S (Subdivision and Stability), and W (Lifesaving Appliances and Arrangements) of this chapter may also be applicable under certain conditions. The provisions of 49 CFR parts 171 through 179 apply whenever packaged hazardous materials are on board vessels (including motorboats), except when specifically exempted by law.

3 Public nautical schoolships, other than vessels of the Navy and Coast Guard, must meet the requirements of part 167 of subchapter R (Nautical Schools) of this chapter, Civilian nautical schoolships, as defined by 46 U.S.C. 1331, must meet the requirements of subchapter H (Passenger Vessels) and part 168 of subchapter R (Nautical Schools) of this chapter.

4 Subchapter H (Passenger Vessels) of this chapter covers only those vessels of 100 gross tons or more, subchapter T (Small Passenger Vessels) of this chapter covers only those vessels of less than 100 gross tons, and subchapter K (Small Passenger Vessels) of this chapter covers only those vessels less than 100 gross tons carrying more than 150 passengers or overnight accommodations for more than 49 passengers.

5 Vessels covered by subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter, where the principal purpose or use of the vessel is not for the carriage of liquid cargo, may be granted a permit to carry a limited amount of flammable or combustible liquid cargo in bulk. The portion of the vessel used for the carriage of the flammable or combustible liquid cargo must meet the requirements of subchapter D (Tank Vessels) in addition to the requirements of subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter.

6 Any vessel on an international voyage is subject to the requirements of the International Convention for Safety of Life at Sea, 1974 (SOLAS).

7 The terms ''passenger(s)'' and ''passenger(s)-for-hire'' are as defined in 46 U.S.C. 2101(21)(21a). On oceanographic vessels, scientific personnel onboard shall not be deemed to be passengers nor seamen, but for calculations of lifesaving equipment, etc., must be counted as persons.

8 Boilers and machinery are subject to examination on vessels over 40 feet in length.

9 Under 46 U.S.C. 441 an oceanographic research vessel ''* * * being employed exclusively in instruction in oceanography or limnology, or both, or exclusively in oceanographic research, * * *. Under 46 U.S.C. 443, ''an oceanographic research vessel shall not be deemed to be engaged in trade or commerce.'' If or when an oceanographic vessel engages in trade or commerce, such vessel cannot operate under its certificate of inspection as an oceanographic vessel, but shall be inspected and certified for the service in which engaged, and the scientific personnel aboard then become persons employed in the business of the vessel.

10 Bulk dangerous cargoes are cargoes specified in table 151.01–10(b); in table 1 of part 153, and in table 4 of part 154 of this chapter.

11 For manned tankbarges, see § 151.01–10(c) of this chapter.

12 See § 151.01–15, 153.900(d), or 154.30 of this chapter as appropriate.

13 Sail vessel means a vessel with no auxiliary machinery on board. If the vessel has auxiliary machinery, refer to motor vessels.

* * * * *

■ 11. In § 90.05–25, paragraph (a) is revised to read as follows:

§ 90.05–25 Seagoing barge.

(a) Each seagoing barge, as defined in 46 CFR 90.10–36, is subject to inspection and certification; except that a seagoing barge is exempt from those requirements if it is unmanned for the purposes of operating or navigating the barge, and carries neither a hazardous material as cargo nor a flammable or combustible liquid, including oil, in bulk quantities of 250 barrels or more.

* * * * *

PART 91—INSPECTION AND CERTIFICATION

■ 12. The authority citation for part 91 continues to read as follows:

Authority: 33 U.S.C. 1321(j); 46 U.S.C. 3205, 3306, 3307; 46 U.S.C. Chapter 701; Executive Order 12234; 45 FR 58801; 3 CFR, 1980 Comp., p. 277; Executive Order 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; Department of Homeland Security Delegation No. 0170.1.

■ 13. In § 91.01–10, paragraph (c) is revised to read as follows:

§ 91.01–10 Period of validity for a Certificate of Inspection.

* * * * *

(c) The master or owner of a seagoing barge for which inspection and certification is required by 46 CFR 90.05–25(a), or the master or owner's agent, may apply for a certificate of inspection that is valid for a specific period less than 5 years, or for a specific voyage. The certificate will describe the conditions under which it is issued, and will be endorsed as applying to an unmanned seagoing barge. Paragraph (c) of this section applies if the seagoing barge–

(1) Makes a voyage beyond the Boundary Line for the sole purpose of changing employment; or

(2) Makes a voyage beyond the Boundary Line only infrequently and after doing so returns to its port of departure.

PART 188—GENERAL PROVISIONS

■ 14. The authority citation for part 188 continues to read as follows:

Authority: 46 U.S.C. 2113, 3306; Pub. L 103–206, 107 Stat. 2439; 49 U.S.C. 5103, 5106; E.O. 12234, 45 FR 58801, 3 CFR, 1980 Comp., p. 277; Department of Homeland Security Delegation No. 0170.1.

■ 15. In § 188.05–1, Table 188.05–1(a), is revised to read as follows:

§ 188.05–1 Vessels subject to requirements of this subchapter.

(a) * * *

TABLE 188.05–1(a)

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(1) Motor, all vessels except seagoing motor vessels ≥300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew.	All vessels >15 gross tons carrying freight-for-hire, except those covered by columns 2 and 3. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 188.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(2) Motor, seagoing motor vessels ≥300 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All ferries <100 gross tons carrying more than 6 passengers and all ferries ≥100 gross tons that carry at least 1 passenger. (iii) These regulations do not apply to—(A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]	All vessels, including recreational vessels, not engaged in trade. This does not include vessels covered by columns 2 and 3, and vessels engaged in the fishing industry.	All vessels not covered by columns 2, 3, 4, 6, and 7.	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(3) Non-self-propelled vessels <100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels that—(A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7]	All manned barges except those covered by columns 2 and 3.	All barges carrying passengers or passengers-for-hire except those covered by column 3.	None	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1 11 12]

TABLE 188.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(E) Carry more than 12 passengers on an international voyage. (F) Carry more than 6 passengers and are ferries.				
(4) Non-self-propelled vessels ≥100 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(iii) All vessels that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and is a submersible vessel.[7] (E) Carry more than 12 passengers on an international voyage. (F) Carry at least 1 passenger and are ferries.	All seagoing barges except a seagoing barge that is covered by column 2 or 3, or that is unmanned for the purposes of operating or navigating the barge, and that carries neither a hazardous material as cargo nor a flammable or combustible liquid, including oil, in bulk quantities of 250 barrels or more.	All barges carrying passengers or passengers-for-hire except those covered by columns 3 and 6.	All seagoing barges engaged in oceanographic research.	All tank barges carrying cargoes listed in Table 151.05 of this chapter or unlisted cargoes that would otherwise be subject to part 151.[1 11 12]
(5) Sail [13] vessels ≤700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 188.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vehicles not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels, not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				
(6) Sail [13] vessels >700 gross tons.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying passengers or passengers-for-hire, except recreational vessels.[7] (ii) All ferries that carry at least 1 passenger.	All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	None	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]
(7) Steam, vessels ≤19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or	All tugboats and towboats. All vessels carrying dangerous cargoes, when required by 46 CFR part 98.	All vessels not covered by columns 2, 3, 4, and 6.	None	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 188.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vessels not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew. (C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				

TABLE 188.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
(8) Steam, vessels >19.8 meters (65 feet) in length.	All vessels carrying combustible or flammable liquid cargo in bulk.[5]	(i) All vessels carrying more than 12 passengers on an international voyage, except recreational vessels not engaged in trade.[7] (ii) All vessels <100 gross tons that— (A) Carry more than 6 passengers-for-hire whether chartered or not, or (B) Carry more than 6 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry more than 6 passengers and are ferries. (iii) All vessels ≥100 gross tons that— (A) Carry more than 12 passengers-for-hire whether chartered or not, or (B) Carry more than 12 passengers when chartered with the crew provided, or (C) Carry more than 12 passengers when chartered with no crew provided, or (D) Carry at least 1 passenger-for-hire and are submersible vessels.[7] (E) Carry at least 1 passenger and are ferries. (iv) These regulations do not apply to— (A) Recreational vehicles not engaged in trade. (B) Documented cargo or tank vessels issued a permit to carry 16 or fewer persons in addition to the crew.	All vessels not covered by columns 2, 3, 6, and 7.	None	All vessels engaged in oceanographic research.	All vessels carrying cargoes in bulk that are listed in part 153, table 1, or part 154, table 4, or unlisted cargoes that would otherwise be subject to these parts.[12]

TABLE 188.05–1(a)—Continued

Method of propulsion, qualified by size or other limitation [1]	Vessels inspected and certificated under Subchapter D—Tank Vessels [2]	Vessels inspected and certificated under Subchapter H—Passenger Vessels [2 3 4 5] or Subchapter K or T—Small Passenger Vessels [2 3 4]	Vessels inspected and certificated under Subchapter I—Cargo and Miscellaneous Vessels [2 5]	Vessels subject to the provisions of Subchapter C—Uninspected Vessels [2 3 6 7 8]	Vessels subject to the provisions of Subchapter U—Oceanographic Vessels [2 3 6 7 9]	Vessels subject to the provisions of Subchapter O—Certain Bulk and Dangerous Cargoes [10]
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
		(C) Fishing vessels not engaged in ocean or coastwise service. Such vessels may carry persons on the legitimate business of the vessel [6] in addition to the crew, as restricted by the definition of passenger.[7]				

Key to symbols used in this table: ≤ means less than or equal to; > means greater than; < means less than; and ≥ means greater than or equal to.

[1] Where length is used in this table, it means the length measured from end to end over the deck, excluding sheer. This expression means a straight line measurement of the overall length from the foremost part of the vessel to the aftermost part of the vessel, measured parallel to the centerline.

[2] Subchapters E (Load Lines), F (Marine Engineering), J (Electrical Engineering), N (Dangerous Cargoes), S (Subdivision and Stability), and W (Lifesaving Appliances and Arrangements) of this chapter may also be applicable under certain conditions. The provisions of 49 CFR parts 171 through 179 apply whenever packaged hazardous materials are on board vessels (including motorboats), except when specifically exempted by law.

[3] Public nautical schoolships, other than vessels of the Navy and Coast Guard, must meet the requirements of part 167 of subchapter R (Nautical Schools) of this chapter, Civilian nautical schoolships, as defined by 46 U.S.C. 1331, must meet the requirements of subchapter H (Passenger Vessels) and part 168 of subchapter R (Nautical Schools) of this chapter.

[4] Subchapter H (Passenger Vessels) of this chapter covers only those vessels of 100 gross tons or more, subchapter T (Small Passenger Vessels) of this chapter covers only those vessels of less than 100 gross tons, and subchapter K (Small Passenger Vessels) of this chapter covers only those vessels less than 100 gross tons carrying more than 150 passengers or overnight accommodations for more than 49 passengers.

[5] Vessels covered by subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter, where the principal purpose or use of the vessel is not for the carriage of liquid cargo, may be granted a permit to carry a limited amount of flammable or combustible liquid cargo in bulk. The portion of the vessel used for the carriage of the flammable or combustible liquid cargo must meet the requirements of subchapter D (Tank Vessels) in addition to the requirements of subchapter H (Passenger Vessels) or I (Cargo and Miscellaneous Vessels) of this chapter.

[6] Any vessel on an international voyage is subject to the requirements of the International Convention for Safety of Life at Sea, 1974 (SOLAS).

[7] The terms ''passenger(s)'' and ''passenger(s)-for-hire'' are as defined in 46 U.S.C. 2101(21)(21a). On oceanographic vessels, scientific personnel onboard shall not be deemed to be passengers nor seamen, but for calculations of lifesaving equipment, etc., must be counted as persons.

[8] Boilers and machinery are subject to examination on vessels over 40 feet in length.

[9] Under 46 U.S.C. 441 an oceanographic research vessel ''* * * being employed exclusively in instruction in oceanography or limnology, or both, or exclusively in oceanographic research, * * *. Under 46 U.S.C. 443, ''an oceanographic research vessel shall not be deemed to be engaged in trade or commerce.'' If or when an oceanographic vessel engages in trade or commerce, such vessel cannot operate under its certificate of inspection as an oceanographic vessel, but shall be inspected and certified for the service in which engaged, and the scientific personnel aboard then become persons employed in the business of the vessel.

[10] Bulk dangerous cargoes are cargoes specified in table 151.01–10(b); in table 1 of part 153, and in table 4 of part 154 of this chapter.

[11] For manned tankbarges, see § 151.01–10(c) of this chapter.

[12] See § 151.01–15, 153.900(d), or 154.30 of this chapter as appropriate.

[13] Sail vessel means a vessel with no auxiliary machinery on board. If the vessel has auxiliary machinery, refer to motor vessels.

Dated: November 16, 2012.

J.G. Lantz,

Director of Commercial Regulations and Standards, U.S. Coast Guard.

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H.R. 3477/P.L. 112–219
To designate the facility of the United States Postal Service located at 133 Hare Road in Crosby, Texas, as the Army First Sergeant David McNerney Post Office Building. (Dec. 28, 2012; 126 Stat. 1595)

H.R. 3783/P.L. 112–220
Countering Iran in the Western Hemisphere Act of 2012 (Dec. 28, 2012; 126 Stat. 1596)

H.R. 3870/P.L. 112–221
To designate the facility of the United States Postal Service located at 6083 Highway 36 West in Rose Bud, Arkansas, as the "Nicky 'Nick' Daniel Bacon Post Office". (Dec. 28, 2012; 126 Stat. 1601)

H.R. 3912/P.L. 112–222
To designate the facility of the United States Postal Service located at 110 Mastic Road in Mastic Beach, New York, as the "Brigadier General Nathaniel Woodhull Post Office Building". (Dec. 28, 2012; 126 Stat. 1602)

H.R. 5738/P.L. 112–223
To designate the facility of the United States Postal Service located at 15285 Samohin Drive in Macomb, Michigan, as the "Lance Cpl. Anthony A. DiLisio Clinton-Macomb Carrier Annex". (Dec. 28, 2012; 126 Stat. 1603)

H.R. 5837/P.L. 112–224
To designate the facility of the United States Postal Service located at 26 East Genesee Street in Baldwinsville, New York, as the "Corporal Kyle Schneider Post Office Building". (Dec. 28, 2012; 126 Stat. 1604)

H.R. 5954/P.L. 112–225
To designate the facility of the United States Postal Service located at 320 7th Street in Ellwood City, Pennsylvania, as the "Sergeant Leslie H. Sabo, Jr. Post Office Building". (Dec. 28, 2012; 126 Stat. 1605)

H.R. 6116/P.L. 112–226
To amend the Revised Organic Act of the Virgin Islands to provide for direct review by the United States Supreme Court of decisions of the Virgin Islands Supreme Court, and for other purposes. (Dec. 28, 2012; 126 Stat. 1606)

H.R. 6223/P.L. 112–227
To amend section 1059(e) of the National Defense Authorization Act for Fiscal Year 2006 to clarify that a period of employment abroad by the Chief of Mission or United States Armed Forces as a translator, interpreter, or in a security-related position in an executive or managerial capacity is to be counted as a period of residence and physical presence in the United States for purposes of qualifying for naturalization, and for other purposes. (Dec. 28, 2012; 126 Stat. 1608)

H.J. Res. 122/P.L. 112–228
Establishing the date for the counting of the electoral votes for President and Vice President cast by the electors in December 2012. (Dec. 28, 2012; 126 Stat. 1610)

S. 1379/P.L. 112–229
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S. 2170/P.L. 112–230
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S. 3193/P.L. 112–232
Barona Band of Mission Indians Land Transfer Clarification Act of 2012 (Dec. 28, 2012; 126 Stat. 1621)

S. 3311/P.L. 112–233
To designate the United States courthouse located at 2601 2nd Avenue North, Billings, Montana, as the "James F. Battin United States Courthouse". (Dec. 28, 2012; 126 Stat. 1623)

S. 3315/P.L. 112–234
GAO Mandates Revision Act of 2012 (Dec. 28, 2012; 126 Stat. 1624)

S. 3564/P.L. 112–235
Public Interest Declassification Board Reauthorization Act of 2012 (Dec. 28, 2012; 126 Stat. 1626)

S. 3642/P.L. 112–236
Theft of Trade Secrets Clarification Act of 2012 (Dec. 28, 2012; 126 Stat. 1627)

S. 3687/P.L. 112–237
To amend the Federal Water Pollution Control Act to reauthorize the Lake Pontchartrain Basin Restoration Program, to designate certain Federal buildings, and for other purposes. (Dec. 28, 2012; 126 Stat. 1628)

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