or secure any swap that is not cleared through a derivatives clearing organization.

§ 4.32 [Removed and Reserved]

7. Section 4.32 is removed and reserved.

8. Section 4.33 is amended by

a. Revising paragraph (a)(6); and

b. Revising paragraph (b)(1), to read as follows:

§ 4.33 Recordkeeping.

* * * * *

(a) * * *

(6) Copies of each confirmation or acknowledgment of a commodity interest transaction, and each purchase and sale statement and each monthly statement received from a futures commission merchant or a retail foreign exchange dealer or a swap dealer.

* * * * *

(b) * * *

(1) An itemized daily record of each commodity interest transaction of the commodity trading advisor, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying physical, the futures commission merchant and/or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold (including, in the case of a retail forex transaction, offset), exercised, expired (including, in the case of a retail forex transaction, whether it was rolled forward), and the gain or loss realized; *Provided, however,* that if the trading advisor is a counterparty to a swap, it must comply with the swap data recordkeeping and reporting requirements of part 45 of this chapter.

* * * * *

9. Section 4.34 is amended by

a. Revising paragraph (g);

b. Revising paragraph (i)(2);

c. Revising paragraph (j)(3); and

d. Revising paragraphs (k)(1)(iii), (k)(2) introductory text and (k)(2)(i), to read as follows:

§ 4.34 General disclosures required.

* * * * *

(g) *Principal risk factors.* A discussion of the principal risk factors of this trading program. This discussion must include, without limitation, risks due to volatility, leverage, liquidity, and counterparty creditworthiness, as applicable to the trading program and the types of transactions and investment activity expected to be engaged in pursuant to such program (including retail forex and swap transactions, if any).

* * * * *

(i) * * *

(2) Where any fee is determined by reference to a base amount including, but not limited to, "net assets," "gross profits," "net profits," "net gains," "pips" or "bid-asked spread," the trading advisor must explain how such base amount will be calculated. Where any fee is based on the difference between bid and asked prices on retail forex or swap transactions, the trading advisor must explain how such fee will be calculated;

* * * * *

(j) * * *

(3) Included in the description of any such conflict must be any arrangement whereby the trading advisor or any principal thereof may benefit, directly or indirectly, from the maintenance of the client's commodity interest account with a futures commission merchant and/or retail foreign exchange dealer, and/or from the maintenance of the client's positions with a swap dealer or from the introduction of such account through an introducing broker (such as payment for order flow or soft dollar arrangements).

(k) * * *

(1) * * *

(iii) Any introducing broker through which the client will be required to introduce its account to the futures commission merchant and/or retail foreign exchange dealer and/or swap dealer.

(2) With respect to a futures commission merchant, retail foreign exchange dealer, swap dealer or introducing broker, an action will be considered material if:

(i) The action would be required to be disclosed in the notes to the futures commission merchant's, retail foreign exchange dealer's, swap dealer's or introducing broker's financial statements prepared pursuant to generally accepted accounting principles;

* * * * *

Issued in Washington, DC, on February 24, 2011, by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendices to Amendments to Commodity Pool Operator and Commodity Trading Advisor Regulations Resulting from the Dodd-Frank Act—Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Sommers, Chilton and O'Malia voted in the affirmative; no Commissioner voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the proposed rule that will amend certain provisions of Part 4 of the Commission's regulations regarding the operations and activities of commodity pool operators (CPOs) and commodity trading advisors (CTAs). The proposed amendments would ensure that CFTC regulations with regard to CPOs and CTAs reflect changes made to the Commodity Exchange Act by the Dodd-Frank Act. Consistent with the Dodd-Frank Act revisions to the definitions of CPOs and CTAs to include pools involved in swaps and advising on swaps, the proposed amendments will enhance current customer protections by increasing the transparency of swap activities by CPOs and CTAs to their pool participants and clients. The proposed rule would require that this information be included in the disclosure, reporting and recordkeeping scheme that currently exists for CPOs and CTAs under Part 4.

[FR Doc. 2011–4657 Filed 3–2–11; 8:45 am]

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DEPARTMENT OF JUSTICE

28 CFR Part 26

[Docket No. OJP (DOJ) 1540; AG Order No. 3255–2011]

RIN 1121–AA77

Office of the Attorney General; Certification Process for State Capital Counsel Systems

AGENCY: Department of Justice.

ACTION: Proposed rule.

SUMMARY: Section 2265 of title 28, United States Code, instructs the Attorney General to promulgate regulations to implement certification procedures for States seeking to qualify for the expedited Federal habeas corpus review procedures in capital cases under chapter 154 of title 28. The procedural benefits of chapter 154 are available to States that establish mechanisms for providing counsel to indigent capital defendants in State postconviction proceedings that satisfy certain statutory requirements. This proposed rule sets forth the required regulations for the certification procedure.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before June 1, 2011. Comments received by mail will be considered timely if they are

postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until Midnight Eastern Time at the end of that day.

ADDRESSES: Comments may be mailed to Regulations Docket Clerk, Office of Legal Policy, Department of Justice, 950 Pennsylvania Avenue, NW., Room 4234, Washington, DC 20530. To ensure proper handling, please reference OAG Docket No. 1540 on your correspondence. You may submit comments electronically or view an electronic version of this proposed rule at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Lisa Ellman, Office of Legal Policy, (202) 514–4601 (not a toll-free number).

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

You are not required to submit personal identifying information in order to comment on this rule. Nevertheless, if you want to submit personal identifying information (such as your name and address) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You also must locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *http://www.regulations.gov.*

Personal identifying information and confidential business information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. If you wish to inspect the agency's public docket file in person by appointment, please see the paragraph above entitled **FOR FURTHER INFORMATION CONTACT**.

Overview

Chapter 154 of title 28, United States Code, makes special procedures available to a State respondent in Federal habeas corpus proceedings involving review of State capital judgments, but only if the Attorney General has certified "that [the] State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265," and if "counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent." 28 U.S.C. 2261(b). Section 2265(a)(1) provides that, in order for a State to qualify for the special habeas procedures, the Attorney General must determine that "the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent [capital] prisoners" and that the State "provides standards of competency for the appointment of counsel in [such proceedings]."

Chapter 154 has been in place since the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Public Law 104–132, section 107, 110 Stat. 1214, 1221–26 (1996), but was amended by the USA PATRIOT Improvement and Reauthorization Act of 2005, Public Law 109–177, section 507, 120 Stat. 192, 250–51 (2006). Prior to the 2006 amendment, the determination of a State's eligibility for the special procedures was left to the Federal habeas courts. The 2006 amendment assigned responsibility for chapter 154 certifications to the Attorney General of the United States, subject to de novo review by the Court of Appeals for the District of Columbia Circuit.

Rulemaking History

Section 2265(b) directs the Attorney General to promulgate regulations to implement the certification procedure. To fulfill this mandate, the Department of Justice published a proposed rule in the **Federal Register** on June 6, 2007, that proposed adding a new subpart entitled "Certification Process for State Capital Counsel Systems" to 28 CFR part 26. 72 FR 31217. The comment period ended on August 6, 2007. The Department published a notice on August 9, 2007, reopening the comment period, 72 FR 44816, and the reopened comment period ended on September 24, 2007. The final rule establishing the chapter 154 certification procedure was published on December 11, 2008, 73 FR 75327, with an effective date of January 12, 2009.

In January 2009, the United States District Court for the Northern District of California enjoined the Department "from putting into effect the rule * * * without first providing an additional comment period of at least thirty days and publishing a response to any comments received during such period." *Habeas Corpus Resource Ctr.* v. *U.S. Dep't of Justice,* No. 08–2649, 2009 WL 185423, at *10 (Jan. 20, 2009) (preliminary injunction); *Habeas Corpus Resource Ctr.* v. *U.S. Dep't of Justice,* No. 08–2649, slip op. at 1 (Jan. 8, 2009) (temporary restraining order). On February 6, 2009, the Department solicited further public comment, with the comment period closing on April 6, 2009. 74 FR 6131.

As the Department reviewed the submitted comments, it considered further the statutory requirements governing the regulatory implementation of the chapter 154 certification procedures. The Attorney General determined that chapter 154 gave him greater discretion in making certification determinations than the December 11, 2008 regulations would have allowed. Therefore, the Department published a notice in the **Federal Register** on May 25, 2010, proposing to revoke the December 11, 2008 regulations by removing them from the Code of Federal Regulations pending the completion of a new rulemaking process, during which the Department would further consider what standards and procedures were appropriate. 75 FR 29217. The comment period closed on June 24, 2010. On November 23, 2010, the Department published a final rule removing the December 11, 2008 regulations. 75 FR 71353.

The rule proposed today is the result of the Attorney General's reconsideration of the appropriate standards and procedures for chapter 154 certification. Sections 26.20 and 26.21 of the proposed rule are, respectively, a general statement of purpose and a section defining certain terms appearing in chapter 154. These sections are unchanged from the December 11, 2008 final rule. Section 26.22 explains the requirements for certification under chapter 154, relating to appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings in capital cases. It is significantly different from the corresponding section in the December 11, 2008 regulations, particularly with respect to counsel

competency and compensation standards. Section 26.23 sets out the procedures for accepting, obtaining public comment on, and deciding State requests for chapter 154 certification. It is similar in substance to the corresponding section of the December 11, 2008 regulations, but in some respects simplified and updated. A section-by-section analysis of the new proposed rule follows.

Section-by-Section Analysis

Section 26.20

Section 26.20, which is unchanged from the December 11, 2008 regulations, explains the rule's purpose to implement the certification procedure for chapter 154.

Section 26.21

Section 26.21, which is also unchanged from the December 11, 2008 regulations, defines certain terms used in chapter 154 and the regulations.

Under 28 U.S.C. 2265(a), a certification request must be made by "an appropriate State official." Prior to the 2006 amendments to chapter 154, Federal courts entertaining habeas corpus applications by State prisoners under sentence of death would decide which set of habeas corpus procedures applied—chapter 153 or chapter 154 of title 28—and State attorneys general responsible for such litigation could request determinations that their States had satisfied the requirements for the applicability of chapter 154. The 2006 amendments to chapter 154 were not intended to disable the State attorneys general from their pre-existing role in this area and State attorneys general continue in most instances to be the officials with the capacity and motivation to seek chapter 154 certification for their States. *See* 73 FR at 75329–30. Section 26.21 of the rule accordingly provides that the appropriate official to seek chapter 154 certification is normally the State attorney general. In those few States, however, where the State attorney general does not have responsibilities relating to Federal habeas corpus litigation, the Chief Executive of the State will be considered the appropriate State official to make a submission on behalf of the State.

Section 26.21 defines "State postconviction proceedings" as "collateral proceedings in State court, regardless of whether the State conducts such proceedings after or concurrently with direct State review." Collateral review normally takes place following the completion of direct review of the judgment, but some States have special procedures for capital cases in which collateral proceedings and direct review may take place concurrently. Formerly separate provisions for the application of chapter 154 in States with "unitary review" procedures (concurrent collateral and direct review) were replaced by the 2006 amendments with provisions that permit chapter 154 certification for all States under uniform standards, regardless of their timing of collateral review vis-a-vis direct review. *Compare* 28 U.S.C. 2261(b), 2265 (2006) (as amended by the USA PATRIOT Improvement and Reauthorization Act of 2005), *with* 28 U.S.C. 2261(b), 2265 (2000) (as enacted by AEDPA); *see* 152 Cong. Rec. S1620 (daily ed. Mar. 2, 2006) (remarks of Sen. Kyl) (explaining that the current provisions simplify the chapter 154 qualification standards, "which obviates the need for separate standards for those States that make direct and collateral review into separate vehicles and those States with unitary procedures").

The definition of "State postconviction proceedings" in the rule reflects the underlying objective of chapter 154 to provide expedited Federal habeas corpus review in capital cases arising in States that have gone beyond the constitutional requirement of appointing counsel for indigents at trial and on appeal by extending the appointment of counsel to indigent capital defendants in State collateral proceedings. *See* 73 FR at 75332–33, 75337 (reviewing relevant legislative and regulatory history). The provisions of chapter 154, as well as its legislative history, reflect the understanding of "postconviction proceedings" as not encompassing all proceedings that occur after conviction (e.g., sentencing proceedings, direct review), but rather as referring to collateral proceedings. *See* 28 U.S.C. 2261(e) (providing that ineffectiveness or incompetence of counsel during postconviction proceedings in a capital case cannot be a ground for relief in a Federal habeas corpus proceeding); 28 U.S.C. 2263(a), (b)(2) (180-day time limit for Federal habeas filing under chapter 154 starts to run "after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review" subject to tolling "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition"); 152 Cong. Rec. S1620, 1624–25 (daily ed. Mar. 2, 2006) (remarks of Sen. Kyl) (explaining that chapter 154 provides incentives for States to provide counsel in State postconviction proceedings, equated to collateral proceedings); 151 Cong. Rec. E2639–40 (daily ed. Dec. 22, 2005) (extension of remarks of Rep. Flake) (same understanding); *see also, e.g., Murray* v. *Giarratano,* 492 U.S. 1 (1989) (equating postconviction and collateral proceedings).

Section 26.22

Section 26.22 sets out the requirements for certification that a State must meet to qualify for the application of chapter 154. These are the requirements in 28 U.S.C. 2261(c)–(d) and 2265(a)(1).

Paragraph (a) of § 26.22—Appointment of Counsel

Paragraph (a) of § 26.22 sets out the requirements of chapter 154 concerning appointment of counsel that appear in 28 U.S.C. 2261(c)–(d).

Paragraph (b) of § 26.22—Competent Counsel

Paragraph (b) of § 26.22 explains how States may satisfy the requirement to provide for appointment of "competent counsel" and to provide "standards of competency" for such appointments. 28 U.S.C. 2265(a)(1)(A), (C).

The corresponding portion of the December 11, 2008 regulations construed the reference to appointment of "competent counsel" in section 2265(a)(1)(A) as a cross-reference to counsel meeting the competency standards provided by the State pursuant to section 2265(a)(1)(C). It accordingly treated the definition of such standards as a matter of State discretion, not subject to further review by the Attorney General. *See* 73 FR at 75331. However, these provisions may also reasonably be construed as permitting the Attorney General to require a threshold of minimum counsel competency, while recognizing substantial State discretion in setting counsel competency standards. *See generally* Memorandum for the Attorney General from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: The Scope of the Attorney General's Authority in Certifying Whether a State Has Satisfied the Requirements for Appointment of Competent Post-Conviction Counsel in Chapter 154 of Title 28, United States Code* (Dec. 16, 2009), *available at http://www.justice.gov/olc/.* The latter understanding is supported by cases interpreting chapter 154, *see, e.g., Spears* v. *Stewart,* 283 F.3d 992, 1013 (9th Cir. 2002) (recognizing that "Congress * * * intended the states to have substantial discretion to determine the substance of the competency

standards" under chapter 154 while still reviewing the adequacy of such standards), and by the original Powell Committee proposal from which many features of chapter 154 ultimately derive, *see* 135 Cong. Rec. 24692, 24696 (Oct. 16, 1989). This understanding is adopted in § 26.22(b) of the proposed rule.

The specific minimum standards set forth in paragraph (b) are based on judgments by Congress in federal laws concerning adequate capital counsel competency standards and on judicial interpretation of the counsel competency requirements of chapter 154. Three broad options are provided for States to satisfy this requirement—an option involving an experience requirement derived from the standard for appointment of counsel in Federal court proceedings in capital cases (paragraph (b)(1)); an option involving qualification standards set in a manner consistent with relevant portions of the Innocence Protection Act (paragraph (b)(2)); and an option of assuring an appropriate level of proficiency in other ways, such as by requiring some combination of experience and training (paragraph (b)(3)).

Option 1: § 26.22(b)(1)—The Competency Standards for Federal Court Proceedings

As provided in paragraph (b)(1) of § 26.22, a State may satisfy chapter 154's requirement relating to counsel competency by requiring appointment of counsel "who have been admitted to the bar for at least five years and have at least three years of felony litigation experience." This is based on the standard for appointed counsel in capital case proceedings in Federal court. *See* 18 U.S.C. 3599(a)–(e). Because Congress has determined that such a counsel competency standard is adequate for capital cases in Federal court proceedings, including postconviction proceedings, *see id.* § 3599(a)(2), it will also be considered adequate for chapter 154 purposes when such cases are at the stage of State postconviction review.

The counsel competency standards for Federal court proceedings in capital cases under 18 U.S.C. 3599 do not require adherence to the five-year/three-year experience requirement in all cases, but provide that the court "for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant," with due consideration of the seriousness of the penalty (i.e., capital punishment) and the nature of the litigation. *Id.* § 3599(d). For example, a court might consider it appropriate to appoint an attorney who is a law professor with expertise in capital punishment law and training in capital postconviction litigation to represent a prisoner under sentence of death, even if the attorney has less than three years of felony litigation experience. The rule in paragraph (b)(1) accordingly does not require the imposition of a five-year/three-year minimum experience requirement in all cases, but allows States that generally impose such a requirement to permit the appointment of other counsel who would qualify for appointment under the standards of 18 U.S.C. 3599, i.e., those whose background, knowledge, or experience would otherwise enable them to properly represent prisoners under sentence of death considering the seriousness of the penalty and the nature of the litigation. This is reflected in the language in paragraph (b)(1) allowing appointment of counsel "who would otherwise qualify for appointment pursuant to the standards for Federal habeas corpus proceedings reviewing State capital cases under 18 U.S.C. 3599."

Option 2: § 26.22(b)(2)—The Innocence Protection Act Standards

Paragraph (b)(2) in § 26.22 sets forth a second option for States to satisfy the counsel competency requirements of chapter 154, specifically, by setting qualification standards for appointment of postconviction capital counsel in a manner consistent with the Innocence Protection Act (IPA), 42 U.S.C. 14163–14163e. The IPA directs the Attorney General to provide grants to States to create or improve "effective system[s] for providing competent legal representation" in capital cases, 42 U.S.C. 14163(c)(1), and provides a definition of "effective system" that is largely based on elements of the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. Feb. 2003) (ABA Guidelines), 42 U.S.C. 14163(e). The IPA specifies that such effective systems are to include appointment of capital counsel (i) by a public defender program, (ii) by an entity composed of individuals with demonstrated knowledge and expertise in capital cases (other than current prosecutors) that is established by statute or by the highest State court with criminal case jurisdiction, or (iii) by the court appointing qualified attorneys from a roster maintained by a State or regional selection committee or similar entity pursuant to a pre-existing statutory procedure. 42 U.S.C. 14163(e)(1).

Under the IPA requirements, the appointing authority or an appropriate designated entity must "establish qualifications for attorneys who may be appointed to represent indigents in capital cases." 42 U.S.C. 14163(e)(2)(A). The IPA does not prescribe the content of these qualifications but assumes that the specifications regarding the nature of the appointment or selection authority and the associated requirements for establishment of qualifications can be relied on to provide appropriate competency standards. Paragraph (b)(2) in § 26.22 follows this legislative judgment in relation to States' satisfaction of the counsel competency requirements of chapter 154. Thus, a State's capital counsel mechanism will be deemed adequate for purposes of chapter 154's counsel competency requirements if it provides for the appointment of counsel in State postconviction proceedings in capital cases in a manner consistent with 42 U.S.C. 14163(e)(1) and establishes standards of competency for such counsel in a manner consistent with 42 U.S.C. 14163(e)(2)(A).

Option 3: § 26.22(b)(3)—Other Standards Reasonably Assuring Proficiency

In enacting chapter 154, "Congress did not envision any specific competency standards but, rather, intended the states to have substantial discretion to determine the substance of the competency standards." *Spears,* 283 F.3d at 1013 (citing 177 Cong. Rec. S3191, S3220 (daily ed. Mar. 13, 1991)). The options described in paragraphs (b)(1) and (b)(2) in § 26.22 accordingly do not exhaust the means by which States may satisfy chapter 154's requirements concerning counsel competency. Indeed, Congress in formulating chapter 154 rejected a recommendation that States uniformly be required to satisfy the standards for Federal court proceedings in capital cases that currently appear in 18 U.S.C. 3599, *see* 73 FR at 75331, and in amending chapter 154 in 2006 Congress did not modify chapter 154 to require adherence by States to the IPA standards that had been enacted in 2004 but rather reenacted the more general language of chapter 154 relating to counsel competency.

Consequently, as provided in paragraph (b)(3) in § 26.22, the Attorney General will consider whether a State's counsel competency standards reasonably assure appointment of counsel with a level of proficiency appropriate for State postconviction litigation in capital cases, even if they do not meet the particular criteria set

forth in paragraph (b)(1) or (b)(2). As in the courts' consideration of the adequacy of State competency standards prior to the 2006 amendments to chapter 154, no definite formula can be prescribed for this review, and the Attorney General will assess such State mechanisms individually. Measures that will be deemed relevant include standards of experience, knowledge, skills, training, education, or combinations thereof that a State requires attorneys to meet in order to be eligible for appointment in State capital postconviction proceedings. *Cf.* 18 U.S.C. 3599(d) (allowing appointment of counsel whose background, knowledge, or experience would otherwise enable such counsel to properly represent the defendant); *Spears,* 283 F.3d at 1012–13 (finding that competency standards involving combination of experience, proficiency, and education were adequate under chapter 154); ABA Guidelines §§ 5.1.B.2, 8.1.B, pp. 35, 46 (recommending skill and training requirements for capital counsel). Also, the rule in paragraphs (b)(1) and (b)(2) of § 26.22 identifies particular approaches that will be considered adequate, specifically, those of the Federal capital counsel statute (18 U.S.C. 3599) and of the Innocence Protection Act (42 U.S.C. 14163(e)(1), (2)(A)). These approaches accordingly may serve as benchmarks, and States' adoption of competency requirements that are similar or that are likely to result in even higher levels of proficiency will weigh in favor of a finding of adequacy for purposes of chapter 154. As indicated in the prefatory language in paragraph (b) of § 26.22, State capital counsel mechanisms will be deemed adequate in relation to counsel competency if they meet or exceed the standards identified in the paragraph. States will not be penalized for going beyond the minimum required by the rule. Thus, for example, in relation to paragraph (b)(1), State competency standards will be considered sufficient if they require, e.g., five years of felony litigation experience rather than three, uniform satisfaction of the five-year/three-year experience requirement rather than allowing some exception as in 18 U.S.C. 3599(d), or training requirements for appointment in addition to the specified experience requirement.

The rule does not require that all counsel in a State qualify under the same standard. Alternative standards may be used so long as the State mechanism requires that all counsel satisfy some standard qualifying under paragraph (b). *Cf.* 18 U.S.C. 3599(d) (allowing exceptions to categorical experience requirement); *Spears,* 283 F.3d at 1013 (finding that alternative standards are allowed under chapter 154). Hence, for example, a State system could pass muster by requiring that appointed counsel either satisfy an experience standard sufficient under paragraph (b)(1) or satisfy an alternative standard sufficient under paragraph (b)(3) involving more limited experience but an additional training requirement.

Paragraph (c) of § 26.22—Compensation of Counsel

Paragraph (c) of § 26.22 explains how a State may satisfy the requirement that it have established a mechanism for the compensation of appointed counsel. 28 U.S.C. 2265(a)(1)(A). The corresponding portion of the December 11, 2008 regulations assumed that levels of compensation for purposes of chapter 154 were a matter of State discretion, not subject to review by the Attorney General, because the statute refers simply to "compensation" and imposes no further requirement that the authorized compensation be "adequate" or "reasonable." *See* 73 FR at 75331–32. However, the broader statutory context is the requirement that the State establish a mechanism "for the appointment [and] compensation * * * of competent counsel." 28 U.S.C. 2265(a)(1)(A). This requirement reflects a determination by Congress that reliance on unpaid volunteers to represent indigent prisoners under sentence of death is insufficient, and a State mechanism affording inadequate compensation could similarly fall short in ensuring the availability of competent counsel for appointment. Hence, when a State relies on a compensation incentive to secure competent counsel, chapter 154 is reasonably construed to permit the Attorney General to review the adequacy of authorized compensation. This understanding is adopted in § 26.22(c) of the proposed rule.

Paragraph (c)(1) in § 26.22 describes a number of possible compensation standards that will be considered adequate for purposes of chapter 154, generally using as benchmarks the authorizations for compensation of capital counsel that have been deemed adequate in other Acts of Congress.

The first option, appearing in paragraph (c)(1)(A), is compensation comparable to that authorized by Congress for representation in Federal habeas corpus proceedings reviewing State capital cases. 18 U.S.C. 3599(g)(1). This level of compensation should similarly be adequate to ensure the availability of competent counsel for appointment in such cases at the stage of State postconviction review.

The second option, appearing in paragraph (c)(1)(B), is compensation comparable to that of retained counsel who meet competency standards sufficient under paragraph (b). The Innocence Protection Act and the ABA Guidelines similarly endorse reliance on market rates for legal representation to provide adequate compensation for appointed capital counsel. *See* 42 U.S.C. 14163(e)(2)(F)(ii)(II); ABA Guidelines § 9.1.B.3, p. 49. Compensation sufficient to induce competent attorneys to carry out such representation for hire should likewise be sufficient to attract competent attorneys to accept appointments for such representation.

The third option, appearing in paragraph (c)(1)(C), is compensation comparable to that of appointed counsel in State appellate or trial proceedings in capital cases. *Cf.* 18 U.S.C. 3599(g)(1) (authorization for compensation of capital counsel not differentiating between compensation at different stages of representation). The compensation afforded at the stages of trial and appeal must be sufficient to secure competent attorneys to provide representation because effective legal representation of indigents is constitutionally required at those stages. Comparable compensation should accordingly be sufficient for that purpose at the postconviction stage.

The fourth option, appearing in paragraph (c)(1)(D), is compensation comparable to that of attorneys representing the State in State postconviction proceedings in capital cases. This option also follows the Innocence Protection Act and the ABA Guidelines, which provide that capital counsel employed by defender organizations should be compensated on a salary scale commensurate with the salary scale of prosecutors in the jurisdiction. 42 U.S.C. 14163(e)(2)(F)(ii)(I); ABA Guidelines § 9.1.B.2, p. 49. The rule allows this approach for compensation of both public defenders and private counsel, but recognizes that private defense counsel may have to pay from their own pockets overhead expenses that publicly employed prosecutors do not bear. The rule accordingly specifies that, if paragraph (c)(1)(D) is relied on to justify the level of compensation authorized for private counsel, the compensation standard should take account of overhead costs (if any) that are not otherwise payable as reasonable litigation expenses. *Cf. Baker* v. *Corcoran,* 220 F.3d 276, 285–86 (4th Cir. 2000) (finding that compensation resulting in substantial losses to

appointed counsel was inadequate under chapter 154).

In comparing a State's compensation standards to the benchmarks identified in paragraph (c)(1), both hourly rates and overall limits on compensation will be taken into account. For example, under paragraph (c)(1)(C), suppose that State law authorizes the same hourly rate for compensation of appointed capital counsel at the appellate stage and in postconviction proceedings, but it specially imposes a low overall limit on compensable hours at the postconviction stage. The compensation authorized at the respective stages may then not be comparable in any realistic sense, and the objective of ensuring the availability of competent counsel for postconviction representation may not be realized, because counsel who accepted such representation would effectively be required to function as uncompensated volunteers to the extent they needed to work beyond the maximum number of compensable hours. This does not mean that State compensation provisions will be deemed inadequate if they specially prescribe presumptive limits on overall compensation at the postconviction stage, but comparability to the paragraph (c)(1) benchmarks may then depend on whether the State provides means for authorizing compensation beyond the presumptive maximum where necessary. *Cf. Spears,* 283 F.3d at 1015 (approving a presumptive 200-hour limit under chapter 154 where compensation was available for work beyond that limit if reasonable); *Mata* v. *Johnson,* 99 F.3d 1261, 1266 (5th Cir. 1996), *vacated in part on reh'g on other grounds,* 105 F.3d (5th Cir. 1997) (overall $7500 limit on compensation was not facially inadequate under chapter 154 and was not shown inadequate in the particular case).

As with the counsel competency standards of paragraph (b), the counsel compensation standards of paragraph (c)(1) provide only a floor that States are free to exceed, and not all counsel must be compensated in conformity with a single standard. Rather, a State may adopt alternative standards, each comparable to or exceeding some benchmark identified in paragraph (c)(1), and provide for compensation of different counsel or classes thereof in conformity with different standards. For example, a State might provide for representation of some indigent capital defendants in postconviction proceedings by appointed private counsel and some by public defender personnel, compensate the private counsel in conformity with paragraph (c)(1)(C), and compensate the public defender counsel in conformity with paragraph (c)(1)(D).

The rule recognizes that the compensation options set out in paragraph (c)(1) of § 26.22 are not necessarily the only means by which a State may provide competent counsel. State compensation provisions for capital counsel have been deemed adequate for purposes of chapter 154 and other Federal laws independent of any comparison to the benchmarks in paragraph (c)(1). *See* 42 U.S.C. 14163(e)(2)(F)(i) (State may compensate under qualifying statutory procedure predating the Innocence Protection Act); *Spears,* 283 F.3d at 1015 (State could compensate at "a rate of up to $100 an hour, a rate that neither Petitioner nor amici argue was unreasonable"). Also, a State may secure representation for indigent capital defendants in postconviction proceedings by means not dependent on any special financial incentive for accepting appointments, such as by providing salaried public defender personnel to carry out such assignments as part of their duties. Accordingly, under paragraph (c)(2) in § 26.22, capital counsel mechanisms involving compensation provisions that do not satisfy paragraph (c)(1) are approvable if they are otherwise reasonably designed to ensure the availability of competent counsel.

Paragraph (d) of § 26.22—Payment of Reasonable Litigation Expenses

Paragraph (d) of § 26.22 incorporates the requirement in 28 U.S.C. 2265(a)(1)(A) to provide for the payment of reasonable litigation expenses. An inflexible cap on reimbursable litigation expenses in capital postconviction proceedings could contravene this requirement by foreclosing the payment of costs incurred by counsel, even if determined by the court to be reasonably necessary. However, the requirement does not foreclose a presumptive limit if the State provides means for authorizing payment of litigation expenses beyond the limit where necessary. *Cf.* 18 U.S.C. 3599(f), (g)(2) (establishing presumptive $7500 limit on payment for litigation expenses in federal court proceedings in capital cases, with authority for chief judge or delegee to approve higher amounts); *Mata,* 99 F.3d at 1266 (concluding that overall $2500 limit on payment of litigation expenses was not facially inadequate under chapter 154 and was not shown to be inadequate in the particular case).

Section 26.23

Section 26.23 in the rule sets out the mechanics of the certification process for States seeking to opt in to chapter 154.

Paragraph (a) provides that an appropriate State official may request in writing that the Attorney General determine whether the State meets the requirements for chapter 154 certification. Paragraph (b) provides that the Attorney General will make the request available on the Internet and solicit public comment on the request by publishing a notice in the Federal Register. It requires Internet availability because State requests for certification may include supporting materials not readily reproducible or viewable in the **Federal Register**, such as copies of State statutes, rules, and judicial decisions bearing on the State's satisfaction of chapter 154's requirements for certification.

As provided in paragraph (c), the Attorney General will review the State's request, including consideration of timely public comments received in response to the **Federal Register** notice. The Attorney General will decide whether the State has satisfied the requirements for chapter 154 certification and will publish the certification in the **Federal Register** if certification is granted. The certification will include a determination of the date the capital counsel mechanism qualifying the State for certification was established, as that date is the effective date of the certification. 28 U.S.C. 2265(a)(2).

Paragraph (d) addresses the effect of changes or alleged changes in a State's capital counsel mechanism after that mechanism has been certified by the Attorney General. The paragraph first addresses situations involving changes or alleged changes in a State's capital counsel mechanism prior to State postconviction proceedings in a capital case. Chapter 154's expedited Federal habeas corpus procedures are available only in cases in which both of two statutory conditions are met: (i) The State's capital counsel mechanism has been certified by the Attorney General, 28 U.S.C. 2261(b)(1), and (ii) "counsel was appointed pursuant to that mechanism"—i.e., the mechanism certified by the Attorney General—unless the petitioner "validly waived counsel * * * [or] retained counsel * * * or * * * was found not to be indigent," 28 U.S.C. 2261(b)(2). The first sentence of paragraph (d) therefore notes that certification by the Attorney General under chapter 154 reflects the Attorney General's determination that the State capital counsel mechanism examined in the Attorney General's review satisfies chapter 154's requirements. If a State later

discontinues that mechanism before counsel is appointed in a given State postconviction proceeding, then counsel in that case will not have been "appointed pursuant to" the mechanism that was approved by the Attorney General and chapter 154 would accordingly be inapplicable. Similarly, if a State later changes or is alleged to have changed its capital counsel mechanism, then chapter 154 may lead to litigation in Federal habeas courts, with those courts responsible for deciding whether the State has actually changed its mechanism and, if so, whether the change means that counsel (even if appointed) was appointed pursuant to what is in effect a new and uncertified mechanism, rather than the mechanism certified by the Attorney General.

To avoid such litigation, the second sentence of paragraph (d) provides that a State may seek a new certification by the Attorney General if it changes or is alleged to have changed a previously certified capital counsel mechanism. If a State wishes to improve on a certified capital counsel mechanism, then certification by the Attorney General of the new or revised mechanism will allow the State to avoid Federal habeas court litigation over whether chapter 154 is applicable to cases involving appointments made pursuant to that mechanism. Similarly, if legal questions are raised about the continued applicability of chapter 154 based on changes or alleged changes in a certified capital counsel mechanism, a State may seek a new certification by the Attorney General that its current mechanism satisfies chapter 154's requirements, ensuring the continued applicability of chapter 154's expedited Federal habeas corpus procedures. By seeking a new certification of a new or revised capital counsel mechanism, a State may ensure that it is the Attorney General, subject to review by the D.C. Circuit Court of Appeals, who determines whether its capital counsel mechanism is in present compliance with chapter 154's requirements, *see* 28 U.S.C. 2261(b)(1), 2265(c)(2), and avoid litigation over that matter in the Federal habeas courts.

The final sentence in paragraph (d) states that subsequent changes in a State's capital counsel mechanism do not affect the applicability of chapter 154 in cases in which a mechanism certified by the Attorney General existed throughout State postconviction proceedings in the case. For example, suppose that the Attorney General certifies a State's capital counsel mechanism in 2012, the State postconviction proceedings in a capital case are carried out in 2013 and 2014 and counsel is appointed in those proceedings pursuant to the certified mechanism, and Federal habeas corpus proceedings in the case commence in 2015. Suppose further that the State makes some change in 2015 to its counsel competency or compensation standards. Because a certified capital counsel mechanism would have been in place throughout State postconviction review, the prerequisites for expedited Federal habeas corpus review under chapter 154 would be satisfied, *see* 28 U.S.C. 2261(b). That result would not be affected by later changes in the State's postconviction capital counsel mechanism.

Regulatory Certifications

Executive Order 12866—Regulatory Planning and Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a "significant regulatory action" under Executive Order 12866, section 3(f), and, accordingly, this rule has been reviewed by the Office of Management and Budget. The determination that this is a significant regulatory action, however, does not reflect a conclusion that it is "likely to result in a rule that may * * * [h]ave an annual effect on the economy of $100 million or more" or other adverse effects as described in section 3(f)(1) of the Executive Order. This rule will have no economic effect unless particular States (i) decide, in their discretion, that any costs entailed in meeting the chapter 154 capital counsel requirements are offset or justified by resulting cost reductions or other benefits to the State under chapter 154, and (ii) accordingly undertake to make any changes needed in their capital counsel systems to meet the chapter 154 requirements and apply to the Attorney General for certification.

If States decide to apply for chapter 154 certification, their resulting costs will mainly depend on (i) the number of capital cases these States litigate in State postconviction proceedings, and (ii) the incremental difference (if any) between their current per-case capital litigation costs and the corresponding costs under a chapter 154-compliant system. Regarding the number of capital cases, at the end of 2009, 36 states held 3,118 prisoners under sentence of death. *See* Bureau of Justice Statistics, Office Justice Programs, U.S. Department of Justice, *Capital Punishment, 2009—Statistical Tables* at 8, table 4 (Dec. 2010), *available at http://bjs.ojp.usdoj.gov/content/pub/pdf/cp09st.pdf.* Regarding the incremental costs of satisfying the chapter 154 standards, States accounting for the great majority of capital cases in the United States already provide for appointment of counsel in State postconviction proceedings. These States may still fall short of satisfying the chapter 154 standards relating to payment of litigation expenses or compensation of counsel. However, the costs necessary to correct such deficiencies would be limited to the difference between existing caps and any higher amounts necessary to defray reasonable litigation expenses and to secure competent attorneys for appointment, and this rule affords States a variety of options that may minimize any resulting increase in costs.

Even assuming that all States will upgrade their postconviction capital counsel mechanisms to the extent necessary to satisfy the proposed rule, and that the number of capital cases pending at any time in State postconviction proceedings is as high as 2,000, the total cost for the States could not reach $100 million annually unless the average increase in litigation costs were $50,000 each year for each case in State postconviction proceedings. There is no reason to believe that costs would increase to that degree, and any increased costs at that stage would be subject to offset by savings resulting from chapter 154's expedited procedures in subsequent Federal habeas corpus review. *See* 28 U.S.C. 2262, 2264, 2266. Moreover, because the States would more fully defray the costs of representing indigent capital defendants in State postconviction proceedings, there would be less need for representation by private counsel on a pro bono basis, often arranged through postconviction capital defense projects. Thus, State costs also would be offset by reduced costs for private entities and individuals who otherwise would provide representation, reducing the overall economic effect. For the foregoing reasons, it is not expected that this rule will or may have an annual effect on the economy of $100 million or more.

Executive Order 13132—Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. It provides only a framework for those States that wish to qualify for the benefits of the expedited

habeas procedures of chapter 154 of title 28 of the United States Code. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. This rule provides only a framework for those States that wish to qualify for the benefits of the expedited habeas procedures of chapter 154 of title 28 of the United States Code.

Unfunded Mandates Reform Act of 1995

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

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 26

Law enforcement officers, Prisoners.

Accordingly, for the reasons set forth in the preamble, part 26 of chapter I of title 28 of the Code of Federal Regulations is proposed to be amended as follows:

PART 26—DEATH SENTENCES PROCEDURES

1. The authority citation for part 26 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 4001(b), 4002; 28 U.S.C. 509, 510, 2261, 2265.

2. Add Subpart B to read as follows:

Subpart B—Certification Process for State Capital Counsel Systems

Sec.
26.20 Purpose.
26.21 Definitions.
26.22 Requirements.
26.23 Certification process.

§ 26.20 Purpose.

Sections 2261(b)(1) and 2265(a) of title 28 of the United States Code require the Attorney General to certify whether a State has a mechanism for providing legal representation to indigent prisoners in State postconviction proceedings in capital cases that satisfies the requirements of chapter 154 of title 28. If certification is granted, sections 2262, 2263, 2264, and 2266 of chapter 154 of title 28 apply in relation to Federal habeas corpus review of capital cases from the State. Subsection (b) of 28 U.S.C. 2265 directs the Attorney General to promulgate regulations to implement the certification procedure under subsection (a) of that section.

§ 26.21 Definitions.

For purposes of this part, the term—

Appropriate state official means the State Attorney General, except that, in a State in which the State Attorney General does not have responsibility for Federal habeas corpus litigation, it means the Chief Executive thereof.

State postconviction proceedings means collateral proceedings in State court, regardless of whether the State conducts such proceedings after or concurrently with direct State review.

§ 26.22 Requirements.

The Attorney General will certify that a State meets the requirements for certification under 28 U.S.C. 2261 and 2265 if the Attorney General determines that the State has established a mechanism for the appointment of counsel for indigent prisoners under sentence of death in State postconviction proceedings that satisfies the following standards:

(a) As provided in 28 U.S.C. 2261(c) and (d), the mechanism must offer to all such prisoners postconviction counsel, who may not be counsel who previously represented the prisoner at trial unless the prisoner and counsel expressly requested continued representation, and the mechanism must provide for the entry of an order by a court of record—

(1) Appointing one or more attorneys as counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) Finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) Denying the appointment of counsel, upon a finding that the prisoner is not indigent.

(b) The mechanism must provide for appointment of competent counsel as defined in State standards of competency for such appointments that meet or exceed any of the following:

(1) Appointment of counsel who have been admitted to the bar for at least five years and have at least three years of felony litigation experience or who would otherwise qualify for appointment pursuant to the standards for Federal habeas corpus proceedings reviewing State capital cases under 18 U.S.C. 3599;

(2) Appointment of counsel meeting qualification standards established in conformity with 42 U.S.C. 14163(e)(1), (2)(A); or

(3) Appointment of counsel satisfying qualification standards that reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.

(c) The mechanism must provide for compensation of appointed counsel.

(1) A State's provision for compensation will be deemed adequate if the authorized compensation is comparable to or exceeds—

(i) The compensation of counsel appointed pursuant to 18 U.S.C. 3599 in Federal habeas corpus proceedings reviewing capital cases from the State;

(ii) The compensation of retained counsel in State postconviction proceedings in capital cases who meet State standards of competency sufficient under paragraph (b) of this section;

(iii) The compensation of appointed counsel in State appellate or trial proceedings in capital cases; or

(iv) The compensation of attorneys representing the State in State postconviction proceedings in capital cases, subject to adjustment for private counsel to take account of overhead costs not otherwise payable as reasonable litigation expenses.

(2) Provisions for compensation not satisfying the criteria in paragraph (c)(1) of this section will be deemed adequate only if the State mechanism is otherwise reasonably designed to ensure the availability for appointment of counsel who meet State standards of competency sufficient under paragraph (b) of this section.

(d) The mechanism must provide for payment of reasonable litigation expenses of appointed counsel, which may include presumptive limits on

payment only if means are authorized for payment of necessary expenses above such limits.

§ 26.23 Certification process.

(a) An appropriate State official may request in writing that the Attorney General determine whether the State meets the requirements for certification under § 26.22.

(b) Upon receipt of a State's request for certification, the Attorney General will make the request publicly available on the Internet (including any supporting materials included in the request) and publish a notice in the **Federal Register**—

(1) Indicating that the State has requested certification;

(2) Identifying the Internet address at which the public may view the State's request for certification; and

(3) Soliciting public comment on the request.

(c) The State's request will be reviewed by the Attorney General. The review will include consideration of timely public comments received in response to the **Federal Register** notice under paragraph (b) of this section. The certification will be published in the **Federal Register** if certification is granted. The certification will include a determination of the date the capital counsel mechanism qualifying the State for certification was established.

(d) A certification by the Attorney General reflects the Attorney General's determination that the State capital counsel mechanism reviewed under paragraph (c) of this section satisfies 28 U.S.C. chapter 154's requirements. A State may request a new certification by the Attorney General to ensure the continued applicability of chapter 154 in cases in which State postconviction proceedings occur after a change or alleged change in the State's certified capital counsel mechanism. Changes in a State's capital counsel mechanism do not affect the applicability of chapter 154 in any case in which a mechanism certified by the Attorney General existed throughout State postconviction proceedings in the case.

Dated: February 25, 2011.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2011–4800 Filed 3–2–11; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 141 and 142

[Docket No. OW–2009–0090; FRL–9274–2]

RIN 2040–AF10

Revisions to the Unregulated Contaminant Monitoring Regulation (UCMR 3) for Public Water Systems

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The 1996 amendments to the Safe Drinking Water Act (SDWA) require that the United States Environmental Protection Agency (EPA or the Agency) establish criteria for a program to monitor unregulated contaminants and to publish a list of contaminants to be monitored every five years. This action meets the SDWA requirement by proposing the design for the third UCMR cycle (*i.e.,* UCMR 3). EPA is proposing six EPA-developed analytical methods, and four equivalent consensus organization-developed methods to monitor for 28 new UCMR chemical contaminants. In addition, EPA proposes monitoring for two viruses, for a total of 30 UCMR 3 contaminants. As envisioned, virus analysis (along with related analysis for pathogen indicators) would be conducted in laboratories under EPA contract. UCMR 3 provides EPA and other interested parties with scientifically valid data on the occurrence of these contaminants in drinking water, permitting the assessment of the number of people potentially being exposed and the levels of that exposure. These data are the primary source of occurrence and exposure information the Agency uses to determine whether to regulate these contaminants. In addition, as part of an Expedited Methods Update, this proposed action also would amend regulations concerning inorganic chemical sampling and analytical requirements. A minor editorial correction to the table moves methods from the "Other" column to the "ASTM" column, as it applies to the inorganic chemical sampling and analytical requirements. The UCMR program is not affected by these changes.

DATES: Comments must be received on or before May 2, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. OW–2009–0090, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: OW–Docket@epa.gov.*
- *Mail:* Send three copies of your comments and any enclosures to: Water Docket, United States Environmental Protection Agency, Mail Code 282211T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Attention Docket ID No. OW–2009–0090. Commenters should use a separate paragraph for each issue discussed. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.
- *Hand Delivery:* Deliver your comments to Water Docket, EPA Docket Center, Environmental Protection Agency, Room 3334, 1301 Constitution Ave., NW., Washington, DC, Attention Docket ID No. OW–2009–0090. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–OW–2009–0090. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.