

Federal Register

Friday
September 11, 1998

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- WHAT:** Free public briefings (approximately 3 hours) to present:
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 2. The relationship between the Federal Register and Code of Federal Regulations.
 3. The important elements of typical Federal Register documents.
 4. An introduction to the finding aids of the FR/CFR system.
- WHY:** To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WASHINGTON, DC

WHEN: September 15, 1998 at 9:00 a.m.
WHERE: Office of the Federal Register
 Conference Room,
 800 North Capitol Street, N.W.
 Washington, DC
 (3 blocks north of Union Station Metro)
RESERVATIONS: 202-523-4538

NEW YORK CITY

WHEN: September 22, 1998 at 9:00 a.m.
WHERE: National Archives—Northeast Region
 201 Varick Street, 12th Floor
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 (Federal Information Center)



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Federal Register

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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 THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 3

[Docket No. 98-12]

RIN 1557-AB14

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 225

[Regulations H and Y; Docket No. R-0982]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 325

RIN 3064-AC11

DEPARTMENT OF THE TREASURY Office of Thrift Supervision

12 CFR Part 567

[Docket No. 98-75]

RIN 1550-AB11

Risk-Based Capital Standards: Unrealized Holding Gains on Certain Equity Securities; Correction

AGENCIES: Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; and Office of Thrift Supervision, Treasury.

ACTION: Final rule; correction.

SUMMARY: On September 1, 1998, the Agencies published a final rule to amend their respective risk-based capital standards for banks, bank holding companies, and thrifts (institutions) with regard to the regulatory capital treatment of unrealized holding gains on certain equity securities (63 FR 46517). This document corrects an error in the **SUPPLEMENTARY INFORMATION** section of the final rule.

DATES: This final rule is effective October 1, 1998. The Agencies will not object if an institution wishes to apply the provisions of this final rule beginning on September 1, 1998.

FOR FURTHER INFORMATION CONTACT:

Jenetha M. Hickson, Alternate Liaison Officer, (202) 898-3807.

SUPPLEMENTARY INFORMATION: The Agencies' final rule, as published on September 1, 1998, at 63 FR 46518, contains an incomplete footnote. Accordingly, on page 46518, in the third column, footnote 2 is corrected to read as follows:

² Each Agency's risk-based capital standards contain more detailed descriptions of core and supplementary capital. See 12 CFR Part 3, Appendix A, for national banks; 12 CFR Part 208, Appendix A, for state member banks; 12 CFR Part 225, Appendix A, for bank holding companies; 12 CFR Part 325, Appendix A, for state nonmember banks; and 12 CFR Part 567 for savings associations.

Dated: September 3, 1998.

Mark J. Tenhundfeld,

Assistant Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, September 3, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

Dated: August 25, 1998.

Federal Deposit Insurance Corporation

Robert E. Feldman,

Executive Secretary.

Dated: September 2, 1998.

By the Office of Thrift Supervision.

Mary H. Gottlieb,

Federal Register Liaison Officer.

[FR Doc. 98-24453 Filed 9-10-98; 8:45am]

BILLING CODE 4810-33-P; 6210-01-P; 6714-01-P; 6720-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97-ANE-50-AD; Amendment 39-10728; AD 98-18-12-AD]

RIN 2120-AA64

Airworthiness Directives; Textron Lycoming Fuel Injected Reciprocating Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Textron Lycoming fuel injected reciprocating engines with certain Crane/Lear Romec "AN" rotary fuel pumps installed. This action requires initial and repetitive torque check inspections of pump relief valve attaching screws. In addition, if the torque remains within acceptable values after two inspections, the repetitive torque check inspections may be terminated. This amendment is prompted by reports of inflight engine fires caused by leaking rotary fuel pumps. The actions specified in this AD are intended to prevent rotary fuel pump leaks, which could result in an engine failure, engine fire, and damage to or loss of the aircraft.

DATES: Effective September 28, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 28, 1998.

Comments for inclusion in the Rules Docket must be received on or before November 10, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 97-ANE-50-AD, 12 New England Executive Park, Burlington, MA 01803-5299. Comments may also be sent via the Internet using the following address: "9-ad-engineprop@faa.dot.gov". Comments sent via the Internet must contain the docket number in the subject line.

The service information referenced in this AD may be obtained from Textron Lycoming, 652 Oliver St., Williamsport, PA 17701; telephone (717) 327-7080, fax (717) 327-7100. This information may be examined at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ray O'Neill, Aerospace Engineer, New York Aircraft Certification Office, FAA, Engine and Propeller Directorate, 10 Fifth St., 3rd Floor, Valley Stream, NY 11581-1200; telephone (516) 256-7505, fax (516) 568-2716.

SUPPLEMENTARY INFORMATION: The Federal Aviation Administration (FAA) has received reports of three engine fires and six other fuel leakage events on certain Textron Lycoming fuel injected reciprocating engines with Crane/Lear Romec "AN" rotary fuel pumps, model series RG9080, RG9570, and RG17980, installed. The investigations revealed that the rotary fuel pumps were leaking past the fuel pump relief valve gasket. The fuel pump valve cover screws had become loose, possibly due to gasket compression set (permanent deformation) or screw yield. If the torque loosens due to gasket compression set, once the torque is reset, it may not loosen again. Therefore, this AD allows for termination of repetitive torque checks if the torque meets specifications during two follow-up checks after being reset. This condition, if not corrected, could result in rotary fuel pump leaks, which could result in an engine failure, engine fire, and damage to or loss of the aircraft.

The FAA has reviewed and approved the technical contents of Textron Lycoming Service Bulletin (SB) No. 529, dated December 1, 1997, that describes procedures for torque check inspections of pump relief valve attaching screws.

Since an unsafe condition has been identified that is likely to exist or develop on other engines of the same type design, this AD is being issued to prevent rotary fuel pump leaks. This AD requires initial and repetitive torque check inspections of pump relief valve attaching screws. In addition, if the torque remains within acceptable values after two inspections, the repetitive torque check inspections may be terminated. The manufacturer is developing a modification to the rotary fuel pump with a more resilient gasket material that does not exhibit these permanent set characteristics, so future rulemaking may be forthcoming requiring this modification as a terminating action to the repetitive inspections required if the torque does not remain within the values stated by the SB. The actions are required to be accomplished in accordance with the SB described previously.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity

for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 97-ANE-50-AD." The postcard will be date stamped and returned to the commenter.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy

of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (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. Section 39.13 is amended by adding the following new airworthiness directive:

98-18-12-AD Textron Lycoming:

Amendment 39-10728. Docket 97-ANE-50-AD.

Applicability: Textron Lycoming IO-320, LIO-320, IO-360, HIO-360, TIO-360, LTIO-360, GO-435, GO-480, IGO-480-A1B6, IO-540, IGO-540, AEIO-540, HIO-540, TIO-540, LTIO-540, TIGO-541, IO-720, and TIO-720 fuel injected reciprocating engines, with Crane/Lear Romec "AN" rotary fuel pump model series, RG9080, RG9570, and RG17980 installed. These engines are installed on but not limited to fuel injected, reciprocating engine powered aircraft manufactured by Cessna, The New Piper, Inc., Mooney, Raytheon (Beech), Bellanca, Champion, Partenavia, Rockwell, Schweizer, Enstrom, Aerospatiale (SOCATA), Maule, Aero Commander, Helio, Hiller, and Pacific Aerospace Corp.

Note 1: This airworthiness directive (AD) applies to each engine identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For engines that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (b) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent rotary fuel pump leaks, which could result in an engine failure, engine fire, and damage to or loss of the aircraft, accomplish the following:

(a) Perform initial and repetitive torque check inspections of pump relief valve attaching screws in accordance with the Accomplishment Instructions of Textron Lycoming Service Bulletin (SB) No. 529, dated December 1, 1997, as follows:

(1) Within 10 hours time in service (TIS), or 30 days after the effective date of this AD, whichever occurs first, perform the initial torque check inspection. If the torque does not meet the specifications in Textron Lycoming SB No. 529, dated December 1, 1997, tighten screws to the required torque in accordance with that SB.

(2) Perform a follow-up torque check inspection after accumulating 50 hours TIS, or 6 months since the initial torque check inspection, whichever occurs first. If the torque does not meet the specification in Textron Lycoming SB No. 529, dated December 1, 1997, during this follow-up inspection, tighten screws to the required torque in accordance with that SB.

(3) Continue the repetitive torque check inspections required by paragraph (a)(2) of this AD until:

(i) The accumulation of 100 hours TIS since the initial inspection with the torque remaining within the SB specification for 50 hours TIS; or

(ii) The torque meets the SB specification during the initial inspection and a subsequent inspection taking place at least 50 hours TIS later.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, New York Aircraft Certification Office. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, New York Aircraft Certification Office.

Note 2: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the New York Aircraft Certification Office.

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the aircraft to a location where the requirements of this AD can be accomplished.

(d) The actions required by this AD shall be done in accordance with the following Textron Lycoming SB:

Document No.	Pages	Date
529	1-6	December 1, 1997.
Total Pages: 6.		

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Textron Lycoming, 652 Oliver St., Williamsport, PA 17701; telephone (717) 327-7080, fax (717) 327-7100. Copies may be inspected at the FAA, New England Region, Office of the Regional Counsel, 12 New England

Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on September 28, 1998.

Issued in Burlington, Massachusetts, on September 1, 1998.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 98-24184 Filed 9-10-98; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98-ANE-44-AD; Amendment 39-10752; AD 98-19-10]

RIN 2120-AA64

Airworthiness Directives; CFM International CFM56-3, -3B, and -3C Series Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to CFM International (CFMI) CFM56-3, -3B, and -3C series turbofan engines. This action requires, on aircraft with two affected engines installed, removal of one affected engine from an aircraft, and replacement with a serviceable engine, or replacement of a suspect accessory gearbox (AGB) starter gearshaft with a serviceable gearshaft within 350 hours time in service (TIS) after the effective date of this AD, or by September 1, 1998, whichever occurs first. This action also requires, on aircraft with only one affected engine installed, removal of the affected engine from the aircraft, and replacement with a serviceable engine, or replacement of the suspect starter gearshaft with a serviceable gearshaft within 2,100 hours TIS after the effective date of this AD, or by February 1, 1999, whichever occurs first. This amendment is prompted by reports of two inflight engine shutdowns caused by an AGB starter gearshaft failure. The actions specified in this AD are intended to prevent an AGB starter gearshaft failure, which can result in an inflight engine shutdown, and on aircraft with two affected engines installed, possible dual inflight engine shutdown and forced landing.

DATES: Effective September 28, 1998.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 28, 1998.

Comments for inclusion in the Rules Docket must be received on or before November 10, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 98-ANE-44-AD, 12 New England Executive Park, Burlington, MA 01803-5299. Comments may also be sent via the Internet using the following address: "9-ad-engineprop@faa.dot.gov". Comments sent via the Internet must contain the docket number in the subject line.

The service information referenced in this AD may be obtained from CFM International, Technical Publications Department, 1 Neumann Way, Cincinnati, OH 45215; telephone (513) 552-2981, fax (513) 552-2816. This information may be examined at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Glorianne Messemer, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803-5299; Telephone (781) 238-7132, Fax (781) 238-7199.

SUPPLEMENTARY INFORMATION: The Federal Aviation Administration (FAA) has received reports of two inflight engine shutdowns on CFM International (CFMI) CFM56-3, -3B, and -3C series turbofan engines. The investigation revealed that the inflight engine shutdowns were caused by an accessory gearbox (AGB) starter gearshaft failure. The investigation revealed that the gearshafts failed due to inadequate fatigue capability caused by high residual tensile stresses introduced during the manufacturing process, coupled with the elimination of shotpeening in the gearshaft hub. The manufacturing process has since been modified. The starter gearshaft, part number 335-302-503-0, involved in the events are included in a lot of 426 parts that have since been identified by the manufacturer as being installed on engines identified by engine serial number (ESN). This condition, if not corrected, could result in an AGB starter gearshaft failure, which can result in an inflight engine shutdown, and on aircraft with two affected engines

installed, possible dual inflight engine shutdown and forced landing.

The FAA has reviewed and approved the technical contents of CFMI CFM56-3/-3B/-3C Service Bulletin (SB) No. 72-877, Revision 1, dated June 15, 1998, that describes procedures for identification of affected engines by ESN, and replacement of a suspect starter gearshaft with a serviceable part.

Since an unsafe condition has been identified that is likely to exist or develop on other engines of the same type design, this AD is being issued to prevent a dual inflight engine shutdown. This AD requires, within 350 hours time in service (TIS) after the effective date of this AD, or by October 1, 1998, whichever occurs first, on aircraft with two affected engines installed, removal of one affected engine from an aircraft, and replacement with a serviceable engine, or replacement of a suspect starter gearshaft with a serviceable part. This AD also requires, within 2,100 hours TIS after the effective date of this AD, or by February 1, 1999, whichever occurs first, on aircraft with only one affected engine installed, removal of the affected engine from the aircraft, and replacement with a serviceable engine, or removal of the suspect starter gearshaft and replacement with a serviceable part. The calendar end-dates were determined based upon risk analysis and parts availability. In addition, this AD requires reporting to the FAA if the ESN listed in Table 1 of the SB does not directly correspond to the adjoining starter gear shaft serial number in order to verify that all affected parts have been removed from service. The actions are required to be accomplished in accordance with the SB described previously.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire.

Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before

the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 98-ANE-44-AD." The postcard will be date stamped and returned to the commenter.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (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. Section 39.13 is amended by adding the following new airworthiness directive:

98-19-10 CFM International: Amendment 39-10752 Docket 98-ANE-44-AD.

Applicability: CFM International (CFMI) CFM56-3, -3B, and -3C series turbofan engines, having any of the engine serial numbers (ESNs) identified in Table 1 of CFMI CFM56-3/-3B/-3C Service Bulletin (SB) No. 72-877, Revision 1, dated June 15, 1998. These engines are installed on but not limited to Boeing 737 series aircraft.

NOTE 1: This airworthiness directive (AD) applies to each engine identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For engines that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (d) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent an accessory gearbox (AGB) starter gearshaft failure, which can result in an inflight engine shutdown, and on aircraft with two affected engines installed, possible dual inflight engine shutdown and forced landing, accomplish the following:

(a) On aircraft with two affected engines installed, remove one affected engine from the aircraft, and replace with a serviceable engine not identified by ESN in Table 1 of CFMI CFM56-3/-3B/-3C SB No. 72-877, Revision 1, dated June 15, 1998, or replace the suspect starter gearshaft on one of the engines with a serviceable gearshaft, in accordance with the Accomplishment Instructions of CFMI CFM56-3/-3B/-3C SB No. 72-877, Revision 1, dated June 15, 1998; within 350 hours time in service (TIS) after the effective date of this AD, or by October 1, 1998, whichever occurs first. Thereafter, for the remaining engine, replace suspect starter gearshafts in accordance with paragraph (b) of this AD.

(b) On aircraft with only one affected engine installed, remove the affected engine

from the aircraft, and replace with a serviceable engine not identified by ESN in Table 1 of CFMI CFM56-3/-3B/-3C SB No. 72-877, Revision 1, dated June 15, 1998, or replace the suspect starter gearshaft with a serviceable gearshaft, in accordance with the Accomplishment Instructions of CFMI CFM56-3/-3B/-3C SB No. 72-877, Revision 1, dated June 15, 1998; within 2,100 hours TIS after the effective date of this AD, or by February 1, 1999, whichever occurs first.

(c) Report within 5 working days of replacement of the starter gearshaft to the FAA if the ESN listed in Table 1 of CFMI CFM56-3/-3B/-3C SB No. 72-877, Revision 1, dated June 15, 1998, does not directly correspond to the adjoining starter gear shaft

serial number to verify that all affected parts have been removed from service. Report to the Manager, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803-5299; Fax (781) 238-7199. Reporting requirements have been approved by the Office of Management and Budget and assigned OMB control number 2120-0056.

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Engine Certification Office. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may

add comments and then send it to the Manager, Engine Certification Office.

Note 2: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the Engine Certification Office.

(e) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the aircraft to a location where the requirements of this AD can be accomplished.

(f) The actions required by this AD shall be done in accordance with the following CFMI CFM56-3/-3B/-3C SB:

Document No.	Pages	Revision	Date
72-877	1-49	1	June 15, 1998.
Total pages:	49.		

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from CFM International, Technical Publications Department, 1 Neumann Way, Cincinnati, OH 45215; telephone (513) 552-2981, fax (513) 552-2816. Copies may be inspected at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(g) This amendment becomes effective on September 28, 1998.

Issued in Burlington, Massachusetts, on September 2, 1998.

David A. Downey,

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

[FR Doc. 98-24183 Filed 9-10-98; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 98-ANE-93]

Establishment of Class E Airspace; Fitchburg, MA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This notice confirms the effective date of a direct final rule which establishes a Class E airspace area at Fitchburg, MA, to provide for adequate controlled airspace for those aircraft using the new GPS RWY 32 Instrument

Approach Procedure to Fitchburg Municipal Airport, Fitchburg, MA (KFIT).

EFFECTIVE DATE: The direct final rule published at 63 FR 40173 is effective 0901 UTC, October 8, 1998.

FOR FURTHER INFORMATION CONTACT:

David T. Bayley, Airspace Branch, ANE-520.3, New England Executive Park, Burlington, MA 01803-5299; telephone (781) 238-7523; fax (781) 238-7596.

SUPPLEMENTARY INFORMATION: The FAA published this direct final rule with a request for comments in the **Federal Register** on July 28, 1998 (63 FR 40173). The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on October 8, 1998. No adverse comments were received, and thus this notice confirms that this direct rule will become effective on that date.

Issued in Burlington, MA, on September 3, 1998.

Bill Peacock,

Manager, Air Traffic Division, New England Region.

[FR Doc. 98-24421 Filed 9-10-98; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 98-ANE-94]

Amendments to Class E Airspace; Bennington, VT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This notice confirms the effective date of a direct final rule which revises the Class E airspace area at Bennington, VT, to provide for adequate controlled airspace for those aircraft using the new GPS RWY 13 Instrument Approach Procedure to William H. Morse State Airport, Bennington, VT (K5B5).

EFFECTIVE DATE: The direct final rule published at 63 FR 40174 is effective 0901 UTC, October 8, 1998.

FOR FURTHER INFORMATION CONTACT: David T. Bayley, Airspace Branch, ANE-520.3, 12 New England Executive Park, Burlington, MA 01803-5299; telephone (781) 238-7523; fax (781) 238-7596.

SUPPLEMENTARY INFORMATION: The FAA published this direct final rule with a request for comments in the **Federal Register** on July 28, 1998 (63 FR 40174). The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received

within the comment period, the regulation would become effective on October 8, 1998. No adverse comments were received, and thus this notice confirms that this direct final rule will become effective on that date.

Issued in Burlington, MA, on September 3, 1998.

Bill Peacock,

Manager, Air Traffic Division, New England Region.

[FR Doc. 98-24420 Filed 9-10-98; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 3, 5, 10, 16, 25, 50, 56, 58, 71, 200, 201, 207, 210, 211, 310, 312, 314, 369, 429, 800, and 812

[Docket No. 98N-0210]

Removal of Regulations Regarding Certification of Drugs Composed Wholly or Partly of Insulin; Confirmation of Effective Date

AGENCY: Food and Drug Administration, HHS.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: The Food and Drug Administration (FDA) published in the **Federal Register** of May 13, 1998, a direct final rule (63 FR 26694). The direct final rule amends the regulations regarding certification of drugs composed wholly or partly of insulin, and conforming and related amendments. This document confirms the effective date of the direct final rule.

EFFECTIVE DATE: The effective date of the direct final rule published at 63 FR 26694 is confirmed as September 25, 1998.

FOR FURTHER INFORMATION CONTACT: Wayne H. Mitchell, Center for Drug Evaluation and Research (HFD-7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-594-2041.

SUPPLEMENTARY INFORMATION: FDA solicited comments concerning the direct final rule for a 75-day period ending July 27, 1998. FDA stated that the effective date of the direct final rule would be on September 25, 1998, 60 days after the end of the comment period, unless any significant adverse comment was submitted to FDA during the comment period. FDA did not receive any significant adverse comments.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under

authority delegated to the Commissioner of Food and Drugs, notice is given that no objections or requests for a hearing were filed in response to the May 13, 1998, final rule. Accordingly, the amendments issued thereby are effective September 25, 1998.

Dated: September 1, 1998.

William B. Schultz,

Deputy Commissioner for Policy.

[FR Doc. 98-24411 Filed 9-10-98; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 430, 431, 432, 433, 436, 440, 441, 442, 443, 444, 446, 448, 449, 450, 452, 453, 455, and 460

[Docket No. 98N-0211]

Removal of Regulations Regarding Certification of Antibiotic Drugs; Confirmation of Effective Date

AGENCY: Food and Drug Administration, HHS.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: The Food and Drug Administration (FDA) published in the **Federal Register** of May 12, 1998, a direct final rule (63 FR 26066). The direct final rule repealed FDA's regulations governing certification of antibiotic drugs. This document confirms the effective date of the direct final rule.

EFFECTIVE DATE: The effective date of the direct final rule published at 63 FR 26066 is confirmed as September 24, 1998.

FOR FURTHER INFORMATION CONTACT: Wayne H. Mitchell, Center for Drug Evaluation and Research (HFD-7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-594-2041.

SUPPLEMENTARY INFORMATION: FDA solicited comments concerning the direct final rule for a 75-day period ending July 27, 1998. FDA stated that the effective date of the direct final rule would be on September 24, 1998, 60 days after the end of the comment period, unless any significant adverse comment was submitted to FDA during the comment period. FDA did not receive any significant adverse comments.

Therefore, under the Federal Food, Drug, and Cosmetic Act, the Food and Drug Administration Modernization Act, and under authority delegated to

the Commissioner of Food and Drugs, notice is given that no objections or requests for a hearing were filed in response to the May 12, 1998, final rule. Accordingly, the amendments issued thereby are effective September 24, 1998.

Dated: September 1, 1998.

William B. Schultz,

Deputy Commissioner for Policy.

[FR Doc. 98-24413 Filed 9-10-98; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs For Use In Animal Feeds; Bacitracin Methylene Disalicylate, Decoquinat, and Roxarsone; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a final rule that appeared in the **Federal Register** of July 17, 1998 (63 FR 38474). The document amended the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Alpharma Inc. The NADA provides for using approved bacitracin methylene disalicylate, decoquinat, and roxarsone Type A medicated articles to make combination drug Type C medicated broiler chicken feeds. The document was published with two typographical errors. This document corrects those errors.

EFFECTIVE DATE: July 17, 1998.

FOR FURTHER INFORMATION CONTACT: Carolyn C. Harris, Office of Policy (HF-27), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-2994.

In FR Doc. 98-19025, appearing on page 38474 in the **Federal Register** of Friday, July 17, 1998, the following corrections are made:

1. On page 38475, in the third column, in amendatory instruction "2." the citation "(d)(3)(xv)" is corrected to read "(d)(3)(xvii)".

§ 558.76 [Corrected]

2. On page 38475, in the third column, in § 558.76 *Bacitracin methylene disalicylate*, paragraph "(d)(3)(xv)" is corrected to read "(d)(3)(xvii)".

Dated: August 25, 1998.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 98-24412 Filed 9-10-98; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF STATE

22 CFR Parts 41 and 42

[Public Notice 2863]

Visas: Documentation of Nonimmigrants and Immigrants—Minor Corrections or Additions to Nonimmigrant Visa Regulations and Deletions of Obsolete Immigrant Visa Provisions

AGENCY: Bureau of Consular Affairs, Department of State.

ACTION: Final rule.

SUMMARY: This rule combines several minor corrections or updating of current nonimmigrant visa regulations with the deletion of several immigrant visa regulations that are inoperative as a result of the repeal or expiration of the underlying provisions of law. The former include correcting the name of Mongolia, adding two classification symbols, and changing a section title from "General" to "Foreign Officials—General". The immigrant visa regulatory removals include certain relief provisions for returning residents which were repealed, and several short-term benefits accorded certain relatives by the Immigration Act of 1990 which have expired.

EFFECTIVE DATE: September 11, 1998.

FOR FURTHER INFORMATION CONTACT: H. Edward Odom, Chief, Legislation and Regulations Division, Visa Services, (202) 663-1204.

SUPPLEMENTARY INFORMATION: Several current visa regulations contain obsolete or incorrect references or relate to or contain references to a provision of law which has been repealed or has passed its statutory time limit, thus rendering the regulation concerned inoperative. As a housekeeping measure, they are being formally corrected or removed by this rule. They are described herein in the sequence in which they appear in 22 CFR Parts 41 and 42.

First is section 41.3, which covers consular and immigration officer joint waivers of the passport and/or visa requirements. In subsection 41.3(e) reference is made to what is erroneously called "Mongolian People's Republic" whereas the name of the country was changed to "Mongolia" in 1992. It is corrected herein.

Next is section 41.12, the enumeration of nonimmigrant visa symbols, in which two symbols are corrected (S-5 and S-6 are substituted for S-7 and S-8, respectively) and two new symbols are being added: C-1/D for a combined transit and crewman visa and S-7 for any qualified family member of an S-5 or S-6 principal alien.

The final nonimmigrant section affected is 41.21 which has been titled simply "General" as the opening section of what the Department considers "the 41.20's", all such sections relating to foreign officials of one kind or another. Inasmuch as there is no 41.20 by that title, however, "General" is a non-descriptive and meaningless heading for 41.21. The title is thus being changed herein to "Foreign Officials—General".

The first of the immigrant sections is 42.22(c), which described the effect of relief provided by the Attorney General in his or her discretion under section 212(c) of the Immigration and Nationality Act (INA) for certain returning residents. Section 212(c) was repealed by section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). As there is no longer a basis for 22 CFR 42.22(c), it is removed and subsection 42.22(d) is redesignated as 42.22(c).

The Immigration Act of 1990 (IMMACT 90) contained several time-limited provisions, one of which (section 112) established up to 55,000 additional visa numbers during each of fiscal years 1992-94 for the spouses and children of aliens whose status was legalized under legislation enacted in 1986. Section 42.51(a)(2) provided for the Department's control of those numbers. It is removed by this rule.

Section 42.51(d) regulated control of special numerical provisions in the Panama Canal Act, which were stricken by section 212(a) of the Immigration and Nationality Technical Corrections Act of 1994. It is hereby removed.

Subsection (a) of section 42.54 as promulgated in 1991 contains prospective language regarding diversity immigrants which is no longer appropriate and is being deleted.

Under the terms of section 631 of the Illegal Immigration Reform and Immigrant Responsibility Act, the period of validity of an immigrant visa was raised from four months to six months. Section 42.72 of 22 CFR, containing the regulations pertaining to immigrant visa validity, was amended shortly thereafter to conform with that amendment. This rule corrects the reference to the visa validity period contained in section 42.64, which relates to passport requirements for immigrants.

Regulatory Analysis and Notices

Final Rule

This rule is being published as a final rule under the "good cause" exceptions set forth at 5 U.S.C. 553(b)(3) and 553(d)(3). As the material being changed is not challengeable and that being removed is no longer germane, no purpose would be served by publication as a proposed rule with a time frame for comment.

The Regulatory Flexibility Act

Pursuant to section 605 of the Regulatory Flexibility Act, the Department has assessed the potential impact of this rule, and the Assistant Secretary for Consular Affairs hereby certifies that it is not expected to have a significant economic impact on a substantial number of small entities.

E.O. 12988 and E.O. 12866

This rule has been reviewed as required under E.O. 12998 and determined to be in compliance therewith. This rule is exempt from review under E.O. 12866, but has been reviewed internally by the Department to ensure consistency therewith. The rule does not directly or indirectly affect states or local governments or Federal relationships and does not create unfunded mandates.

5 U.S.C. Chapter 8

As required by 5 U.S.C., chapter 8, the Department has screened this rule and determined that it is not a major rule, as defined in 5 U.S.C. 80412.

Paperwork Reduction Act

This rule imposes no paperwork requirements.

Lists of Subjects

22 CFR Part 41

Aliens, Foreign officials, Passports and visas, Students.

22 CFR Part 42

Immigration, Passports and visas.

In view of the foregoing, 22 CFR Parts 41 and 42 are amended as follows:

PART 41—[AMENDED]

1. The authority citation for Part 41 is revised to read:

Authority: 8 U.S.C. 1104.

§ 41.3 [Amended]

2. Section 41.3 is amended in paragraph (e), by removing "Mongolian People's Republic" and adding in its place "Mongolia".

3. Section 41.12 is amended in the table by removing the entries for S-7

and S-8 and adding new entries in alphanumeric order to read as follows:

§ 41.12 Classification Symbols.

* * * * *

NONIMMIGRANTS

Symbol	Class	Section of law
C-1/D	Combined Transit and Crewman Visa	101(a)(15)(C) and (D).
S-5	Certain Aliens Supplying Critical Information Relating to a Criminal Organization or Enterprise	101(a)(15)(S)(i).
S-6	Certain Aliens Supplying Critical Information Relating to Terrorism	101(a)(15)(S)(ii).
S-7	Qualified Family Member of S-5 or S-6	101(a)(15)(S).

4. Section 41.21 is amended by revising the section heading to read as follows:

§ 41.21 Foreign Officials—General.

* * * * *

PART 42—[AMENDED]

5. The authority citation for Part 42 continues to read as follows:

Authority: 8 U.S.C. 1104.

§ 42.22 [Amended]

6. Section 42.22 is amended by removing paragraph (c) and redesignating paragraph (d) as paragraph (c).

§ 42.51 [Amended]

7. Section 42.51 is amended by removing paragraph (a)(2), by redesignating paragraphs (a)(1) introductory text, (a)(1)(i), and (a)(1)(ii) as paragraphs (a) introductory text, (a)(1), and (a)(2), respectively, and by removing paragraph (d).

§ 42.54 [Amended]

8. Section 42.54 is amended by removing the words “Beginning with fiscal year 1995, in” from paragraph (a)(2) and adding in their place “In”.

§ 42.64 [Amended]

9. Section 42.64(b) is amended by revising “4 months” to read “6 months”.

Dated: July 23, 1998.

Mary A. Ryan,

Assistant Secretary for Consular Affairs.

[FR Doc. 98-24084 Filed 9-10-98; 8:45 am]

BILLING CODE 4710-06-P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Parts 250 and 253

RIN 1010-AC33

Oil Spill Financial Responsibility for Offshore Facilities

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Correction to final regulation.

SUMMARY: This document contains a correction to the final regulations, which were published in the **Federal Register** of Tuesday, August 11, 1998, (63 FR 42699). The regulations are related to the Oil Spill Financial Responsibility for Offshore Facilities contained in 30 CFR part 253.

EFFECTIVE DATE: October 13, 1998.

FOR FURTHER INFORMATION CONTACT:

Steve Waddell, Adjudication Unit Supervisor, at (504) 736-1710.

SUPPLEMENTARY INFORMATION: As published, the final regulations contain an error which may prove to be misleading and needs to be clarified; the correction provides a better reference citation on claims.

Correction of Publication

Accordingly, the publication on August 11, 1998 63 FR 42699 which was the subject of FR Doc. 98-21096, is corrected as follows:

On page 42714, in the third column, in § 253.15, paragraph (f), “§ 253.60 (b) or (c)(4)” is corrected to read “§ 253.60.”

Dated: September 3, 1998.

E.P. Danenberger,

Chief, Engineering and Operations Division.

[FR Doc. 98-24444 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-MR-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD08-96-058]

RIN 2115-AE46

Special Local Regulations: City of Clarkville Riverfest; Cumberland River mile 125.5 TO 127.0, Clarksville, TN

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: Special local regulations are being adopted for the City of Clarksville Riverfest. This event will be held on September 13, 1998 from 9 a.m. until 5 p.m. at the riverfront in Clarksville, TN. These regulations are needed to provide for the safety of life on navigable waters during the event.

EFFECTIVE DATE: These regulations are effective from 9 a.m. until 5 p.m. on September 13, 1998.

FOR FURTHER INFORMATION CONTACT: LTJG Tom Boyles, Marine Safety Office Paducah, KY. Tel: (502) 442-1621 ext. 310.

SUPPLEMENTARY INFORMATION:

Drafting Information

The drafters of this regulation are LTJG Tom Boyles, Project Officer, Marine Safety Office Paducah, and LTJG Michele Woodruff, Project Attorney, Eighth Coast Guard District Legal Office.

Regulatory History

In accordance with 5 U.S.C. 553, a notice of proposed rule making for these regulations has not been published, and good cause exists for making them effective in less than 30 days from the date of publication. Following normal rule making procedures would have

been impracticable. The details of the event were not finalized with sufficient time remaining to publish proposed rules in advance of the event or to provide for a delayed effective date.

Background and Purpose

The marine event requiring this regulation is the Riverfest powerboat/pylon races on the river. Event sponsors expect between 25,000 and 50,000 spectators. The City of Clarksville sponsors this event. Spectators will be able to view the event from areas designated by the sponsor.

Regulatory Evaluation

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has not been reviewed by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary because of the event's short duration.

Small Entities

The Coast Guard finds that the impact on small entities, if any, is not substantial. Therefore, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq) that this temporary rule will not have a significant economic impact on a substantial number of small entities because of the event's short duration.

Collection of Information

This rule contains no information collection requirements under the Paperwork Reduction Act (44 U.S.C. 3501 et seq).

Federalism Assessment

The Coast Guard has analyzed this action in accordance with the principles and criteria of Executive Order 12612 and has determined that this rule does not raise sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Assessment

The Coast Guard considered the environmental impact of this rule and concluded that under section 2-1, paragraph (34)(h) of Commandant Instruction M16475.1C this rule is excluded from further environmental documentation.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements.

Temporary Regulations

In consideration of the foregoing, Part 100 of Title 33, Code of Federal Regulations, is amended as follows:

PART 100—[AMENDED]

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

Authority: 33 U.S.C. 1233; 49 CFR 1.46 and 33 CFR 100.35

2. A temporary § 100.35–T08–058 is added to read as follows:

§ 100.35–T08–058 Cumberland River at Clarksville, Tennessee.

(a) *Regulated Area:* A regulated area is established on all waters of the Cumberland River between mile 125.5 and mile 127.0.

(b) *Special Local Regulation:* All persons and/or vessels not registered with the sponsors as participants or official patrol vessels are considered spectators. The "official patrol" consists of any Coast Guard, public, state or local law enforcement and/or sponsor provided vessels assigned to patrol the event.

(1) No spectators shall anchor, block, loiter in, or impede the through transit of participants or official patrol vessels in the regulated area during effective dates and times, unless cleared for such entry by or through an official patrol vessel.

(2) When hailed and/or signaled by an official patrol vessel, a spectator shall come to an immediate stop. Vessels shall comply with all directions given: failure to do so may result in a citation.

(3) The Patrol Commander is empowered to forbid and control the movement of all vessels in the regulated area. The Patrol Commander may terminate the event at any time it is deemed necessary for the protection of life and/or property and can be reached on VHF–FM Channel 16 by using the call sign "PATCOM".

(c) *Effective Date:* This section is effective on September 13, 1998 from 9 a.m. until 5 p.m.

Dated: August 27, 1998.

Paul J. Pluta,

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

[FR Doc. 98–24422 Filed 9–10–98; 8:45 am]

BILLING CODE 4910–15–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300706; FRL–6025–6]

RIN 2070–AB78

Cypermethrin; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for residues of cypermethrin (\pm) alpha-cyano-(3-phenoxyphenyl)methyl (\pm) *cis, trans*-3(2,2-dichloroethylenyl)-2,2-dimethylcyclopropane carboxylate in or on the commodity green onion at 6.0 parts per million (ppm). The Interregional Research Project Number 4 (IR-4) requested this tolerance under the Federal Food, Drug and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996.

DATES: This regulation is effective September 11, 1998. Objections and requests for hearings must be received by EPA on or before November 10, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP–300706], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300706], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 file format or ASCII file format. All copies

of objections and hearing requests in electronic form must be identified by the docket control number [OPP-300706]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: By mail: Sidney Jackson, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 305-7610, e-mail: jackson.sidney@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: In the *Federal Register* of March 19, 1998 (63 FR 13404) (FRL-5776-6), EPA, issued a notice pursuant to section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e), announcing the filing of a pesticide petition (PP 5E4463) for tolerance by the Interregional Research Project (IR-4). This notice included a summary of the petition prepared by FMC Corporation, 1735 Market St., Philadelphia, PA 19103, the registrant. There were no comments received in response to the notice of filing.

The petition requested that 40 CFR 180.418 be amended by establishing a tolerance for residues of the insecticide cypermethrin (\pm) alpha-cyano-(3-phenoxyphenyl)methyl (\pm) *cis, trans*-3(2,2-dichloroethenyl)-2,2-dimethylcyclopropane carboxylate in or on the commodity green onion at 6.0 ppm.

I. Risk Assessment and Statutory Findings

New section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable

certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . ."

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides based primarily on toxicological studies using laboratory animals. These studies address many adverse health effects, including (but not limited to) reproductive effects, developmental toxicity, toxicity to the nervous system, and carcinogenicity. Second, EPA examines exposure to the pesticide through the diet (e.g., food and drinking water) and through exposures that occur as a result of pesticide use in residential settings.

A. Toxicity

1. *Threshold and non-threshold effects.* For many animal studies, a dose response relationship can be determined, which provides a dose that causes adverse effects (threshold effects) and doses causing no observed effects (the "no-observed effect level" or "NOEL").

Once a study has been evaluated and the observed effects have been determined to be threshold effects, EPA generally divides the NOEL from the study with the lowest NOEL by an uncertainty factor (usually 100 or more) to determine the Reference Dose (RfD). The RfD is a level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. An uncertainty factor (sometimes called a "safety factor") of 100 is commonly used since it is assumed that people may be up to 10 times more sensitive to pesticides than the test animals, and that one person or subgroup of the population (such as infants and children) could be up to 10 times more sensitive to a pesticide than another. In addition, EPA assesses the potential risks to infants and children based on the weight of the evidence of the toxicology studies and determines whether an additional uncertainty factor is warranted. Thus, an aggregate daily exposure to a pesticide residue at or below the RfD (expressed as 100% or less of the RfD) is generally considered acceptable by EPA. EPA generally uses the RfD to evaluate the chronic risks posed by pesticide exposure. For shorter term risks, EPA calculates a margin of exposure (MOE) by dividing the estimated human exposure into the NOEL from the appropriate animal study. Commonly, EPA finds MOEs lower than 100 to be unacceptable. This 100-fold MOE is based on the same

rationale as the 100-fold uncertainty factor.

Lifetime feeding studies in two species of laboratory animals are conducted to screen pesticides for cancer effects. When evidence of increased cancer is noted in these studies, the Agency conducts a weight of the evidence review of all relevant toxicological data including short-term and mutagenicity studies and structure activity relationship. Once a pesticide has been classified as a potential human carcinogen, different types of risk assessments (e.g., linear low dose extrapolations or MOE calculation based on the appropriate NOEL) will be carried out based on the nature of the carcinogenic response and the Agency's knowledge of its mode of action.

2. *Differences in toxic effect due to exposure duration.* The toxicological effects of a pesticide can vary with different exposure durations. EPA considers the entire toxicity data base, and based on the effects seen for different durations and routes of exposure, determines which risk assessments should be done to assure that the public is adequately protected from any pesticide exposure scenario. Both short and long durations of exposure are always considered. Typically, risk assessments include "acute," "short-term," "intermediate term," and "chronic" risks. These assessments are defined by the Agency as follows.

Acute risk, by the Agency's definition, results from 1-day consumption of food and water, and reflects toxicity which could be expressed following a single oral exposure to the pesticide residues. High end exposure to food and water residues are typically assumed.

Short-term risk results from exposure to the pesticide for a period of 1-7 days, and therefore overlaps with the acute risk assessment. Historically, this risk assessment was intended to address primarily dermal and inhalation exposure which could result, for example, from residential pesticide applications. However, since enactment of FQPA, this assessment has been expanded to include both dietary and non-dietary sources of exposure, and will typically consider exposure from food, water, and residential uses when reliable data are available. In this assessment, risks from average food and water exposure, and high-end residential exposure, are aggregated. High-end exposures from all three sources are not typically added because of the very low probability of this occurring in most cases, and because the other conservative assumptions built into the assessment assure adequate

protection of public health. However, for cases in which high-end exposure can reasonably be expected from multiple sources (e.g. frequent and widespread homeowner use in a specific geographical area), multiple high-end risks will be aggregated and presented as part of the comprehensive risk assessment/characterization. Since the toxicological endpoint considered in this assessment reflects exposure over a period of at least 7 days, an additional degree of conservatism is built into the assessment; i.e., the risk assessment nominally covers 1-7 days exposure, and the toxicological endpoint/NOEL is selected to be adequate for at least 7 days of exposure. (Toxicity results at lower levels when the dosing duration is increased.)

Intermediate-term risk results from exposure for 7 days to several months. This assessment is handled in a manner similar to the short-term risk assessment.

Chronic risk assessment describes risk which could result from several months to a lifetime of exposure. For this assessment, risks are aggregated considering average exposure from all sources for representative population subgroups including infants and children.

B. Aggregate Exposure

In examining aggregate exposure, FFDCA section 408 requires that EPA take into account available and reliable information concerning exposure from the pesticide residue in the food in question, residues in other foods for which there are tolerances, residues in groundwater or surface water that is consumed as drinking water, and other non-occupational exposures through pesticide use in gardens, lawns, or buildings (residential and other indoor uses). Dietary exposure to residues of a pesticide in a food commodity are estimated by multiplying the average daily consumption of the food forms of that commodity by the tolerance level or the anticipated pesticide residue level. The Theoretical Maximum Residue Contribution (TMRC) is an estimate of the level of residues consumed daily if each food item contained pesticide residues equal to the tolerance. In evaluating food exposures, EPA takes into account varying consumption patterns of major identifiable subgroups of consumers, including infants and children. The TMRC is a "worst case" estimate since it is based on the assumptions that food contains pesticide residues at the tolerance level and that 100% of the crop is treated by pesticides that have established tolerances. If the TMRC exceeds the RfD

or poses a lifetime cancer risk that is greater than approximately one in a million, EPA attempts to derive a more accurate exposure estimate for the pesticide by evaluating additional types of information (anticipated residue data and/or percent of crop treated data) which show, generally, that pesticide residues in most foods when they are eaten are well below established tolerances.

Percent of crop treated estimates are derived from federal and private market survey data. Typically, a range of estimates are supplied and the upper end of this range is assumed for the exposure assessment. By using this upper end estimate of percent of crop treated, the Agency is reasonably certain that exposure is not understated for any significant subpopulation group. Further, regional consumption information is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups, to pesticide residues. For this pesticide, the most highly exposed population subgroup was not regionally based.

II. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action, EPA has sufficient data to assess the hazards of cypermethrin and to make a determination on aggregate exposure, consistent with section 408(b)(2), for a tolerance for residues of cypermethrin on green onions at 6.0 ppm. EPA's assessment of the dietary exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by cypermethrin are discussed below.

1. *Acute toxicity.* The required battery of acute toxicity studies has been submitted and found adequate. The findings were as follows: oral toxicity, lethal dose (LD)₅₀ > 263 milligram/kilogram (mg/kg); dermal toxicity, LD₅₀ > 2,460 mg/kg; inhalation toxicity lethal concentration (LC)₅₀, 2.5 mg/liter (L); primary eye irritation--Toxicity Category

III; primary dermal irritation --Toxicity Category IV. Cypermethrin is considered to be a dermal sensitizer.

2. *Genotoxicity.* The Agency has reviewed several mutagenicity studies. Types include an Ames mutagenicity assay; a dominant lethal study, a mouse lymphoma mutagenicity assay, a Chinese hamster ovary/hypoxanthine guanine phosphoribose transferase (CHO/HGPRT) assay, and a bone marrow cytogenic study. The data base for mutagenicity is considered to be adequate. Based on the available mutagenicity studies, there are no concerns for mutagenicity.

3. *Reproductive and developmental toxicity—* i. *Developmental toxicity study in the rat.* Cypermethrin was administered by gavage to rats at dose levels of 0, 17.5, 35, or 70 mg/kg/day on days 6-15 of gestation. The maternal lowest-observed effect level (LOEL) is 35 mg/kg/day, based on bodyweight. The maternal NOEL is 17.5 mg/kg/day. The developmental LOEL was > 70 mg/kg/day. The developmental NOEL is > 70 mg/kg/day.

ii. *Developmental toxicity study in the rabbit.* Cypermethrin was administered to 20 New Zealand White rabbits per dose group by gavage at dose levels of 0, 100, 450, or 700 mg/kg/day from days 7 through 19 of gestation. The test animals were sacrificed on day 29 of gestation. The maternal LOEL was 450 mg/kg/day, based on bodyweight gain. The maternal NOEL was 100 mg/kg/day. There were no indications of developmental toxicity. The NOEL and LOEL for developmental toxicity was > 700 mg/kg/day.

iii. *Three-generation reproduction study in rats.* Cypermethrin was administered to rats at dose levels of 0, 50, 150, or 1,000/750 ppm (reduced to 750 ppm after 12 weeks because of severe neurological symptoms). These dose levels correspond to 2.5, 7.5, or 50/37.5 mg/kg/day. Three successive generations were produced, each consisting of two separate breedings to produce six sets of litters. The LOEL is 150 ppm (7.5 mg/kg/day) based on consistent decreased bodyweight gain in both sexes. The NOEL was 50 ppm (2.5 mg/kg/day).

4. *Subchronic toxicity.* The data base for subchronic toxicity is considered to be complete except for a series 82-4 subchronic inhalation toxicity study of 90-days duration. This study is required if inhalation exposure is for periods greater than 21-days.

i. *A 21-day dermal study in the rabbit.* Cypermethrin was applied at dose levels of control, 2, 20, or 200 mg/kg/day applied in 20% weight/weight (w/w) basis PEG 300 with daily applications

for 3 weeks for a total of 15 applications. The LOEL is 200 mg/kg/day based on liver effects. The NOEL is 20 mg/kg/day.

ii. *A 21-day inhalation study in the rat.* Cypermethrin was administered to rats by nose only exposure at concentrations of 0, 0.01, 0.05, or 0.25 mg/L for 6 hours per day, 5 days per week for total of 15 exposures. The LOEL was 0.05 mg/L based mainly on bodyweight decrease. The NOEL was 0.01 mg/L.

5. *Chronic toxicity/carcinogenicity—*

i. *Chronic oral study in the dog.*

Cypermethrin was administered to beagle dogs at dose levels of 0, 1, 5, or 15 mg/kg/day for 52 weeks. The LOEL was 5 mg/kg/day based on gastrointestinal effects. The NOEL is 1 mg/kg/day.

ii. *Carcinogenicity study in the mouse.*

Cypermethrin was administered to mice at dose levels of control-1, control-2, 100, 400, and 1,600 ppm (corresponding to 0, 0, 14, 57, or 229 mg/kg/day) for 97 weeks for males and 101 weeks for females. The LOEL was 400 ppm (57 mg/kg/day) based on liver weight. The NOEL was 100 ppm (14 mg/kg/day). This study was determined to be positive for induction of benign alveolegic neoplasms.

iii. *Chronic feeding/carcinogenicity study in the rat.* Cypermethrin was administered to rats at dose levels of control-1, control-2, 20, 150, or 1,500 ppm (corresponding to 0, 1, 7.5, or 75 mg/kg/day) for 2 years. The LOEL is 1,500 ppm (75 mg/kg/day) based on body weight. The NOEL was 150 ppm (7.5 mg/kg/day). Cypermethrin was not considered to be oncogenic in this study. A possible association with increased testicular interstitial tumors was not considered definite.

6. *Metabolism.* Studies in rats, dogs, and mice are available to support the requirement of metabolism in mammals. Studies show that cypermethrin is readily absorbed from the gastrointestinal tract and extensively metabolized. It is mostly excreted in the urine. No additional data are required.

7. *Neurotoxicity.* Additional data considered by the Agency included an acute delayed type neurotoxicity in hens, an acute neurotoxicity screening study in rats with a NOEL of 30 mg/kg and a LOEL of 100 mg/kg, and a subchronic neurotoxicity screening study in rats with a NOEL of 31 mg/kg/day and a LOEL of 77 mg/kg/day. Additional data will be required under a special Data Call-In (DCI) letter pursuant to section 3(c)(2)(B) of FIFRA. Although these data are lacking EPA has a sufficient toxicity data base to support these tolerances and these additional

studies are not expected to significantly change its risk assessment.

B. *Toxicological Endpoints*

1. *Acute toxicity.* To assess risk from acute dietary exposure, the Agency used a NOEL of 1.0 mg/kg/day based on increased incidence of passage of liquid stools at 5 mg/kg/day and above starting the first weeks of dosing in a chronic-dog study. A MOE of 100 is required

2. *Short- and intermediate-term toxicity.* To assess risk from (non-food) short- and intermediate-term dermal exposure, the Agency used a NOEL of 5 mg/kg/day from the chronic-dog study, incorporating 25% dermal absorption. A dermal absorption rate of 25% was derived based on the weight-of-evidence available for structurally related pyrethroids. For exposure via inhalation, the Agency used a NOEL of 0.01 mg/L from the 21-day inhalation study in rats.

3. *Chronic toxicity.* EPA has established the RfD for cypermethrin at 0.01 mg/kg/day. This RfD is based on a NOEL of 1.0 mg/kg/day from the chronic-dog study with an uncertainty factor of 100.

4. *Carcinogenicity.* Using its Guidelines for Carcinogen Risk Assessment published September 24, 1986 (51 FR 33992) the Carcinogenicity Peer Review Committee (CPRC) has classified cypermethrin as a Group C chemical, possible human carcinogen, based on increased incidence of lung adenomas in female mice, but did not recommend assignment of a cancer potency factor (Q^*1) for a linear quantitative cancer risk assessment. Instead, the CPRC recommended the RfD approach. Based on the CPRC's recommendation that the RfD approach be used to assess dietary cancer risk, a quantitative linear dietary cancer risk assessment was not performed. Human health risk concerns due to long-term consumption of cypermethrin residues are adequately addressed by the dietary risk evaluation chronic exposure analysis using the RfD.

C. *Exposures and Risks*

1. *From food and feed uses.* Tolerances have been established (40 CFR 180.418) for residues of cypermethrin in or on a variety of raw agricultural commodities. Tolerances currently exist for residues of cypermethrin on cottonseed; pecans; lettuce, head; onions, bulb; cabbage; *Brassica*, head and stem; *Brassica*, leafy and livestock commodities of cattle, goats, hogs, horses, and sheep as well as this pending tolerance for green onions. For the purposes of dietary risk assessment, residue data generated from

residue field trials conducted at maximum application rates and minimum preharvest intervals were used. To assess secondary exposure from edible animal commodities, animal dietary burdens were calculated using mean field trial residue, adjusted for percent crop treated and applying appropriate processing factors for all feed items. Risk assessments were conducted by EPA to assess dietary exposures and risks from cypermethrin as follows:

i. *Acute exposure and risk.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a one day or single exposure. The acute dietary exposure assessment used Monte Carlo modeling (in accordance with Tier 3 of EPA June 1996 "Acute Dietary Exposure Assessment" guidance document) incorporating anticipated residues and percent crop treated refinement. The acute exposure via dietary intake for the U.S. Population is estimated at 0.004438 mg/kg/day. The acute dietary risk estimated by MOE at the 99.9th percentile for the U.S. population is 225. The acute dietary exposure for children is 0.005465 mg/kg/day with a resulting MOE of 183. EPA concludes that there is a reasonable certainty of no harm for MOEs of 100 or greater.

ii. *Chronic exposure and risk.* The chronic dietary exposure assessment incorporated anticipated residues, tolerance values, FDA and PDP monitoring data, and percent crop treated information. The RfD used was 0.01 mg/kg/day. For the U.S. population, the exposure was estimated at 0.000025 mg/kg/day. The risk assessment resulted in use of 0.3% of the RfD. For children, the exposure was estimated at 0.000042 mg/kg/day, which uses 0.4% of the RfD.

Section 408(b)(2)(E) of the FFDCFA authorizes EPA to consider available data and information on the anticipated residue levels of pesticides residues in food and the actual levels of pesticide chemicals that have been measured in food. If EPA relies on such information, EPA must require that data be provided five years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. Following the initial data submission, EPA is authorized to require similar data on a time frame it deems appropriate. Section 408(b)(2)(F) allows the Agency to use data on the actual percent of crop treated when establishing a tolerance only where the Agency can make the following

findings: (a) that the data used are reliable and provide a valid basis for showing the percentage of food derived from a crop that is likely to contain residues; (b) that the exposure estimate does not underestimate the exposure for any significant subpopulation and; (c) where data on regional pesticide use and food consumption are available, that the exposure estimate does not understate exposure for any regional population. In addition, the Agency must provide for periodic evaluation of any estimates used.

The percent of crop treated estimates for cypermethrin were derived from federal and market survey data. EPA considers these data reliable. A range of estimates are supplied by these data and the upper end of this range was used for the exposure assessment. By using this upper end estimate of percent crop treated, the Agency is reasonably certain that exposure is not underestimated for any significant subpopulation. Further, regional consumption information is taken into account through EPA's computer based model for evaluating exposure of significant subpopulations including several regional groups. Review of this regional data allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. To meet the requirement for data on anticipated residues, EPA will issue a Data Call-In (DCI) notice pursuant to section 408(f) of the FFDCA requiring submission of data on anticipated residues in conjunction with approval of the registration under FIFRA.

2. *From drinking water.* Studies show that cypermethrin is immobile in soil and does not leach into ground water. Drinking water residue levels were estimated using the PRZM1/EXAMS computer models in 1993 for comparative ecological risk assessment.

i. *Acute exposure and risk.* For the U.S. population, acute exposure is estimated at 0.000126 mg/kg/day (MOE = 7,965). For non-nursing infants < 1 year old, exposure is estimated at 0.000242 mg/kg/day (MOE= 4,138).

ii. *Chronic exposure and risk.* For the U.S. population, chronic exposure is estimated at 0.000005 mg/kg/day, or essentially 0% of the RfD. For non-nursing infants < 1 year old, exposure is estimated at 0.000021 mg/kg/day, or 0.2% of the RfD.

3. *From non-dietary exposure.* Cypermethrin is currently registered for use on the following residential non-food sites: lawns and carpet. Non-occupational exposure to cypermethrin may occur as a result of inhalation or contact from indoor residential, indoor

commercial, and outdoor residential uses. Using surrogate data and conservative exposure scenarios, the Agency has estimated combined inhalation, dermal, and oral non-dietary exposure.

4. *Short- and intermediate-term exposure and risk.* For the U.S. population, exposure is estimated at 0.0000515 mg/kg/day. For infants less than 1 year old, the exposure is estimated at 0.00259 mg/kg/day. It should be noted that carpet uses are considered short and intermediate term exposures because available data indicate that cypermethrin dissipates over time and is thus unavailable to contribute as chronic exposure and risk.

5. *Cumulative exposure to substances with common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity." The Agency believes that "available information" in this context might include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides, although the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way. EPA has begun a pilot process to study this issue further through the examination of particular classes of pesticides. The Agency hopes that the results of this pilot process will increase the Agency's scientific understanding of this question such that EPA will be able to develop and apply scientific principles for better determining which chemicals have a common mechanism of toxicity and evaluating the cumulative effects of such chemicals. The Agency anticipates, however, that even as its understanding of the science of common mechanisms increases, decisions on specific classes of chemicals will be heavily dependent on chemical specific data, much of which may not be presently available.

Although at present the Agency does not know how to apply the information in its files concerning common mechanism issues to most risk

assessments, there are pesticides as to which the common mechanism issues can be resolved. These pesticides include pesticides that are toxicologically dissimilar to existing chemical substances (in which case the Agency can conclude that it is unlikely that a pesticide shares a common mechanism of activity with other substances) and pesticides that produce a common toxic metabolite (in which case common mechanism of activity will be assumed).

Four members of the insecticide class pyrethroids produce a common metabolite known as DCVA (3-(2,2-dichloroethenyl)-2,2-dimethylcyclopropane carboxylic acid). These insecticides are cyfluthrin, cypermethrin, zeta-cypermethrin and permethrin. Although the residues of DCVA can be estimated, no toxicology data on the compound per se are available to directly conduct a hazard evaluation and thereby establish an appropriate endpoint for use in a joint risk assessment. To date, for the purpose of assessing the risk of the parent compound the toxicity of DCVA has been assumed to be equivalent to the parent compound. However, due to the different toxicological profiles of cyfluthrin, cypermethrin, permethrin, and zeta-cypermethrin, EPA does not believe that it would be appropriate to cumulate DCVA for these pesticides, or DCVA residues from one of these pesticides with the parent of another of these pesticides, in conducting the risk assessment for these pesticides. Accordingly, for the purposes of this tolerance action, EPA has not assumed that cypermethrin has a common mechanism of toxicity with other substances.

D. Aggregate Risks and Determination of Safety for U.S. Population

The Agency has determined that an aggregate systemic oral and dermal exposure risk assessment is not appropriate due to difference in the toxicity endpoints observed between the oral (neurotoxicity) and dermal (hepatotoxicity) routes. An aggregate oral and inhalation risk assessment is appropriate due to the similarity of toxicity (neurotoxicity) observed in rats via these routes.

1. *Acute risk.* Aggregate acute risk represents the sum of acute food and acute drinking water exposure. For cypermethrin, the aggregate acute exposure is estimated at 0.004564 mg/kg/day, with a resulting MOE of 219 for the adult U.S. population. EPA generally has no concern for acute risk when the MOE is greater than 100.

2. *Chronic risk.* Aggregate chronic exposure is the sum of chronic exposure from food and drinking water. Using the exposure assumptions described above, EPA has concluded that aggregate exposure to cypermethrin from food and water will utilize 0.3% of the RfD for the U.S. population. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health.

3. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account chronic dietary food and water (considered to be a background exposure level) plus indoor and outdoor residential exposure. For cypermethrin, exposure is estimated at 0.000082 mg/kg/day, with a resulting MOE of 61,000 for the U.S. population. EPA generally has no concern for short-term risks if MOEs are shown to be over 100.

E. Aggregate Cancer Risk for U.S. Population

Cypermethrin is classified as a weak Group C carcinogen based on the increased incidence of lung adenomas in female mice. An RfD approach was recommended for human risk assessment purposes. Therefore, a quantitative dietary cancer risk assessment was not performed. Dietary risk concerns due to long-term consumption of cypermethrin are adequately addressed in the chronic exposure analysis. For the U.S. population, less than 1% of the RfD is occupied by aggregate chronic food and water exposure.

F. Conclusion

EPA concludes that there is a reasonable certainty that no harm will result from aggregate exposure to cypermethrin residues.

G. Aggregate Risks and Determination of Safety for Infants and Children

1. Safety factor for infants and children— i. *In general.* In assessing the potential for additional sensitivity of infants and children to residues of cypermethrin, EPA considered data from developmental toxicity studies in the rat and rabbit and a 2-generation reproduction study in the rat. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from maternal pesticide exposure gestation. Reproduction studies provide information relating to effects from exposure to the pesticide on the

reproductive capability of mating animals and data on systemic toxicity.

FFDCA section 408 provides that EPA shall apply an additional ten-fold margin of safety for infants and children in the case of threshold effects to account for pre- and post-natal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. EPA believes that reliable data support using the standard uncertainty factor (usually 100 for combined inter- and intra-species variability) and not the additional tenfold MOE/uncertainty factor when EPA has a complete data base under existing guidelines and when the severity of the effect in infants or children or the potency or unusual toxic properties of a compound do not raise concerns regarding the adequacy of the standard MOE/safety factor.

ii. *Developmental toxicity studies.* In the pre-natal developmental toxicity studies in rats and rabbits, there was no evidence of developmental toxicity at the highest dose tested (70 mg/kg/day in rats and 700 mg/kg/day in rabbits).

iii. *Reproductive toxicity study.* An acceptable 3-generation reproduction study in rats has been submitted. Offspring toxicity was observed only at the highest dietary level tested, (700/1,000 ppm; 50/37.5 mg/kg/day), while toxicity in parental animals was observed at the lower treatment levels. The parental systemic NOEL was 50 ppm (2.5 mg/kg/day) and the parental systemic LOEL was 150 ppm (7.5 mg/kg/day).

iv. *Pre- and post-natal sensitivity.* The developmental and reproductive toxicity data demonstrated no indications of increased pre- and post-natal sensitivity.

v. *Conclusion.* From available adequate data, there is no indication that the developing fetus or neonate is more sensitive than adult animals. No developmental neurotoxicity studies are being required at this time. A developmental neurotoxicity data requirement is an upper tier study and required only if effects observed in the acute and 90-day neurotoxicity studies indicate concerns for frank neuropathy or alterations seen in fetal nervous system in the developmental or reproductive toxicology studies. The FQPA conditional requirement of an additional tenfold margin of safety for pesticide residues be applied for infants and children to take into account

potential pre- and post-natal toxicity was not imposed in this case. The Agency believes that reliable data support the use of the standard 100-fold uncertainty factor, and that a ten-fold (10x) uncertainty factor is not needed to protect the safety of infants and children.

2. *Acute risk.* For children 1 to 6 years old, (most highly exposed subgroup), the aggregate acute exposure is estimated at 0.005572 mg/kg/day, with a resulting MOE of 179. EPA generally has no concern for MOEs over 100.

3. *Chronic exposure and risk.* Using the conservative exposure assumptions, EPA has concluded that aggregate exposure to cypermethrin from food and water is estimated at 0.000044 mg/kg/day for children 1 to 6 years old (the highly exposed subgroup) will utilize 0.4% of the RfD for infants and children. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health.

4. *Short- or intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account chronic dietary food and water (considered to be a background exposure level) plus short-term and intermediate-term residential exposure. The MOE for non-nursing infants < 1 year old (most highly exposed subgroup) is estimated at 1,900, well above MOE values of a MOE less than 100 which the Agency finds unacceptable.

Therefore, EPA concludes that there is reasonable certainty that no harm will result to infants and children from aggregate exposure to cypermethrin residues.

5. *Special docket.* The complete acute and chronic exposure analyses (including dietary, non-dietary, drinking water, and residential exposure, and analysis of exposure to infants and children) used for risk assessment purposes can be found in the Special Docket for the FQPA under the title "Risk Assessment for Extension of Tolerances for Synthetic Pyrethroids." Further explanation regarding EPA's decision regarding the additional safety factor can also be found in the Special Docket.

H. Endocrine Disrupter Effects

EPA is required to develop a screening program to determine whether certain substances (including all pesticides and inert) "may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or such other endocrine effect...." The Agency is currently

working with interested stakeholders, including other government agencies, public interest groups, industry, and research scientists in developing a screening and testing program and a priority setting scheme to implement the program. Congress has allowed 3 years from passage of FQPA (August 3, 1999) to implement this program. At that time, EPA may require further testing of this active ingredient and end use products for endocrine disruption effects.

III. Other Considerations

A. Metabolism In Plants and Animals

The metabolism of cypermethrin in plants and animals is adequately understood. Studies have been conducted to delineate the metabolism of radiolabelled cypermethrin in various crops all showing similar results. The residue that is regulated is the parent compound, cypermethrin.

B. Analytical Enforcement Methodology

Adequate enforcement methodology Gas Chromatography with Electron Capture Detection (GC/ECD) is available in PAM II for enforcement of the tolerance.

C. Magnitude of Residues

Residue data from field trial and the FDA monitoring program (1992-1995) and the PDP monitoring program (1994) were used to estimate chronic dietary exposure. For the chronic analyses, mean residues from FDA monitoring were used for lettuce and onions (dry bulbs). Residue field trial data were used for broccoli, cabbage, cotton, green onions, mustard greens, and pecans. For acute dietary exposure analysis, field trial residue data, along with percent crop treated were used in the Monte Carlo analysis.

D. International Residue Limits

There are no Codex Maximum Residue Limits (MRL) for cypermethrin on green onions.

IV. Conclusion

Therefore, the tolerance is established for residues of cypermethrin (\pm) alpha-cyano(3-phenoxyphenyl)methyl (\pm) *cis*, *trans* 3-(2,2-dichloroethenyl)-2,2-dimethylcyclopropanecarboxylate) in or on the raw agricultural commodity green onions at 6.0 ppm.

V. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to "object" to a tolerance regulation issued by EPA under new section 408(e) and (l)(6) as was provided in the old section 408 and in section

409. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which govern the submission of objections and hearing requests. These regulations will require some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use those procedural regulations with appropriate adjustments to reflect the new law.

Any person may, by November 10, 1998, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

VI. Public Record and Electronic Submissions

EPA has established a record for this rulemaking under docket control number [OPP-300706] (including any comments and data submitted

electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 119 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA.

Electronic comments may be sent directly to EPA at:
opp-docket@epamail.epa.gov.

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the Virginia address in "ADDRESSES" at the beginning of this document.

VII. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

This final rule establishes a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). Nor does it require any prior consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income

Populations (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997).

B. Executive Order 12875

Under Executive Order 12875, entitled Enhancing Intergovernmental Partnerships (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget (OMB) a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create an unfunded federal mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

C. Executive Order 13084

Under Executive Order 13084, entitled Consultation and Coordination with Indian Tribal Governments (63 FR 27655, May 19, 1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order

13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

In addition, since these tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950) and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Submission to Congress and the Comptroller General

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

List of Subjects in 40 CFR Part 180

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

Dated: August 31, 1998.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

Authority: 21 U.S.C. 346a and 371.

2. In § 180.418, the table in paragraph (a)(1) is amended by alphabetically adding the commodity to read as follows:

§ 180.418 Cypermethrin; tolerances for residues.

(a)(1)* * *

Commodity	Parts per million
* * * * *	* *
Onions, green	6.0
* * * * *	* *

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[FR Doc. 98-24472 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP-300685; FRL-6017-9]

RIN 2070-AB78

Metolachlor; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a time-limited tolerance for combined residues of metolachlor and its metabolites determined as the derivatives, 2-[(2-ethyl-6-methylphenyl)amino]-1-propanol and 4-(2-ethyl-6-methylphenyl)-2-hydroxy-5-methyl-3-morpholinone, each expressed as the parent compound in or on grass forage and grass hay. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide on grass grown for seed in Oregon. This

regulation establishes maximum permissible levels for residues of metolachlor in these feed commodities pursuant to section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act of 1996. The tolerances will expire and are revoked on December 31, 1999.

DATES: This regulation is effective September 11, 1998. Objections and requests for hearings must be received by EPA on or before November 10, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP-300685], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP-300685], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 file format or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP-300685]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: By mail: Andrea Beard, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Crystal

Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 308-9356, e-mail: beard.andrea@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA, on its own initiative, pursuant to section 408(e) and (l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) and (l)(6), is establishing a tolerance for combined residues of the herbicide metolachlor and its metabolites determined as the derivatives, 2-[(2-ethyl-6-methylphenyl)amino]-1-propanol and 4-(2-ethyl-6-methylphenyl)-2-hydroxy-5-methyl-3-morpholinone, each expressed as the parent compound, in or on grass forage at 10 part per million (ppm), and grass hay at 0.2 ppm. These tolerances will expire and are revoked on December 31, 1999. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations.

I. Background and Statutory Authority

The Food Quality Protection Act of 1996 (FQPA) (Pub. L. 104-170) was signed into law August 3, 1996. FQPA amends both the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 301 *et seq.*, and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.* The FQPA amendments went into effect immediately. Among other things, FQPA amends FFDCA to bring all EPA pesticide tolerance-setting activities under a new section 408 with a new safety standard and new procedures. These activities are described below and discussed in greater detail in the final rule establishing the time-limited tolerance associated with the emergency exemption for use of propiconazole on sorghum (61 FR 58135, November 13, 1996) (FRL-5572-9).

New section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to

infants and children from aggregate exposure to the pesticide chemical residue. . . ."

Section 18 of FIFRA authorizes EPA to exempt any Federal or State agency from any provision of FIFRA, if EPA determines that "emergency conditions exist which require such exemption." This provision was not amended by FQPA. EPA has established regulations governing such emergency exemptions in 40 CFR part 166.

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

Because decisions on section 18-related tolerances must proceed before EPA reaches closure on several policy issues relating to interpretation and implementation of the FQPA, EPA does not intend for its actions on such tolerance to set binding precedents for the application of section 408 and the new safety standard to other tolerances and exemptions.

II. Emergency Exemption for Metolachlor on Grass Grown for Seed and FFDCA Tolerances

Because of cancellation of several herbicide uses in recent years, a shift in weed populations and the development of resistance, plus restrictions imposed on open field burning, grass growers are no longer able to control weeds adequately with registered materials and cultural methods. The Applicants claim that if weeds are not adequately controlled, growers will incur significant economic losses due to reduced yields, and from losses due to contaminated seed, and replanting of fields that do not meet certification requirements. The Applicant proposed use of metolachlor, in conjunction with several other herbicides, to comprise a comprehensive management system to solve the current weed control problems in grass seed production. EPA has authorized under FIFRA section 18 the use of metolachlor on grass grown for seed for control of weeds in Oregon. After having reviewed the submission, EPA concurs that emergency conditions exist for this State.

As part of its assessment of this emergency exemption, EPA assessed the potential risks presented by residues of metolachlor in or on grass hay and forage. In doing so, EPA considered the new safety standard in FFDCA section

408(b)(2), and EPA decided that the necessary tolerances under FFDC section 408(l)(6) would be consistent with the new safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to address an urgent non-routine situation and to ensure that the resulting food is safe and lawful, EPA is issuing these tolerances without notice and opportunity for public comment under section 408(e), as provided in section 408(l)(6). Although these tolerances will expire and are revoked on December 31, 1999, under FFDC section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerances remaining in or on grass hay or forage after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA, and the residues do not exceed a level that was authorized by these tolerances at the time of that application. EPA will take action to revoke these tolerances earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because these tolerances are being approved under emergency conditions EPA has not made any decisions about whether metolachlor meets EPA's registration requirements for use on grass grown for seed or whether permanent tolerances for this use would be appropriate. Under these circumstances, EPA does not believe that these tolerances serve as a basis for registration of metolachlor by a State for special local needs under FIFRA section 24(c). Nor do these tolerances serve as the basis for any State other than Oregon to use this pesticide on this crop under section 18 of FIFRA without following all provisions of section 18 as identified in 40 CFR part 166. For additional information regarding the emergency exemption for metolachlor, contact the Agency's Registration Division at the address provided above.

III. Risk Assessment and Statutory Findings

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides based primarily on toxicological studies using laboratory animals. These studies address many adverse health effects, including (but not limited to) reproductive effects, developmental toxicity, toxicity to the nervous system, and carcinogenicity. Second, EPA examines exposure to the pesticide through the diet (e.g., food and drinking water) and through exposures

that occur as a result of pesticide use in residential settings.

A. Toxicity

1. *Threshold and non-threshold effects.* For many animal studies, a dose response relationship can be determined, which provides a dose that causes adverse effects (threshold effects) and doses causing no observed effects (the "no-observed effect level" or "NOEL").

Once a study has been evaluated and the observed effects have been determined to be threshold effects, EPA generally divides the NOEL from the study with the lowest NOEL by an uncertainty factor (usually 100 or more) to determine the Reference Dose (RfD). The RfD is a level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. An uncertainty factor (sometimes called a "safety factor") of 100 is commonly used since it is assumed that people may be up to 10 times more sensitive to pesticides than the test animals, and that one person or subgroup of the population (such as infants and children) could be up to 10 times more sensitive to a pesticide than another. In addition, EPA assesses the potential risks to infants and children based on the weight of the evidence of the toxicology studies and determines whether an additional uncertainty factor is warranted. Thus, an aggregate daily exposure to a pesticide residue at or below the RfD (expressed as 100 % or less of the RfD) is generally considered acceptable by EPA. EPA generally uses the RfD to evaluate the chronic risks posed by pesticide exposure. For shorter term risks, EPA calculates a margin of exposure (MOE) by dividing the estimated human exposure into the NOEL from the appropriate animal study. Commonly, EPA finds MOEs lower than 100 to be unacceptable. This 100-fold MOE is based on the same rationale as the 100-fold uncertainty factor.

Lifetime feeding studies in two species of laboratory animals are conducted to screen pesticides for cancer effects. When evidence of increased cancer is noted in these studies, the Agency conducts a weight of the evidence review of all relevant toxicological data including short-term and mutagenicity studies and structure activity relationship. Once a pesticide has been classified as a potential human carcinogen, different types of risk assessments (e.g., linear low dose extrapolations or MOE calculation based on the appropriate NOEL) will be carried out based on the nature of the

carcinogenic response and the Agency's knowledge of its mode of action.

2. *Differences in toxic effect due to exposure duration.* The toxicological effects of a pesticide can vary with different exposure durations. EPA considers the entire toxicity data base, and based on the effects seen for different durations and routes of exposure, determines which risk assessments should be done to assure that the public is adequately protected from any pesticide exposure scenario. Both short and long durations of exposure are always considered. Typically, risk assessments include "acute," "short-term," "intermediate term," and "chronic" risks. These assessments are defined by the Agency as follows.

Acute risk, by the Agency's definition, results from 1-day consumption of food and water, and reflects toxicity which could be expressed following a single oral exposure to the pesticide residues. High end exposure to food and water residues are typically assumed.

Short-term risk results from exposure to the pesticide for a period of 1-7 days, and therefore overlaps with the acute risk assessment. Historically, this risk assessment was intended to address primarily dermal and inhalation exposure which could result, for example, from residential pesticide applications. However, since enactment of FQPA, this assessment has been expanded to include both dietary and non-dietary sources of exposure, and will typically consider exposure from food, water, and residential uses when reliable data are available. In this assessment, risks from average food and water exposure, and high-end residential exposure, are aggregated. High-end exposures from all three sources are not typically added because of the very low probability of this occurring in most cases, and because the other conservative assumptions built into the assessment assure adequate protection of public health. However, for cases in which high-end exposure can reasonably be expected from multiple sources (e.g. frequent and widespread homeowner use in a specific geographical area), multiple high-end risks will be aggregated and presented as part of the comprehensive risk assessment/characterization. Since the toxicological endpoint considered in this assessment reflects exposure over a period of at least 7 days, an additional degree of conservatism is built into the assessment; i.e., the risk assessment nominally covers 1-7 days exposure, and the toxicological endpoint/NOEL is selected to be adequate for at least 7 days of exposure. (Toxicity results at

lower levels when the dosing duration is increased.)

Intermediate-term risk results from exposure for 7 days to several months. This assessment is handled in a manner similar to the short-term risk assessment.

Chronic risk assessment describes risk which could result from several months to a lifetime of exposure. For this assessment, risks are aggregated considering average exposure from all sources for representative population subgroups including infants and children.

B. Aggregate Exposure

In examining aggregate exposure, FFDCA section 408 requires that EPA take into account available and reliable information concerning exposure from the pesticide residue in the food in question, residues in other foods for which there are tolerances, residues in groundwater or surface water that is consumed as drinking water, and other non-occupational exposures through pesticide use in gardens, lawns, or buildings (residential and other indoor uses). Dietary exposure to residues of a pesticide in a food commodity are estimated by multiplying the average daily consumption of the food forms of that commodity by the tolerance level or the anticipated pesticide residue level. The Theoretical Maximum Residue Contribution (TMRC) is an estimate of the level of residues consumed daily if each food item contained pesticide residues equal to the tolerance. In evaluating food exposures, EPA takes into account varying consumption patterns of major identifiable subgroups of consumers, including infants and children. The TMRC is a "worst case" estimate since it is based on the assumptions that food contains pesticide residues at the tolerance level and that 100% of the crop is treated by pesticides that have established tolerances. If the TMRC exceeds the RfD or poses a lifetime cancer risk that is greater than approximately one in a million, EPA attempts to derive a more accurate exposure estimate for the pesticide by evaluating additional types of information (anticipated residue data and/or percent of crop treated data) which show, generally, that pesticide residues in most foods when they are eaten are well below established tolerances.

Percent of crop treated estimates are derived from federal and private market survey data. Typically, a range of estimates are supplied and the upper end of this range is assumed for the exposure assessment. By using this upper end estimate of percent of crop

treated, the Agency is reasonably certain that exposure is not understated for any significant subpopulation group. Further, regional consumption information is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups, to pesticide residues. For this pesticide, the most highly exposed population subgroups (non-nursing infants <1 year old, and children 1 to 6 years old) were not regionally based.

IV. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action, EPA has sufficient data to assess the hazards of metolachlor and to make a determination on aggregate exposure, consistent with section 408(b)(2), for time-limited tolerances for combined residues of metolachlor and its metabolites in/on grass forage at 10 ppm, and grass hay at 0.2 ppm. EPA's assessment of the dietary exposures and risks associated with establishing the tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by metolachlor are discussed below.

1. *Acute toxicity.* EPA scientists have determined that available data do not indicate that there is potential for adverse effects after a single dietary exposure. Therefore, acute risk assessments were not conducted.

2. *Short - and intermediate - term toxicity.* For intermediate-term dermal risk assessment, the NOEL of 100 milligrams/kilogram/day (mg/kg/day) from the 21-day dermal toxicity study in rats is to be used. At the lowest effect level (LEL) of 1,000 mg/kg/day, there were dose-related increases in minor histopathological alterations of the skin, in total bilirubin (females), in absolute and relative liver weights (males), and in relative kidney weights (females). An inhalation exposure intermediate-term hazard was not identified. The EPA has determined that the available data do not indicate the potential for adverse

effects from short-term dermal or inhalation exposures.

3. *Chronic toxicity.* EPA has established the RfD for metolachlor at 0.10 mg/kg bodyweight/day (bwt/day). This RfD is based on the results from the 1-year feeding study in dogs, with a NOEL of 9.7 mg/kg/day, and an uncertainty factor of 100, based on decreased body weight gain at the LOEL of 33 mg/kg/day.

4. *Carcinogenicity.* Under the EPA Guidelines for Carcinogen Risk Assessment, metolachlor has been classified as a Group C Chemical (possible human carcinogen), based on increased incidence of adenomas and combined adenomas/carcinomas in female rats. The structural relationship of metolachlor to acetochlor and alachlor was of concern to the OPP Carcinogenicity Peer Review Committee (CPRC). However, in light of new information on the relative metabolism of these chemicals, and since there was no supportable mutagenicity concern, the CPRC recommended the MOE approach for estimation of risk, using the NOEL of 15.7 mg/kg/day from the 2-year rat feeding study.

B. Exposures and Risks

1. *From food and feed uses.* Tolerances have been established (40 CFR 180.368) for the combined residues of metolachlor and its metabolites, in or on a variety of raw agricultural commodities ranging from 0.02 ppm in various animal commodities, to 30 ppm in peanut forage and hay. Risk assessments were conducted by EPA to assess dietary exposures and risks from metolachlor as follows:

i. *Acute exposure and risk.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a one day or single exposure. EPA scientists have determined that available data do not indicate that there is potential for adverse effects after a single dietary exposure. Therefore, acute risk assessment is not required.

ii. *Chronic exposure and risk.* In conducting this chronic dietary (food only) risk assessment, OPP used percent of crop treated data for selected crops, and assumed tolerance level residues in all commodities having metolachlor tolerances. These assumptions result in an overestimate of human dietary exposure, and thus this risk estimate should be viewed as conservative; further refinement using anticipated residue levels and additional percent crop treated values would result in lower exposure estimates. Based on the given assumptions, EPA has calculated

that dietary exposure to metolachlor will utilize 1.1 % of the RfD for the overall U.S. population. The major identifiable subgroups with the highest exposure are non-nursing infants <1 year old and children 1 to 6 years old, both at 2.3 % of the RfD. This is further discussed below in the section on infants and children. EPA generally has no concern for exposure below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to metolachlor in drinking water, EPA does not expect the aggregate exposure to exceed 100% of the RfD. EPA concludes that there is reasonable certainty that no harm will result from chronic aggregate exposure to metolachlor residues.

2. From drinking water.

Environmental fate studies indicate that metolachlor appears to be moderately persistent and ranges from being mobile to highly mobile in different soils. Data collected from around the US provides evidence that metolachlor leaches into ground water, occasionally at levels that exceed the Lifetime Health Advisory (HA) level of 100 ppb. Metolachlor is not yet formally regulated under the Safe Drinking Water Act; therefore, no enforcement Maximum Contaminant Level (MCL) has been established for it. Metolachlor also has relatively high health advisory levels (1-10 day HA level of 2,000 ppb and lifetime HA level of 100 ppb). Based on available data, it appears highly unlikely that maximum or short-term average metolachlor concentrations will exceed the 1-10 day HA levels of 2,000 ppb, or that annual average metolachlor concentrations will exceed the lifetime HA of 100 ppb anywhere. Additionally, to mitigate risk, additional label restrictions are being required under the Reregistration process, designed to minimize ground and surface water contamination.

Because the Agency lacks sufficient water-related exposure data to complete a comprehensive drinking water risk assessment for many pesticides, EPA has commenced and nearly completed a process to identify a reasonable yet conservative bounding figure for the potential contribution of water-related exposure to the aggregate risk posed by a pesticide. In developing the bounding figure, EPA estimated residue levels in water for a number of specific pesticides using various data sources. The Agency then applied the estimated residue levels, in conjunction with appropriate toxicological endpoints (RfD's or acute dietary NOEL's) and assumptions about body weight and consumption, to

calculate, for each pesticide, the increment of aggregate risk contributed by consumption of contaminated water. While EPA has not yet pinpointed the appropriate bounding figure for exposure from contaminated water, the ranges the Agency is continuing to examine are all below the level that would cause metolachlor to exceed the RfD if the tolerance being considered in this document were granted. The Agency has therefore concluded that the potential exposures associated with metolachlor in water, even at the higher levels the Agency is considering as a conservative upper bound, would not prevent the Agency from determining that there is a reasonable certainty of no harm if the tolerance is granted.

3. From non-dietary exposure.

Metolachlor is currently registered for use on a number of residential non-food sites including ornamental plants and grasses, highway rights of way, and recreational areas. No indoor uses are registered.

i. *Acute exposure and risk.* EPA generally will not include residential or other non-dietary exposures as a component of the acute exposure assessment. Theoretically, it is also possible that a residential, or other non-dietary, exposure could be combined with the acute total dietary exposure from food and water. However, the Agency does not believe that aggregate multiple exposure to large amounts of pesticide residues in the residential environment via multiple products and routes for a one day exposure is a reasonably probable event. It is highly unlikely that, in one day, an individual would have multiple high-end exposures to the same pesticide by treating their lawn and garden, treating their house via crack and crevice application, swimming in a pool, and be maximally exposed by the food and water consumed. Additionally, the concept of an acute exposure as a single exposure does not allow for including post-application exposures, in which residues decline over a period of days after application. Therefore, the Agency believes that residential exposures are more appropriately included in the short-term exposure scenario discussed below.

ii. *Short- and intermediate-term exposure and risk.* There are residential uses of metolachlor and EPA acknowledges that there may be short and intermediate-term non-occupational exposure scenarios. The EPA has identified a toxicity endpoint for intermediate-term residential risks. However, no acceptable reliable exposure data to assess the potential risks are available at this time. Based on

the high level of the intermediate-term toxicity endpoint (NOEL of 100 mg/kg/day, and LOEL of 1,000 mg/kg/day), the Agency does not expect the intermediate-term aggregate risk to exceed the level of concern. A short-term non-dietary toxicity endpoint was not identified for metolachlor.

iii. *Chronic exposure and risk.* The Agency has concluded that a chronic residential exposure scenario does not exist for non-occupational uses of metolachlor.

4. *Cumulative exposure to substances with common mechanism of toxicity.* Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity." The Agency believes that "available information" in this context might include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides, although the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way. EPA has begun a pilot process to study this issue further through the examination of particular classes of pesticides. The Agency hopes that the results of this pilot process will increase the Agency's scientific understanding of this question such that EPA will be able to develop and apply scientific principles for better determining which chemicals have a common mechanism of toxicity and evaluating the cumulative effects of such chemicals. The Agency anticipates, however, that even as its understanding of the science of common mechanisms increases, decisions on specific classes of chemicals will be heavily dependent on chemical specific data, much of which may not be presently available.

Although at present the Agency does not know how to apply the information in its files concerning common mechanism issues to most risk assessments, there are pesticides as to which the common mechanism issues can be resolved. These pesticides include pesticides that are toxicologically dissimilar to existing chemical substances (in which case the

Agency can conclude that it is unlikely that a pesticide shares a common mechanism of activity with other substances) and pesticides that produce a common toxic metabolite (in which case common mechanism of activity will be assumed).

EPA does not have, at this time, available data to determine whether metolachlor has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, metolachlor does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that metolachlor has a common mechanism of toxicity with other substances.

C. Aggregate Risks and Determination of Safety for U.S. Population

1. *Acute risk.* The available data for metolachlor do not indicate the potential for adverse effects from acute dietary exposures. Therefore, an acute aggregate risk assessment was not conducted.

2. *Chronic risk.* Using the conservative exposure assumptions described above, EPA has concluded that aggregate exposure to metolachlor from food will utilize 1.1 % of the RfD for the U.S. population. The major identifiable subgroup with the highest aggregate exposure is non-nursing infants <1 year old, and children 1 to 6 years old, both at 2.3 % of the RfD; this is further discussed below. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to metolachlor in drinking water and from non-dietary, non-occupational exposure, EPA does not expect the aggregate exposure to exceed 100% of the RfD. EPA concludes that there is a reasonable certainty that no harm will result from aggregate exposure to metolachlor residues.

3. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account chronic dietary food and water (considered to be a background exposure level) plus indoor and outdoor residential exposure. Based on the low percentage of the RfD occupied by the chronic dietary exposure (<3% for all population subgroups) and the high level of the intermediate-term toxicity endpoint (NOEL and LOEL of 100 and

1,000 mg/kg/day, respectively), in the best scientific judgment of EPA, the intermediate-term aggregate risk will not exceed the Agency's level of concern. Despite the potential for exposure to metolachlor in drinking water, EPA does not expect the aggregate exposure to exceed 100% of the RfD. Since a short-term toxicity endpoint was not identified for metolachlor, a short-term aggregate risk assessment was not conducted.

D. Aggregate Cancer Risk for U.S. Population

Based on the CPRC recommendation that the MOE approach be used to assess cancer risk, a quantitative cancer risk assessment was not performed. Based on the aggregate chronic dietary analysis (food only), the calculated MOEs for the U.S. population and infants/children are 15,000 and 6,800, respectively. Other than dietary exposure, no chronic exposure scenarios have been identified from registered uses of metolachlor. The EPA believes that the potential additional exposure in drinking water would not significantly lower the chronic dietary MOEs. The EPA has not yet established what an adequate MOE should be for chemicals having a non-linear mechanism for carcinogenicity. At this time, and for the purpose of this action only, the Agency concludes that the MOEs given above are adequate to ensure that there is a reasonable certainty that no harm to the U.S. population or to infants and children, will result from aggregate exposure to residues of metolachlor. When the Agency reaches a conclusion on the science policy issue of adequate MOEs for non-linear carcinogens, it is possible that the risk assessment for metolachlor may need to be revised.

E. Aggregate Risks and Determination of Safety for Infants and Children

1. *Safety factor for infants and children—* i. *In general.* In assessing the potential for additional sensitivity of infants and children to residues of metolachlor, EPA considered data from developmental toxicity studies in the rat and rabbit and a two-generation reproduction study in the rat. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from maternal pesticide exposure during gestation. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability of mating animals and data on systemic toxicity.

FFDCA section 408 provides that EPA shall apply an additional tenfold margin of safety for infants and children in the

case of threshold effects to account for pre- and post-natal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. EPA believes that reliable data support using the standard MOE and uncertainty factor (usually 100 for combined inter- and intra-species variability) and not the additional tenfold MOE/uncertainty factor when EPA has a complete data base under existing guidelines and when the severity of the effect in infants or children or the potency or unusual toxic properties of a compound do not raise concerns regarding the adequacy of the standard MOE/safety factor.

ii. *Developmental toxicity studies.* In the rat developmental study, the maternal NOEL was 300 mg/kg/day; mortality, increased salivation, lacrimation, convulsions, reduced body weight gain, and reduced food consumption were observed at the LEL of 1,000 mg/kg/day. The developmental NOEL was also 300 mg/kg/day, with reduced mean fetal body weight, reduced number of implantations, and a slight increase in resorptions, seen at the LEL of 1,000 mg/kg/day. In the rabbit developmental study, the maternal NOEL was 120 mg/kg/day, with lacrimation, miosis, reduced food consumption, and decreased body weight gain seen at the LEL of 360 mg/kg/day. No developmental effects were observed at the levels tested, and therefore the developmental NOEL was greater than 360 mg/kg/day (the highest dose tested (HDT)).

iii. *Reproductive toxicity study.* In the two-generation rat reproductive study, the reproductive/developmental toxicity NOEL of 23 mg/kg/day was less than the parental (systemic) toxicity NOEL of >76 mg/kg/day (HDT). The reproductive/developmental NOEL was based on decreased pup body weight during late lactation.

iv. *Pre- and post-natal sensitivity.* Based on current toxicological data requirements, the database for metolachlor relative to pre- and post-natal toxicity is complete. The developmental toxicity NOELs of 300 mg/kg/day (in rats) and >360 mg/kg/day (HDT tested in rabbits) demonstrate that there is not increased sensitivity to metolachlor by the developing fetus (pre-natal) in the presence of maternal toxicity. There was developmental toxicity in rats at 1,000 mg/kg/day (but

not in rabbits). The developmental NOELs are more than 30- and 37-fold higher in the rats and rabbits, respectively, than the NOEL of 9.7 mg/kg/day from the 1-year feeding study in dogs, which is the basis of the RfD. In the two-generation reproductive toxicity study in rats, the reproductive/developmental toxicity NOEL of 23 mg/kg/day was less than the parental (systemic) toxicity NOEL of >76 mg/kg/day. The reproductive/developmental NOEL was based on decreased pup body weight during late lactation and the NOEL occurred at a level which is below the NOEL for parental toxicity (>76 mg/kg/day). This finding suggests that pups are more sensitive to metolachlor than adult animals. For purposes of this Section 18 only, an additional 3-fold uncertainty factor was added to the RfD for infants and children.

v. Conclusion. The TMRC value for the most highly exposed infant and children subgroups (non-nursing infants <1 year old, and children 1 to 6 years old) occupies 6.9% of the RfD for both groups (with the additional 3-fold safety factor). This estimate should be viewed as conservative, since it is based on percent of crop treated data for selected crops and tolerance level residues for all commodities. Refinement of the dietary risk assessment by using additional percent crop treated and anticipated residue data would reduce dietary exposure estimates. Therefore, this risk assessment is an over-estimate of dietary risk.

2. Acute risk. The available data for metolachlor do not indicate the potential for adverse effects from acute dietary exposures. Therefore, no acute risk assessment was conducted.

3. Chronic risk. Using the conservative exposure assumptions described above, EPA has concluded that aggregate exposure to metolachlor from food ranges from 6.9 % for non-nursing infants <1 year old, down to 1.8 % for nursing infants <1 year old (using an additional three-fold safety factor). EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to metolachlor in drinking water and from non-dietary, non-occupational exposure, EPA does not expect the aggregate exposure to exceed 100% of the RfD. EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to metolachlor residues.

4. Short- or intermediate-term risk. Short- and intermediate-term aggregate exposure takes into account chronic dietary food and water (considered to be a background exposure level) plus indoor and outdoor residential exposure. A short-term non-dietary toxicity endpoint was not identified for metolachlor. Using the conservative exposure assumptions described above, EPA has concluded that the percent of the RfD that will be utilized by aggregate exposure to residues of metolachlor is 6.9 % (using an additional 3 fold safety factor) for non-nursing infants <1 year old and children 1 to 6 years old (the most highly exposed population subgroups). Based on the low percentage of the RfD occupied by the chronic dietary exposure and the high level of the intermediate-term toxicity endpoint (NOEL = 100 mg/kg/day and LOEL = 1,000 mg/kg/day), in the best scientific judgment of EPA, the intermediate-term aggregate risk will not exceed the Agency's level of concern. Despite the potential for exposure to metolachlor in drinking water, EPA does not expect the aggregate exposure to exceed 100% of the RfD.

V. Other Considerations

A. Metabolism In Plants and Animals

The nature of the residue in plants and animals is adequately understood. Tolerances for residues of metolachlor in or on food/feed commodities are currently expressed in terms of the combined residues (free and bound) of the herbicide metolachlor ([2-chloro-*N*-(2-ethyl-6-methylphenyl)-*N*-(2-methoxy-1-methylethyl)acetamide)] and its metabolites, determined as the derivatives, 2-[(2-ethyl-6-methylphenyl)amino]-1-propanol and 4-(2-ethyl-6-methylphenyl)-2-hydroxy-5-methyl-3-morpholinone, each expressed as the parent compound (40 CFR 180.368)].

B. Analytical Enforcement Methodology

Adequate methods for purposes of data collection and enforcement of tolerances for metolachlor residues are available. Methods for determining the combined residues of metolachlor and its metabolites, as the derivatives CGA-37913 and CGA-49751, are described in PAM, Vol. II, as Method I (plants; Gas Chromatography (GC) with Nitrogen Phosphorus Detection(NPD)) and Method II (animals; GC-Mass Spectroscopy).

C. Magnitude of Residues

Residues of metolachlor are not expected to exceed 10 ppm in/on forage and 0.2 ppm in/on the hay of grass

grown for seed, as a result of this section 18 use. Secondary residues in animal commodities are not expected to exceed existing tolerances as a result of this section 18 use.

D. International Residue Limits

There are no established CODEX, Canadian, or Mexican residue limits for metolachlor on grass commodities.

E. Rotational Crop Restrictions

Fields in which certified grass seed is grown are not normally rotated to other crops; rotational crop restrictions are not required for this use.

VI. Conclusion

Therefore, the tolerance is established for combined residues of metolachlor and its metabolites, each expressed as the parent compound in grass forage and grass hay at 10 ppm and 0.2 ppm, respectively.

VII. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to "object" to a tolerance regulation issued by EPA under new section 408(e) and (l)(6) as was provided in the old section 408 and in section 409. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which govern the submission of objections and hearing requests. These regulations will require some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use those procedural regulations with appropriate adjustments to reflect the new law.

Any person may, by November 10, 1998, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the

material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

VIII. Public Record and Electronic Submissions

EPA has established a record for this rulemaking under docket control number [OPP-300685] (including any comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 119 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

Electronic comments may be sent directly to EPA at:
opp-docket@epamail.epa.gov.

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the Virginia

address in "ADDRESSES" at the beginning of this document.

IX. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

This final rule establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). Nor does it require any prior consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997).

B. Executive Order 12875

Under Executive Order 12875, entitled Enhancing Intergovernmental Partnerships (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget (OMB) a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create an unfunded federal mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

C. Executive Order 13084

Under Executive Order 13084, entitled Consultation and Coordination with Indian Tribal Governments (63 FR 27655, May 19, 1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

In addition, since these tolerances and exemptions that are established under FFDCA section 408 (l)(6), such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950), and was provided to the

Chief Counsel for Advocacy of the Small Business Administration.

X. Submission to Congress and the Comptroller General

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

List of Subjects in 40 CFR Part 180

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

Dated: August 14, 1998.

Arnold E. Layne,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180— [AMENDED]

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

Authority: 21 U.S.C. 346a and 371.

2. In § 180.368, in paragraph (b), by alphabetically adding the following commodities to the table to read as follows:

§ 180.368 Metolachlor; tolerances for residues.

* * * * *

(b) * * *

Commodity	Parts per million	Expiration/revocation date
Grass forage	10	12/31/99
Grass hay	0.2	12/31/99
* * *	* * *	* * *

* * * * *

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP-300701; FRL-6024-2]

RIN 2070-AB78

Bacillus Sphaericus; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes an exemption from the requirement of a tolerance for residues of the *Bacillus sphaericus* in or on all food commodities when applied/used in or on all food crops. Abbott Laboratories submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act as amended by the Food Quality Protection Act of 1996 (Pub. L. 104-170) requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of *Bacillus sphaericus*.

DATES: This regulation is effective September 11, 1998. Objections and requests for hearings must be received by EPA on or before November 10, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number [OPP-300701], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees) and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP-300701], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of

electronic objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 file format or ASCII file format. All copies of electronic objections and hearing requests must be identified by the docket number [OPP-300701]. No Confidential Business Information (CBI) should be submitted through e-mail. Copies of electronic objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: By mail: Willie H. Nelson, c/o Product Manager (PM) 90, Biopesticides and Pollution Prevention Division (7511C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number and e-mail address: 9th fl., Crystal Mall #2 1921 Jefferson Davis Hwy., Arlington, VA 22202, (703)308-8682 e-mail: Nelson.Willie@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of August 22, 1997 (62 FR 44687) (FRL-5737-8), EPA issued a notice pursuant to section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) announcing the filing of a pesticide tolerance petition by Abbott Laboratories, Sheridan Road, North Chicago, Illinois, 60064. This notice included a summary of the petition prepared by the petitioner and this summary contained conclusions and arguments to support its conclusion that the petition complied with the Food Quality Protection Act (FQPA) of 1996. The petition requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of *Bacillus sphaericus*.

There were no comments received in response to the notice of filing, the data submitted in the petition and all relevant material have been evaluated.

I. Risk Assessment and Statutory Findings

New section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all

other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue..." EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

II. Toxicological Profile

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

All available information and data submitted by Abbott Laboratories in support of the pesticide petition (PP 7F4822) have been reviewed, and indicate that there is a reasonable certainty that no harm will result from residues of *Bacillus sphaericus* because of its ubiquitous nature and its low mammalian toxicity. The toxicological data submitted with the petition demonstrate a lack of human health issues and fully supports the exemption from the requirement of a tolerance. The toxicological data submitted in support of the petition were as follows:

1. An acute oral toxicity/pathogenicity study - was conducted with *Bacillus sphaericus* technical material in rats. An oral dose of approximately 1×10^8 colony forming units (CFUs) administered to rats resulted in rapid clearance during the 20-day post-treatment observation period. A pattern of clearance during the 49-day post-treatment period was established following an intratracheal installation of approximately 1×10^8 CFUs. Similarly, a pattern of clearance over a 35-day post-treatment period was observed following an intravenous dose of approximately 1×10^7 CFUs. There were no mortalities, no evidence of pathogenicity or treatment-related

toxicity in rats given either an oral, intratracheal or intravenous dose.

2. An acute oral toxicity study - done on *Bacillus sphaericus* technical material caused no death in rats given a dose of 5,000 milligram/kilograms (mg/kg); therefore, the acute oral LD₅₀ was greater than 5,000 mg/kg.

3. Acute dermal LD₅₀ - no mortality in rabbits over the 14-day period observation period following a 2,000 mg/kg dermal application for 24 hours; thus, the acute dermal was greater than 2,000 mg/kg.

4. An acute inhalation study - in a 4-hour inhalation toxicity study in rats, the maximum attainable concentration was 0.09 mg/L, with 13.3% of the particles having a mass median aerodynamic diameter of >10 microns. Since there was no mortality or clinical signs during exposure or the 14-day observation period, the 4-day inhalation LC₅₀ was greater than 0.09 mg/L.

5. Dermal irritation - described as moderately irritating to rabbits skin at 72 hours. Irritation and iridal effects following a 1,000 mg aliquot of *Bacillus sphaericus* being placed in the eye of rabbits were no longer present at day 10 post-treatment.

III. Aggregate Exposures

In examining aggregate exposure, FFDCA section 408 directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from groundwater or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

A. Dietary Exposure

The use patterns for *Bacillus sphaericus* on aquatic crops may result in dietary exposure. However, in the absence of any mammalian toxicological endpoints and the heat used during food processing, risk from the consumption of treated commodities is not expected for neither the general population nor infants and children.

B. Drinking Water Exposure and Risk Characterization

Although the potential exist for *Bacillus sphaericus* to enter drinking water sources, the health risk is expected to be negligible due to: (1) The lack of any mammalian toxicological concerns associated with *Bacillus sphaericus*, (2) lack of any published record of human disease or infection caused by *Bacillus sphaericus*, and (3) the municipal drinking water treatment processes.

C. Other Non-Occupational Exposure

Non-dietary exposure is not anticipated from the use of this microbial pesticide. Occupational exposure will be mitigated through the use of proper personal protective equipment.

IV. Cumulative Effects

Cumulative effects of *Bacillus sphaericus* have been considered. But, *Bacillus sphaericus* does not exhibit a particular mechanism of toxicity common with other agents; therefore, cumulative effects with any other substance are not considered.

V. Determination of Safety for U.S. Population, Infants and Children

Based on the information discussed above, EPA concludes that there is reasonable certainty that no harm will result from aggregate exposure to the U.S. population, including infants and children, to residues of *Bacillus sphaericus*. This includes anticipated dietary exposures and all other exposures for which there is reliable information. The Agency has arrived at this conclusion because, as discussed above, the toxicity of *Bacillus sphaericus* to mammals is very low and under reasonably foreseeable circumstances, it does not pose a risk.

FFDCA section 408 provides that EPA shall apply an additional tenfold margin of exposure (safety) for infants and children in the case of threshold effects to account for pre- and post-natal toxicity and the completeness of the database, unless EPA determines that a different margin of exposure (safety) are often referred to as uncertainty (safety) factors. In this instance, the Agency believes there is reliable data to support the conclusion that *Bacillus sphaericus* is practically non-toxic to mammals, including infants and children, and, thus, a margin of exposure (safety) approach is not needed to protect adults or infants and children.

VI. Other Considerations

A. Endocrine Disruptors

The Agency has no information to suggest that *Bacillus sphaericus* will not adversely affect the immune systems. The Agency is not requiring information on the endocrine effects of this microbial pesticide at this time; Congress has allowed 3 years after August 3, 1996, for the Agency to implement a screening program with respect to endocrine effects.

B. Analytical Method(s)

The Agency is establishing an exemption from the requirement of a

tolerance without any numerical limitations; therefore, the Agency has concluded that an analytical method is not required for enforcement purposes for *Bacillus sphaericus*.

C. Codex Maximum Residue Level

There are no CODEX tolerances or international tolerance exemptions for *Bacillus sphaericus* at this time.

VII. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to "object" to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d) and as was provided in the old section 408 and in section 409. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which governs the submission of objections and hearing requests. These regulations will require some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use those procedural regulations with appropriate adjustments to reflect the new law.

Any person may, by November 10, 1998, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given under the "ADDRESSES" section (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the hearing clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection

with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

VIII. Public Record and Electronic Submissions

EPA has established a record for this rulemaking under docket control number [OPP-300701]. A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 119 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202.

Electronic comments can be sent directly to EPA at:
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Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this rulemaking, as well as the public version, as described above, is kept in paper form. Accordingly, in the event there are objections and hearing requests, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record. The official rulemaking record is the paper record maintained at the Virginia address in "ADDRESSES" at the beginning of this document.

IX. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

This final rule establishes an exemption from the tolerance requirement under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993).

This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub.L. 104-4). Nor does it require prior consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629), February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997). In addition, since tolerance exemptions that are established on the basis of a petition under section 408(d) of the FFDCA, such as the exemption in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the Agency previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950), and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

B. Executive Order 12875

Under Executive Order 12875, entitled *Enhancing Intergovernmental Partnerships* (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to OMB a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal

governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create an unfunded federal mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

C. Executive Order 13084

Under Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19, 1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

X. Submission to Congress and the Comptroller General

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

the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: August 21, 1998.

Stephen L. Johnson,

Deputy Director, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180 - [AMENDED]

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

Authority: 21 U.S.C. 346a and 371.

2. Section 180.1202 is added to subpart D to read as follows:

§ 180.1202 *Bacillus sphaericus*; exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of the microbial pesticides, *Bacillus sphaericus* when used in or on all food crops.

[FR Doc. 98-24469 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 180 and 185

[OPP-300709; FRL 6026-6]

RIN 2070-AB78

Sulfosate; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes new tolerances to replace recently-expired time-limited tolerances for residues of the herbicide sulfosate (the trimethylsulfonium salt of glyphosate, also known as glyphosate-trimesium) in or on cattle, goats, horses, hogs and sheep, in fat, meat by-products, and meat; in poultry fat, meat-by-products (except liver), meat and liver; in eggs; in milk; in corn stover (field and pop), grain (field and pop), and forage (field); in soybean forage, hay, and seed; and in aspirated grain fractions. Zeneca Ag Products requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996

(Pub. L. 104-170). In addition, this regulation moves existing tolerances for prunes at 0.20 ppm, raisins at 0.20 ppm, and soybean hulls at 7.0 ppm from 40 CFR 185.5375 to 40 CFR 180.489.

DATES: This regulation is effective September 11, 1998. Objections and requests for hearings must be received by EPA on or before November 10, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, OPP-300709, must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, OPP-300709, must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number OPP-300709. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: By mail: Jim Tompkins, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, 703-305-5697; e-mail: tompkins.jim@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of March 8, 1996 (61 FR 9355) (FRL 5353-4), time-limited tolerances were established for sulfosate on corn and animal commodities (listed below). In the **Federal Register** of April 10, 1996 (61 FR 15899) (FRL 5782-9), time-limited tolerances were established for unprocessed soybean commodities and aspirated grain fractions (listed below).

In the **Federal Register** of March 4, 1998 (63 FR 10614) (FRL 5772-6), EPA, issued a notice pursuant to section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) announcing the filing of a pesticide petition for tolerance by Zeneca Ag Products, 1800 Concord Pike, P. O. Box 15458, Wilmington, DE 19850-5458. This notice included a summary of the petition prepared by Zeneca Ag Products, the registrant. There were no comments received in response to the notice of filing.

The petition 0F3860 requested that 40 CFR 180.489 be amended by removing the expiration date of April 10, 1998, for residues of the herbicide sulfosate (glyphosate-trimesium; sulfonium, trimethyl salt with *N*-phosphonomethylglycine (1:1)), in or on soybean forage (2.00 ppm, of which no more than 1 ppm is trimethylsulfonium (TMS)), soybean aspirated grain fractions (210.00 ppm, of which no more than 60 ppm is TMS), soybean hay (5.00 ppm, of which no more than 2 ppm is TMS), and soybean seed (3.00 ppm of which no more than 1 ppm is TMS). The petition 9F3796 requested that 40 CFR 180.489 be amended by removing the expiration date of March 9, 1998 for residues of sulfosate in or on cattle, goat, hog, horse, sheep and poultry fat (0.10 ppm), meat by products (1.00 ppm), and meat (0.20 ppm); poultry liver (0.05 ppm), poultry meat by-products (0.10 ppm), and poultry meat (0.05 ppm); corn fodder (0.30, of which no more than 0.20 is trimethylsulfonium TMS)), corn forage (0.10 ppm), and corn grain (0.20 ppm, of which no more than 0.10 ppm is TMS); milk (0.20 ppm); and eggs (0.02 ppm).

In the corn tolerances for this action, the commodity term "stover" replaces the older term "fodder" in keeping with current EPA policy for naming this commodity. In this action, the previous tolerance for "soybean aspirated grain fractions" is replaced with the tolerance for "aspirated grain fractions". The term "soybean aspirated grain fractions" was printed in error in the April 10, 1996 FR notice (61 FR 15899); aspirated grain fractions typically contain more than

one type of grain and typically contain both soybeans and corn.

This action also moves tolerances for prunes, raisins, and soybean hulls from 40 CFR 185.5375 to 40 CFR 180.489. The Food Quality Protection Act (FQPA) amended the Federal Food, Drug and Cosmetic Act (FFDCA) to consolidate pesticide tolerances for raw and processed agricultural commodities under FFDCA section 408(j)(2). Prior to this change, raw agricultural commodity tolerances were established according to FFDCA section 408 and processed commodities were established according to FFDCA section 409. As a result of the change in the regulations governing FFDCA, all new tolerances for both raw and agricultural commodities are established according to FFDCA section 408(j)(2) in 40 CFR part 180. When 40 CFR part 180 is amended as to a specific pesticide, it is EPA's policy to move existing related regulations governing residues of that pesticide on processed agricultural commodities from 40 CFR parts 185 and 186 and place them in part 180. Ultimately, EPA will amend all tolerance regulations so that all tolerances are listed in 40 CFR part 180.

I. Risk Assessment and Statutory Findings

New section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . ."

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides based primarily on toxicological studies using laboratory animals. These studies address many adverse health effects, including (but not limited to) reproductive effects, developmental toxicity, toxicity to the nervous system, and carcinogenicity.

Second, EPA examines exposure to the pesticide through the diet (e.g., food and drinking water) and through exposures that occur as a result of pesticide use in residential settings.

A. Toxicity

1. *Threshold and non-threshold effects.* For many animal studies, a dose response relationship can be determined, which provides a dose that causes adverse effects (threshold effects) and doses causing no observed effects (the "no-observed effect level" or "NOEL").

Once a study has been evaluated and the observed effects have been determined to be threshold effects, EPA generally divides the NOEL from the study with the lowest NOEL by an uncertainty factor (usually 100 or more) to determine the Reference Dose (RfD). The RfD is a level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. An uncertainty factor (sometimes called a "safety factor") of 100 is commonly used since it is assumed that people may be up to 10 times more sensitive to pesticides than the test animals, and that one person or subgroup of the population (such as infants and children) could be up to 10 times more sensitive to a pesticide than another. In addition, EPA assesses the potential risks to infants and children based on the weight of the evidence of the toxicology studies and determines whether an additional uncertainty factor is warranted. Thus, an aggregate daily exposure to a pesticide residue at or below the RfD (expressed as 100% or less of the RfD) is generally considered acceptable by EPA. EPA generally uses the RfD to evaluate the chronic risks posed by pesticide exposure. For shorter term risks, EPA uses a RfD approach or calculates a margin of exposure (MOE) by dividing the estimated human exposure into the NOEL from the appropriate animal study. Commonly, EPA finds MOEs lower than 100 to be unacceptable. This 100-fold MOE is based on the same rationale as the 100-fold uncertainty factor.

Lifetime feeding studies in two species of laboratory animals are conducted to screen pesticides for cancer effects. When evidence of increased cancer is noted in these studies, the Agency conducts a weight of the evidence review of all relevant toxicological data including short-term and mutagenicity studies and structure activity relationship. Once a pesticide has been classified as a potential human carcinogen, different types of risk assessments (e.g., linear low dose extrapolations or MOE calculation based

on the appropriate NOEL) will be carried out based on the nature of the carcinogenic response and the Agency's knowledge of its mode of action.

2. *Differences in toxic effect due to exposure duration.* The toxicological effects of a pesticide can vary with different exposure durations. EPA considers the entire toxicity data base, and based on the effects seen for different durations and routes of exposure, determines which risk assessments should be done to assure that the public is adequately protected from any pesticide exposure scenario. Both short and long durations of exposure are always considered. Typically, risk assessments include "acute," "short-term," "intermediate term," and "chronic" risks. These assessments are defined by the Agency as follows.

Acute risk, by the Agency's definition, results from 1-day consumption of food and water, and reflects toxicity which could be expressed following a single oral exposure to the pesticide residues. High end exposure to food and water residues are typically assumed.

Short-term risk results from exposure to the pesticide for a period of 1-7 days, and therefore overlaps with the acute risk assessment. Historically, this risk assessment was intended to address primarily dermal and inhalation exposure which could result, for example, from residential pesticide applications. However, since enactment of FQPA, this assessment has been expanded to include both dietary and non-dietary sources of exposure, and will typically consider exposure from food, water, and residential uses when reliable data are available. In this assessment, risks from average food and water exposure, and high-end residential exposure, are aggregated. High-end exposures from all three sources are not typically added because of the very low probability of this occurring in most cases, and because the other conservative assumptions built into the assessment assure adequate protection of public health. However, for cases in which high-end exposure can reasonably be expected from multiple sources (e.g. frequent and widespread homeowner use in a specific geographical area), multiple high-end risks will be aggregated and presented as part of the comprehensive risk assessment/characterization. Since the toxicological endpoint considered in this assessment reflects exposure over a period of at least 7 days, an additional degree of conservatism is built into the assessment; i.e., the risk assessment nominally covers 1-7 days exposure, and the toxicological endpoint/NOEL is

selected to be adequate for at least 7 days of exposure. (Toxicity results at lower levels when the dosing duration is increased.)

Intermediate-term risk results from exposure for 7 days to several months. This assessment is handled in a manner similar to the short-term risk assessment.

Chronic risk assessment describes risk which could result from several months to a lifetime of exposure. For this assessment, risks are aggregated considering average exposure from all sources for representative population subgroups including infants and children.

B. Aggregate Exposure

In examining aggregate exposure, FFDCA section 408 requires that EPA take into account available and reliable information concerning exposure from the pesticide residue in the food in question, residues in other foods for which there are tolerances, residues in groundwater or surface water that is consumed as drinking water, and other non-occupational exposures through pesticide use in gardens, lawns, or buildings (residential and other indoor uses). Dietary exposure to residues of a pesticide in a food commodity are estimated by multiplying the average daily consumption of the food forms of that commodity by the tolerance level or the anticipated pesticide residue level. The Theoretical Maximum Residue Contribution (TMRC) is an estimate of the level of residues consumed daily if each food item contained pesticide residues equal to the tolerance. In evaluating food exposures, EPA takes into account varying consumption patterns of major identifiable subgroups of consumers, including infants and children. The TMRC is a "worst case" estimate since it is based on the assumptions that food contains pesticide residues at the tolerance level and that 100% of the crop is treated by pesticides that have established tolerances. If the TMRC exceeds the RfD or poses a lifetime cancer risk that is greater than approximately one in a million, EPA attempts to derive a more accurate exposure estimate for the pesticide by evaluating additional types of information (anticipated residue data and/or percent of crop treated data) which show, generally, that pesticide residues in most foods when they are eaten are well below established tolerances.

Percent of crop treated estimates are derived from federal and private market survey data. Typically, a range of estimates are supplied and the upper end of this range is assumed for the

exposure assessment. By using this upper end estimate of percent of crop treated, the Agency is reasonably certain that exposure is not understated for any significant subpopulation group. Further, regional consumption information is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups, to pesticide residues. For this pesticide, the most highly exposed population subgroups (females, infants, and children) were not regionally based.

II. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action, EPA has sufficient data to assess the hazards of sulfosate and to make a determination on aggregate exposure, consistent with section 408(b)(2), for tolerance for residues of sulfosate on cattle, goats, horses, hogs and sheep at 0.10 ppm in fat, at 1.00 ppm in meat by-products, and at 0.20 ppm in meat; in poultry at 0.05 ppm in fat, meat-by-products (except liver), and meat, and at 0.10 ppm in liver; in eggs at 0.02 ppm; in milk at 0.20 ppm; in corn at 0.30 ppm (of which no more than 0.20 ppm is TMS) in stover (field and pop), at 0.20 ppm (of which no more than 0.10 ppm is TMS) in grain (field and pop), at 0.10 ppm in forage (field); in soybeans at 2.00 ppm (of which no more than 1.0 ppm is TMS) in forage, at 5.00 ppm (of which no more than 2.0 ppm is TMS) in hay, and at 3.00 (of which no more than 1.0 ppm is TMS) ppm in seed; and in aspirated grain fractions at 210 ppm (of which no more than 60 ppm is TMS). EPA's assessment of the dietary exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by sulfosate are discussed below.

Several acute toxicity studies were performed, placing technical-grade sulfosate in Toxicity Category III. The acute toxicity data for sulfosate show that this chemical is not acutely toxic by the oral, inhalation, and dermal routes

of exposure. Sulfosate technical is, however, a slight dermal sensitizer.

In a subchronic feeding study, 6 week old CrL: CD(SD)BR Sprague-Dawley rats were treated with Sulfosate technical at doses of 0, 150, 350, 800 or 2,000 ppm sulfosate in their diet (males for 90 days & females for 96 days). At 2,000 ppm in males (88 mg/kg/day) there was a significant overall decrease in body weight gain of 22%. At 2,000 ppm, the females exhibited some sporadic and minimal decreases in body weight (6% at week 2, 8% at week 11, 21% at week 13) which were due to a decrease in food consumption and is not used to set a lowest effect level (LOEL). No significant changes were observed in clinical chemistry, hematology, clinical observations, organ weight, and macroscopic/microscopic histopathology. The systemic no effect level (NOEL) is 800 ppm in males (36 mg/kg/day) and 2,000 ppm (108 mg/kg/day) in females. The systemic LOEL is 2,000 ppm in males (88 mg/kg/day), based on significant overall decrease in body weight gain of 22%. The maximum tolerated dose (MTD) was achieved only in male rats.

Two subchronic toxicity studies on dogs were conducted. In one subchronic oral study, beagle dogs were treated with Sulfosate technical at doses of 0, 2, 10 or 50 mg/kg/day. The dose volume was 0.5 milliliter per kilogram body weight (ml/kg b.w.) by oral gavage (5 days/week) for 45–50 days. The NOEL is 10 mg/kg/day for both males and females. The LOEL is 50 mg/kg/day for both males and females, based on significant earlier onsets and increased incidence of salivation and emesis. No significant change was observed in body weight, food consumption, urinalysis, organ weights, macroscopic/microscopic histopathology, hematology, and clinical chemistry including cholinesterase activity. In another subchronic toxicity study, Sulfosate was administered to 4 male and 4 female beagle dogs by gelatin capsule at doses of 0, 10, 25, or 50 mg/kg/day for at least 90 days. Evaluations included clinical observations, body weight, food consumption, clinical pathology, organ weights and gross and microscopic histopathology. There were no effects on food consumption, body weight, clinical pathology, organ weights or histopathology. Observed at 50 mg/kg/day in both sexes was salivation at dosing (weeks 2–14) and/or salivation (weeks 1–13) either consistently or intermittently, and resisting dosing (weeks 6–13) occasionally. A female in the 50 mg/kg/day group was sacrificed on day 2 after being found cold and recumbent and

replaced with another female dog. The dose was lowered to 40 mg/kg/day in another female dog (50 mg/kg/day group) for most of the remainder of the study following two incidents of tremors, recumbency, and voluntary paddling of the limbs. One high dose male had a unilateral cataract. The LOEL is 50 mg/kg/day, based on clinical signs of neurotoxicity in the females. The NOEL is 25 mg/kg/day.

Two 21-day dermal studies were conducted. In one 21-day dermal study, Rabbits (New Zealand White) were treated with sulfosate soluble concentrate (51.2% a.i.), Sulfosate at doses of 0, 10, 100, 1,000 mg/kg/day, 6 hrs/day, 5 days/wk for 3 weeks. There was no systemic toxicity at any dose. There was mild erythema at application sites in all sulfosate-treated groups. The systemic NOEL is 1,000 mg/kg/day, the highest dose tested (HDT). In another 21-day dermal study, sulfosate emulsifiable concentrate (39.8% a.i.) was applied to the skin of rats (Alpk: AP (Wistar derived), 5/sex/group) at doses of 25, 250, 1,000 mg/kg in 0.0021, 0.027, and 0.0826 ml/100 g body wt. At 25 and 1,000 mg/kg/day (not 250 mg/kg/day) there was a slight increase in testes weight with normal histology (toxicological significance is unclear). There was occasional sciatic nerve fiber degeneration (1 male and 2 females out of a total of 10) at 1,000 mg/kg/day. There was occasional sciatic nerve fiber degeneration (1/5 males, 2/5 females) at 1,000 mg/kg/day with none in controls. Dermal irritation occurred in male rats at 1,000 mg/kg/day including scabbing, erythema, edema and desquamation. There were no histological changes. The systemic LOEL was 1,000 mg/kg/day based on sciatic nerve findings. The NOEL was 250 mg/kg/day.

In a feeding/carcinogenicity study, 60/sex/group Sprague-Dawley (CrL: CD SD BR) rats were tested with sulfosate soluble concentrate (56.2% a.i.) at dose levels of 0 (basal diet, no vehicle), 0 (basal diet plus 1% propylene glycol), 100, 500 or 1,000 ppm a.i. (male - 0, 4.2, 21.2, or 41.8; female - 0, 5.4, 27.0, or 55.7) for 2 years. Rats may have tolerated higher dose levels. At 1,000 ppm there were decreases in bodyweight in both males and females and an increase in incidences of chronic laryngeal and nasopharyngeal inflammation in males. Bodyweight decrease was secondary to the decrease in food consumption. The LOEL and NOEL were at or above 1,000 ppm (41.8 and 55.7 mg/kg/day) for males and females, respectively). There was no evidence of carcinogenicity in this study at the doses tested. The study is considered acceptable based on the

results of a subchronic and reproduction study. The high dose for a feeding/carcinogenicity study should be near, but not necessarily at, a dose that would produce well defined toxicity. The subchronic rat study indicated well defined toxicity at 2,000 ppm (only twice the high dose in the feeding/carcinogenicity study), a dose that is adequate for estimating a maximum tolerated dose (MTD). Therefore, 1,000 ppm in the feeding/carcinogenicity study is considered a reasonable extrapolation from the subchronic toxicity study results. In addition, at 2,000 ppm in the reproduction study there is well defined toxicity with some evidence of toxicity, although less severe, at 800 ppm. Therefore, it is believed that sulfosate was adequately tested for carcinogenicity in the rat.

In a chronic oral gavage study, beagle dogs (5/sex/dose) were treated with sulfosate soluble concentrate (56.2% a.i.) for 1 year at doses of 0, 2, 10, or 50 mg/kg/day. Signs of toxicity were limited to the 50 mg/kg/day group females and included transient salivation (1/5 at 10 mg/kg/day and 5/5 at 50 mg/kg/day) and emesis (single episodes in 3/5 dogs). The decreased lactic acid dehydrogenase (LDH) in females at 12 months is of questionable biological significance. The high dose was however, supported by subchronic studies where transient salivation and emesis again occurred at 50 mg/kg/day in a 90 day study and at 75 mg/kg/day in a 28 day study; with death occurring within 3 days at 150 mg/kg/day in the 28 day study. The LOEL is 50 mg/kg/day based on salivation and emesis and support from shorter term studies also with emesis and salivation. The NOEL is 10 mg/kg/day.

In a feeding carcinogenicity study, mice (60/sex/dose) were given sulfosate technical (56.17% a.i.) in the diet at concentrations of 0a (dietary control), 0b (vehicle control), 100, 1,000 and 8,000 ppm (males at 0, 0, 11.7, 118, or 991 mg/kg/day; and females at 0, 0, 16.0, 159, or 1,341 mg/kg/day) for 2 years. The only signs of toxicity occurred at 8,000 ppm and included (in both sexes) decreased body weight (about 10% lower than controls) and weight gain (about 50% lower than controls). Decreased food consumption (0 to 15% lower than controls in both sexes) was responsible only in part for the decreased weight gain. In addition, there was increased incidence of white matter degeneration in the lumbar region of the spinal cord (males only) (2, 3, 4, 4, 79% response, controls to high dose), and increased incidence of epithelial hyperplasia of duodenum (females only) (10, 13, 16, 15, 24%

response, controls to high dose). The systemic LEL is 8,000 ppm (991, 1,340 mg/kg/day for males and females) based on decreased body weight & food consumption (both sexes), increased incidence of white matter degeneration in lumbar bar region of spinal cord (males only), and increased incidence of epithelial hyperplasia of duodenum (females only). The systemic NOEL is 1000 ppm (118, 159 mg/kg/day for males and females). This study was tested to adequate doses based on decreased body weight and weight gain. There was no evidence of carcinogenicity in this study at the doses tested.

In a developmental toxicity study, rats (25/dose) were treated with sulfosate soluble concentrate (19.2% a.i.) by gavage on gestation days 6 through 20 at dose levels of 0, 30, 100, or 333 mg/kg/day. The test material was dissolved in water and administered in a volume of 5 ml/kg. Treatment related effects were limited to the high dose dams and included decreased body weight (17% less than the control), body weight gain and feed consumption. There was also salivation, chromorhinorrhea and lethargy after dosing in this group ($p < 0.05$). The Maternal LOEL is 333 mg/kg/day based on decreased body weight, feed consumption and body weight gain along with increased incidences of salivation, chromorhinorrhea, and lethargy after dosing. The Maternal NOEL is 100 mg/kg/day. Developmental signs of toxicity were limited to the high dose and included decreased fetal body weight (5.0, 4.9, 4.9, 4.2 gm, controls to high dose). The Developmental toxicity LOEL is 333 mg/kg/day based on decreased fetal body weight. The Developmental toxicity NOEL is 100 mg/kg/day.

In a developmental toxicity study, New Zealand white rabbits (15/group except 21 at the high dose) were treated by gavage with sulfosate soluble concentrate (56.2% ai) from gestation days 7–19. The test material was dissolved in water and administered in a volume of 2 ml/kg at dose levels of 0, 10, 40 or 100 mg/kg/day. The Maternal LOEL is 100 mg/kg/day (6 deaths in 17 pregnant does, 4 abortions in the 11 survivors along with decreased body weight, feed consumption and body weight gain). The Maternal NOEL is 40 mg/kg/day. The developmental LOEL is 100 mg/kg/day based on decreased number of live fetuses/doe for 7 surviving rabbits (5.4 versus 7.4 in controls), 4 rabbits aborted their litters. Having only 7 litters does not give a sufficiently high number of animals to absolutely conclude that no developmental toxicity is occurring,

particularly in light of the massive losses to death and abortions. The developmental NOEL is 40 mg/kg/day.

In a 2-generation reproduction study, 20 male and 30 female/group Sprague-Dawley rats received sulfosate soluble concentrate (19.2% a.i.) at dose levels of 0, 150, 800, or 2,000 ppm in the diet (average for P₀ and P₁ - males - 0, 6.0, 35, 88.5 mg/kg/day; females - 0, 8, 41, 98 mg/kg/day). The systemic LEL is 800 ppm (35 and 41 mg/kg/day for males and females) based on a decrease in absolute and sometimes relative organ weights in both generations (thymus, heart, kidney and liver) at 800 and 2,000 ppm and a decrease in body weights and body weight gains during the pre-mating period at 2,000 ppm. The Systemic NOEL is 150 ppm (6 and 8 mg/kg/day for males and females). The reproductive/developmental LOEL is 800 ppm (35 and 41 mg/kg/day for males and females) is based on decreased litter size in F_{0a} and F_{1b} litters at 2,000 ppm and on decrease in mean pup weights during lactation in second litters at 800 ppm & in all litters at 2,000 ppm. The reproductive/developmental NOEL is 150 ppm (6 and 8 mg/kg/day for males and females).

In an acute neurotoxicity study, white leghorn chickens (6 hens/group in control groups, 8 hens/group in treated groups) were treated with technical sulfosate (56.9% a.i.) by gavage at doses of 0, 500 or 5,000 mg/kg in 5 ml/kg water. Tri-ortho-cresylphosphate (TOCP, 500 mg/kg) was the positive control. Each animal was dosed twice during study; day 1 and day 22. Each animal was evaluated up to day 41 (or 42). At 500 mg/kg there was diarrhea starting a few days after each dosing, lasting for 2–3 days. At 5,000 mg/kg there was diarrhea, changes in comb appearance, early decreased food consumption and decrease in egg production. No indications of neurotoxicity were observed. The positive control indicated the appropriate clinical signs of toxicity, increased ataxia and microscopic observations for an organophosphate. The NOEL for systemic toxicity was 500 mg/kg. The LEL for systemic toxicity was 5,000 mg/kg.

In an acute neurotoxicity study, sulfosate technical (59.4% a.i.) was used to treat Alpk: APfSD rats, 10/sex/dose by gavage at 1 ml/100 g bw with doses of 0, 30, 100 or 300 mg/kg. Adequate positive control data were provided. At 300 mg/kg there was death, ptosis, decreased activity, decreased splay reflex, upward curvature of spine, chromodacryorrhea, staining around the nose, decreased bodyweight and food consumption (males), shaking, sides

pinched in, signs of urinary incontinence, irregular breathing, hunched posture, abnormal or staggering gait, increased time to tail flick, decreased landing foot splay, decreased forelimb grip strength, decreased hindlimb grip strength, decreased motor activity. There was no microscopic evidence of neurotoxicity. There were no indications of neurotoxicity below a lethal dose. The LEL was 300 mg/kg based on mortality, neurologic signs described above and decreased body weight and food consumption. The NOEL was 100 mg/kg.

Technical sulfosate (59.4% a.i.) was tested in a 90 day neurotoxicity feeding study in Alpk: APfSD rats. Rats (12/sex/group) received either 0, 200, 600, or 2,000 ppm (0, 15.6, 47.6 or 153.2 mg/kg/day for males; 0, 18.2, 54.4 or 171.0 mg/kg/day for females) in the diet. Six/sex/dose group received complete necropsy and neurohistopathology. Positive control data were provided. The other 6/sex/dose were perfused and the neurohistopathology carried out. Clinical signs of toxicity, body weights, food consumption, functional battery, motor activity and neuropathology parameters were measured and recorded regularly. Positive control data were provided. At 2,000 ppm, decreased body weights (16% for males and 9% for females), food consumption and utilization were observed. In addition, mean forelimb grip strength values for high dose females were statistically significantly decreased over the values for the controls during weeks 5–14 (75–82% of controls). There was no microscopic evidence of neurotoxicity. The significance of the decreased grip strength as a neurotoxicological effect is less certain since there were no effects in mean hindlimb grip strength for high dose females, in either of the mean grip strength values at any time period for males, in any of the other functional battery parameters, in motor activity values or in neuropathology microscopic examinations for either sex. However, it occurred at all time points, was statistically significant, and signs of neurotoxicity occur in other studies. The LEL is 2,000 ppm (153.2 mg/kg/day) based on decreases in mean body weight, food consumption, food utilization and mean forelimb grip strength values. The NOEL is 600 ppm (47.6 mg/kg/day).

Several mutagenicity tests were conducted. In some of the *in vitro* mutagenicity tests (forward mutation/mouse lymphoma cells, structural chromosomal aberrations/CHO cells), sulfosate induced a false positive mutagenic effect. A common feature of

these tests was that the pHs of the test incubation media were acidic (pH 5.67–7.07) due to the addition of sulfosate. These positive results were no longer observed when the pH was readjusted to a more physiological level (pH 7.4) before the mutagenicity tests were conducted. Based on the available mutagenicity studies, there are no concerns for mutagenicity at this time.

In a metabolism study, rats were treated with sulfosate soluble concentrate (^{14}C labeled). Radiolabelled trimethylsulfonium ion (TMS) was rapidly excreted unmetabolized in urine and feces; the principal sites of localization of TMS are adrenals, kidneys, bladder, liver, thyroid and stomach.

In a metabolism study, rats were treated with sulfosate (^{14}C -labeled on the anionic part of the molecule, 56.1% ai). Intravenous (IV) or oral ^{14}C -sulfosate was rapidly excreted; over a 5 day period most (86–95%) of the administered dose was excreted in the urine & feces. IV treated male & females eliminated 90% of the administered dose in urine. Absorption of ^{14}C -sulfosate was incomplete by the oral route; most groups eliminated 47–57% of the administered dose in the urine and 36–42% in the feces. Females treated with a high dose eliminated less in the urine (36% of dose) and more in the feces (54% of dose). There was negligible ^{14}C -carbon dioxide ($^{14}\text{CO}_2$) elimination. Tissue ^{14}C residues were < 0.32% of administered dose. Carcass ^{14}C residues were < 2.2% of administered dose (mostly in bones, 3–7 ppm in low dose rats & 19–32 ppm in high dose rats). Most excreted radioactivity (77–96% of fecal; 80–95% of urinary) was unchanged anion (carboxymethylamino-methylphosphonate). One fecal metabolite (repeated dose females; 8.5% of fecal radioactivity) was aminomethyl phosphonic acid. Several minor unidentified (\cong 3% of total urinary/fecal radioactivity) metabolites were recovered. The low dose was 25 mg/kg. At the high dose of 250 mg/kg, toxic signs were lethargy, moderate to severe depression, tremors, dehydration, and decreased food consumption in 2–5 rats (total of 10 rats tested). Recovery was within 72 hours.

B. Toxicological Endpoints

1. *Acute toxicity.* An acute NOEL of 100 mg/kg was determined based on mortality, decreased body weight and food consumption, and neurotoxicity at 300 mg/kg (LOEL) from an acute rat neurotoxicity study. An acute RFD of 1.0 mg/kg was calculated by dividing the 100 mg/kg NOEL by the uncertainty factor of 100 (10x for inter-species

extrapolation and 10x for intra-species variations). Based on FQPA, EPA has determined that an additional safety factor of 3x must be retained for the acute dietary assessment to protect infants and children. Without the 3x safety factor, the level of concern is dietary consumption above the level of 100% of the RfD. With the 3x safety factor, the level of concern is consumption above the level of 33% of the acute RfD.

2. *Short- and intermediate-term toxicity.* There are currently no residential uses for sulfosate; therefore, assessment of short- and intermediate-term toxicity is not necessary for the purpose of establishing sulfosate tolerances.

3. *Chronic toxicity.* EPA has established the RfD for sulfosate at 0.10 milligrams/kilogram/day (mg/kg/day). This RfD is based on an oral NOEL of 10 mg/kg/day (LOEL of 50 mg/kg/day) from a chronic oral gavage study in dogs and an uncertainty factor of 100. Based on FQPA, EPA has determined that an additional safety factor of 3x must be retained for the chronic dietary assessment to protect infants and children. Without the 3x safety factor, the level of concern is dietary consumption above the level of 100% of the RfD. With the 3x safety factor, the level of concern is consumption above the level of 33% of the chronic RfD.

4. *Carcinogenicity.* Sulfosate was classified as a "Group E" carcinogen (no evidence for carcinogenicity in humans) based on the lack of evidence of carcinogenicity in mice and rats at doses that were judged to be adequate to assess the carcinogenic potential and the "Guidelines for Carcinogen Risk Assessment" [51 FR 33992] for classifying the weight-of-evidence for carcinogenicity.

C. Exposures and Risks

1. *From food and feed uses.* Tolerances have been previously established (40 CFR 180.489) for the residues of sulfosate, in or on a variety of raw agricultural commodities. Time-limited tolerances for soybeans expired on April 10, 1998, and time limited tolerances for corn, ruminants, poultry, milk, and eggs expired on March 9, 1998. Risk assessments were conducted by EPA to assess dietary exposures and risks from sulfosate as follows:

i. *Acute exposure and risk.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a one day or single exposure. An acute dietary (food only) risk assessment was conducted for sulfosate. The exposure to

the most sensitive population subgroup, in this instance non-nursing infants, was 9.7% of the acute RfD (1.0 mg/kg bwt/day). Based on FQPA, EPA has determined that an additional safety factor of 3x must be retained for the acute dietary assessment to protect infants and children. Without the 3x safety factor, the level of concern is dietary consumption above the level of 100% of the RfD. With the 3x safety factor, the level of concern is consumption above the level of 33% of the acute RfD. Therefore, the acute dietary risk due to food does not exceed the level of concern.

ii. *Chronic exposure and risk.* An chronic dietary (food only) risk assessment was conducted for sulfosate. This risk assessment assumed 100% of the crops with existing tolerances plus those established in this notice were treated and that residues were consumed at the theoretical Maximum Residue Contribution (TMRC, the level of residues consumed daily if each food item contained pesticide residues equal to the tolerance). The exposure to the most sensitive population subgroup, in this instance children 1 to 6 years old, was 20.3% of the chronic RfD (0.1 mg/kg bwt/day). Based on FQPA, EPA has determined that an additional safety factor of 3x must be retained for the acute dietary assessment to protect infants and children. Without the 3x safety factor, the level of concern is dietary consumption above the level of 100% of the RfD. With the 3x safety factor, the level of concern is consumption above the level of 33% of the acute RfD. Therefore, the chronic dietary risk due to food does not exceed the level of concern.

2. *From drinking water.* Results from computer modeling indicate that sulfosate in groundwater will not contribute significant residues in drinking water as a result of sulfosate use at the recommended maximum annual application rate (1 application at 4.75 lbs., a.i., acre⁻¹). The computer model uses conservative numbers, therefore it is unlikely that groundwater concentrations would exceed the estimated concentration of 0.00224 ppb, and sulfosate should not pose a threat to ground water.

The surface water estimates are based on an exposure modeling procedure called GENECC (Generic Expected Environmental Concentration). The assumptions of 1 application of 4.75 lbs., a.i., acre⁻¹ resulted in calculated estimated maximum concentrations of 125 ppb (acute, based on the highest 56 day value) and 35 ppb (chronic, average). GENECC modeling procedures assumed that sulfosate was applied to a

10-hectare field that drained into a 1-hectare pond, 2-meters deep with no outlet for all crops.

As a conservative assumption, because sulfosate residues in ground water are expected to be insignificant compared to surface water, EPA assumed that 100% of drinking water consumed was derived from surface water in all drinking water exposure and risk calculations.

To calculate the maximum acceptable acute and chronic exposures to sulfosate in drinking water, the dietary food exposure (acute or chronic) was subtracted from 33% of the appropriate (acute or chronic) RfD. DWLOCs were then calculated using the maximum acceptable acute or chronic exposure, default body weights (70 kg - adult, 10 kg - child) and drinking water consumption figures (2 litres - adult, 1 litre - child).

i. *Acute exposure and risk.* OPP has calculated drinking water levels of concern (DWLOCs) for acute exposure to be 9,740 ug/l parts per billion (ppb) for U.S. population, 2,360 ug/l (ppb) for non-nursing infants (<1 year old), and 2600 ug/l (ppb) for children (1-6 years old). These levels include the FQPA additional safety factor of 3x to protect infants and children. The estimated maximum concentration of sulfosate in surface water of 125 ppb (highest 56 day value) is less than all of the calculated acute DWLOCs. Therefore, taking into account the present uses plus uses on corn and soybeans, EPA concludes with reasonable certainty that acute exposure to residues of sulfosate in drinking water (when considered along with other sources of exposure for which EPA has reliable data) would not result in unacceptable levels of aggregate human health risk at this time.

ii. *Chronic exposure and risk.* OPP has calculated DWLOCs for chronic (non-cancer) exposure to be 925 ug/l (ppb) for U.S. population and 130 ug/l (ppb) for the most sensitive population group, in this instance children 1 to 6 years old. These levels include the FQPA additional safety factor of 3x to protect infants and children. The estimated concentration 35 ppb (chronic, average) of sulfosate in surface water of is less than all of the calculated chronic DWLOCs. Therefore, taking into account the present uses plus uses on corn and soybeans, EPA concludes with reasonable certainty that chronic exposure to residues of sulfosate in drinking water (when considered along with other sources of exposure for which EPA has reliable data) would not result in unacceptable levels of aggregate human health risk at this time.

3. *From non-dietary exposure.*

Sulfosate is currently not registered for use on any residential non-food sites: Therefore, residential exposure to sulfosate residues will be through dietary exposure only.

4. *Cumulative exposure to substances with common mechanism of toxicity.* Sulfosate is structurally similar to glyphosate. Further, other pesticides may have common toxicity endpoints with sulfosate. Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity." The Agency believes that "available information" in this context might include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides, although the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way. EPA has begun a pilot process to study this issue further through the examination of particular classes of pesticides. The Agency hopes that the results of this pilot process will increase the Agency's scientific understanding of this question such that EPA will be able to develop and apply scientific principles for better determining which chemicals have a common mechanism of toxicity and evaluating the cumulative effects of such chemicals. The Agency anticipates, however, that even as its understanding of the science of common mechanisms increases, decisions on specific classes of chemicals will be heavily dependent on chemical specific data, much of which may not be presently available.

Although at present the Agency does not know how to apply the information in its files concerning common mechanism issues to most risk assessments, there are pesticides as to which the common mechanism issues can be resolved. These pesticides include pesticides that are toxicologically dissimilar to existing chemical substances (in which case the Agency can conclude that it is unlikely that a pesticide shares a common mechanism of activity with other

substances) and pesticides that produce a common toxic metabolite (in which case common mechanism of activity will be assumed).

EPA does not have, at this time, available data to determine whether sulfosate has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, sulfosate does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that sulfosate has a common mechanism of toxicity with other substances.

D. *Aggregate Risks and Determination of Safety for U.S. Population*

1. *Acute risk.* Since there are no residential uses for sulfosate, the acute aggregate exposure only includes food and water. For the U.S. population, 5.8% of the acute RfD is occupied by dietary (food) exposure. The estimated average concentrations of sulfosate in surface and ground water are less than EPA's levels of concern for sulfosate in drinking water as a contribution to acute aggregate exposure. The above calculations include the FQPA safety factor of 3x. Therefore, EPA concludes with reasonable certainty that residues of sulfosate in drinking water do not contribute significantly to the aggregate acute human health risk at the present time considering the present uses and uses proposed in this action.

2. *Chronic risk.* Using the exposure assumptions TMRCs described above, EPA has concluded that aggregate exposure to sulfosate from food will utilize 7.6% of the RfD for the U.S. population. The major identifiable subgroup with the highest aggregate exposure is children 1 to 6 years old (discussed below). EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. For infants, children, and women, EPA determined that the 10x factor for increased susceptibility of infants and children (as required by FQPA) should be reduced to 3x. Therefore, for infants, children, and women, there is no concern for exposures below 33% of the RfD. Despite the potential for exposure to sulfosate in drinking water, EPA does not expect the aggregate exposure to exceed 33% of the RfD.

3. *Aggregate cancer risk for U.S. population.* Sulfosate was classified as a

"Group E" carcinogen (no evidence for carcinogenicity in humans, see section B.4 of this document).

4. *Conclusions.* EPA concludes that there is a reasonable certainty that no harm will result from aggregate exposure to sulfosate residues.

E. Aggregate Risks and Determination of Safety for Infants and Children

1. *Safety factor for infants and children—i. In general.* In assessing the potential for additional sensitivity of infants and children to residues of sulfosate, EPA considered data from developmental toxicity studies in the rat and rabbit and a 2-generation reproduction study in the rat. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from maternal pesticide exposure gestation. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability of mating animals and data on systemic toxicity.

FFDCA section 408 provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for pre- and post-natal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. EPA believes that reliable data support using the standard uncertainty factor (usually 100 for combined inter- and intra-species variability) and not the additional tenfold MOE/uncertainty factor when EPA has a complete data base under existing guidelines and when the severity of the effect in infants or children or the potency or unusual toxic properties of a compound do not raise concerns regarding the adequacy of the standard MOE/safety factor.

ii. *Developmental toxicity studies.* In a prenatal developmental toxicity study, sulfosate was administered by gavage to groups of pregnant Sprague-Dawley rats on gestation days 6–20 at dose levels of 0, 30, 100, or 333 mg/kg/day. The maternal NOEL was 100 mg/kg/day and LOEL was 333 mg/kg/day based on decreased body weight, food consumption, and increased clinical signs. The developmental NOEL was 100 mg/kg/day and LOEL was 333 mg/kg/day based on decreased fetal body weight.

In another prenatal developmental toxicity study, Sulfosate was

administered by gavage to groups of New Zealand White rabbits on gestation days 6–18 at doses of 0, 10, 40, or 100 mg/kg/day. The maternal NOEL was 40 mg/kg/day and LOEL was 100 mg/kg/day based on abortions, deaths, decreased body weight and food consumption. The developmental NOEL was 40 mg/kg/day and LOEL was 100 mg/kg/day based on decreased number (7) of surviving does, and decrease in number of live fetuses/doe (5.4 vs 7.4 in controls).

iii. *Reproductive toxicity study.* Sulfosate was administered by diet to Sprague-Dawley rats at dose levels of 0, 150, 800, or 2,000 ppm for 2-generations. The parental systemic NOEL was 140 ppm (7.5 mg/kg/day) and the LOEL was 800 ppm (40 mg/kg/day) based on decreased body weight, decreased organ weights and decreased food consumption. The reproductive/offspring NOEL was 7.5 mg/kg/day (140 ppm) and LOEL was 40 mg/kg/day (800 ppm) based on decreased pup body weight during lactation.

iv. *Pre- and post-natal sensitivity.* The data provided no indication of increased susceptibility in rats or rabbits from in utero and/or post natal exposure to sulfosate. In the prenatal developmental toxicity study in rats, evidence of developmental toxicity was seen only in the presence of maternal toxicity. In the developmental toxicity study in rabbits, developmental toxicity was seen in the presence of maternal toxicity at the highest dose level. In the 2-generation reproduction study in rats, effects in the offspring were observed only at or above treatment levels which results in evidence of parental toxicity. It should be noted that a developmental neurotoxicity study is required.

v. *Developmental neurotoxicity.* A developmental neurotoxicity study is not available. One is required due to neurotoxicity observed in the rat, dog and mouse. Sulfosate is a neurotoxic chemical, which produces clinical findings such as salivation, tremors, emesis, and decreased activity in dogs and/or rats. Salivation was the most consistent sign, and in dogs may have served as a precursor to more severe symptoms. In one study, salivation stopped upon withdrawal of sulfosate and recurred upon reintroduction of treatment. Dogs appear to be the most sensitive species for these effects, with high intra-individual variability in sensitivity. Acute neurotoxicity effects observed after a single dose of 300 mg/kg in the rat included ptosis, decreased activity, decreased splay reflex, upward curvature of spine, shaking, sides pinched in, signs of urinary incontinence, irregular breathing,

hunched posture, abnormal or staggering gait, increased time to tail flick, decreased landing foot splay, decreased forelimb grip strength, decreased hindlimb grip strength, decreased motor activity. There was also death at this dose. In the subchronic rat neurotoxicity study, the decreased forelimb grip strength observed at 153 mg/kg/day, in females only, may also have been due to treatment.

Hydrocephalus or dilated ventricles were observed in at least one animal at the HDT (50 mg/kg/day) in adult dogs in all the dog studies, following both 90-days (gavage or capsule) and one year of dosing. This finding was never seen in controls or low dose groups.

Hydrocephaly and/or dilated ventricles in dogs of this age may have been due to inherent asymptomatic incidences in the beagle (Vullo *et al.*, 1997), but it was noted that these animals were not supplied by the same breeding colony, and the incidences were only observed at the high dose levels across several studies. Therefore, these findings can not be dismissed. Neuropathology was observed in the 21-day rat dermal study (sciatic nerve degeneration) at 1000 mg/kg, and the 2-year chronic mouse study (degeneration of the sciatic nerve, lumbar spinal root, and lumbar spinal white matter in males) at 991 mg/kg. Although these findings were previously discounted due to lack of supporting neuropathology data in the acute and subchronic neurotoxicity studies in rats, the overall neurotoxicity profile of the chemical indicated that the neuropathology could be a treatment-related effect of concern.

v. *Conclusion.* EPA concludes that the 10x factor for increased susceptibility of infants and children (as required by FQPA) should be reduced to 3x. The Agency determined that the data indicate that there is no increased susceptibility to young rats or rabbits following *in utero* exposure in prenatal studies or in the postnatal study in rats, and the guideline requirements for the toxicology data base are completed. Additionally, the exposure assessments for sulfosate do not indicate a concern for potential risk to infants and children since: (1) The dietary exposure assessments are unrefined (assuming that all commodities contain tolerance level residues) resulting in an over estimate of dietary exposure; (2) data from modeling are used for the ground and surface source drinking water exposure assessments, resulting in estimates considered to be reasonable upper-bound concentrations; and (3) there are currently no registered residential uses for sulfosate.

However, the FQPA safety factor was reduced to 3x instead of being removed because of the concern for the overall neurotoxicity exhibited in long-term studies in adult animals (mice, rats, and dogs) and the Agency's determination based on these findings that additional data are needed. In mice, sulfosate induced degeneration of the sciatic nerve, lumbar spinal root and lumbar spinal white matter was reported. In rats, degeneration of the sciatic nerve was seen following dermal applications. In dogs, hydrocephalus and/or dilated ventricles were observed following subchronic and chronic exposures. In addition, clinical signs indicative of neurotoxicity such as salivation, tremors, emesis, decreased activity was seen in rats and dogs. Based on these factors, the Agency determined that a developmental neurotoxicity study in rats is required to characterize the observed neuropathology in the subchronic and chronic studies.

2. *Acute risk.* Since there are no residential uses for sulfosate, the acute aggregate exposure only includes food and water. For infants and children, 7.3–9.4% of the acute RfD is occupied by dietary (food) exposure. The estimated average concentrations of sulfosate in surface and ground water are less than EPA's levels of concern for sulfosate in drinking water as a contribution to acute aggregate dietary exposure. The above calculations include the FQPA safety factor of 3x. Therefore, EPA concludes with reasonable certainty that residues of sulfosate in drinking water do not contribute significantly to the aggregate acute human health risk at the present time considering the present uses and uses proposed in this action. EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate acute exposure to sulfosate residues.

3. *Chronic risk.* Using the conservative exposure assumptions described above, EPA has concluded that aggregate exposure to sulfosate from food will utilize 11.9–20.3% of the RfD for infants and children. EPA has no concern for exposures below 33% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to health of infants and children. Despite the potential for exposure to sulfosate in drinking water, EPA does not expect the aggregate dietary exposure to exceed 33% of the RfD. EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to sulfosate residues.

III. Other Considerations

A. Metabolism In Plants and Animals

The nature of the residues in plants and animals is understood. EPA has determined that the tolerance expression for sulfosate must include both of the parent ions.

B. Analytical Enforcement Methodology

1. *Plants.* Analytical methods are available for enforcement. There is currently a PAM II enforcement method for the *N*-(phosphonomethyl)glycine anion (PMG) in crops. For TMS, the registrant has proposed gas chromatography (GC) Method RR 93–105B as the analytical enforcement method. A successful petition method validation (PMV) of this analytical enforcement method for the TMS moiety in plants has been completed by the EPA laboratory. EPA concludes that Method RR 93–105B is adequate for enforcement of the permanent tolerances.

2. *Animals.* Analytical methods are available for enforcement. For PMG, the registrant has proposed GC Method RR 93–104B as the analytical enforcement method. For TMS, the registrant has proposed GC Method RR 93–100B as the analytical enforcement method. Successful PMV of these analytical enforcement methods for the PMG and TMS moieties in meat, milk and eggs have been completed by the EPA laboratory. EPA concludes that Method RR 93–104B and Method RR 93–100B are adequate for enforcement of the permanent tolerances.

C. Magnitude of Residues

The crop field trial data are adequate to support these tolerances.

D. International Residue Limits

There are no Codex, Canadian or Mexican tolerances or maximum residue limits for residues of sulfosate in the subject crops. Therefore, a compatibility issue is not relevant to the proposed tolerances.

E. Rotational Crop Restrictions.

EPA has previously reviewed two confined rotational crop studies for sulfosate and concluded that rotational crop restrictions were not required.

IV. Conclusion

Therefore, the tolerance is established for residues of sulfosate in cattle, goats, horses, hogs and sheep at 0.10 ppm in fat, at 1.00 ppm in meat by-products, and at 0.20 ppm in meat; in poultry at 0.05 ppm in fat, meat-by-products (except liver), and meat, and at 0.10 ppm in liver; in eggs at 0.02 ppm; in

milk at 0.20 ppm; in corn at 0.30 ppm (of which no more than 0.20 ppm is TMS) in stover (field and pop), at 0.20 ppm (of which no more than 0.10 ppm is TMS) in grain (field and pop), at 0.10 ppm in forage (field); in soybeans at 2.00 ppm (of which no more than 1.0 ppm is TMS) in forage, at 5.00 ppm (of which no more than 2.0 ppm is TMS) in hay, and at 3.00 (of which no more than 1.0 ppm is TMS) ppm in seed; and in aspirated grain fractions at 210 ppm (of which no more than 60 ppm is TMS). In addition, the existing tolerances for prunes at 0.20 ppm, raisins at 0.20 ppm, and soybean hulls at 7.0 ppm are moved from 40 CFR 185.5375 to 40 CFR 180.489.

V. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to "object" to a tolerance regulation issued by EPA under new section 408(e) and (l)(6) as was provided in the old section 408 and in section 409. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which govern the submission of objections and hearing requests. These regulations will require some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use those procedural regulations with appropriate adjustments to reflect the new law.

Any person may, by November 10, 1998, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of

the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as Confidential Business Information (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

VI. Public Record and Electronic Submissions

EPA has established a record for this rulemaking under docket control number OPP-300709 (including any comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 119 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA.

Electronic comments may be sent directly to EPA at:
 opp-docket@epamail.epa.gov.

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the Virginia address in "ADDRESSES" at the beginning of this document.

VII. Regulatory Assessment Requirements

A. Certain Acts and Other Executive Orders

This final rule establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). Nor does it require any prior consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997).

B. Executive Order 12875

Under Executive Order 12875, entitled Enhancing Intergovernmental Partnerships (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget (OMB) a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create an unfunded federal mandate on State,

local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

C. Executive Order 13084

Under Executive Order 13084, entitled Consultation and Coordination with Indian Tribal Governments (63 FR 27655, May 19, 1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

In addition, since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950) and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Submission to Congress and the General Accounting Office

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 Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 180

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

40 CFR Part 185

Environmental protection, Food additives, Pesticides and pests.

Dated: August 31, 1998.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180 — [AMENDED]

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

Authority: 21 U.S.C. 346a and 371.

2. Section 180.489 is revised to read as follows:

§180.489 Sulfosate (Sulfonium, trimethyl-salt with N-(phosphonomethyl)glycine (1:1)); tolerances for residues.

(a) *General*. Tolerances are established for residues of the herbicide sulfosate (sulfonium, trimethyl-salt with N-(phosphonomethyl)glycine (1:1)) in or on the following raw and processed agricultural commodities:

Commodity	Parts per million
Almond, hulls (of which no more than 0.30 ppm is trimethylsulfonium (TMS)).	1.00

Commodity	Parts per million
Aspirated grain fractions (of which no more than 60 ppm is TMS).	210.00
Bananas (imported only)a.	0.05
Cattle, fat	0.10
Cattle, mby	1.00
Cattle, meat	0.20
Citrus fruit group	0.05
Corn, field, forage	0.10
Corn, field and pop, grain (of which no more than 0.10 ppm is TMS).	0.20
Corn, field and pop, stover (of which no more than 0.20 ppm is TMS).	0.30
Eggs	0.02
Goats, fat	0.10
Goats, mby	1.00
Goats, meat	0.20
Grape	0.10
Hogs, fat	0.10
Hogs, mby	1.00
Hogs, meat	0.20
Horses, fat	0.10
Horses, mby	1.00
Horses, meat	0.20
Milk	0.20
Poultry, fat	0.05
Poultry, liver	0.05
Poultry, mby (except liver).	0.10
Poultry, meat	0.05
Prune (of which no more than 0.05 ppm is TMS).	0.20
Raisin (of which no more than 0.05 ppm is TMS).	0.20
Sheep, fat	0.10
Sheep, mby	1.0
Sheep, meat	0.20
Soybean, forage (of which no more than 1 ppm is TMS).	2.0
Soybean, hay (of which no more than 2 ppm is TMS).	5.0
Soybean, hulls (of which no more than 2 ppm is TMS).	7.0
Soybean, seed (of which no more than 1 ppm is TMS).	3.0
Stone fruit group	0.05

Commodity	Parts per million
Tree nut group	0.05

aThere are no U.S. registrations as of the date of publication of the tolerance in the FEDERAL REGISTER.

- (b) *Section 18 emergency exemptions.* [Reserved]
- (c) *Tolerances with regional registrations.* [Reserved]
- (d) *Indirect or inadvertent residues.* [Reserved]

PART 185 — [AMENDED]

1. The authority citation for part 185 continues to read as follows:
Authority: 21 U.S.C. 346a and 348.

§185.5375 [Removed]

2. By removing § 185.5375 Sulfonium, trimethyl-salt with N-(phosphonomethyl)glycine (1:1).

[FR Doc. 98-24468 Filed 9-10-98; 8:45 am]
BILLING CODE 6560-50-F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP-300708; FRL 6026-5]

RIN 2070-AB78

Esfenvalerate; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of esfenvalerate, ((S)-cyano-(3-phenoxyphenyl)methyl (S)-4-chloro-alpha-(1-methylethyl) benzeneacetate in or on the raw agricultural commodities mustard greens at 5.0 parts per million (ppm), kiwifruit at 0.5 ppm, globe artichoke at 1.0 ppm, and kohlrabi at 2.0 ppm. Esfenvalerate is the S,S-isomer of fenvalerate which consists of a racemic mixture of four isomers (S,S;R,S;S,R; and RR). Technical grade esfenvalerate, Asana, the only fenvalerate formulation sold in the United States for agricultural use at this time, is enriched in the insecticidally active S,S-isomer (84%). Tolerance expressions for esfenvalerate are based on the sum of all isomers. The Interregional Research Project Number 4 (IR-4) requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (Pub. L. 104-170).

DATES: This regulation is effective September 11, 1998. Objections and requests for hearings must be received by EPA on or before November 10, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, OPP-300708, must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number OPP-300708, must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number [OPP-300708]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: By mail: Sidney Jackson, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: CM #2, 1921 Jefferson Davis Hwy., Arlington, VA, 703-305-7610; e-mail: jackson.sidney@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of April 15, 1998 (63 FR 18411), (FRL 5781-9) EPA, issued a notice pursuant to section 408 of the FFDCA, 21 U.S.C. 346a(e) announcing the filing of a pesticide petition for tolerances by DuPont Agricultural

Products, Wilmington, Delaware. This notice included a summary of the petition prepared by DuPont Agricultural Products, Wilmington, Delaware, the registrant. There were no comments received in response to the notice of filing.

The petition requested that 40 CFR 180.533 be amended by establishing tolerances for residues of the insecticide esfenvalerate, ((S)-cyano-(3-phenoxyphenyl)methyl (S)-4-chloro-alpha-(1-methylethyl) benzeneacetate, in or on the raw agricultural commodities mustard greens at 5.0 parts per million (ppm), kiwifruit at 0.5 ppm, globe artichoke at 1.0 ppm, and kohlrabi at 2.0 ppm.

I. Risk Assessment and Statutory Findings

New section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . ."

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides based primarily on toxicological studies using laboratory animals. These studies address many adverse health effects, including (but not limited to) reproductive effects, developmental toxicity, toxicity to the nervous system, and carcinogenicity. Second, EPA examines exposure to the pesticide through the diet (e.g., food and drinking water) and through exposures that occur as a result of pesticide use in residential settings.

A. Toxicity

1. *Threshold and non-threshold effects.* For many animal studies, a dose response relationship can be determined, which provides a dose that causes adverse effects (threshold effects)

and doses causing no observed effects (the "no-observed effect level" or "NOEL").

Once a study has been evaluated and the observed effects have been determined to be threshold effects, EPA generally divides the NOEL from the study with the lowest NOEL by an uncertainty factor (usually 100 or more) to determine the Reference Dose (RfD). The RfD is a level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. An uncertainty factor (sometimes called a "safety factor") of 100 is commonly used since it is assumed that people may be up to 10 times more sensitive to pesticides than the test animals, and that one person or subgroup of the population (such as infants and children) could be up to 10 times more sensitive to a pesticide than another. In addition, EPA assesses the potential risks to infants and children based on the weight of the evidence of the toxicology studies and determines whether an additional uncertainty factor is warranted. Thus, an aggregate daily exposure to a pesticide residue at or below the RfD (expressed as 100% or less of the RfD) is generally considered acceptable by EPA. EPA generally uses the RfD to evaluate the chronic risks posed by pesticide exposure. For shorter term risks, EPA calculates a margin of exposure (MOE) by dividing the estimated human exposure into the NOEL from the appropriate animal study. Commonly, EPA finds MOEs lower than 100 to be unacceptable. This 100-fold MOE is based on the same rationale as the 100-fold uncertainty factor.

Lifetime feeding studies in two species of laboratory animals are conducted to screen pesticides for cancer effects. When evidence of increased cancer is noted in these studies, the Agency conducts a weight of the evidence review of all relevant toxicological data including short-term and mutagenicity studies and structure activity relationship. Once a pesticide has been classified as a potential human carcinogen, different types of risk assessments (e.g., linear low dose extrapolations or MOE calculation based on the appropriate NOEL) will be carried out based on the nature of the carcinogenic response and the Agency's knowledge of its mode of action.

2. *Differences in toxic effect due to exposure duration.* The toxicological effects of a pesticide can vary with different exposure durations. EPA considers the entire toxicity data base, and based on the effects seen for different durations and routes of exposure, determines which risk

assessments should be done to assure that the public is adequately protected from any pesticide exposure scenario. Both short and long durations of exposure are always considered.

Typically, risk assessments include "acute," "short-term," "intermediate term," and "chronic" risks. These assessments are defined by the Agency as follows.

Acute risk, by the Agency's definition, results from 1-day consumption of food and water, and reflects toxicity which could be expressed following a single oral exposure to the pesticide residues. High end exposure to food and water residues are typically assumed.

Short-term risk results from exposure to the pesticide for a period of 1-7 days, and therefore overlaps with the acute risk assessment. Historically, this risk assessment was intended to address primarily dermal and inhalation exposure which could result, for example, from residential pesticide applications. However, since enactment of FQPA, this assessment has been expanded to include both dietary and non-dietary sources of exposure, and will typically consider exposure from food, water, and residential uses when reliable data are available. In this assessment, risks from average food and water exposure, and high-end residential exposure, are aggregated. High-end exposures from all three sources are not typically added because of the very low probability of this occurring in most cases, and because the other conservative assumptions built into the assessment assure adequate protection of public health. However, for cases in which high-end exposure can reasonably be expected from multiple sources (e.g. frequent and widespread homeowner use in a specific geographical area), multiple high-end risks will be aggregated and presented as part of the comprehensive risk assessment/characterization. Since the toxicological endpoint considered in this assessment reflects exposure over a period of at least 7 days, an additional degree of conservatism is built into the assessment; i.e., the risk assessment nominally covers 1-7 days exposure, and the toxicological endpoint/NOEL is selected to be adequate for at least 7 days of exposure. (Toxicity results at lower levels when the dosing duration is increased.)

Intermediate-term risk results from exposure for 7 days to several months. This assessment is handled in a manner similar to the short-term risk assessment.

Chronic risk assessment describes risk which could result from several months to a lifetime of exposure. For this

assessment, risks are aggregated considering average exposure from all sources for representative population subgroups including infants and children.

B. Aggregate Exposure

In examining aggregate exposure, FFDCA section 408 requires that EPA take into account available and reliable information concerning exposure from the pesticide residue in the food in question, residues in other foods for which there are tolerances, residues in groundwater or surface water that is consumed as drinking water, and other non-occupational exposures through pesticide use in gardens, lawns, or buildings (residential and other indoor uses). Dietary exposure to residues of a pesticide in a food commodity are estimated by multiplying the average daily consumption of the food forms of that commodity by the tolerance level or the anticipated pesticide residue level. The Theoretical Maximum Residue Contribution (TMRC) is an estimate of the level of residues consumed daily if each food item contained pesticide residues equal to the tolerance. In evaluating food exposures, EPA takes into account varying consumption patterns of major identifiable subgroups of consumers, including infants and children. The TMRC is a "worst case" estimate since it is based on the assumptions that food contains pesticide residues at the tolerance level and that 100% of the crop is treated by pesticides that have established tolerances. If the TMRC exceeds the RfD or poses a lifetime cancer risk that is greater than approximately one in a million, EPA attempts to derive a more accurate exposure estimate for the pesticide by evaluating additional types of information (anticipated residue data and/or percent of crop treated data) which show, generally, that pesticide residues in most foods when they are eaten are well below established tolerances.

Percent of crop treated estimates are derived from federal and private market survey data. Typically, a range of estimates are supplied and the upper end of this range is assumed for the exposure assessment. By using this upper end estimate of percent of crop treated, the Agency is reasonably certain that exposure is not understated for any significant subpopulation group. Further, regional consumption information is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups, to pesticide residues. For this pesticide, the most

highly exposed population subgroup was not regionally based.

II. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action, EPA has sufficient data to assess the hazards of esfenvalerate and to make a determination on aggregate exposure, consistent with section 408(b)(2), for tolerances for residues of esfenvalerate (S,S; R,S; S,R; and R,R isomers) in or on the raw agricultural commodities mustard greens at 5 ppm, kiwifruit at 0.5 ppm, globe artichoke at 1.0 ppm, and kohlrabi at 2.0 ppm. EPA's assessment of the dietary exposures and risks associated with establishing the tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by esfenvalerate are discussed below.

1. *Acute toxicity.* A battery of acute toxicity studies places technical esfenvalerate in Toxicity category II for acute oral lethal dose LD₅₀ at 87.2 milligrams/kilogram (mg/kg), Category III for acute dermal LD₅₀ > 2000 mg/kg and primary eye irritation, and Category IV for primary skin irritation. Esfenvalerate is a non-sensitizer. Acute inhalation on technical grade active ingredient is waived due to negligible vapor pressure. The Acute Delayed Neurotoxicity (Guideline 81-8) remains a data gap.

2. *Genotoxicity*—i. In a reverse gene mutation assay in bacteria, *S. typhimurium* and *Escherichia coli* were exposed to fenvalerate in DMSO at concentrations of 15, 50, 150, 500, 1,500, or 5,000 micrograms (µg)/plate in the presence and absence of mammalian metabolic activation (S9-mix). There was no evidence of induced mutant colonies over background.

ii. In a mammalian cell gene mutation assay at the HGPRT locus, Chinese hamster V79 cells cultured *in vitro* were exposed to fenvalerate in DMSO at concentrations of 12.6, 42, 126, 420 µg/ml in the presence of mammalian metabolic activation (S9-mix) and at concentrations of 4.2, 12.6, 42, 126 µg/milliliter (ml) in the absence of S9-mix.

There was no evidence of induced mutant colonies over background. In Chinese hamster lung fibroblasts (V79 cells) forward gene mutation assay the test was negative up to cytotoxic and/or precipitating levels 126 µg/ml in the absence of metabolic activation -S9; 420 µg/ml in the presence of metabolic activation +S9).

iii. In a mammalian cell cytogenetics chromosomal aberration assay CHO-K1 cell cultures were exposed to fenvalerate in DMSO at concentrations of 4.2 µg/ml, 8.4 µg/ml, 21 µg/ml, 42 µg/ml respectively without exogenous metabolic activation (S9-mix) and at concentrations of 21 µg/ml, 42 µg/ml, 84 µg/ml, 210 µg/ml respectively with S9-mix. There was no evidence of a significant induction of chromosomal aberrations or polyploid cells over background.

iv. A mouse micronucleus assay was negative in male ICR mice up to the highest dose tested (HDT) (150 mg/kg) administered by intraperitoneal injection. Since there appears to be no sex specific difference in the toxicity of esfenvalerate, the use of males only is justifiable. No overt toxicity was observed, but suggestive evidence of bone marrow cytotoxicity was seen 48 hours post-administration at the highest dose level tested.

v. Other genetic toxicology studies submitted on racemic fenvalerate indicate that the mixture containing equal parts of the four stereoisomers is not mutagenic in bacteria. The racemic mixture was also negative in a mouse host mediated assay and in a mouse dominant lethal assay.

3. *Reproductive and developmental toxicity*—i. Esfenvalerate was administered to female rats at doses of 0, 2.5, 5.0, 10.0 or 20.0 mg/kg/day from gestation days 6 through 15 (pilot study doses were 1.0, 2.0, 3.0, 4.0, 5.0 and 20 mg/kg/day). The Lowest Observed Effect Level (LOEL) is 2.5 mg/kg/day based on behavioral/Central Nervous System (CNS) clinical signs. The NOEL for maternal toxicity is 2.0 mg/kg/day (from the pilot study). There was no evidence of developmental toxicity at any dose. The NOEL is 20 mg/kg/day, the highest dose tested.

ii. Esfenvalerate was administered to rabbits at doses of 0, 3.0, 10.0 or 20.0 mg/kg/day from gestation days 7 through 19 (pilot study doses were 0, 2.0, 3.0, 4.0, 4.5, 5.0 or 20.0 mg/kg/day). The LOEL is 3.0 mg/kg/day based on behavioral/CNS clinical signs. The NOEL is 2.0 mg/kg/day (from the pilot study). There was no evidence of developmental toxicity at any dose. The LOEL is greater than 20.0 mg/kg/day.

The NOEL is equal to or greater than 20.0 mg/kg/day, the HDT.

iii. In a 2-generation reproduction toxicity study in rats esfenvalerate was administered to rats at dose levels of 0, 3.75, 5.0, 17.5 and 35.0/17.5 mg/kg/day. The LOEL for parental toxicity is 3.75 mg/kg/day based on decreases in mean body weights of F₁ females and an increased incidence of skin lesions. The NOEL could not be determined. The LOEL for reproductive toxicity is 5.0 mg/kg/day based on decreases in F₁ pup weights on day 21 of lactation; decreases in litter size and F₂ pup weights and an increased incidence of subcutaneous hemorrhage. The NOEL is 3.75 mg/kg/day.

4. *Subchronic toxicity*. i. In a 90-day feeding study, rats were administered 0, 4.7, 6.2, 7.8 or 18.7 mg/kg/day of esfenvalerate. The LOEL is 18.7 mg/kg/day based on neurological dysfunction. The NOEL is 7.8 mg/kg/day.

ii. In another 90-day feeding study, rats were administered 0, 5, 15, 30 or 50 mg/kg/day of esfenvalerate. The LOEL is 15 mg/kg/day based on neurological dysfunction. The NOEL is 5 mg/kg/day.

iii. Esfenvalerate was administered to mice at dose levels of 0, 10.5, 30.5 or 106 mg/kg/day (male) and 0, 12.6, 36.8 or 113 mg/kg/day (female). The LOEL for esfenvalerate is 106 mg/kg/day. The NOEL is 30.5 mg/kg/day.

5. *Chronic toxicity*—i. In a 21-day probe for a 1 year feeding study 2 male and 2 female beagles were administered 0, 2.80, 6.40 or 9.38 mg/kg/day in males and 0, 2.25, 7.37 or 8.50 mg/kg/day of esfenvalerate. The LOEL was determined to be 6.40 mg/kg/day based on nervous system involvement and decreases in body weight and food consumption. The NOEL is 2.25 mg/kg/day.

ii. In a 1-year feeding study, 6 male and 6 female beagles/group were administered 0, 0.68, 1.36 or 5.29 mg/kg/day esfenvalerate. The LOEL was determined to be 6.40 mg/kg/day based on nervous system involvement and decreases in body weight and food consumption. The NOEL was determined to be 5.29 mg/kg/day. These studies are acceptable and satisfies the requirement for a guideline series 83-1b chronic feeding study in dogs.

6. *Chronic/carcinogenicity toxicity*—i. In a chronic/carcinogenicity feeding study, rats were administered 0.050, 0.25, 1.25 or 12.5 mg/kg/day of fenvalerate in the diet for 2 years. The LOEL was greater than or equal to 12.5 mg/kg/day. There was no increase in tumors at 12.5 mg/kg/day. The NOEL was determined to be 12.5 mg/kg/day the highest dose tested (HDT) in the 2 year study. The study is supplementary

and does not satisfy the requirement for a guideline series 83-5 combined chronic/carcinogenicity study in rats.

ii. In a lifetime feeding study, rats were administered 0 or 50.0 mg/kg/day of fenvalerate in the diet. Spindle cell sarcomas were produced in male rats only. The LOEL was 50.0 mg/kg/day based on loss of weight and neurological effects. The NOEL was 12.5 mg/kg/day as determined in the 2-year rat chronic/carcinogenicity feeding study above.

The conclusion that fenvalerate is associated with the production of spindle cell sarcomas was later retracted by EPA. The study is supplementary and does not satisfy the requirement for a guideline series 83-5 combined chronic/carcinogenicity study in rats. When taken together with chronic/carcinogenicity feeding study, the guideline requirement for a 83-2a, cancer study in the rat is satisfied.

iii. In a 2-year feeding study mice were administered 0, 1.5, 7.5, 38.0 or 187.5 mg/kg/day fenvalerate in the diet. The LOEL was 7.5 mg/kg/day based on granulomatous changes (related to fenvalerate only, not esfenvalerate). The NOEL was 1.5 mg/kg/day. This study satisfies the requirement for combined chronic feeding carcinogenicity study in mice.

iv. In an 18-month feeding study, mice were fed 0, 15.0, 45.0, 150.0 or 450.0 mg/kg/day of fenvalerate in the diet. The LOEL is 45.0 mg/kg/day based on granulomatous changes in the liver and spleen. The NOEL is 15.0 mg/kg/day. No carcinogenicity was observed.

v. In a life span feeding study, mice were administered 0, 1.5, 4.5, 15.0 or 45.0 mg/kg/day of fenvalerate in the diet. The LOEL was determined to be 15 mg/kg/day based on the granulomatous lesions observed and on the change in hematological parameters. Fenvalerate was determined not to be carcinogenic in the specific test strain of the mouse. The NOEL was determined to be 3.48 mg/kg/day.

The following studies are considered data gaps in the toxicology data base: general metabolism, 21 day dermal, dermal penetration, and acute and subchronic 90-day neurotoxicity. Developmental neurotoxicity data requirements are reserved as an upper tier study which would only be required if effects in the acute and subchronic studies indicate concerns for increased sensitivity of the infant or neonate. Although these data are lacking EPA has sufficient toxicity data to support these tolerances and these additional studies are not expected to significantly change its risk assessment. These studies will be required under a special Data Call-In

letter pursuant to section 3 (c)(2)(B) of FIFRA.

B. Toxicological Endpoints

1. *Acute toxicity.* EPA has established an NOEL of 2.0 mg/kg/day through the dietary route in rat and rabbit developmental studies. This NOEL is based on behavioral and central nervous system clinical signs. A MOE of 100 is required.

2. *Short - and intermediate - term toxicity.* To assess risk from (nonfood) short and intermediate term dermal exposure, EPA has established a NOEL of 2.0 mg/kg/day from the rat and rabbit developmental studies. No dermal penetration/absorption study is available and the NOEL incorporates a 25% dermal absorption based on the weight-of-evidence available for structurally related pyrethroids.

This NOEL is based on behavioral and central nervous system clinical signs. For exposure via inhalation the Agency used an oral NOEL of 2.0 mg/kg/day and assumed 100% absorption (based on the 2 mg/kg/day used for the dermal risk assessment since no appropriate inhalation toxicity studies are available).

3. *Chronic toxicity.* EPA has established the RfD for esfenvalerate ester at 0.02 mg/kg/day. This RfD is based on a NOEL of 2.0 mg/kg/day through the dietary exposure route in developmental study in rat. The NOEL is based on behavioral changes and clinical signs of neurotoxicity. This RfD is based on an uncertainty factor of 100.

4. *Carcinogenicity.* Esfenvalerate is classified as a Group E. There is no evidence of carcinogenicity in either rats or mice.

C. Exposures and Risks

1. *From food and feed uses.* Tolerances have been established (40 CFR 180.533) for the residues of fenvalerate in or on a variety of raw agricultural commodities. EPA notes that the acute dietary risk assessments used Monte Carlo modeling (in accordance with Tier 3 of EPA June 1996 "Acute Dietary Exposure Assessment" guidance document) incorporating anticipated residues and percent of crop treated refinements. Field trial data and FDA monitoring data were used to generate anticipated residues or residue distribution for Monte Carlo analyses. Chronic dietary risk assessments used anticipated residues and percent crop treated refinements.

Risk assessments were conducted by EPA to assess dietary exposures and risks from esfenvalerate as follows:

i. *Acute exposure and risk.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a one day or single exposure. The NOEL used for the acute dietary exposure was 2.0 mg/kg/day. Potential acute exposures from food commodities were estimated using a Tier 3 acute dietary risk assessment (Monte Carlo Analysis). The MOEs (99.9th percentile) for the U.S. population based on an acute dietary exposure of 0.011717 mg/kg/day are 171. For children 1-6 years old (most highly exposed population) the MOEs based on an acute dietary exposure of 0.019445 mg/kg/day are 103. The Agency has no cause for concern if total acute exposure calculated for the 99.9th percentile yields an MOE of 100 or larger.

ii. *Chronic exposure and risk.* Potential chronic exposures were estimated using NOVIGEN's DEEM (Dietary Exposure Evaluation Model). The RfD used for the chronic dietary analysis is 0.02 mg/kg/day. Using tolerance values and anticipated residues discussed above the risk assessment resulted in use of 1.9% of the RfD for the general U.S. population and 4.6% of the RfD for children 1-6 years.

Section 408(b)(2)(E) authorizes EPA to consider available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide chemicals that have been measured in food. If EPA relies on such information, EPA must require that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. Following the initial data submission, EPA is authorized to require similar data on a time frame it deems appropriate. Section 408(b)(2)(F) allows the Agency to use data on the actual percent of crop treated when establishing a tolerance only where the Agency can make the following findings: (1) that the data used are reliable and provide a valid basis for showing the percentage of food derived from a crop that is likely to contain residues; (2) that the exposure estimate does not underestimate the exposure for any significant subpopulation and; (3) where data on regional pesticide use and food consumption are available, that the exposure estimate does not understate exposure for any regional population. In addition, the Agency must provide for periodic evaluation of any estimates used.

The percent of crop treated estimates for esfenvalerate were derived from

federal and market survey data. EPA considers these data reliable. A range of estimates are supplied by these data and the upper end of this range was used for the exposure assessment. By using this upper end of estimate of percent crop treated, the agency is reasonably certain that exposure is not underestimated for any significant subpopulation. Further, regional consumption information is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Review of these regional data allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. To meet the requirement for data on anticipated residues, EPA will issue a Data Call-In (DCI) notice pursuant to FFDCA section 408(f) requiring submission of data on anticipated residues in conjunction with approval of the registration under the FIFRA.

2. *From drinking water.* Esfenvalerate is immobile in soil and will not leach into groundwater. Additionally, due to their insolubility and lipophilic nature, any residues in surface water will rapidly and tightly bind to soil particles and remain with sediment. A screening evaluation of leaching potential of a typical potential of a typical pyrethroid was conducted using EPA's Pesticide Root Zone Model (PRZM1). Based on this screening assessment, the potential concentrations of a pyrethroid in ground water at depths of 1 and 2 meters are essentially zero (much less than 0.001 parts per billion). Therefore, EPA concludes that residues are not expected to occur in drinking water.

i. *Acute exposure and risk.* Acute drinking water exposure is estimated for the U.S. population to be 0.000039 mg/kg/day with an MOE of 51,743. For non-nursing infants less than 1 year old the exposure is 0.000074 with a MOE of 27,042.

ii. *Chronic exposure and risk.* Chronic drinking water exposure is estimated for the U.S. population to be 0.000001 mg/kg/day and for the non-nursing infants 0.000005 mg/kg/day. Less than 0.1% of the RfD is occupied by both population groups.

3. *From non-dietary exposure.* Esfenvalerate is currently registered for use on the following residential non-food sites: spray treatments in and around commercial and residential areas, treatments for control of ectoparasites on pets, home care products including foggers, pressurized sprays, crack and crevice treatments, lawn and garden sprays, and pet and pet

bedding sprays. For the non-agricultural products, the very low amounts of active ingredient they contain, combined with the low vapor pressure (1.5×10^{-9} mm Mercury at 25 °C) and low dermal penetration, would result in minimal inhalation and dermal exposure. Individual non-dietary risk exposure analyses were conducted using a flea infestation scenario that included pet spray, carpet and room treatment, and lawn care, respectively.

4. *Short- and intermediate-term exposure and risk.* Short- and intermediate-term exposure and risk. The total aggregate non-dietary exposure including lawn, carpet, and pet uses (mg/kg/day) are: 0.000023 for adults; 0.00129 for children aged 1–6 years; and 0.00138 for infants less than 1 year old. It should be noted that carpet uses are considered short and intermediate term exposures because available data indicate that esfenvalerate dissipates over time and is thus unavailable to contribute as chronic exposure and risk.

For the adults, children aged 1–6 years, and infants less than 1 year old subgroups discussed above, the MOE is > 87,000, 1,500, and 1,400, respectively. Based on potential non-dietary exposure for esfenvalerate from existing product uses as discussed above, it can be concluded that non-dietary risk is well below levels of concern to the Agency.

5. *Cumulative exposure to substances with common mechanism of toxicity.* Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider “available information” concerning the cumulative effects of a particular pesticide’s residues and “other substances that have a common mechanism of toxicity.” The Agency believes that “available information” in this context might include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides, although the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way. EPA has begun a pilot process to study this issue further through the examination of particular classes of pesticides. The Agency hopes that the results of this pilot process will increase the Agency’s scientific understanding of this question such that

EPA will be able to develop and apply scientific principles for better determining which chemicals have a common mechanism of toxicity and evaluating the cumulative effects of such chemicals. The Agency anticipates, however, that even as its understanding of the science of common mechanisms increases, decisions on specific classes of chemicals will be heavily dependent on chemical specific data, much of which may not be presently available.

Although at present the Agency does not know how to apply the information in its files concerning common mechanism issues to most risk assessments, there are pesticides as to which the common mechanism issues can be resolved. These pesticides include pesticides that are toxicologically dissimilar to existing chemical substances (in which case the Agency can conclude that it is unlikely that a pesticide shares a common mechanism of activity with other substances) and pesticides that produce a common toxic metabolite (in which case common mechanism of activity will be assumed).

EPA does not have, at this time, available data to determine whether esfenvalerate has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, esfenvalerate does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that esfenvalerate has a common mechanism of toxicity with other substances.

D. Aggregate Risks and Determination of Safety for U.S. Population

1. *Acute risk.* The acute aggregate risk assessment takes into account exposure from food and drinking water. The potential acute exposure from food and drinking water to the overall U.S. population provides an acute dietary exposure of 0.011756 mg/kg/day with an MOE of 170. This acute dietary exposure estimate is considered conservative, using anticipated residue values and percent crop-treated data in conjunction with Monte Carlo analysis.

2. *Chronic risk.* Using the ARC exposure assumptions described above, EPA has concluded that aggregate exposure to esfenvalerate will utilize 1.9% of the RfD for the U.S. population. The major identifiable subgroup with the highest aggregate exposure is children 1 – 6 years. EPA generally has no concern for exposures below 100%

of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health.

3. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account chronic dietary food and water (considered to be a background exposure level) plus indoor and outdoor residential exposure. The potential short- and intermediate-term aggregate risk for the U.S. population is an exposure of 0.0082 mg/kg/day with an MOE of 244.

4. *Conclusion.* EPA concludes that there is reasonable certainty that no harm will result from acute, chronic or short- and intermediate-term aggregate exposure to esfenvalerate residues.

5. *Aggregate cancer risk for U.S. population.* Esfenvalerate is classified as a Group E carcinogen - no evidence of carcinogenicity in rats or mice. Therefore, a carcinogenicity risk analysis is not required. Based on available adequate data, EPA believes that approved use of this pesticide does not pose a significant cancer risk.

E. Aggregate Risks and Determination of Safety for Infants and Children

1. *Safety factor for infants and children.*—i. *In general.* In assessing the potential for additional sensitivity of infants and children to residues of esfenvalerate, EPA considered data from developmental toxicity studies in the rat and rabbit and a 2-generation reproduction study in the rat. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from maternal pesticide exposure gestation. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability of mating animals and data on systemic toxicity.

FFDCA section 408 provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for pre- and post-natal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. EPA believes that reliable data support using the standard uncertainty factor (usually 100 for combined inter- and intra-species variability) and not the additional tenfold MOE/uncertainty factor when EPA has a complete data

base under existing guidelines and when the severity of the effect in infants or children or the potency or unusual toxic properties of a compound do not raise concerns regarding the adequacy of the standard MOE/safety factor.

ii. *Developmental toxicity studies.* In both prenatal developmental toxicity studies in rats and rabbits, there is no evidence of developmental toxicity at a dose up to 20 mg/kg/day. Maternal clinical neurotoxicity (based on behavioral and central nervous system clinical signs) was observed at a dose as low as 2.5 or 3.0 mg/kg/day for rats and rabbits, respectively. The maternal NOEL was 2.0 mg/kg/day.

iii. *Reproductive toxicity study.* In the 2-generation reproduction study in rats, offspring toxicity was observed only at dietary levels which were also found to be toxic to parental animals. The LOEL was 5.1 mg/kg/day based on decrease in mean body weights of females and increased incidence of dermal lesions. The NOEL for parental systemic toxicity was not determined. Effects on the offspring, including decreased pup weights in both generations during early and/or late lactation, decreased litter size, and increased incidence of subcutaneous hemorrhage, were observed at dietary levels of 6.70 mg/kg/day and above, with a NOEL of 5.1 mg/kg/day.

iv. *Pre- and post-natal sensitivity.* There is no evidence of additional sensitivity to young rats or rabbits following pre- or postnatal exposure to esfenvalerate.

v. *Conclusion.* From available adequate data, there is no indication that the developing fetus or neonate is more sensitive than adult animals. No developmental neurotoxicity studies are being required at this time. A developmental neurotoxicity data requirement is an upper tier study and required only if effects observed in the acute and 90-day neurotoxicity studies indicate concerns for frank neuropathy or alterations seen in the fetal nervous system in the developmental and reproductive toxicology studies. The FQPA conditional requirement of an additional tenfold margin of safety for pesticide residues be applied for infants and children to take into account potential pre- and post-natal toxicity was not imposed in this case. The Agency believes that reliable data support use of the standard 100-fold uncertainty factor, and that an additional ten-fold (10x) uncertainty factor is not needed to protect the safety of infants and children.

2. *Acute risk.* The potential acute exposure from food and drinking water to the most sensitive population

subgroup, children 1–6 years old is 0.019477 mg/kg/day with an MOE of 103. The Agency has no cause for concern if total acute exposure calculated for the 99.9th percentile yields a MOE of 100 or larger.

3. *Chronic risk.* Using the conservative exposure assumptions described above, EPA has concluded that aggregate exposure to esfenvalerate from food and drinking water will utilize 4.6% of the RfD for children 1–6 years old, the most sensitive population subgroup based on a dietary exposure of 0.000912 mg/kg/day. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to esfenvalerate in drinking water and from non-dietary, non-occupational exposure, EPA does not expect the aggregate exposure to exceed 100% of the RfD.

4. *Short- or intermediate-term risk.* EPA has concluded that potential short- or intermediate-term aggregate exposure of esfenvalerate from chronic dietary food and water (considered to be a background exposure level) plus indoor and outdoor residential exposure to children (1–6 years old) is 0.0113 mg/kg/day with an MOE of 177. For infants (less than 1 year old) the exposure is 0.0098 mg/kg/day with an MOE of 204. The Agency is not generally concerned for exposures where the MOE value is greater than 100.

EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to esfenvalerate residues.

5. *Special docket.* The complete acute and chronic exposure analyses (including dietary, non-dietary, drinking water, and residential exposure, and analysis of exposure to infants and children) used for risk assessment purposes can be found in the Special Docket for the FQPA under the title "Risk Assessment for Extension of Tolerances for Synthetic Pyrethroids." Further explanation regarding EPA's decision regarding the additional safety factor can also be found in the Special Docket.

6. *Endocrine disrupter effects.* EPA is required to develop a screening program to determine whether certain substances (including all pesticides and inerts) "may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or such other endocrine effect..." The Agency is currently working with interested stakeholders, including other

government agencies, public interest groups, industry and research scientists in developing a screening and testing program and a priority setting scheme to implement this program. Congress has allowed 3 years from the passage of FQPA (August 3, 1999) to implement this program. At that time, EPA may require further testing of this active ingredient and end use products for endocrine disrupter effects.

III. Other Considerations

A. Metabolism In Plants and Animals

The nature of the residue in plants and animals is adequately defined. EPA has concluded that the qualitative nature of the residue is the same for both fenvalerate and esfenvalerate. The residue to be regulated is fenvalerate: the *S,S*; *R,S*; *S,R*; and *R,R* isomers.

B. Analytical Enforcement Methodology

There is a practical analytical method utilizing electron-capture gas chromatography with nitrogen phosphorous detection available for enforcement with a limit of detection that allows monitoring food with residues at or above tolerance levels. The limit of detection for the updated method is the same as that of the current PAM II method, which is 0.01 ppm.

C. Magnitude of Residues

Tolerances are based on the sum of all isomers of fenvalerate. Fenvalerate is a racemic mixture of four isomers about 25% each. This product was registered as Pydrin®. However since 1992, an *S,S*-isomer enriched formulation, Asana® (esfenvalerate), has been the only fenvalerate formulation sold in the United States for agricultural use. Since the *S,S*-isomer is the insecticidally active isomer, the use rate for Asana® is four times lower than that for Pydrin®. A petition is pending (PP 4F4329), to convert tolerances (still to be expressed as the sum of all isomers) based on the use rates for Asana®. Bridging residue studies have shown Asana® residues to be 3–4 times lower than Pydrin residues. Available residue data support the tolerance levels being established by this Notice.

D. International Residue Limits

There are no Codex maximum residue levels (MRL's) for esfenvalerate on crops that are the subject of this notice. MRLs have been established for the related compound, fenvalerate, on a number of crops that also have U. S. tolerances. Use rate and isomer pesticidal activity are among factors that effect residue levels. The Agency will fully evaluate MRL values for all permanent tolerances when pesticides are reregistered.

IV. Conclusion

Therefore, the tolerances are established for residues of esfenvalerate, ((S)-cyano-(3-phenoxyphenyl)methyl (S)-4-chloro-alpha-(1-methylethyl) benzeneacetate and the *S,S*; *R,S*; *S,R*; and *R,R* isomers in or on the raw agricultural commodities mustard greens at 5.0 parts per million (ppm), kiwifruit at 0.5 ppm, globe artichoke at 1.0 ppm, and kohlrabi at 2.0 ppm.

V. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to "object" to a tolerance regulation issued by EPA under new section 408(e) and (l)(6) as was provided in the old section 408 and in section 409. However, the period for filing objections is 60 days, rather than 30 days. EPA currently has procedural regulations which govern the submission of objections and hearing requests. These regulations will require some modification to reflect the new law. However, until those modifications can be made, EPA will continue to use those procedural regulations with appropriate adjustments to reflect the new law.

Any person may, by November 10, 1998, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issues on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the requestor (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

VI. Public Record and Electronic Submissions

EPA has established a record for this rulemaking under docket control number OPP-300708 (including any comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 119 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA.

Electronic comments may be sent directly to EPA at:
opp-docket@epamail.epa.gov.

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this rulemaking, as well as the public version, as described above will be kept in paper form. Accordingly, EPA will transfer any copies of objections and hearing requests received electronically into printed, paper form as they are received and will place the paper copies in the official rulemaking record which will also include all comments submitted directly in writing. The official rulemaking record is the paper record maintained at the Virginia address in "ADDRESSES" at the beginning of this document.

VII. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

This final rule establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive

Order 12866, entitled Regulatory Planning and Review (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). Nor does it require any prior consultation as specified by Executive Order 12875, entitled Enhancing the Intergovernmental Partnership (58 FR 58093, October 28, 1993), or special considerations as required by Executive Order 12898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997).

B. Executive Order 12875

Under Executive Order 12875, entitled Enhancing Intergovernmental Partnerships (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget (OMB) a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create an unfunded federal mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

C. Executive Order 13084

Under Executive Order 13084, entitled Consultation and Coordination with Indian Tribal Governments (63 FR

27655, May 19, 1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

In addition, since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerances in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Nevertheless, the Agency has previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950) and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Submission to Congress and the Comptroller General

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

of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: August 31, 1998.

James Jones,
Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

Authority: 21 U.S.C. 346a and 371.

2. In § 180.533, by alphabetically adding the following commodities to the table in paragraph (a) to read as follows:

§ 180.533 Esfenvalerate; tolerances for residues

(a) * * *

Commodity	Parts per million
Artichoke, globe	1.0
* * * *	*
Kiwifruit	0.5
Kohlrabi	2.0
* * * *	*
Mustard greens	5.0
* * * *	*

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[FR Doc. 98-24770 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 73 and 74

[MM Docket No. 97-234, GC Docket No. 92-52, and GEN Docket No. 90-264; FCC 98-194]

Implementation of Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This *First Report and Order (First R&O)* implements the Federal Communications Commission's amended auction authority. Specifically, the *First R&O* adopts rules and procedures for auctioning pending and future mutually exclusive applications for construction permits in the various commercial broadcast services; determines that competing Instructional Television Fixed Service (ITFS) applications are subject to auction; and adopts procedures for resolving pending broadcast comparative renewal cases, in which the Commission is not authorized to use auctions. To further the goals of the designated entity provisions of the Commission's auction authority, the *First R&O* adopts a tiered "new entrant" bidding credit for entities with controlling interests in either no, or less than four, other media entities. The *First R&O* notes that the Commission intends to continue its review of the barriers to entry or growth that may exist for small, minority- and women-owned businesses in broadcasting, and to make adjustments to its designated entity provisions, as appropriate, in light of these studies.

EFFECTIVE DATE: November 10, 1998.

FOR FURTHER INFORMATION CONTACT: Jerianne Timmerman, Video Services Division, Mass Media Bureau at (202) 418-1600; Lisa Scanlan, Audio Services Division, Mass Media Bureau at (202) 418-2720; Lee Martin, Office of General Counsel at (202) 418-1720.

SUPPLEMENTARY INFORMATION:

Summary

This *First R&O* implements: (1) amended Section 309(j) of the Communications Act (Act), which requires that the Commission use auctions to select from among virtually all mutually exclusive applications for initial licenses and construction permits, including broadcast construction permits, and (2) new Section 309(l) of the Act, which

authorizes auctions to resolve pending comparative licensing cases involving applications for full-service commercial radio or television stations filed before July 1, 1997. As proposed in this proceeding, the *First R&O* amends the disparate application procedures for the various broadcast services to establish a uniform window filing approach that should facilitate the determination of mutually exclusive groups of applications for auction purposes, and also establishes rules and procedures for auctioning mutually exclusive applications for broadcast construction permits that follow, as closely as possible, the Commission's general part 1 auction rules.

General Authority to Use Competitive Bidding to Award Secondary and Primary Commercial Broadcast Licenses

2. Under amended Section 309(j)(1), the Commission found that auctions are mandatory for all secondary commercial broadcast services (e.g., LPTV, FM translator and television translator services). Similarly, the Commission found that, except for certain pending applications that are subject to new Section 309(l), its auction authority is mandatory, rather than permissive, for all full power commercial radio and analog television stations. Nothing in the statutory language or in the accompanying legislative history indicates that the requirement to use competitive bidding for "any initial license or construction permit" is limited to full power radio and analog television stations, or that Congress intended such a limitation. Nor are secondary commercial broadcast service licenses exempted from the auction requirement under Section 309(j)(2), which enumerates the certain types of spectrum licenses that are not subject to competitive bidding.

3. The Commission stated further that all pending mutually exclusive applications for these secondary broadcast services must be resolved through a system of competitive bidding. Nothing in Section 309(j)(1) suggests that the requirement to use auctions applies only to applications filed in the future. The only statutory reference to pending applications is contained in Section 309(l), and the Commission determined that Congress did not intend to include pending secondary broadcast applications within Section 309(l).

Statutory Authority to Use Competitive Bidding for Modification Applications

4. The Commission concluded that it is not precluded by the terms of Section

309(j) from auctioning mutually exclusive modification applications. The Commission recognized, however, that competing major modification applications can often be resolved by changes to the engineering proposals submitted by applicants and may raise special considerations where settlements are particularly appropriate. The Commission will therefore allow applicants who have, under the window filing procedures adopted in the *First R&O* for new station applications and major modification applications, filed either competing major modification applications, or competing major modification and new station applications, to resolve their mutual exclusivities by means of engineering solutions or settlements during a limited period after the filing of short-form applications but before the start of the auction. The Commission stated that it would apply competitive bidding procedures to resolve mutual exclusivities among major modification applications and between major modification and initial applications, if the parties are unable to resolve their mutual exclusivities during a limited period, as established by public notice, following the filing of short-form applications.

5. The Commission determined that it would not, however, generally subject competing minor modification applications to auction procedures. Given the infrequency with which minor modification applications are mutually exclusive and the less significant changes usually proposed in minor modification applications, the Commission will encourage parties "to use engineering solutions, negotiation * * * and other means" to resolve any mutual exclusivities. 47 U.S.C. 309(j)(6)(E).

Statutory Exemption for Noncommercial Educational and Public Broadcast Stations

6. The Commission determined that it had not received sufficiently focused comment to finally resolve in this proceeding the issues relating to noncommercial educational and public broadcast stations. While the exemption in Section 309(j)(2)(C) for noncommercial educational broadcasters clearly precludes the Commission from using competitive bidding to award broadcast station licenses on the reserved noncommercial frequencies, there are difficult issues as to how the Commission should apply this provision when noncommercial educational and public broadcasters apply for frequencies in the commercial band. The Commission found that its

decision on these issues would be aided by a further round of comment. Therefore, the Commission stated that it would not proceed to auction at this time any pending cases where both noncommercial and commercial applicants have filed competing applications for nonreserved channels; these cases will be resolved following the release of a report and order in our noncommercial proceeding, MM Docket No. 95-31.

Discretion to Use Auctions in Pending Cases Involving pre-July 1, 1997 Applications

7. The Commission found that it has discretion under new Section 309(l) to resolve comparative licensing proceedings that involve pre-July 1, 1997 applications for full service commercial radio and television stations by either competitive bidding procedures or through the comparative hearing process. The explicit language of Section 309(l)(1) provides that the Commission "shall have the authority to conduct a competitive bidding proceeding," in contrast to the mandatory language of Section 309(j)(1) providing that "the Commission shall grant the license . . . through a system of competitive bidding." The Commission concluded that the language of Section 309(l) unambiguously addresses a situation in which auctions are permissible, but are not required.

Public Interest Considerations Favoring Resolution of Pending Cases by Competitive Bidding

8. The Commission stated that auctions will generally be fairer and more expeditious than deciding the pending mutually exclusive applications filed before July 1, 1997 through the comparative hearing process. Auctions will generally expedite service and better serve the public interest in these cases, because competitive bidding is a more efficient and cost-effective method of assigning spectrum in cases of mutual exclusivity than any previously employed method. The Commission concluded that there is no inherent unfairness in using auctions, rather than comparative hearings, to resolve mutual exclusivity among these pre-July 1, 1997 applications, as most of these applicants filed after *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), which made it clear that some change in the existing selection criteria was inevitable. The Commission also found that changing the selection process for pending applications filed before July 1, 1997 is not impermissibly retroactive or

otherwise unlawful. The pre-July 1, 1997 applicants, whether their applications are pending on the processing line or have been designated for hearing, have no vested right to a comparative hearing that is abridged by the Commission's decision to award such authorizations by a system of competitive bidding. The Commission moreover noted that the impact of this regulatory change is ameliorated somewhat by the statutory requirement that auctions to resolve these pre-July 1 pending cases be closed to other participants.

Treatment of Pending Hearing Cases

9. The Commission concluded that, even for the small number of pending cases involving pre-July 1, 1997 applications that have progressed at least through an Initial Decision by an Administrative Law Judge, auctions better serve the public interest than comparative hearings. While these pending applicants have spent considerable time and money prosecuting their applications and have experienced significant delays in obtaining a final decision as to the selection of the licensee, these circumstances do not, the Commission determined, outweigh the additional delays, uncertainty and administrative costs that would be incurred by resolving these cases through the comparative hearing process.

Scope of Section 309(l)

10. The Commission found that, where post-June 30th applications are mutually exclusive with two or more pre-July 1, 1997 applications, it is compelled by the express language of Section 309(l)(2) to dismiss them and conduct a competitive bidding procedure that is restricted to the pre-July 1, 1997 applications. The Commission also stated that, given the express reference to "competing applications" in Section 309(l), this provision does not apply to a single pre-July 1, 1997 application. Under Section 309(l)(2), the Commission is statutorily precluded from permitting post-June 30th applicants to participate as qualified bidders in a competitive bidding procedure conducted to resolve mutual exclusivity among two or more pre-July 1, 1997 competing applications. The *First R&O* notes that the practical effect of this distinction between applications filed before July 1st and after June 30th will be limited, as the Commission believes that settlement agreements have been filed in connection with the small number of cases involving post-June 30th applications mutually exclusive with

two or more pre-July 1, 1997 applications.

Pending Applications Not Subject to Section 309(l)

11. The most significant issue with regard to the pending applications falling outside the scope of Section 309(l) concerns the pool of bidders who will be eligible for any auction of these mutually exclusive applications. Specifically, the Commission has the discretion to restrict the class of eligible bidders to those with applications already filed, or to reopen the filing period for additional applicants that would be eligible to participate in the auction. The Commission concluded that, in cases of pending mutually exclusive applications not subject to Section 309(l) where the relevant period or window for filing applications under the existing procedures has expired, the public interest would not be served by reopening the filing period for additional mutually exclusive applications. The Commission found no compelling reason to reopen filing windows that have already expired to permit the filing of additional applications by applicants who failed to file during the Commission's previously clearly delineated filing periods.

12. The Commission noted, however, that there are pending a number of broadcast applications (primarily AM and FM translator) that have never been subjected to competition because periods or windows for the filing of competing applications have not yet been opened by the Commission. Rather than open individual filing windows or issue individual cut-off lists for each of these pending broadcast applications, the Commission decided that it would be more efficient to simply include these applications in the first general auction conducted for new applicants in the relevant service.

Competitive Bidding Design

13. The Commission announced that it would conduct all auctions of mutually exclusive broadcast applications in conformity with the general competitive bidding rules set forth in part 1 of the Commission's rules. However, because the same type of auction methodology may not be appropriate for all mutually exclusive broadcast and secondary broadcast applications, different approaches may be warranted to resolve mutual exclusivity among certain categories of broadcast applications and for "daisy chain" situations. The Commission concluded that the appropriate auction design will vary depending on the type of service involved, the number of

construction permits at stake, how many bidders are likely to participate, and the degree to which interdependence may be important to those likely to bid on a particular type of permit. The Commission delegated authority to the Mass Media Bureau and the Wireless Telecommunications Bureau (the Bureaus) to seek comment on and establish an appropriate auction design methodology prior to the start of each broadcast auction or group of broadcast auctions. The Commission also delegated to the Bureaus authority to seek comment on and, as appropriate, to establish upfront payments, minimum opening bids and/or reserve prices for each broadcast auction or group of broadcast auctions.

Auction Application Procedures

14. The Commission will follow for all broadcast service auctions the procedural and payment rules set forth in the general part 1 auction rules, with certain modifications. Specifically, the *First R&O* replaces the Commission's disparate filing procedures for the various broadcast services with a specific time period, or auction window, during which all applicants seeking to participate in an auction must file their applications for new broadcast facilities or for major changes to existing facilities. Applicants will be required to submit only a short-form application (FCC Form 175) prior to any auction, and only winning bidders will need to file complete long-forms (FCC Form 301 for AM, FM and television stations, FCC Form 346 for LPTV and television translators, or FCC Form 349 for FM translators). Specifically, in response to a public notice announcing a window for the filing of broadcast and/or secondary broadcast applications for new stations and for major changes to existing facilities, applicants will be required to file a short-form application, along with any engineering data necessary to determine mutual exclusivity in a particular service. The Commission stated that, prior to auction, it would examine the engineering data submitted by applicants for the non-table services (AM, LPTV, and television and FM translators) only to the extent necessary to determine the mutually exclusive groups of applications for auction purposes. Applicants for FM stations need not submit any engineering data in addition to their FCC Form 175 applications, as such data is not needed to make determinations of mutual exclusivity in the FM service.

15. The Commission determined to follow the general auction rule mandating electronic filing, and will

require all applicants for broadcast auctions to file their FCC Form 175 applications electronically beginning January 1, 1999, unless it is not operationally feasible. Applicants for non-table services, who must submit engineering information with their short-forms, will be required to file the engineering section of the electronic versions of the FCC Forms 301, 346 and 349, which are currently being developed.

16. Consistent with the part 1 anti-collusion rule, the Commission announced that applicants in broadcast auctions will be required to identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process. In addition, applicants will be required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bids, bidding strategies, or the particular construction permits on which they will or will not bid. After short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders that have applied to bid in the same geographic license area, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.

17. The Commission also determined to follow in broadcast auctions the general part 1 auction rules with regard to post-auction procedures, including the payment by winning bidders of their bids and the withdrawal, default and disqualification of winning bidders. The *First R&O* additionally adopted a shortened 10-day period for the filing of petitions to deny against the long-form applications filed by auction winners.

Designated Entities

18. Due to the insufficiency of the record in this proceeding, the *First R&O* does not make a final determination regarding the adoption of bidding credits or other special measures to enhance participation by various designated entities, including small, minority- and women-owned businesses, in broadcast service and ITFS auctions. The *First R&O* does

adopt a tiered new entrant bidding credit to further the goals of the designated entity provisions of Section 309(j); specifically, applicants with no controlling interests in any media outlets will receive a 35% bidding credit, and applicants with controlling interests in no more than three media outlets, none of which serve the same area as the proposed station, will receive a 25% bidding credit. Following the completion of certain pending evidentiary studies, the Commission anticipates the release of a further report and order in this proceeding addressing designated entity issues in the broadcast context. If additional or alternative designated entity measures are ultimately adopted in this further order following the completion of the Commission's evidentiary studies, then any such measures will be applicable to the auction of any broadcast and ITFS applications then on file with the Commission. To prevent any unjust enrichment by designated entities utilizing the new entrant bidding credit, we will follow the general part 1 auction rules in requiring, under certain circumstances involving assignments or transfers, the reimbursement of bidding credits utilized in obtaining broadcast licenses via auction.

Auction Authority for Instructional Television Fixed Service

19. The Commission determined that, because Section 309(j) generally requires the use of competitive bidding to resolve mutually exclusive applications with only certain specified exemptions, it does not have the discretion to create another exemption from competitive bidding for ITFS. When Congress explicitly enumerates certain exceptions to a general requirement, additional exceptions should not be implied, and the list of exemptions from the Commission's general auction authority set forth in Section 309(j)(2) is clearly exhaustive, rather than merely illustrative, of the types of licenses or permits that may not be awarded through a system of competitive bidding. Because ITFS is not one of the services exempted from competitive bidding in Section 309(j)(2), the *First R&O* concludes that competing ITFS applications must be subjected to competitive bidding procedures. The Commission declined to interpret the exemption from competitive bidding for noncommercial educational broadcast stations contained in Section 309(j)(2)(C) to include ITFS. As the Commission has stated and the courts have recognized, ITFS is not a broadcast service, and therefore it does not fall within the scope of the Section

309(j)(2)(C) exemption from competitive bidding for noncommercial broadcasters.

20. The Commission stated, however, that it will request that Congress amend Section 309(j) so that the statute clearly reflects its intent with regard to ITFS. Absent a clear statement from Congress that it means to exempt ITFS from competitive bidding, then the Commission will proceed with the auction of mutually exclusive ITFS applications. The Commission stated that it will not commence ITFS auctions immediately so as to allow sufficient time to obtain Congressional guidance.

21. The Commission found that pending ITFS applications are outside the scope of new Section 309(l) of the Act, which provides that the Commission has discretion regarding the resolution of pending comparative licensing proceedings involving pre-July 1, 1997 applications for commercial radio and television stations. Accordingly, pending mutually exclusive ITFS applications must be resolved by competitive bidding pursuant to Section 309(j)(1). However, the Commission determined that it would not serve the public interest to accept additional competing ITFS applications despite its authority to do so; thus, the eligible bidders in any auction of the pending ITFS applications will be limited to those with applications already on file.

Resolution of Pending Comparative Renewal Proceedings

22. With regard to the very small number of pending comparative renewal proceedings, the Commission determined that the most equitable and expeditious approach would be simply to permit the renewal applicants and their challengers, within the confines of the generally phrased standard comparative issue, to present the factors and evidence they believe most appropriate. If the renewal applicant can demonstrate substantial performance and thus an entitlement to a renewal expectancy, this will continue to be the most important factor and can be expected in most cases to outweigh other considerations in favor of the challenger.

23. The complete text of this *First R&O*, including any statements, is available for inspection and copying during normal business hours in the Federal Communications Commission Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C., and it may be purchased from the Commission's copy contractor, International Transcription Service,

Inc., 1231 20th Street, N.W., Washington, D.C. 20036, (202)857-3800.

Final Regulatory Flexibility Analysis (FRFA)

Summary

24. As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM) in this proceeding. The Commission sought written public comments on the proposals in the NPRM, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this *First R&O* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996, Public Law 104-121, 110 Stat. 847 (1996).

Need For and Objectives of Action

25. This *First R&O* adopts rules to implement the Balanced Budget Act of 1997 (Budget Act), Public Law 105-33, 111 Stat. 251 (1997), which amended Section 309(j) and adopted new Section 309(l) of the Communications Act to expand the Commission's competitive bidding authority to include, *inter alia*, the commercial broadcast and secondary broadcast services.

Significant Issues Raised by the Public in Response to the Initial Analysis

26. No comments were received specifically in response to the IRFA contained in the NPRM. However, some comments did address certain small business issues. A number of commenters called for the adoption of bidding credits for small businesses to ensure their participation in broadcast spectrum auctions. To promote diversification of ownership of broadcast stations, a number of commenters also supported the adoption of bidding credits for non-group owners, who would likely be small businesses. Some commenters argued that upfront payments should be small enough to allow small businesses to compete effectively. Commenters generally opposed the use of competitive bidding for selecting among mutually exclusive Instructional Television Fixed Service (ITFS) applicants, who are primarily educational institutions and governmental educational entities.

27. Small business-related issues were also raised by commenters more indirectly. A small number of commenters opposed requiring prospective bidders in broadcast auctions to file their short-form applications (FCC Form 175)

electronically, contending that electronic filing would be a barrier to participation by those not computer literate or by low power television (LPTV) and translator applicants (many of whom are small businesses). Several commenters also asked the Commission to reconfirm its support for certain previously-adopted special measures to protect LPTV and television translator stations that are displaced during the transition to digital television. A small number of commenters additionally contended that it was unfair or inequitable to auction secondary broadcast services (LPTV and television and FM translators), the licensees of which tend to be small businesses.

Description and Number of Small Entities Involved

28. Under the RFA, small entities include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. 601(6). The RFA, 5 U.S.C. 601(3), defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act. See 15 U.S.C. 632. 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 Small Business Administration (SBA). Pursuant to the RFA, the statutory definition of a small business applies when considering the impact of an agency's action(s) "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, established one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**."

29. In the NPRM we stated that we tentatively believe that the SBA's definition of "small business" greatly overstates the number of radio and television broadcast stations that are small businesses and is not particularly suitable for the Commission's purposes, and we sought comment on how we should define small business for this purpose. While we utilized the SBA's definition to determine the number of small businesses to which any auction procedures would apply, we reserved the right to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations. We received no comment in response to the IRFA on how to define radio and television broadcast "small businesses." Therefore, we will continue to utilize

the SBA's definitions for the purposes of this FRFA.

30. *Radio Broadcasting Stations*. The SBA defines a radio broadcasting station that has no more than \$5 million in annual receipts as a small business. A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public. Included in this industry are commercial, religious, educational, and other radio stations. Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included. Official Commission records indicate that 11,334 individual radio stations were operating in 1992. The 1992 Census indicates that 96 percent of radio station establishments (5,861 of 6,127) produced less than \$5 million in revenue in 1992. As of May 31, 1998, official Commission records indicate that 4,724 AM radio stations, 7,595 FM radio stations and 3,011 FM translator/booster stations were licensed. We conclude a similarly high percentage (96 percent) of current radio broadcasting licensees are small entities.

31. *Television Broadcasting Stations*. The SBA defines a television broadcasting station that is independently owned and operated, is not dominant in its field of operation, and has no more than \$10.5 million in annual receipts as a small business. Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational, and other television stations. Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials. There were 1,509 television stations operating in the nation in 1992. In 1992, there were 1,155 television station establishments that produced less than \$10.0 million in revenue (76.5 percent). As of May 31, 1998, official Commission records indicate that 1,579 full power television stations, 2089 low power television stations, and 4924 television translator stations were licensed. We conclude that a similarly high percentage of current television broadcasting licensees are small entities (76.5 percent).

32. *ITFS*. In addition, there are presently 2032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions may be included in the definition of a small entity. ITFS is a non-pay, non-commercial educational microwave service that, depending on

SBA categorization, has, as small entities, entities generating either \$10.5 million or less, or \$11.0 million or less, in annual receipts. However, we do not collect, nor are we aware of other collections of, annual revenue data for ITFS licensees. Thus, we conclude that up to 1932 of these licensees are small entities.

33. *Pending and Future Applicants Affected by Rulemaking.* The auction procedures set forth in the *First R&O* will affect pending and future competing applicants for the various commercial broadcast services and for ITFS. We estimate that, as of the adoption date of the *First R&O*, there are approximately: (1) 700 mutually exclusive pending applications for commercial radio stations; (2) 200 pending competing applications for full power commercial analog television stations; (3) 100 mutually exclusive pending applications for low power television stations and television translator stations; (4) 30 competing applications for FM translator stations; and (5) 200 or more mutually exclusive pending applications for ITFS stations. The Commission has no data on file as to whether entities with pending permit applications, which are subject to the new auction rules adopted for the broadcast services, meet the SBA's definition of a small business concern. However, we conclude that, given the smaller size of the markets at issue in the pending applications, most of the entities with pending applications for a permit to construct a new primary or secondary broadcast station are small entities, as defined by the SBA rules. It is not possible, at this time, to estimate the number of markets for which mutually exclusive applications will be received in the future, nor the number of entities that in the future may seek a construction permit for a new broadcast station. Given the fact that fewer new stations (particularly fewer analog television stations) will be licensed in the future and that these stations generally will be located in smaller, more rural areas, we conclude that most of the entities applying for these stations will be small entities, as defined by the SBA rules.

Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements

34. The *First R&O* adopts a number of rules that include reporting, recordkeeping, and compliance requirements. These requirements will apply to all applicants subject to the new competitive bidding procedures, as more fully detailed in the *First R&O*

(referred to in this section more generally as "applicants").

35. Applicants will be required to submit a short-form application (FCC Form 175) prior to any auction. Only winning bidders will need to file complete long-forms (FCC Form 301 for AM, FM and television stations, FCC Form 346 for LPTV and television translators, or FCC Form 349 for FM translators). Specifically, in response to a public notice announcing a window for the filing of broadcast and/or secondary broadcast applications for new stations and for major changes in existing facilities, applicants will be required to file a short-form application, along with any engineering data necessary to determine mutual exclusivity in a particular service. Applicants for broadcast auctions will be required to follow the general auction rules, 47 CFR 1.2105, with regard to completion of the short form and exhibits to be submitted with the short form. Also consistent with the Commission's general part 1 auction rules, all applicants for broadcast auctions must file their FCC Form 175 applications electronically beginning January 1, 1999.

36. Applicants may be subject to upfront payments, minimum opening bids and/or reserve prices in order to participate in broadcast service auctions. The Mass Media Bureau in conjunction with the Wireless Telecommunications Bureau shall seek public comment on and, as appropriate, shall establish these mechanisms for each auction, or group of auctions, in the broadcast services.

37. Following the close of bidding in an auction, winning bidders will be required to submit a down payment, file an appropriate long-form application for each construction permit for which it was the high bidder, and pay the balance of their winning bids in a timely manner. Broadcast auction participants will also be subject to the bid withdrawal, default and disqualification payments set forth in the general part 1 auction rules.

38. A licensee, or holder of a construction permit, who utilized a new entrant bidding credit will be required to reimburse the government for the amount of the bidding credit, plus interest, as a condition for Commission approval of the assignment or transfer of the license or permit to an entity that would not have qualified for the new entrant credit, as generally provided in the Commission's part 1 rules.

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

39. Due to the insufficiency of the record in this proceeding, the *First R&O* does not make a final determination regarding the adoption of bidding credits or other special measures to enhance participation by various designated entities, including small businesses, in broadcast service and ITFS auctions. Such measures will be considered in a further report and order to be issued at a later time. For all auctions held prior to ultimate resolution of the designated entity issue, the *First R&O* adopts a tiered new entrant bidding credit for entities with controlling interests in either no, or less than four, other media entities so as to enhance participation by small businesses and other designated entities, including small businesses owned by women and minority group members. Following the completion of certain pending evidentiary studies, the Commission may, in a further report and order in this proceeding, adopt additional or alternative bidding credits or other measures that more directly alleviate any adverse impact on small businesses (including those owned by women or by minority group members) of the requirement to participate in an auction to obtain a construction permit to provide commercial broadcast service. If additional or alternative designated entity measures are ultimately adopted, then any such measures will be applicable to the auction of any broadcast and ITFS applications then on file with the Commission.

40. Moreover, even if further special measures are not ultimately adopted, we believe that some of the competitive bidding procedures adopted in this *First R&O* reduce the time and cost of securing commercial broadcast and ITFS licenses to the ultimate benefit of small businesses. For example, entities interested in bidding for broadcast station permits will not be required to submit a long-form application prior to auction. We will require only that a short-form application be submitted prior to auction, although applicants in the non-table services will be required to submit the engineering data necessary to make determinations of mutual exclusivity. The procedures adopted here further expedite service to the public, thereby reducing the cost to small entities of participating in these auctions, by limiting our pre-auction application processing to what is necessary to determine mutual exclusivity.

41. After careful consideration and in light of Congress' directive in the Budget Act, we found that a shortened period of 10 days is appropriate for the filing of petitions to deny against the long-form applications filed by broadcast auction winners. We have also eliminated the requirement that applicants affirmatively certify their financial qualifications and the availability of their proposed tower locations in their applications.

42. We recognize that, despite the efficiency of auctions and the resulting reduction in the costs associated with filing an application, having to participate in an auction may limit the opportunities available to small businesses. However, except for certain commercial broadcast applications filed before July 1, 1997, Section 309(j)(1) requires that the Commission use competitive bidding procedures to award virtually all construction permits for commercial broadcast stations where mutually exclusive applications are filed. After carefully considering the comments, we determined that auctions are statutorily required to resolve mutually exclusive secondary broadcast service applications, as nothing in the statute or in the legislative history reflects an intention to limit Section 309(j)(1) to full power radio and television applications.

43. Relying on the fact that the exemption from competitive bidding set forth in Section 309(j)(2) is expressly limited to noncommercial educational and public broadcast stations, we also determined that the exemption does not apply to ITFS, which is a non-broadcast service. Thus, although we agreed with commenters that ITFS is similar to noncommercial educational broadcast service and that Section 309(j) may not reflect on its face Congress's intent regarding the treatment of competing ITFS applications, we found that auctions are statutorily required to resolve all pending and future mutually exclusive ITFS applications. However, we will request that Congress amend Section 309(j) so that the statute clearly reflects its intent with regard to ITFS. Absent a clear statement from Congress that it means to exempt ITFS from competitive bidding, we will proceed to auction mutually exclusive ITFS applications. ITFS auctions will not commence immediately, however, in order to allow sufficient time for the Commission to obtain Congressional guidance.

44. We also determined to use competitive bidding to resolve mutually exclusive major modification applications. Although some commenters opposed the auctioning of

modification applications, commenters did not suggest another method of resolving mutually exclusive major modification applications that is as efficient as competitive bidding. We will, however, allow applicants who have filed competing major modification applications, or competing major modification and new station applications, to resolve their mutual exclusivity by means of engineering solutions or settlement before proceeding to auction. We saw less utility to be gained from subjecting minor change applications to competitive bidding procedures; thus, in accord with the comments, the parties will be expected to work together to resolve any mutual exclusivities between minor modification applications.

45. Section 309(l) governs the resolution of approximately 130 pending comparative licensing proceedings involving pre-July 1, 1997, applications for new commercial radio or television stations that did not settle within the 180-day waiver period prescribed by Congress. For settlements executed within that period, we waived our settlement rules, including the prohibition against "white knight" settlement agreements where a full-market settlement was involved. Based upon the express language of Section 309(l), we concluded that in cases that did not settle, we have discretion to resolve applications subject to that provision by either auction or comparative hearings. Some commenters favored the use of comparative hearings for these pending pre-July 1, 1997 cases and expressed concern that the switch to auctions would detrimentally affect the quality of broadcast service. We found that Congress itself has made the judgment that auctions are generally preferable to comparative hearings, and concluded that, by providing us with the discretion to determine whether or not to use auctions in pending pre-July 1st cases, Congress intended the Commission to focus on any special circumstances in these cases that would tip the policy balance in favor of comparative hearings, not to re-visit the general congressional determination that broadcast auctions serve the public interest.

46. In exercising this discretion, we concluded that, even for the few pre-July 1, 1997 cases that had already progressed through an Initial Decision by an Administrative Law Judge, auctions will generally be fairer and more expeditious than deciding these pending cases through the comparative hearing process, particularly since the

court's invalidation of the key comparative criterion prevents us from deciding any of these cases according to the applicants' reasonable expectation when they filed their applications. We found that for the Commission's Administrative Law Judges to adjudicate and decide the approximately 130 pending proceedings would take many years while auctions can be carried out much more quickly.

47. We rejected arguments raised by commenters that changing the selection process for pending applications filed before July 1, 1997 is impermissibly retroactive or otherwise unlawful. We found that none of the pre-July 1, 1997 applicants subject to the new Section 309(l) have a vested right to a comparative hearing that is abridged by our decision to resolve such applications by competitive bidding. And, in any event, the economic impact of this regulatory change is ameliorated somewhat by the statutory requirement that auctions to decide these pending cases be closed to other participants.

48. Based upon the express language of Section 309(l)(2), we found that, where post-June 30, 1997 applications are mutually exclusive with two or more pre-July 1, 1997 applications, we must dismiss them and conduct a competitive bidding procedure that is restricted to the pre-July 1, 1997 applications. We rejected arguments by some commenters that the distinction between pre-July 1st and post-June 30th applications is arbitrary. We found that Congress adopted a bright line distinction and that this distinction operates to exclude some applicants but to include others does not make it unlawful. Moreover, the practical effect of this bright line distinction will be limited, as we believe that settlement agreements have been filed in connection with the small number of cases involving post-June 30th applications mutually exclusive with two or more pre-July 1st applications.

49. Except for applications subject to Section 309(l), there is no statutory bar to reopening new filing periods for applications that would be mutually exclusive with pending applications. We agreed with commenters that reopening already closed filing periods would not serve the public interest since it would delay, rather than expedite, the resolution of the pending applications, and would defeat the reasonable expectations of applicants who timely filed long-form applications.

50. As a matter of fairness to pending applicants, we determined to refund all hearing and certain filing fees paid by all pending applicants. But we declined the suggestion of various commenters

that we also reimburse the legitimate and prudent expenses of pending pre-July 1st applicants subject to the comparative freeze, who either do not participate in the auction or are outbid in the auction. We are aware of no legal authority to make such additional reimbursement and concluded we have no obligation to do so.

51. We concluded that, consistent with our approach in most of the Commission's previous auctions, broadcast and ITFS applicants should be required to submit upfront payments with their short-form applications prior to auction. We also reserved the right to adopt minimum opening bid and/or reserve prices for each license. Establishing upfront payments, minimum opening bid and/or reserve prices may have a significant economic impact on small businesses interested in applying for commercial broadcast and ITFS licenses. However, upfront payments have been required in our general part 1 auction rules since they were first promulgated, and Congress has directed us to prescribe minimum opening bids or reserve prices unless we specifically determine that this will not serve the public interest. While we were unpersuaded by generalized assertions that reserve prices or minimum opening bids would contravene the public interest, we directed the staff to seek comment on, and as appropriate, establish upfront payments, opening bids and/or reserve prices for each auction or group auctions.

52. A number of commenters opposed our proposal to apply the anti-collusion rule to broadcast service auctions, believing instead that auction applicants should be permitted to conclude settlement agreements following the short-form filing deadline with those applicants with whom they are mutually exclusive. We noted that we adopted the anti-collusion rule to both prevent and to facilitate the detection of collusive conduct, thereby enhancing the competitiveness of the auction process and the post-auction market structure. We found that the rule has proven effective in the numerous spectrum auctions conducted to date, and concluded to apply the rule to broadcast auctions, although a limited exception to the anti-collusion rule will be made, as discussed above, in the context of mutually exclusive major modification applications.

53. For the pending comparative renewal proceedings (which may not be resolved by auction), we determined that the most equitable and expeditious approach would be simply to permit the renewal applicants and their challengers, within the confines of the

generally phrased standard comparative issues, to present whatever factors and evidence they believe most appropriate.

Report to Congress

54. The Commission will send a copy of the *First R&O*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. 3See 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the *First R&O*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

55. Authority for issuance of this *First R&O* is contained in Sections 4(i) and (j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), 309(l) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 301, 303(f), 303(g), 303(h), 303(j), 303(r), 307(c), 308(b), 309(j), 309(l) and 403.

List of Subjects in 47 CFR parts 1, 73 and 74

Radio broadcasting, Reporting and recordkeeping requirements, Television broadcasting.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

Rule Changes

Parts 1, 73 and 74 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 303(r).

2. Section 1.65 is amended by revising paragraphs (a) and (b) to read as follows:

§ 1.65 Substantial and significant changes in the information furnished by applicants to the Commission.

(a) Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever there has been a substantial change as to any

other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47. Where the matter is before any court for review, statements and requests to amend shall in addition be served upon the Commission's General Counsel. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

(b) Applications in ITFS and broadcast services subject to competitive bidding will be subject to the provisions of §§ 1.2105(b), 73.5002 and 73.3522 regarding the modification of their applications.

* * * * *

3. Section 1.1601 is amended by reserving paragraph (a) to read as follows:

§ 1.1601 Scope.

* * * * *

(a) [Reserved]

* * * * *

4. Section 1.604 is amended by revising paragraph (a) to read as follows:

§ 1.1604 Post-selection hearings.

(a) Following the random selection, the Commission shall announce the "tentative selectee" and, where permitted by § 73.3584 invite Petitions to Deny its application.

* * * * *

PART 73—RADIO BROADCAST SERVICES

5. The authority for part 73 is revised to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

6. Section 73.1010 is amended by adding paragraph (a)(8) to read as follows:

§ 73.1010 Cross reference to rules in other parts.

* * * * *

(a) * * *

(8) Subpart Q, "Competitive Bidding Proceedings" (§§ 1.2101-1.2112).

* * * * *

7. Section 73.3500 is amended by adding the following new entry in numerical order to read as follows:

§ 73.3500 Application and report forms.

Form number	Title
175	Application to Participate in an FCC Auction
*	* * * * *

8. Section 73.3522 is revised to read as follows:

§ 73.3522 Amendment of applications.

(a) *Broadcast services subject to competitive bidding.* (1) Applicants in all broadcast services subject to competitive bidding will be subject to the provisions of §§ 73.5002 and 1.2105(b) regarding the modification of their short-form applications.

(2) Subject to the provision of § 73.5005, if it is determined that a long form application submitted by a winning bidder or a non-mutually exclusive applicant for a new station or a major change in an existing station in all broadcast services subject to competitive bidding is substantially complete, but contains any defect, omission, or inconsistency, a deficiency letter will be issued affording the applicant an opportunity to correct the defect, omission or inconsistency. Amendments may be filed pursuant to the deficiency letter curing any defect, omission or inconsistency identified by the Commission, or to make minor modifications to the application, or pursuant to § 1.65. Such amendments should be filed in accordance with § 73.3513. If a petition to deny has been filed, the amendment shall be served on the petitioner.

(3) Subject to the provisions of §§ 73.3571, 73.3572 and 73.3573, deficiencies, omissions or inconsistencies in long-form applications may not be cured by major amendment. The filing of major amendments to long-form applications is not permitted. An application will be considered to be newly filed if it is amended by a major amendment.

(4) Paragraph (a) of this section is not applicable to applications for minor modifications of facilities in the non-reserved FM broadcast service, nor to any application for a reserved band FM station.

(b) *Reserved band FM and reserved noncommercial educational television stations.—(1) Predesignation amendments.* Subject to the provisions of §§ 73.3525, 73.3572, 73.3573 and 73.3580, mutually exclusive broadcast applications for reserved band FM stations and television stations on a reserved channel may be amended as a matter of right by the date specified (not

less than 30 days after issuance) in the FCC's Public Notice announcing the acceptance for filing of the last-filed mutually exclusive application. Subsequent amendments prior to designation of the proceeding for hearing will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration.

(2) *Postdesignation amendments.* (i) Except as provided in paragraph (ii) of this section, requests to amend an application after it has been designated for hearing will be considered only upon written petition properly served upon the parties of record in accordance with § 1.47 and, where applicable, compliance with the provisions of § 73.3525, and will be considered only upon a showing of good cause for late filing. In the case of requests to amend the engineering proposal (other than to make changes with respect to the type of equipment specified), good cause will be considered to have been shown only if, in addition to the usual good cause consideration, it is demonstrated:

(A) That the amendment is necessitated by events which the applicant could not reasonably have foreseen (e.g., notification of a new foreign station or loss of transmitter site by condemnation); and

(B) That the amendment does not require an enlargement of issues or the addition of new parties to the proceeding.

(ii) In comparative broadcast cases (including comparative renewal proceedings), amendments relating to issues first raised in the designation order may be filed as a matter of right within 30 days after that Order or a summary thereof is published in the **Federal Register**, or by a date certain to be specified in the Order.

(iii) Notwithstanding the provisions of paragraphs (b)(2)(i) and (b)(2)(ii) of this section, and subject to compliance with the provisions of § 73.3525, a petition for leave to amend may be granted, provided it is requested that the application as amended be removed from the hearing docket and returned to the processing line. (c) Minor modifications of facilities in the non-reserved FM broadcast service.

(1) Subject to the provisions of §§ 73.3525, 73.3573, and 73.3580, for a period of 30 days following the FCC's issuance of a Public Notice announcing the tender of an application for minor modification of a non-reserved band FM station, (other than Class D stations), minor amendments may be filed as a matter of right.

(2) For applications received on or after August 7, 1992, an applicant whose application is found to meet minimum filing requirements, but nevertheless is not complete and acceptable, shall have the opportunity during the period specified in the FCC staff's deficiency letter to correct all deficiencies in the tenderability and acceptability of the underlying application, including any deficiency not specifically identified by the staff. [For minimum filing requirements see § 73.3564(a). Examples of tender defects appear at 50 FR 19936 at 19945-46 (May 13, 1985), reprinted as Appendix D, Report and Order, MM Docket No. 91-347, 7 FCC Rcd 5074, 5083-88 (1992). For examples of acceptance defects, see 49 FR 47331.] Prior to the end of the period specified in the deficiency letter, a submission seeking to correct a tender and/or acceptance defect in an application meeting minimum filing requirements will be treated as an amendment for good cause if it would successfully and directly correct the defect. Other amendments submitted prior to grant will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514.

(3) Unauthorized or untimely amendments are subject to return by the Commission without consideration. However, an amendment to a non-reserved band application will not be accepted if the effect of such amendment is to alter the proposed facility's coverage area so as to produce a conflict with an applicant who files subsequent to the initial applicant but prior to the amendment application. Similarly, an applicant subject to "first come/first serve" processing will not be permitted to amend its application and retain filing priority if the result of such amendment is to alter the facility's coverage area so as to produce a conflict with an applicant which files subsequent to the initial applicant but prior to the amendment.

Note 1 to § 73.3522: When two or more broadcast applications are tendered for filing which are mutually exclusive with each other but not in conflict with any previously filed applications which have been accepted for filing, the FCC, where appropriate, will announce acceptance of the earliest tendered application and place the later filed application or applications on a subsequent public notice of acceptance for filing in order to establish a deadline for the filing of amendments as a matter of right for all applicants in the group.

9. Section 73.3525 is amended by revising paragraphs (c) and (d) and adding paragraph (l) to read as follows:

§ 73.3525 Agreements for removing application conflicts.

* * * * *

(c) Except where a joint request is filed pursuant to paragraph (a) of this section, any applicant filing an amendment pursuant to §§ 73.3522(b)(1) and (c), or a request for dismissal pursuant to § 73.3568(b)(1) and (c), which would remove a conflict with another pending application; or a petition for leave to amend pursuant to § 73.3522(b)(2) which would permit a grant of the amended application or an application previously in conflict with the amended application; or a request for dismissal pursuant to § 73.3568(b)(2), shall file with it an affidavit as to whether or not consideration (including an agreement for merger of interests) has been promised to or received by such applicant, directly or indirectly, in connection with the amendment, petition or request.

(d) Upon the filing of a petition for leave to amend or to dismiss an application for broadcast facilities which has been designated for hearing or upon the dismissal of such application on the FCC's own motion pursuant to § 73.3568, each applicant or party remaining in hearing, as to whom a conflict would be removed by the amendment or dismissal shall submit for inclusion in the record of that proceeding an affidavit stating whether or not he has directly or indirectly paid or promised consideration (including an agreement for merger of interests) in connection with the removal of such conflict.

* * * * *

(l) The prohibition of collusion as set forth in §§ 1.2105(c) and 73.5002 of this section, which becomes effective upon the filing of short-form applications, shall apply to all broadcast services subject to competitive bidding.

10. Section 73.3564 is revised to read as follows:

§ 73.3564 Acceptance of applications.

(a)(1) Applications tendered for filing are dated upon receipt and then forwarded to the Mass Media Bureau, where an administrative examination is made to ascertain whether the applications are complete. Except for applications for minor modifications of facilities in the non-reserved FM band, as defined in § 73.3573(a)(2), long form applications subject to the provisions of § 73.5005 found to be complete or substantially complete are accepted for filing and are given file numbers. In the case of minor defects as to completeness, a deficiency letter will be issued and the applicant will be

required to supply the missing or corrective information. Applications that are not substantially complete will not be considered and will be returned to the applicant.

(2) In the case of minor modifications of facilities in the non-reserved FM band, applications will be placed on public notice if they meet the following two-tiered minimum filing requirement as initially filed in first come/first served proceedings:

- (i) The application must include:
 - (A) Applicant's name and address,
 - (B) Applicant's original signature,
 - (C) Principal community,
 - (D) Channel or frequency,
 - (E) Class of station, and
 - (F) Transmitter site coordinates; and
- (ii) The application must not omit

more than 3 of the second tier items specified in appendix C, Report and Order, MM Docket No. 91-347, FCC 92-328, 7 FCC Rcd 5074 (1992). Applications found not to meet minimum filing requirements will be returned to the applicant. Applications found to meet minimum filing requirements, but that contain deficiencies in tender and/or acceptance information, shall be given an opportunity for corrective amendment pursuant to § 73.3522. Applications found to be substantially complete and in accordance with the Commission's core legal and technical requirements will be accepted for filing. Applications with uncorrected tender and/or acceptance defects remaining after the opportunity for corrective amendment will be dismissed with no further opportunity for corrective amendment.

(b) Acceptance of an application for filing merely means that it has been the subject of a preliminary review by the FCC's administrative staff as to completeness. Such acceptance will not preclude the subsequent dismissal of the application if it is found to be patently not in accordance with the FCC's rules.

(c) At regular intervals, the FCC will issue a Public Notice listing all long form applications which have been accepted for filing. Pursuant to §§ 73.3571(h), 73.3572, and 73.3573(f), such notice shall establish a cut-off date for the filing of petitions to deny. With respect to reserved band FM applications, the Public Notice shall also establish a cut-off date for the filing of mutually exclusive applications pursuant to § 73.3573(e). However, no application will be accepted for filing unless certification of compliance with the local notice requirements of § 73.3580(h) has been made in the tendered application.

(d) The FCC will specify by Public Notice, pursuant to § 73.5002, a period for filing applications for new stations or for major modifications in the facilities of an existing station. Except for reserved band FM stations and TV stations on reserved noncommercial educational channels, applications for new and major modifications in facilities will be accepted only during these window filing periods specified by the Commission.

(e) Applications for minor modification of facilities may be tendered at any time, unless restricted by the FCC. These applications will be processed on a "first come/first served" basis and will be treated as simultaneously tendered if filed on the same day. Any applications received after the filing of a lead application will be grouped according to filing date, and placed in a queue behind the lead applicant. The FCC will periodically release a Public Notice listing those minor modification of facilities applications accepted for filing.

(f) If a non-reserved band FM channel allotment becomes vacant, after the grant of a construction permit becomes final, because of a lapsed construction permit or for any other reason, the FCC will, by Public Notice, announce a subsequent filing window for the acceptance of new applications for such channels.

(g) Applications for operation in the 1605-1705 kHz band will be accepted only if filed pursuant to the terms of § 73.30(b).

11. Section 73.3568 is revised to read as follows:

§ 73.3568 Dismissal of applications.

(a) (1) Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal.

(2) Applicants in all broadcast services subject to competitive bidding will be subject to the provisions of §§ 73.5002 and 1.2105(b) regarding the dismissal of their short-form applications.

(3) Applicants in all broadcast services subject to competitive bidding will be subject to the provisions of §§ 73.5004, 73.5005 and 1.2104(g) regarding the dismissal of their long-form applications and the imposition of applicable withdrawal, default and disqualification payments.

(b) (1) Subject to the provisions of § 73.3525, dismissal of applications for channels reserved for noncommercial educational use will be without prejudice where an application has not yet been designated for hearing, but may

be made with prejudice after designation for hearing.

(2) Subject to the provisions of § 73.3525, requests to dismiss an application for a channel reserved for noncommercial educational use, without prejudice, after it has been designated for hearing, will be considered only upon written petition properly served upon all parties of record. Such requests shall be granted only upon a showing that the request is based on circumstances wholly beyond the applicant's control which preclude further prosecution of his application.

(c) Subject to the provisions of §§ 73.3523 and 73.3525, any application for minor modification of facilities may, upon request of the applicant, be dismissed without prejudice as a matter of right.

(d) An applicant's request for the return of an application that has been accepted for filing will be regarded as a request for dismissal.

12. Section 73.3571 is revised to read as follows:

§ 73.3571 Processing of AM broadcast applications.

(a) Applications for AM broadcast facilities are divided into three groups.

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. A major change for an AM station authorized under this part is any increase in power, except where accompanied by a complimentary reduction of antenna efficiency which leads to the same amount, or less, radiation in all directions (in the horizontal and vertical planes when skywave propagation is involved, and in the horizontal plane only for daytime considerations), relative to the presently authorized radiation levels, or any change in frequency, hours of operation, or community of license. A major change in ownership is a situation where the original party or parties to the application do not retain more than 50% ownership interest in the application as originally filed.

(2) The second group consists of applications for licenses and all other changes in the facilities of authorized stations.

(3) The third group consists of applications for operation in the 1605–1705 kHz band which are filed subsequent to FCC notification that allotments have been awarded to petitioners under the procedure specified in § 73.30.

(b)(1) The FCC may, after acceptance of an application for modification of facilities, advise the applicant that such application is considered to be one for

a major change and therefore is subject to the provisions of §§ 73.3522, 73.3580 and 1.1111 of this chapter pertaining to major changes. Such major modification applications will be dismissed as set forth in paragraph (h)(1)(i) of this section.

(2) An amendment to an application which would effect a major change, as defined in paragraph (a)(1) of this section, will not be accepted except as provided for in paragraph (h)(1)(i) of this section.

(c) An application for changes in the facilities of an existing station will continue to carry the same file number even though (pursuant to FCC approval) an assignment of license or transfer of control of said licensee or permittee has taken place if, upon consummation, the application is amended to reflect the new ownership.

(d) If, upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of an application, the same will be granted. If the FCC is unable to make such a finding and it appears that a hearing may be required, the procedure set forth in § 73.3593 will be followed.

(e) Applications proposing to increase the power of an AM station are subject to the following requirements:

(1) In order to be acceptable for filing, any application which does not involve a change in site must propose at least a 20% increase in the station's nominal power.

(2) Applications involving a change in site are not subject to the requirements in paragraph (e)(1) of this section.

(3) Applications for nighttime power increases for Class D stations are not subject to the requirements of this section and will be processed as minor changes.

(4) The following special procedures will be followed in authorizing Class II–D daytime-only stations on 940 and 1550 kHz, and Class III daytime-only stations on the 41 regional channels listed in § 73.26(a), to operate unlimited-time.

(i) Each eligible daytime-only station in the foregoing categories will receive an Order to Show Cause why its license should not be modified to specify operation during nighttime hours with the facilities it is licensed to start using at local sunrise, using the power stated in the Order to Show Cause, that the Commission finds is the highest nighttime level—not exceeding 0.5 kW—at which the station could operate without causing prohibited interference to other domestic or foreign stations, or to co-channel or adjacent channel

stations for which pending applications were filed before December 1, 1987.

(ii) Stations accepting such modification shall be reclassified. Those authorized in such Show Cause Orders to operate during nighttime hours with a power of 0.25 kW or more, or with a power that, although less than 0.25 kW, is sufficient to enable them to attain RMS field strengths of 141 mV/m or more at 1 kilometer, shall be redesignated as Class II–B stations if they are assigned to 940 or 1550 kHz, and as unlimited-time Class III stations if they are assigned to regional channels.

(iii) Stations accepting such modification that are authorized to operate during nighttime hours at powers less than 0.25 kW, and that cannot with such powers attain RMS field strengths of 141 mV/m or more at 1 kilometer, shall be redesignated as Class II–S stations if they are assigned to 940 or 1550 kHz, and as Class III–S stations if they are assigned to regional channels.

(iv) Applications for new stations may be filed at any time on 940 and 1550 kHz and on the regional channels. Also, stations assigned to 940 or 1550 kHz, or to the regional channels, may at any time, regardless of their classifications, apply for power increases up to the maximum generally permitted. Such applications for new or changed facilities will be granted without taking into account interference caused to Class II–S or Class III–S stations, but will be required to show interference protection to other classes of stations, including stations that were previously classified as Class II–S or Class III–S, but were later reclassified as Class II–B or Class III unlimited-time stations as a result of subsequent facilities modifications that permitted power increases qualifying them to discontinue their "S" subclassification.

(f) Applications for minor modifications for AM broadcast stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and, generally will be processed in the order in which they are tendered. The FCC will periodically release a Public Notice listing those applications accepted for filing. Any such applications found to be mutually exclusive must be resolved through settlement or technical amendment.

(g) Applications for change of license to change hours of operation of a Class C AM broadcast station, to decrease hours of operation of any other class of station, or to change station location involving no change in transmitter site will be considered without reference to the processing line.

(h) *Processing new and major AM broadcast station applications.* (1)(i) The FCC will specify by Public Notice, pursuant to § 73.5002, a period for filing AM applications for a new station or for major modifications in the facilities of an authorized station. AM applications for new facilities or for major modifications will be accepted only during these specified periods. Applications submitted prior to the appropriate filing period or "window" opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

(ii) Such AM applicants will be subject to the provisions of §§ 1.2105 and 73.5002 regarding the submission of the short-form application, FCC Form 175, and all appropriate certifications, information and exhibits contained therein. To determine which AM applications are mutually exclusive, AM applicants must submit the engineering data contained in FCC Form 301 as a supplement to the short-form application. Such engineering data will not be studied for technical acceptability, but will be protected from subsequently filed applications as of the close of the window filing period. Determinations as to the acceptability or grantability of an applicant's proposal will not be made prior to an auction.

(iii) AM applicants will be subject to the provisions of §§ 1.2105 and 73.5002 regarding the modification and dismissal of their short-form applications.

(2) Subsequently, the FCC will release Public Notices:

(i) identifying the short-form applications received during the window filing period which are found to be mutually exclusive;

(ii) establishing a date, time and place for an auction;

(iii) providing information regarding the methodology of competitive bidding to be used in the upcoming auction, bid submission and payment procedures, upfront payment procedures, upfront payment deadlines, minimum opening bid requirements and applicable reserve prices in accordance with the provisions of § 73.5002;

(iv) identifying applicants who have submitted timely upfront payments and, thus, are qualified to bid in the auction.

(3) If, during the window filing period, the FCC receives non-mutually exclusive AM applications, a Public Notice will be released identifying the non-mutually exclusive applicants, who will be required to submit the appropriate long form application within 30 days of the Public Notice and

pursuant to the provisions of § 73.5005(d). These non-mutually exclusive applications will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584. If the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the non-mutually exclusive long form application, the same will be granted.

(4)(i) The auction will be held pursuant to the procedures set forth in §§ 1.2101 *et seq.* and 73.5000 *et seq.* Subsequent to the auction, the FCC will release a Public Notice announcing the close of the auction and identifying the winning bidders. Winning bidders will be subject to the provisions of §§ 1.2107 and 73.5003 regarding down payments and will be required to submit the appropriate down payment within 10 business days of the Public Notice. Pursuant to §§ 1.2107 and 73.5005, a winning bidder that meets its down payment obligations in a timely manner must, within 30 days of the release of the Public Notice announcing the close of the auction, submit the appropriate long-form application for each construction permit for which it was the winning bidder. Long-form applications filed by winning bidders shall include the exhibits identified in § 73.5005(a).

(ii) These applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584. If the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the winning bidder's long-form application, a Public Notice will be issued announcing that the construction permit is ready to be granted. Each winning bidder shall pay the balance of its winning bid in a lump sum within 10 business days after release of the Public Notice, as set forth in §§ 1.2109(a) and 73.5003. Construction permits will be granted by the Commission following the receipt of the full payment.

(iii) All long-form applications will be cutoff as of the date of filing with the FCC and will be protected from subsequently filed long-form applications. Applications will be required to protect all previously filed

commercial and noncommercial applications. Winning bidders filing long-form applications may change the technical proposals specified in their previously submitted short-form applications, but such change may not constitute a major change. If the submitted long-form application would constitute a major change from the proposal submitted in the short-form application, the long-form application will be returned pursuant to paragraph (h)(1)(i) of this section.

(i) In order to grant a major or minor change application made contingent upon the grant of another licensee's request for a facility modification, the Commission will not consider mutually exclusive applications by other parties that would not protect the currently authorized facilities of the contingent applicants. Such major change applications remain, however, subject to the provisions of §§ 73.3580 and 1.1111. The Commission shall grant contingent requests for construction permits for station modifications only upon a finding that such action will promote the public interest, convenience and necessity.

13. Section 73.3572 is revised to read as follows:

§ 73.3572 Processing of TV broadcast, low power TV, TV translator and TV booster station applications.

(a) Applications for TV stations are divided into two groups:

(1) In the first group are applications for new stations or major changes in the facilities of authorized stations. A major change for TV broadcast stations authorized under this part is any change in frequency or community of license which is in accord with a present allotment contained in the Table of Allotments (§ 73.606). Other requests for change in frequency or community of license for TV broadcast stations must first be submitted in the form of a petition for rulemaking to amend the Table of Allotments. In the case of low power TV, TV translator, and TV booster stations authorized under part 74 of this chapter, a major change is any change in:

(i) Frequency (output channel) assignment (does not apply to TV boosters);

(ii) Transmitting antenna system including the direction of the radiation, directive antenna pattern or transmission line;

(iii) Antenna height;

(iv) Antenna location exceeding 200 meters; or

(v) Authorized operating power.

(2) However, if the proposed modification of facilities, other than a

change in frequency, will not increase the signal range of the low power TV, TV translator or TV booster station in any horizontal direction, the modification will not be considered a major change.

(i) Provided that in the case of an authorized low power TV, TV translator or TV booster which is predicted to cause or receive interference to or from an authorized TV broadcast station pursuant to § 74.705 or interference with broadcast or other services under § 74.703 or § 74.709, that an application for a change in output channel, together with technical modifications which are necessary to avoid interference (including a change in antenna location of less than 16.1 km), will not be considered as an application for a major change in those facilities.

(ii) Provided further, that a low power TV, TV translator or TV booster station: authorized on a channel from channel 60 to 69, or which is causing or receiving interference or is predicted to cause or receive interference to or from an authorized DTV station pursuant to § 74.706, or which is located within the distances specified below in paragraph (iii) of this section to the coordinates of co-channel DTV authorizations (or allotment table coordinates if there are no authorized facilities at different coordinates), may at any time file a displacement relief application for a change in output channel, together with any technical modifications which are necessary to avoid interference or continue serving the station's protected service area. Such an application will not be considered as an application for a major change in those facilities. Where such an application is mutually exclusive with applications for new low power TV, TV translator or TV booster stations, or with other nondisplacement relief applications for facilities modifications, priority will be afforded to the displacement application(s) to the exclusion of the other applications.

(iii)(A) The geographic separations to co-channel DTV facilities or allotment reference coordinates, as applicable, within which to qualify for displacement relief are the following:

- (1) Stations on UHF channels: 265 km (162 miles)
- (2) Stations on VHF channels 2-6: 280 km (171 miles)
- (3) Stations on VHF channels 7-13: 260 km (159 miles)

(B) Engineering showings of predicted interference may also be submitted to justify the need for displacement relief.

(iv) Provided further, that the FCC may, within 15 days after acceptance of any other application for modification of facilities, advise the applicant that

such application is considered to be one for a major change and therefore subject to the provisions of §§ 73.3522, 73.3580, and 1.1111 of this chapter pertaining to major changes. Such major modification applications filed for low power TV, TV translator, TV booster stations, and for a non-reserved television allotment, are subject to competitive bidding procedures and will be dismissed if filed outside a specified filing period. See 47 CFR 73.5002(a).

(b) A new file number will be assigned to an application for a new station or for major changes in the facilities of an authorized station, when it is amended so as to effect a major change, as defined in paragraph (a)(1) of this section, or result in a situation where the original party or parties to the application do not retain more than 50% ownership interest in the application as originally filed and § 73.3580 will apply to such amended application. An application for change in the facilities of any existing station will continue to carry the same file number even though (pursuant to FCC approval) an assignment of license or transfer of control of such licensee or permittee has taken place if, upon consummation, the application is amended to reflect the new ownership.

(c) Amendments to low power TV, TV translator, TV booster stations, or non-reserved television applications, which would require a new file number pursuant to paragraph (b) of this section, are subject to competitive bidding procedures and will be dismissed if filed outside a specified filing period. See 47 CFR 73.5002(a). When an amendment to an application for a reserved television allotment would require a new file number pursuant to paragraph (b) of this section, the applicant will have the opportunity to withdraw the amendment at any time prior to designation for a hearing if applicable; and may be afforded, subject to the discretion of the Administrative Law Judge, an opportunity to withdraw the amendment after designation for a hearing.

(d) Applications for TV stations on reserved noncommercial educational channels will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically release a Public Notice listing applications which have been

accepted for filing and announcing a date (not less than 30 days after issuance) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and petitions to deny the listed applications must be filed.

(e)(1) The FCC will specify by Public Notice, pursuant to § 73.5002, a period for filing applications for a new non-reserved television, low power TV and TV translator stations or for major modifications in the facilities of such authorized station.

(2) Such applicants shall be subject to the provisions of §§ 1.2105 and competitive bidding procedures. See 47 CFR 73.5000 *et seq.*

(f) Applications for minor modifications for television broadcast, low power television and TV translator stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and, generally, will be processed in the order in which they are tendered.

(g) TV booster station applications may be filed at any time. Subsequent to filing, the FCC will release a Public Notice accepting for filing and proposing for grant those applications which are not mutually exclusive with any other TV translator, low power TV, or TV booster application, and providing for the filing of Petitions To Deny pursuant to § 73.3584.

14. Section 73.3573 is revised to read as follows:

§ 73.3573 Processing FM broadcast station applications.

(a) Applications for FM broadcast stations are divided into two groups:

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. A major change for an FM station authorized under this part is any change in frequency or community of license which is in accord with a present allotment contained in the Table of Allotments (§ 73.202(b)). A licensee or permittee may seek the higher or lower class adjacent channel, intermediate frequency or co-channel or the same class adjacent channel of its existing FM broadcast station authorization by filing a minor change application. Other requests for change in frequency or community of license for FM stations must first be submitted in the form of a petition for rulemaking to amend the Table of Allotments. Long-form applications submitted pursuant to § 73.5005 for a new FM broadcast service may propose a higher or lower class adjacent channel, intermediate frequency or co-channel. For

noncommercial educational FM stations, a major change is any change in frequency or community of license or any change in power or antenna location or height above average terrain (or combination thereof) which would result in a change of 50% or more in the area within the station's predicted 1 mV/m field strength contour. (A change in area is defined as the sum of the area gained and the area lost as a percentage of the original area.) A major change in ownership is a situation where the original party or parties to the application do not retain more than 50% ownership interest in the application as originally filed.

(2) The second group consists of applications for licenses and all other changes in the facilities of authorized stations.

(b)(1) The FCC may, after the acceptance of an application for modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore subject to the provisions of §§ 73.3522, 73.3580 and 1.1111 of this chapter pertaining to major changes. Such major modification applications in the non-reserved band will be dismissed as set forth in paragraph (f)(2)(i) of this section.

(2) An amendment to a non-reserved band application which would effect a major change, as defined in paragraph (a)(1) of this section, will not be accepted, except as provided for in paragraph (f)(2)(i) of this section.

(3) A new file number will be assigned to a reserved band application for a new station or for major changes in the facilities of an authorized station, when it is amended so as to effect a major change, as defined in paragraph (a)(1) of this section. Where an amendment to a reserved band application would require a new file number, the applicant will have the opportunity to withdraw the amendment at any time prior to designation for hearing, if applicable; and may be afforded, subject to the discretion of the Administrative Law Judge, an opportunity to withdraw the amendment after designation for hearing.

(c) An application for changes in the facilities of any existing station will continue to carry the same file number even though (pursuant to FCC approval) an assignment of license or transfer of control of such licensee or permittee has taken place if, upon consummation, the application is amended to reflect the new ownership.

(d) If, upon examination, the FCC finds that the public interest, convenience and necessity will be

served by the granting of an application for FM broadcast facilities, the same will be granted. If the FCC is unable to make such a finding and it appears that a hearing may be required, the procedure given in § 73.3593 will be followed.

(e) Applications for reserved band and Class D FM broadcast stations will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically release a Public Notice listing applications which have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and/or petitions to deny the listed applications must be filed.

(f) *Processing non-reserved FM broadcast station applications.* (1) Applications for minor modifications for non-reserved FM broadcast stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and, generally, will be processed in the order in which they are tendered. The FCC will periodically release a Public Notice listing those applications accepted for filing. Processing of these applications will be on a "first come/first serve" basis with the first acceptable application cutting off the filing rights of subsequent applicants. All applications received on the same day will be treated as simultaneously tendered and, if they are found to be mutually exclusive, must be resolved through settlement or technical amendment. Applications received after the tender of a lead application will be grouped, according to filing date, behind the lead application in a queue. The priority rights of the lead applicant, as against all other applicants, are determined by the date of filing, but the filing date for subsequent applicants for that channel and community only reserves a place in the queue. The rights of an applicant in a queue ripen only upon a final determination that the lead applicant is unacceptable and if the queue member is reached and found acceptable. The queue will remain behind the lead applicant until a construction permit is finally granted, at which time the queue dissolves.

(2) (i) The FCC will specify by Public Notice, pursuant to § 73.5002(a), a period for filing non-reserved band FM applications for a new station or for major modifications in the facilities of an authorized station. FM applications for new facilities or for major modifications will be accepted only during the appropriate filing period or "window." Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

(ii) Such FM applicants will be subject to the provisions of §§ 1.2105 and 73.5002 regarding the submission of the short-form application, FCC Form 175, and all appropriate certifications, information and exhibits contained therein. FM applicants may submit a set of preferred site coordinates as a supplement to the short-form application. Any specific site indicated by FM applicants will not be studied for technical acceptability, but will be protected from subsequently filed applications as a full-class facility as of the close of the window filing period. Determinations as to the acceptability or grantability of an applicant's proposal will not be made prior to an auction.

(iii) FM applicants will be subject to the provisions of §§ 1.2105 and 73.5002(c) regarding the modification and dismissal of their short-form applications.

(3) Subsequently, the FCC will release Public Notices:

(i) identifying the short-form applications received during the window filing period which are found to be mutually exclusive;

(ii) establishing a date, time and place for an auction;

(iii) providing information regarding the methodology of competitive bidding to be used in the upcoming auction, bid submission and payment procedures, upfront payment procedures, upfront payment deadlines, minimum opening bid requirements and applicable reserve prices in accordance with the provisions of § 73.5002;

(iv) identifying applicants who have submitted timely upfront payments and, thus, are qualified to bid in the auction.

(4) If, after the close of the appropriate window filing period, a non-reserved FM allotment remains vacant, the window remains closed until the FCC, by Public Notice, specifies a subsequent period for filing non-reserved band FM applications for a new station or for major modifications in the facilities of an authorized station pursuant to paragraph (f)(2)(i) of this section. If,

during the window filing period, the FCC receives only one application for any non-reserved FM allotment, a Public Notice will be released identifying the non-mutually exclusive applicant, who will be required to submit the appropriate long-form application within 30 days of the Public Notice and pursuant to the provisions of § 73.5005. These non-mutually exclusive applications will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584 of this chapter. If the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the non-mutually exclusive long-form application, it will be granted.

(5)(i) The auction will be held pursuant to the procedures set forth in §§ 1.2101 *et seq.* and 73.5000 *et seq.* Subsequent to the auction, the FCC will release a Public Notice announcing the close of the auction and identifying the winning bidders. Winning bidders will be subject to the provisions of §§ 1.2107 and 73.5003 regarding down payments and will be required to submit the appropriate down payment within 10 business days of the Public Notice. Pursuant to §§ 1.2107 and 73.5005, a winning bidder that meets its down payment obligations in a timely manner must, within 30 days of the release of the public notice announcing the close of the auction, submit the appropriate long-form application for each construction permit for which it was the winning bidder. Long-form applications filed by winning bidders shall include the exhibits identified in § 73.5005(a).

(ii) These applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584 of this chapter. If the applicant is duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the winning bidder's long-form application, a Public Notice will be issued announcing that the construction permit is ready to be granted. Each winning bidder shall pay the balance of its winning bid in a lump sum within 10 business days after release of the Public Notice, as set forth in §§ 1.2109(a) and 73.5003(c).

Construction permits will be granted by the Commission following the receipt of the full payment.

(iii) All long-form applications will be cut-off as of the date of filing with the FCC and will be protected from subsequently filed long-form applications and rulemaking petitions. Applications will be required to protect all previously filed commercial and noncommercial applications. Winning bidders filing long-form applications may change the technical proposals specified in their previously submitted short-form applications, but such change may not constitute a major change. If the submitted long-form application would constitute a major change from the proposal submitted in the short-form application or the allotment, the long-form application will be returned pursuant to paragraph (f)(2)(i) of this section.

Note 1 to § 73.3573: Applications to modify the channel and/or class of an FM broadcast station to an adjacent channel, intermediate frequency (IF) channel, or co-channel shall not require any other amendments to the Table of Allotments. Such applications may resort to the provisions of the Commission's Rules permitting short spaced stations as set forth in § 73.215 as long as the applicant shows by separate exhibit attached to the application the existence of an allotment reference site which meets the allotment standards, the minimum spacing requirements of § 73.207 and the city grade coverage requirements of § 73.315. This exhibit must include a site map or, in the alternative, a statement that the transmitter will be located on an existing tower. Examples of unsuitable allotment reference sites include those which are offshore, in a national or state park in which tower construction is prohibited, on an airport, or otherwise in an area which would necessarily present a hazard to air navigation.

Note 2 to § 73.3573: Processing of applications for new low power educational FM applications: Pending the Commission's restudy of the impact of the rule changes pertaining to the allocations of 10-watt and other low power noncommercial educational FM stations, applications for such new stations, or major changes in existing ones, will not be accepted for filing. Exceptions are: (1) In Alaska, applications for new Class D stations or major changes in existing ones are acceptable for filing; and (2) applications for existing Class D stations to change frequency are acceptable for filing. In (2), upon the grant of such application, the station shall become a Class D (secondary) station. (See First Report and Order, Docket 20735, FCC 78-386, 43 FR 25821, and Second Report and Order, Docket 20735, FCC 78-384, 43 FR 39704.) Effective date of this FCC imposed "freeze" was June 15, 1978. Applications which specify facilities of at least 100 watts effective radiated power will be accepted for filing.

Note 3 to § 73.3573: For rules on processing FM translator and booster stations, see § 74.1233 of this chapter.

15. Add Subpart I, which includes §§ 73.5000 through 73.5009, to read as follows:

PART 73—RADIO BROADCAST SERVICES

Subpart I—Competitive Bidding Procedures

- Sec.
- 73.5000 Services subject to competitive bidding.
 - 73.5001 Competitive bidding procedures.
 - 73.5002 Bidding application and certification procedures; prohibition of collusion.
 - 73.5003 Submission of upfront payments, down payments and full payments.
 - 73.5004 Bid withdrawal, default and disqualification.
 - 73.5005 Filing of long-form applications.
 - 73.5006 Filing of petitions to deny against long-form applications.
 - 73.5007 Designated entity provisions.
 - 73.5008 Definitions applicable for designated entity provisions.
 - 73.5009 Assignment or transfer of control.

Subpart I—Competitive Bidding Procedures

§ 73.5000 Services subject to competitive bidding.

(a) Mutually exclusive applications for new facilities and for major changes to existing facilities in the following broadcast services are subject to competitive bidding: AM; FM; FM translator; analog television; low power television; and television translator. Mutually exclusive applications for new facilities and for major changes to existing facilities in the Instructional Television Fixed Service (ITFS) are also subject to competitive bidding. The general competitive bidding procedures found in 47 CFR Part 1, Subpart Q will apply unless otherwise provided in 47 CFR Part 73 and Part 74.

(b) Mutually exclusive applications for broadcast channels in the reserved portion of the FM band (Channels 200–220) and for television broadcast channels reserved for noncommercial educational use are not subject to competitive bidding procedures.

§ 73.5001 Competitive bidding procedures.

(a) Specific competitive bidding procedures for broadcast service and ITFS auctions will be set forth by public notice prior to any auction. The Commission may also design and test alternative procedures, including combinatorial bidding and real time bidding. See 47 CFR 1.2103 and 1.2104.

(b) The Commission may utilize the following competitive bidding mechanisms in broadcast service and ITFS auctions:

(1) *Sequencing.* The Commission will establish and may vary the sequence in which broadcast service construction permits and ITFS licenses will be auctioned.

(2) *Grouping.* In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding in broadcast service or ITFS auctions, the Commission will determine which construction permits or licenses will be auctioned simultaneously or in combination.

(3) *Reservation price.* The Commission may establish a reservation price, either disclosed or undisclosed, below which a broadcast construction permit or ITFS license subject to auction will be not awarded.

(4) *Minimum and maximum bid increments.* The Commission may, by announcement before or during broadcast service or ITFS auctions, require minimum bid increments in dollar or percentage terms. The Commission may, by announcement before or during broadcast service or ITFS auctions, establish maximum bid increments in dollar or percentage terms.

(5) *Minimum opening bids.* The Commission may establish a minimum opening bid for each broadcast construction permit or ITFS license subject to auction.

(6) *Stopping rules.* The Commission will establish stopping rules before or during multiple round broadcast service or ITFS auctions in order to terminate the auction within a reasonable time.

(7) *Activity rules.* The Commission will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted a certain number of waivers of such rule during the auction.

§ 73.5002 Bidding application and certification procedures; prohibition of collusion.

(a) Prior to any broadcast service or ITFS auction, the Commission will issue a public notice announcing the upcoming auction and specifying the period during which all applicants seeking to participate in an auction must file their applications for new broadcast or ITFS facilities or for major changes to existing facilities. Broadcast service or ITFS applications for new facilities or for major modifications will be accepted only during these specified periods. This initial and other public

notices will contain information about the completion and submission of applications to participate in the broadcast or ITFS auction, any materials that must accompany the applications, and any filing fee that must accompany the applications or any upfront payments that will need to be submitted. Such public notices will also, in the event mutually exclusive applications are filed for broadcast construction permits or ITFS licenses, contain information about the method of competitive bidding to be used and more detailed instructions on submitting bids and otherwise participating in the auction. In the event applications are submitted that are not mutually exclusive with any other application in the same service, such applications will be identified by public notice and will not be subjected to auction.

(b) To participate in broadcast service or ITFS auctions, all applicants must timely submit short-form applications (FCC Form 175), along with all required certifications, information and exhibits, pursuant to the provisions of 47 CFR 1.2105(a) and any Commission public notices. So determinations of mutual exclusivity for auction purposes can be made, applicants for non-table broadcast services or for ITFS must also submit the engineering data contained in the appropriate FCC form (FCC Form 301, FCC Form 346, FCC Form 349 or FCC Form 330). Beginning January 1, 1999, all short-form applications must be filed electronically.

(c) Applicants in all broadcast service or ITFS auctions will be subject to the provisions of 47 CFR 1.2105(b) regarding the modification and dismissal of their short-form applications. Notwithstanding the general applicability of Section 1.2105(b) to broadcast and ITFS auctions, applicants who file mutually exclusive major modification applications, or mutually exclusive major modification and new station applications, will be permitted to make amendments to their engineering submissions following the filing of their short-form applications so as to resolve their mutual exclusivity.

(d) The prohibition of collusion set forth in 47 CFR 1.2105(c), which becomes effective upon the filing of short-form applications, shall apply to all broadcast service or ITFS auctions. Notwithstanding the general applicability of Section 1.2105(c) to broadcast and ITFS auctions, applicants who file mutually exclusive major modification applications, or mutually exclusive major modifications and new station applications, will be permitted

to resolve their mutual exclusivities by means of engineering solutions or settlements during a limited period after the filing of short-form applications. Such period will be further specified by Commission public notices.

§ 73.5003 Submission of upfront payments, down payments and full payments.

(a) To be eligible to bid, each bidder in every broadcast service or ITFS auction shall submit an upfront payment prior to the commencement of bidding, as set forth in any public notices and in accordance with 47 CFR 1.2106.

(b) Within ten (10) business days following the close of bidding and notification to the winning bidders, each winning bidder in every broadcast service or ITFS auction shall make a down payment in an amount sufficient to bring its total deposits up to twenty (20) percent of its high bid(s), as set forth in 47 CFR 1.2107(b).

(c) Each winning bidder in every broadcast service or ITFS auction shall pay the balance of its winning bid(s) in a lump sum within ten (10) business days after release of a public notice announcing that the Commission is prepared to award the construction permit(s) or license(s), as set forth in 47 CFR 1.2109(a). If a winning bidder fails to pay the balance of its winning bid in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five (5) percent of the amount due. Broadcast construction permits and ITFS licenses will be granted by the Commission following the receipt of full payment.

§ 73.5004 Bid withdrawal, default and disqualification.

(a) The Commission shall impose the bid withdrawal, default and disqualification payments set forth in 47 CFR 1.2104(g) upon bidders who withdraw high bids during the course, or after the close, of any broadcast service or ITFS auction, who default on payments due after an auction closes, or who are disqualified. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the competitive bidding process may also be subject to the remedies set forth in 47 CFR 1.2109(d).

(b) In the event of a default by or the disqualification of a winning bidder in any broadcast service or ITFS auction, the Commission will follow the procedures set forth in 47 CFR 1.2109

(b)–(c) regarding the reauction of the construction permit(s) or license(s) at issue.

§ 73.5005 Filing of long-form applications.

(a) Within thirty (30) days following the close of bidding and notification to the winning bidders, each winning bidder must submit an appropriate long-form application (FCC Form 301, FCC Form 346, FCC Form 349 or FCC Form 330) for each construction permit or license for which it was the high bidder. Long-form applications filed by winning bidders shall include the exhibits required by 47 CFR 1.2107(d)

(concerning any bidding consortia or joint bidding arrangements); § 1.2110(i) (concerning designated entity status, if applicable); and § 1.2112 (a) and (b) (concerning disclosure of ownership and real party in interest information, and, if applicable, disclosure of gross revenue information for small business applicants).

(b) The long-form application should be submitted pursuant to the rules governing the service in which the applicant is a high bidder and according to the procedures for filing such applications set out by public notice. When electronic procedures become available for the submission of long-form applications, the Commission may require all winning bidders to file their long-form applications electronically.

(c) An applicant that fails to submit the required long-form application under this section, and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and shall be subject to the payments set forth in 47 CFR 1.2104(g).

(d) An applicant whose short-form application, submitted pursuant to 47 CFR 73.5002(b), was not mutually exclusive with any other short-form application in the same service and was therefore not subject to auction, shall submit an appropriate long-form application within thirty (30) days following release of a public notice identifying any such non-mutually exclusive applicants. The long-form application should be submitted pursuant to the rules governing the relevant service and according to any procedures for filing such applications set out by public notice. The long-form application filed by a non-mutually exclusive applicant need not contain the additional exhibits, identified in § 73.5005(a), required to be submitted with the long-form applications filed by winning bidders. When electronic procedures become available, the Commission may require any non-mutually exclusive applicants to file

their long-form applications electronically.

§ 73.5006 Filing of petitions to deny against long-form applications.

(a) As set forth in 47 CFR 1.2108, petitions to deny may be filed against the long-form applications filed by winning bidders in broadcast service or ITFS auctions and against the long-form applications filed by applicants whose short-form applications to participate in a broadcast or ITFS auction were not mutually exclusive with any other applicant.

(b) Within ten (10) days following the issuance of a public notice announcing that a long-form application has been accepted for filing, petitions to deny that application may be filed. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The time for filing such oppositions shall be five (5) days from the filing date for petitions to deny, and the time for filing replies shall be five (5) days from the filing date for oppositions.

(d) If the Commission denies or dismisses all petitions to deny, if any are filed, and is otherwise satisfied that an applicant is qualified, a public notice will be issued announcing that the broadcast construction permit(s) or ITFS license(s) is ready to be granted, upon full payment of the balance of the winning bid(s). See 47 CFR 73.5003(c). Construction of broadcast stations or ITFS facilities shall not commence until the grant of such permit or license to the winning bidder.

§ 73.5007 Designated entity provisions.

New entrant bidding credit. A winning bidder that qualifies as a “new entrant” may use a bidding credit to lower the cost of its winning bid on any broadcast construction permit. A thirty-five (35) percent bidding credit will be given to a winning bidder if it and/or its owners have no recognizable interest (more than fifty (50) percent or de facto control) in the aggregate, in any other media of mass communications. A twenty-five (25) percent bidding credit will be given to a winning bidder if it and/or its owners, in the aggregate, have a recognizable interest in no more than three mass media facilities. No bidding credit will be given if any of the commonly owned mass media facilities

serves the same area as the proposed broadcast station, or if the winning bidder and/or its owners have recognizable interests in more than three mass media facilities.

(a) The new entrant bidding credit is not available to applicants that control, or whose owners control, in the aggregate, more than fifty (50) percent of any other media of mass communications in the same area as the proposed broadcast facility. The facilities will be considered in the “same area” if the following defined areas wholly encompass, or are encompassed by, the proposed broadcast or secondary broadcast facility’s relevant contour:

(1) AM broadcast station—predicted or measured 2mV/m groundwave contour (see 47 CFR 73.183 or 73.186);

(2) FM broadcast or FM translator station—predicted 1.0 mV/m contour (see 47 CFR 73.313);

(3) Television broadcast station—Grade A contour (see 47 CFR 73.684);

(4) Low power television or television translator station—the predicted, protected contour (see 47 CFR 74.707(a));

(5) Cable television system—the franchised community of a cable system;

(6) Daily newspaper—community of publication; and

(7) Multipoint Distribution Service station—protected service area (see 47 CFR 21.902(d) or 21.933).

(b) *Unjust enrichment.* If a licensee or permittee that utilizes a new entrant bidding credit under this subsection seeks to assign or transfer control of its license or construction permit to an entity not meeting the eligibility criteria for the bidding credit, the licensee or permittee must reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten-year U.S. Treasury obligations applicable on the date the construction permit was originally granted, as a condition of Commission approval of the assignment or transfer. If a licensee or permittee that utilizes a new entrant bidding credit seeks to assign or transfer control of a license or construction permit to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten-year U.S. Treasury obligations applicable on the date the construction permit was originally granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. The amount of the

reimbursement payments will be reduced over time. An assignment or transfer in the first two years after issuance of the construction permit to the winning bidder will result in a forfeiture of one hundred (100) percent of the value of the bidding credit; during year three, of seventy-five (75) percent of the value of the bidding credit; in year four, of fifty (50) percent; in year five, twenty-five (25) percent; and thereafter, no payment. If a licensee or permittee who utilized a new entrant bidding credit in obtaining a broadcast license or construction permit acquires within this five-year reimbursement period an additional broadcast facility or facilities, such that the licensee or permittee would not have been eligible for the new entrant credit, the licensee or permittee will not be required to reimburse the U.S. Government for the amount of the bidding credit.

§ 73.5008 Definitions applicable for designated entity provisions.

(a) *Scope.* The definitions in this section apply to 47 CFR 73.5007, unless otherwise specified in that section.

(b) *A medium of mass communications* means a daily newspaper; a cable television system; or a license or construction permit for a television station, a low power television or television translator station, an AM, FM or FM translator broadcast station, a direct broadcast satellite transponder, or a Multipoint Distribution Service station.

(c) The *owners* of a winning bidder shall include the winning bidder, in the case of a sole proprietor; partner, including limited or "silent" partners, in the case of a partnership; the beneficiaries, in the case of a trust; any member, in the case of a nonstock corporation or unincorporated association with members; any member of the governing board (including executive boards, boards of regents, commissions, or similar governmental bodies where each member has one vote), in the case of nonstock corporation or unincorporated association without members; and owners of voting shares, in the case of stock corporations.

§ 73.5009 Assignment or transfer of control.

(a) The reporting requirement contained in 47 CFR 1.2111(a) shall apply to an applicant seeking approval for a transfer of control or assignment of a broadcast construction permit or license within three years of receiving such permit or license by means of competitive bidding.

(b) The ownership disclosure requirements contained in 47 CFR 1.2112(a) shall apply to an applicant seeking consent to assign or transfer control of a broadcast construction permit or license awarded by competitive bidding.

PART 74—EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

16. The authority for part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307, and 554.

17. Section 74.910 is amended by adding the two new entries in numerical order to read as follows:

§ 74.910 Part 73 application requirements pertaining to ITFS stations.

* * * * *

§ 73.3522(a) Amendment of applications.

* * * * *

§ 73.5000–73.5006 Competitive Bidding Procedures.

* * * * *

18. Section 74.911 is amended by revising paragraph (c) and removing paragraph (d) to read as follows:

§ 74.911 Processing of ITFS station applications.

* * * * *

(c)(1)(i) The FCC will specify by Public Notice, pursuant to § 73.5002, a period for filing ITFS applications for a new station or for major modifications in the facilities of an authorized station.

(ii) Such ITFS applicants shall be subject to the provisions of §§ 1.2105 and the ITFS competitive bidding procedures. See 47 CFR 73.5000 *et seq.*

(2) [Reserved]

§ 74.912 [Removed]

19. Section 74.912 is removed.

§ 74.913 [Removed]

20. Section 74.913 is removed.

21. Section 74.1233 is revised to read as follows:

§ 74.1233 Processing FM translator and booster station applications.

(a) Applications for FM translator and booster stations are divided into two groups:

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. In the case of FM translator stations, a major change is any change in frequency (output channel), or change (only the gain should be included in determining amount of change) or increase (but not

decrease) in area to be served greater than ten percent of the previously authorized 1 mV/m contour. All other changes will be considered minor. All major changes are subject to the provisions of §§ 73.3580 and 1.1104 of this chapter pertaining to major changes.

(2) In the second group are applications for licenses and all other changes in the facilities of the authorized station.

(b) Applications for booster stations and reserved-band FM translator stations will be processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and will be drawn by the staff for study, the lowest file number first. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the FCC will periodically release a Public Notice listing reserved-band applications that have been accepted for filing and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications and/or petitions to deny the listed applications must be filed.

(c) In the case of an application for an instrument of authorization, other than a license pursuant to a construction permit, grant will be based on the application, the pleadings filed, and such other matters that may be officially noticed. Before a grant can be made it must be determined that:

(1) There is not pending a mutually exclusive application filed in accordance with paragraph (b) of this section.

(2) The applicant is legally, technically, financially and otherwise qualified;

(3) The applicant is not in violation of any provisions of law, the FCC rules, or established policies of the FCC; and

(4) A grant of the application would otherwise serve the public interest, convenience and necessity.

(d) Processing non-reserved band FM translator applications. (1) Applications for minor modifications for non-reserved FM translator stations, as defined in paragraph (a)(2) of this section, may be filed at any time, unless restricted by the FCC, and, generally, will be processed in the order in which they are tendered. The FCC will periodically release a Public Notice listing those applications accepted for filing. All minor modification applications found to be mutually

exclusive, must be resolved through settlement or technical amendment.

(2)(i) The FCC will specify by Public Notice, pursuant to § 73.5002(a), a period for filing non-reserved band FM translator applications for a new station or for major modifications in the facilities of an authorized station. FM translator applications for new facilities or for major modifications will be accepted only during these specified periods. Applications submitted prior to the window opening date identified in the Public Notice will be returned as premature. Applications submitted after the specified deadline will be dismissed with prejudice as untimely.

(ii) Such FM translator applicants will be subject to the provisions of §§ 1.2105 and 73.5002(a) regarding the submission of the short-form application, FCC Form 175, and all appropriate certifications, information and exhibits contained therein. To determine which FM translator applications are mutually exclusive, FM translator applicants must submit the engineering data contained in FCC Form 349 as a supplement to the short-form application. Such engineering data will not be studied for technical acceptability, but will be protected from subsequently filed applications as of the close of the window filing period. Determinations as to the acceptability or grantability of an applicant's proposal will not be made prior to an auction.

(iii) FM translator applicants will be subject to the provisions of § 1.2105 regarding the modification and dismissal of their short-form applications.

(iv) Consistent with § 1.2105(a), beginning January 1, 1999, all short-form applications must be filed electronically.

(3) Subsequently, the FCC will release Public Notices:

(i) identifying the short-form applications received during the appropriate filing period or "window" which are found to be mutually exclusive;

(ii) establishing a date, time and place for an auction;

(iii) providing information regarding the methodology of competitive bidding to be used in the upcoming auction, bid submission and payment procedures, upfront payment procedures, upfront payment deadlines, minimum opening bid requirements and applicable reserve prices in accordance with the provisions of § 73.5002;

(iv) identifying applicants who have submitted timely upfront payments and, thus, are qualified to bid in the auction.

(4) If, during the window filing period, the FCC receives non-mutually exclusive applications for a non-reserved FM translator station, a Public Notice will be released identifying the non-mutually exclusive applicants, who will be required to submit the appropriate long form application within 30 days of the Public Notice and pursuant to the provisions of § 73.5005. These non-mutually exclusive applications will be processed and the FCC will periodically release a Public Notice listing such non-mutually exclusive applications determined to be acceptable for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of §§ 73.5006 and 73.3584 of this chapter. If the applicants are duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the non-mutually exclusive long-form application, the same will be granted.

(5)(i) The auction will be held pursuant to the procedures set forth in § 1.2101. Subsequent to the auction, the FCC will release a Public Notice announcing the close of the auction and identifying the winning bidders. Winning bidders will be subject to the provisions of § 1.2107 regarding down payments and will be required to submit the appropriate down payment within 10 business days of the Public Notice. Pursuant to § 1.2107, a winning bidder that meets its down payment obligations in a timely manner must, within 30 days of the release of the public notice announcing the close of the auction, submit the appropriate long-form application for each construction permit for which it was the winning bidder. Long-form applications filed by winning bidders shall include the exhibits identified in § 73.5005.

(ii) These applications will be processed and the FCC will periodically release a Public Notice listing such applications that have been accepted for filing and announcing a date by which petitions to deny must be filed in accordance with the provisions of § 73.3584 of this chapter. If the applicants are duly qualified, and upon examination, the FCC finds that the public interest, convenience and necessity will be served by the granting of the winning bidder's long-form application, a Public Notice will be issued announcing that the construction permit is ready to be granted. Each winning bidder shall pay the balance of its winning bid in a lump sum within 10 business days after release of the

Public Notice, as set forth in § 1.2109(a). Construction permits will be granted by the Commission following the receipt of the full payment.

(iii) All long-form applications will be cut-off as of the date of filing with the FCC and will be protected from subsequently filed long-form translator applications. Applications will be required to protect all previously filed applications. Winning bidders filing long-form applications may change the technical proposals specified in their previously submitted short-form applications, but such change may not constitute a major change. If the submitted long-form application would constitute a major change from the proposal submitted in the short-form application or the allotment, the long-form application will be returned pursuant to paragraph (d)(2)(i) of this section.

(e) Selection of mutually exclusive reserved band FM translator applications.

(1) Applications for FM translator stations proposing to provide fill-in service (within the primary station's protected contour) of the commonly owned primary station will be given priority over all other applications.

(2) Where applications for FM translator stations are mutually exclusive and do not involve a proposal to provide fill-in service of commonly owned primary stations, the FCC may stipulate different frequencies as necessary for the applicants.

(3) Where there are no available frequencies to substitute for a mutually exclusive application, the FCC will base its decision on the following priorities:

(i) first-full-time aural services;

(ii) second full-time aural services; and

(iii) other public interest matters including, but not limited to the number of aural services received in the proposed service area, the need for or lack of public radio service, and other matters such as the relative size of the proposed communities and the growth rate.

(4) Where the procedures in paragraphs (e)(1), (e)(2) and (e)(3) of this section fail to resolve the mutual exclusivity, the applications will be processed on a first-come-first-served basis.

[FR Doc. 98-23963 Filed 9-10-98; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION**47 CFR Parts 54 and 69**

[CC Docket No. 96-45; DA 98-1581]

Federal-State Joint Board on Universal Service**AGENCY:** Federal Communications Commission.**ACTION:** Final rule.

SUMMARY: In this document, the Commission clarifies the application of the Commission's "lowest corresponding price" requirement set forth in the *Universal Service Order*, 62 FR 32862 (June 17, 1997). The Commission clarifies that this requirement was not intended to preempt state law, and does not obligate carriers to offer rates that would violate state laws.

EFFECTIVE DATE: September 11, 1998.

FOR FURTHER INFORMATION CONTACT: Kaylene Shannon, Attorney, Common Carrier Bureau, Accounting Policy Division, (202) 418-7400.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document released on August 7, 1998. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C., 20554. This document is also available from the Commission's copy contractor, International Transcription Service, 1231 20th Street, N.W., Washington, D.C. 20036.

I. Background

1. In the *Universal Service Order*, 62 FR 32862 (June 17, 1997), the Commission provided that schools and libraries should be eligible to apply for discounted telecommunications services, Internet access, and internal connections, subject to certain limitations and conditions. The *Universal Service Order* concluded that, to ensure that their lack of experience in dealing with telecommunications providers does not prevent schools and libraries from receiving competitive prices, service providers must offer services to eligible schools and libraries at prices no higher than the lowest price the provider charges to similarly situated non-residential customers for similar services. The Commission clarified that, for purposes of determining the lowest corresponding price, similar services would include those provided under contract as well as those provided under tariff. The

Commission established a rebuttable presumption that rates offered within the previous three years are compensatory.

2. In the *Fourth Reconsideration*, 63 FR 2093 (January 13, 1998), the Commission concluded that earlier versions of tariffs that have been modified should be included in the comparable rates upon which the lowest corresponding rate is determined, "[u]nless a regulatory agency has found that the tariffed rate should be changed, and affirmatively ordered such change, or absent a showing that the rate is not compensatory." A question has been raised whether the lowest corresponding rate can be based on rates not lawfully offered under state law.

II. Discussion

3. Although the Commission disagreed with the general assertion that the lowest corresponding price should not reflect expired tariffs, the Commission did not expressly preempt state laws governing what rates may lawfully be offered to eligible schools and libraries. In the absence of such an expressly stated intention to preempt, we conclude that the Commission did not intend to require carriers to base the lowest corresponding rate on rates that may not lawfully be offered under state law. Thus, we interpret the *Fourth Reconsideration* as requiring only that rates that may be offered consistent with state law must be made available as the lowest corresponding price.

III. Ordering Clause

4. Accordingly, it is ordered that, pursuant to section 4(i) and section 254 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 254, and sections 0.91 and 0.291 of the Commission's rules, 47 CFR 0.91 and 0.291, the lowest corresponding price requirement is clarified.

List of Subjects*47 CFR Part 54*

Healthcare providers, Libraries, Reporting and recordkeeping requirements, Schools, Telecommunications, Telephone.

47 CFR Part 69

Communications common carriers, Reporting and recordkeeping requirements, Telephone.

Federal Communication Commission.

Kathryn C. Brown,

Chief, Common Carrier Bureau.

[FR Doc. 98-24276 Filed 9-10-98; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 17**

RIN 1018-AB10

Captive-bred Wildlife Regulation**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

SUMMARY: The final rule amends the definition of "harass" in § 17.3 applied to captive wildlife to exclude generally accepted animal husbandry practices, breeding procedures, and provisions of veterinary care that are not likely to result in injury to the animal. The final rule deletes the requirement to obtain a CBW registration for eight species of pheasants, parakeets of the species *Neophema splendida* and *N. pulchella*, the Laysan duck, and the "generic" or inter-subspecific crossed tiger. This final rule will be followed in the future by a new proposed rule that will set forth proposed criteria for addition to, or deletion from, the list of taxa exempted from registration requirements, and will further consider the subject of education.

DATES: This rule is effective October 13, 1998.

ADDRESSES: The complete file for this rule is available for inspection by appointment at the Office of Management Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 700, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Teiko Saito, Chief, [see **ADDRESSES** section] telephone 703/358-2093; fax 703/358-2281.

SUPPLEMENTARY INFORMATION: On January 7, 1992, the Service initiated a review of the Captive-bred Wildlife (CBW) regulation (50 CFR 17.21(g)). On June 11, 1993, the Service followed with a proposed rule (58 FR 32632) that included several proposed changes to the CBW regulation, including elimination of CBW registrations for several species that are present in the United States in large numbers and/or that are genetically unsuitable for scientifically based breeding programs; amendment of the definition of "harass" in 50 CFR 17.3 to exclude normal animal husbandry practices such as humane and healthful care when applied to captive wildlife; and deletion of education from the definition of "enhance" in § 17.3. On December 27, 1993, the Service published a final rule (58 FR 68323) that eliminated public education through exhibition of living

wildlife as the sole justification for issuance of a CBW registration. On the same date, the Service published a notice (58 FR 68383) that reopened the comment period on the balance of the issues in the proposed rule, including the larger question of the value education provides to the conservation of non-native species in the wild as it applies to endangered and threatened species permits issued under §§ 17.22 and 17.32.

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and implementing regulations prohibit any person subject to the jurisdiction of the United States from conducting certain activities with endangered or threatened species of fish, wildlife, or plants. These activities include import, export, take, and interstate or foreign commerce. The Secretary of the Interior (or the Secretary of Commerce in the case of certain marine species) may permit such activities, under such terms and conditions as he/she will prescribe, for scientific purposes or to enhance the propagation or survival of the affected species, provided these activities are consistent with the purposes of the Act. The Secretary of the Interior's authority to administer permit matters relating to endangered and threatened species generally has been delegated through the Director of the Fish and Wildlife Service to the Office of Management Authority (OMA).

Since 1976, the Service has been striving to achieve an appropriate degree of control over prohibited activities involving living wildlife of non-native species born in captivity in the United States.

In 1978, the Service announced a review of regulations on captive-bred wildlife (43 FR 16144, April 14, 1978). The notice reiterated the Service's philosophy on its approach to captive versus wild populations.

The Service considers the purpose of the Act to be best served by conserving species in the wild along with their ecosystems. Populations of species in captivity are, in large degree, removed from their natural ecosystems and have a role in survival of the species only to the extent that they maintain genetic integrity and offer the potential of restocking natural ecosystems where the species has become depleted or no longer occurs.

Following an extensive public review in 1978 and 1979, the Service published a final rule (44 FR 54002, September 17, 1979) that established the Captive-bred Wildlife (CBW) registration system. The final rule amended regulations in 50 CFR 17.21 by adding § 17.21(g), which granted general, conditional permission to take; export or re-import; deliver,

receive, carry, transport, or ship in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any non-native endangered or threatened wildlife that is bred in captivity in the United States. In other words, the regulation itself contains the permit. For persons or institutions to operate under that permit, certain conditions must be met, including that the person or institution must first register with the Service. Authorization for the Service to collect information from persons wanting to register was submitted and approved by the Office of Management and Budget under the clearance number of 1018-0093.

Unless an exception is made under § 17.21(g)(5), the CBW system applies only to species that do not include any part of the United States (as defined in 50 CFR part 10) in their natural geographic distribution. Additionally, the individual specimens must have been born in captivity in the United States. The registration authorizes interstate purchase and sale only between entities that each hold a registration for living wildlife of the taxon concerned. Interstate or foreign commerce, in the course of commercial activity, with respect to non-living wildlife is not authorized under a CBW registration. To conduct such activities, separate permits must be applied for under the appropriate regulations for endangered or threatened wildlife at 50 CFR 17.22 or 50 CFR 17.32.

The 1979 final rule also amended the definition of "enhance the propagation or survival" of wildlife in captivity to include a wide range of normal animal husbandry practices used to maintain self-sustaining and genetically viable stocks of wildlife in captivity. Specifically included in those practices were "culling" and "euthanasia". Other aspects of the definition of "enhance" that were codified in 1979 and are still used today include accumulation and holding and transfer of animals not immediately needed or suitable for propagative or scientific purposes (50 CFR 17.3).

The above definition is found in subpart A, the General Provisions of part 17. Therefore, it applies not only to CBW registrations, but to all endangered and threatened species permits for captive wildlife issued under §§ 17.22 and 17.32.

After 12 years' experience with the system, the Service began another review with a notice of intent to propose a rule, published on January 7, 1992 (57 FR 548). The notice discussed problems the Service was experiencing with the system and offered for discussion three options intended to show the range of

possible actions that might be taken. These ranged from no action (no change in the system) to complete elimination of the CBW registration process. The notice also questioned whether the term "harass" as defined in § 17.3 applied to captive-born wildlife, and whether education of the American public through exhibition of living, non-native wildlife actually accomplished measurable enhancement of the survival of the affected species in the wild. Three options for dealing with education were presented, ranging from no change in the existing definition to deleting education as a justification for permits and CBW registrations.

It should be noted here that while the preamble to the proposed rule referred to "captive-born wildlife" in the context of the discussion of the proposed amendment of the term "harass", the proposed rulemaking language refers to "captive wildlife". This was, and is, the Service's intent. Therefore, the rest of this discussion is in terms of "captive wildlife" to make it agree with both proposed and final rulemaking language.

Public comments and suggestions were solicited. Written responses were received from 942 individuals, institutions, and organizations.

After review of comments received, the Service published a proposed rule on June 11, 1993 (58 FR 32632), that proposed several changes to § 17.21(g): Elimination of registration for several species that are present in the United States in large numbers and/or that are genetically unsuitable for scientifically based breeding programs; restriction of eligibility for CBW registrations to those entities that are participants in an approved responsible cooperative breeding program for the taxon concerned; amendment to the definition of "harass" in § 17.3 to exclude normal animal husbandry practices such as humane and healthful care when applied to captive wildlife; and, the conditional deletion of education from the definition of "enhance" in § 17.3.

On December 27, 1993, the Service published a final rule (58 FR 68323) that was limited to the narrow issue of education as it relates to the CBW system. That rule eliminated public education through exhibition of living wildlife as the sole justification for issuance of a CBW registration under § 17.21(g). That decision was based on the Service's belief that the scope of the CBW system should be revised to relate more closely to its original intent, *i.e.*, the encouragement of responsible breeding that is specifically designed to help conserve the species involved. On the same date, the Service published a

notice (58 FR 68383) that reopened the comment period on the balance of the issues in the proposed rule, including the larger question of the value that education provides to the conservation of non-native species in the wild as it applies to endangered and threatened species permits issued under §§ 17.22 and 17.32.

Information and Comments

A total of 1,269 sets of written information and comments were received from individuals, institutions, and organizations in response to the proposed rule and during the re-opened comment period. Some commenters responded both times.

Of comments received, some 450 were form letters, patterned responses, or multiple signatures on letters or petitions. Opinions expressed on specific issues are summarized as follows (a number of letters offered comments on more than one issue):

Retain education as part of the definition of enhancement of survival of the species	1,165
Retain education, but establish guidelines.....	29
Delete education	10
Require CBW registrants to participate in a responsible cooperative breeding program.....	17
Do not require participation in a responsible cooperative breeding program	77
Change definition of "harass" to exclude normal animal husbandry practices for captive wildlife	18
Do not change definition of "harass"	3
Replace CBW registration with rebuttable presumption	2
Do not use rebuttable presumption.....	37
Completely deregulate captive-bred wildlife.....	36
Deregulate interstate commerce in captive-bred wildlife	65
Exempt certain species from registration requirements as proposed	26
Exempt some species but not all of the proposed taxa.....	13
Exempt no species	2

Because the Service has decided to reformulate its proposal concerning deletion of education from the definition of "enhancement", the discussion below deals only with comments on other aspects of the proposed rule. Comments concerning education are being considered and will be the subject of a **Federal Register** notice at a later date.

Comments Concerning Definitions

Comment: Commenters generally favored changing the definition of "harass" to exclude normal animal husbandry practices for captive wildlife.

Some felt that terms such as "normal", "adequate", "safe", and "healthful" are vague, subjective, and amenable to widely varying interpretation. Various suggestions for rewording the definition were offered.

Response: The Service agrees and believes that the revised definition in this final rule reduces subjectivity to the extent possible.

Comment: Some commenters objected to a change in the definition of "harass". Some believed that the change created a broad exception to the prohibition against harassment. One commenter suggested that any concerns over the definition be addressed through specific permit restrictions for individual permittees and registrants, thus tailoring protection to the particular affected species.

Response: The Service believes this approach could result in the need for preparing husbandry manuals for each species and would not result in a commensurate benefit to the species. To evaluate facilities and care provided by applicants, the Service will continue to consult with experts such as the Department of Agriculture's Animal and Plant Health Inspection Service, which is charged with administering the Animal Welfare Act, and knowledgeable persons in the zoo and aquarium communities and the private sector, as needed.

Comment: Several commenters recommended amending the definition of "take" to apply only to animals from the wild. This is based on the concern that holding animals in captivity or transferring them for breeding opportunities could be construed as a "taking".

Response: "Take" was defined by Congress in Section 3 of the Act as * * * "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect * * *" endangered or threatened wildlife, whether wild or captive. Therefore, the definition can be clarified by further defining its component terms, but the statutory term cannot be changed administratively.

The purpose of amending the Service's definition of "harass" is to exclude proper animal husbandry practices that are not likely to result in injury from the prohibition against "take". Since captive animals can be subjected to improper husbandry as well as to harm and other taking activities, the Service considers it prudent to maintain such protections, consistent with Congressional intent.

Comment: One comment was that the Service is not authorized to treat members of a particular species differently based on whether the

specimen is wild or held in captivity; the Act's protections are afforded to whole species of endangered and threatened animals and their habitats.

Response: It is true that the Act applies to all specimens that comprise a "species" (as defined in the Act) that has been listed as endangered or threatened, and in general does not distinguish between wild and captive specimens thereof. However, the definition of "take" in the Act clearly applies to individual specimens or groups of specimens, and the captive or non-captive status of a particular specimen is a significant factor in determining whether particular actions would "harass" that specimen or whether such actions would "enhance the propagation or survival" of the species. The Service believes that ample authority is provided by the Act to adopt the regulatory amendments set out in this final rule as a proper interpretation of the statutory provisions of the Act.

To decide otherwise would place those persons holding captive specimens of a listed species in an untenable position. If providing for the maintenance and veterinary care of a live animal were considered to be "harassment", those persons holding such specimens in captivity would be forced to obtain a permit or give up possession since any *failure* to provide proper care and maintenance would be an unlawful "taking". Since Congress chose not to prohibit the mere possession of lawfully-taken listed species in Section 9(a)(1) of the Act, the Service believes that congressional intent supports the proposition that measures necessary for the proper care and maintenance of listed wildlife in captivity do not constitute "harassment" or "taking".

Comments Concerning CBW Questions

Comment: Responses showed overwhelming opposition to a rebuttable presumption, usually based on the argument that it would in effect mean that a person was considered guilty until proven innocent.

Response: The Service does not agree with this assessment. As discussed in detail in the preamble to the proposed rule a rebuttable presumption is not a presumption of guilt. Section 10(g) of the Act imposes a burden of proof on any person claiming the benefit of an exemption or permit under the Act. Thus, the final regulation requires persons claiming benefit of exception at § 17.21(g) to maintain records and make them available for inspection at reasonable hours by law enforcement

officials as prescribed by 50 CFR 13.46 and 13.47 to document legal activities.

Comment: A few commenters favored completely deregulating captive-bred wildlife. However, most commenters thought the Service should deregulate and exempt only certain non-native species from the CBW registration requirements.

Response: The Service agrees that it is best, at this time, to delete the registration requirement for species that are known to be in the United States in large numbers and breeding well, and/or are genetically unsuitable for scientific breeding programs.

Comment: Commenters generally favored efforts by the Service to lessen the regulatory and paperwork requirements for interstate breeding transactions with captive-bred wildlife. Many believed that the current regulations for interstate commerce were the cause of inbreeding and hybridization of certain species within their State. Some stated that a change to the regulations would increase interstate breeding transactions resulting in better management of captive populations.

Response: The Service agrees that provisions of the final rule will facilitate interstate breeding transactions with exempted species, and thereby, increase successful breeding and maintenance of these endangered and threatened species.

Comment: Seventy-seven commenters opposed and seventeen favored the proposal to restrict CBW registrations to those entities that participate in an organized breeding program. Most of those opposed were concerned that currently there are very few organized programs other than the Species Survival Plans (SSP) of the American Zoo and Aquarium Association (AZA). As private breeders or non-AZA member institutions, they might have difficulty gaining approval to participate in an SSP. Another objection was that SSP's do not exist for most species and that it would be unrealistic to estimate more than 80–100 programs by the year 2000. Some commented to the effect that the proposed rule would create a monopoly on the part of the entity that would approve programs and would mandate a bureaucratic nightmare. Another concern was the cost and difficulty of developing and maintaining new breeding programs as opposed to participating in those already in place.

One commenter noted that the proposal doesn't meet Vice President Gore's goal of reducing regulatory burden and unnecessary paperwork; it actually creates a new layer of regulatory oversight and adds potential for litigation by those who disagree with

the Service's decisions regarding those programs or participants that do or do not qualify. Another comment was that the Service couldn't, in effect, deny a permit to one who was refused participation in a breeding program without allowing the exercise of the appeal process; this would constitute abdication of the Service's responsibility to a private group or institution.

Some commenters also questioned what would happen if there were two applications for approval of a program for the same species; some said there should only be a single program for each species/subspecies, while others argued that more than one program should be allowed. Finally, it was pointed out that the goal should not be to develop a single well-managed genetically diverse and self-sustaining population. A species can be managed for either retention of alleles or of heterozygosity, and possibly both management schemes could be correct.

Response: While the Service believes that the concept embodied in the proposal is theoretically sound, the proposal has been deleted from this final rule. The practical, socio-economic, and biological problems inherent in attempting to manage such an effort in an effective and equitable manner could result in a significant increase in workload and paperwork. There is a potential for agency decisions to be perceived as unfair or biologically improper. Such a situation might give rise to frequent appeals and litigation, that would add to the burden on the public and the Service while contributing little to management of captive-bred wildlife.

Comment: The proposal to exempt certain species from CBW registration requirements elicited 142 comments, of which 101 recommended either complete deregulation of captive-bred wildlife or at least of interstate commerce in such animals. The proposal was supported by 26 commenters and opposed by 2. Thirteen other commenters favored or opposed some, but not all of the taxa proposed for exemption. The majority of the latter were concerned about exempting generic tigers because it might encourage uncontrolled breeding and further hybridization for commercial sales and exploitation. A related concern was that purebred tigers might be "laundered" as generic in order to avoid regulation, thus losing potentially valuable breeders from the SSP's for the various subspecies.

Response: The Service believes that the breeding of generic tigers has not been affected by the CBW system. Those

who hold CBW registrations can legally purchase and sell generic tigers in interstate commerce. Non-commercial interstate transfers (e.g., breeding loans, donations) are not prohibited. As pointed out in the notice of intent to propose rule (57 FR 548), generic tigers can be found in most of the 50 states, and intrastate commerce is not regulated. The Service does not believe that "laundering" of purebred tigers as generic animals in order to avoid regulation would be widespread, since so doing would decrease the value of the animals in most cases. Further, those who would do this would probably not be likely participants in SSP's for purebred tiger subspecies.

Comment: Two commenters who generally supported the exemption for pheasants argued that several species are not present in the United States in large numbers (if at all), and therefore those species should continue to be regulated under the CBW system. These species are: Edwards, cheer, Swinhoe's, Mikado, imperial, and white eared pheasants; Sclater's and Chinese monals; and Blyth's, Cabot's, and western tragopans.

Response: Based on the 1993 survey conducted by the American Pheasant and Waterfowl Society (482 respondents, or the equivalent of nearly 25% of APWS membership), several of these species do have low captive populations: Imperial pheasant—0; Sclater's monal—0; western tragopan—25; Blyth's tragopan—32; and Cabot's tragopan—75. Therefore, these species will not be exempted from the CBW registration requirements at this time. Of the other 10 species to be exempted, the sample shows numbers of 222 or more. As stated in the proposed rule, it is impossible to project total pheasant populations in the United States with any certainty due to possible sampling bias, plus the fact that there is probably a significant number of pheasant breeders who do not belong to the APWS.

Comment: One objection to exemption was received for each of the following: Laysan duck, white-winged wood duck, and *Neophema*.

Response: The APWS survey indicates healthy captive populations of the Laysan duck (445) and the white-winged wood duck (278); therefore, they will be exempted from CBW registration requirements.

The 1991 Psittacine Captive Breeding Survey, done by World Wildlife Fund in collaboration with the American Federation of Aviculture, concludes that serious thought should be given to downlisting or delisting the captive stocks of *Neophema splendida* and *N.*

pulchella because the survival of these species in captivity appears assured if inbreeding can be minimized. Both 1990 and 1991 censuses showed that these species are well represented and are breeding well in captivity. In 1991, 114 pairs of *N. splendida* hatched 337 eggs, and 61 pairs of *N. pulchella* hatched 266 eggs. Thus, these species are exempted by this final rule.

Comment: No criteria were provided for the addition or deletion of taxa from the list exempted from the CBW registration requirement.

Response: The Service believes that a case-by-case determination of eligibility, consistent with the provisions of the Act and the public notice and comment procedure, is adequate for the small number of species that will be considered for exemptions. In the near future, the Service will propose a new rule that sets criteria for adding or deleting taxa from the list exempted from the CBW registration requirements. The Service will solicit comments from the public on the proposed rule to ensure that the proposal is as accurate and effective as possible.

Comment: The proposed exemptions from registration requirements violate the notice, comment, and finding provisions of sections 10(c) and (d) of the Act.

Response: The proposed exemptions make no change in existing CBW procedures concerning notice and review. Section 17.21(g)(1) contains a general permit issued to "any person". The question involved here is whether entities (permittees) holding the exempted taxa would be required to register with the Service. Thus, the new exemptions represent changes to the terms of the existing general permit, and public notice and comment procedures have been observed in developing those changes.

Comment: The proposed exemptions improperly do away with the Act's requirement that listed species be held for scientific purposes or to enhance the propagation or survival of the species.

Response: The proposed rule did not specify that the purpose of activities with species from taxa where the holder is exempted from registering must be for the enhancement of propagation or survival of the species. This final rule now includes such language in the regulation at § 17.21(g)(6)(i). Captive U.S. stocks of taxa to be exempted from the CBW registration requirement are characterized by large numbers of specimens and successful breeding efforts; therefore, their survival in captivity appears assured. The fact that these stocks are sufficient to satisfy demand is evidenced by little or no

demand for additional specimens from the wild. Computerized permit records show that in the 3-year period 1991 to 1993, there were no imports of wild specimens of any of these taxa (for the pheasants, there have been no requests for such imports since 1986). Importation of wild-caught specimens of these taxa for breeding purposes could be approved only in unusual circumstances, including a definitive showing of need for new bloodlines that could only be satisfied by wild animals. A determination would have to be made that the status of the wild population would safely allow limited taking. Preference would be given to imports of captive-born specimens of the exempted taxa. The importation of either wild-caught specimens or specimens born in captivity outside the United States would continue to require permits under section 10 of the Act as well as the Convention on International Trade in Endangered Species.

Comment: In the final rule published on December 27, 1993 (58 FR 68323), § 17.21(g)(1) was amended to state that the principal purpose of activities with animals regulated under the CBW system must be to facilitate captive breeding. Section 17.21(g)(1)(ii) requires that the purpose be to enhance the propagation or survival of the species. This double requirement is confusing and apparently redundant.

Response: The Service agrees. The purpose of the wording added to § 17.21(g)(1) was to indicate that public education could not be used as the sole basis for justifying issuance of a CBW registration for species that do not qualify for the exempted taxa list. The text of this final rule has been revised to clarify this issue.

Comment: An objection was made that the proposed rule would require entities such as circuses to show that permanent exports of generic tigers would be for the purpose of enhancement of propagation or survival of the species in accordance with § 17.21(g)(4). This does not make sense, since the Service has concluded that inter-subspecific crossed or generic tigers have no value in terms of preserving the species through propagation because they no longer have the same genetic makeup as wild populations.

Response: The Service agrees that generic or inter-subspecific crossed tigers cannot be used for enhancement of propagation of the species. However, they can be used in a manner that should enhance survival of the species in the wild. Examples include exhibition in a manner designed to educate the public about the ecological

role and conservation needs of the species and satisfaction of demand for tigers so that wild specimens or captive purebred subspecies are not used.

Export of any of the exempted taxa will continue to require appropriate CITES documentation under 50 CFR part 23. The information required by § 17.21(g)(4) can be submitted with the CITES application, as is current practice.

Discussion of Final Rule

This final rule revises existing §§ 17.3 and 17.21(g). These revisions and their effects are discussed below:

1. "Harass" under the definition of "take in § 17.3 is an act or omission that creates the likelihood of injury by annoying wildlife to such an extent as to significantly disrupt normal behavior patterns. The applicability of this concept to captive-held animals has been unclear, since human activities, including normal husbandry practices, provided in caring for captive-held wildlife in all probability disrupt behavior patterns.

In light of this, the definition of "harass" in 50 CFR 17.3 is modified to exclude normal animal husbandry practices that are not likely to result in injury such as humane and healthful care when applied to captive wildlife. While no permit is required to possess lawfully acquired listed wildlife, a person cannot possess wildlife without doing something to it that might be construed as harassment under a literal interpretation of the definition in use since 1979, e.g., keep it in confinement, provide veterinary care, etc. Under this scenario, a person who legally possessed wildlife without a permit could be considered in violation of the prohibition against harassment unless they obtained a specific permit that authorized them to conduct normal animal husbandry activities. Had Congress intended this result, the prohibition on possession in section 9 of the Act would not have been limited to endangered species taken in violation of the Act.

However, maintaining animals in inadequate, unsafe or unsanitary conditions, physical mistreatment, and the like constitute harassment because such conditions might create the likelihood of injury or sickness. The Act continues to afford protection to listed species that are not being treated in a humane manner.

2. Ten species of pheasants (family Phasianidae), parakeets of the species *Neophema splendida* and *N. pulchella*, the Laysan duck, the white-winged wood duck, and the "generic" tiger are exempted from the CBW registration

requirements of § 17.21(g)(2), because their survival in captivity appears assured. All of these taxa are present in the United States in large numbers and/or are genetically unsuitable for scientifically-based breeding programs (as is the case with the generic tiger). The four purebred subspecies of tiger in captivity in the United States are the subject of breeding programs under SSP's and will continue to require CBW registrations.

Current holders of CBW registrations for the above taxa (listed in § 17.21(g)(6)) will no longer need them. Applications for new or renewed registrations for these taxa that are pending before the Service on the effective date of this rule will not be processed.

No written annual reports will be required of holders of these exempted taxa. However, record keeping and inspection requirements of 50 CFR 13.46 and 13.47 are still in place for persons holding the exempted taxa or other captive-bred species requiring a CBW registration. It is estimated that the paperwork burden of the CBW system on the Service and the public will be reduced.

The Service believes that this relaxation of the registration requirement in § 17.21(g) will not operate to the disadvantage of the species in the wild; further, it will be consistent with the conservation of the species because domestic demand has been, and will continue to be, satisfied by captive-born wildlife. The import of live wild-caught specimens, including those belonging to the exempted taxa, would not be authorized unless evidence showed a need for new bloodlines that could not be satisfied by internal exchange or that foreign-bred specimens were unavailable. Furthermore, the Service would have to determine that the wild populations could sustain limited taking.

Regulatory Analysis

This rulemaking has been reviewed by the Office of Management and Budget review under Executive Order 12866. Furthermore, the Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities (zoos, circuses, independent breeders) under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will beneficially affect about 400 small entities currently registered under the CBW system. The economic effects are minor since they represent less than \$20,000 and thus, the total effect on such small entities will be minimal. There will be a regulatory

reduction for those entities holding species to be exempted from registration by this rule. This rule may also provide a reduction of risk to holders of captive wildlife because of the amended definition of "harass".

This final rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act and will not negatively effect the economy, consumer costs, or U.S. based-enterprises. The Service recognizes that the rule will effect a substantial number of small entities, such as zoo, circuses, or independent breeders, but in a beneficial manner.

The Service has determined and certified pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of \$100 million or more in any given year on private entities, or local or State governments.

The Department has determined that these final regulations meet the applicable standards provided in Section 3(a) and 3(b)(2) of Executive Order 12988.

This rule will not have substantial direct effects on the States, in their relationship between the Federal Government and the States or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612 the Service has determined that the rule does not have significant Federalism implications to warrant the preparation of a Federalism Assessment.

The Service has determined that the rule has no potential takings of private property implications as defined in Executive Order 12630.

Persons registering with the Service for a captive-bred wildlife registration requires the collection of information, and the Office of Management and Budget has approved the collection of information contained in this rule under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1018-0093 with an expiration date of February 28, 20001. The application information submitted by a person for a captive-bred wildlife registration is used by the Service to make decisions in accordance with wildlife regulations on the issuance, suspension, revocation or denial of permits. The Service has reviewed all permit information collection requirements and ensured the burden imposed on the public is the lowest possible. It should be noted that the main intent of this rule is to lower the number of persons needing a registration.

The Service has reviewed this rule under Executive Order 12372 and

determined that intergovernmental consultation is unnecessary.

The Service has determined that these regulations are categorically excluded from further National Environmental Policy Act (NEPA) requirements. Part 516 of the Departmental Manual, Chapter 6, Appendix I, section 1.4(A)(1) categorically excludes changes or amendments to an approved action when such changes have no potential for causing substantial environmental impact.

The Service has evaluated possible effects on Federally recognized Tribes and determined that there will be no adverse effects to any Tribe. Any individual tribal member possessing a CBW registration will receive the same beneficial regulatory and economic relief as other registrants who hold wildlife species that will be exempted by this rule.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

For the reasons set forth in the preamble, title 50, chapter I, subchapter B, part 17, subpart C is amended as set forth below.

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500.

Subpart A—Introduction and General Provisions

2. The definition of "Harass" in § 17.3 is revised to read as follows:

§ 17.3 Definitions.

* * * * *

Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted:

- (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,
- (2) Breeding procedures, or
- (3) Provisions of veterinary care for confining, tranquilizing, or

anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.

* * * * *

Subpart C—Endangered Wildlife

3. Section 17.21(g) is revised to read as follows:

§ 17.21 Prohibitions.

* * * * *

(g) *Captive-bred wildlife.* (1) Notwithstanding paragraphs (b), (c), (e) and (f) of this section, any person may take; export or re-import; deliver, receive, carry, transport or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered wildlife that is bred in captivity in the United States provided either that the wildlife is of a taxon listed in paragraph (g)(6) of this section, or that the following conditions are met:

(i) The wildlife is of a species having a natural geographic distribution not including any part of the United States, or the wildlife is of a species that the Director has determined to be eligible in accordance with paragraph (g)(5) of this section;

(ii) The purpose of such activity is to enhance the propagation or survival of the affected species;

(iii) Such activity does not involve interstate or foreign commerce, in the course of a commercial activity, with respect to non-living wildlife;

(iv) Each specimen of wildlife to be re-imported is uniquely identified by a band, tattoo or other means that was reported in writing to an official of the Service at a port of export prior to export from the United States; and

(v) Any person subject to the jurisdiction of the United States who engages in any of the activities authorized by this paragraph does so in accordance with paragraphs (g) (2), (3) and (4) of this section, and with all other applicable regulations in this Subchapter B.

(2) Any person subject to the jurisdiction of the United States seeking to engage in any of the activities authorized by this paragraph must first register with the Service (Office of Management Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Arlington, Virginia 22203). Requests for registration must be submitted on an official application form (Form 3-200-41) provided by the Service, and must include the following information:

(i) The types of wildlife sought to be covered by the registration, identified by common and scientific name to the

taxonomic level of family, genus or species;

(ii) A description of the applicant's experience in maintaining and propagating the types of wildlife sought to be covered by the registration, and when appropriate, in conducting research directly related to maintaining and propagating such wildlife;

(iii) Photograph(s) or other evidence clearly depicting the facilities where such wildlife will be maintained; and

(iv) a copy of the applicant's license or registration, if any, under the animal welfare regulations of the U.S. Department of Agriculture (9 CFR part 2).

(3) Upon receiving a complete application, the Director will decide whether or not the registration will be approved. In making this decision, the Director will consider, in addition to the general criteria in § 13.21(b) of this subchapter, whether the expertise, facilities or other resources available to the applicant appear adequate to enhance the propagation or survival of the affected wildlife. Public education activities may not be the sole basis to justify issuance of a registration or to otherwise establish eligibility for the exception granted in paragraph (g)(1) of this section. Each person so registered must maintain accurate written records of activities conducted under the registration, and allow reasonable access to Service agents for inspection purposes as set forth in §§ 13.46 and 13.47. Each person registered must submit to the Director an individual written annual report of activities, including all births, deaths and transfers of any type.

(4) Any person subject to the jurisdiction of the United States seeking to export or conduct foreign commerce in captive-bred endangered wildlife that will not remain under the care of that person must first obtain approval by providing written evidence to satisfy the Director that the proposed recipient of the wildlife has expertise, facilities or other resources adequate to enhance the propagation or survival of such wildlife and that the proposed recipient will use such wildlife for purposes of enhancing the propagation or survival of the affected species.

(5)(i) The Director will use the following criteria to determine if wildlife of any species having a natural geographic distribution that includes any part of the United States is eligible for the provisions of this paragraph:

(A) Whether there is a low demand for taking of the species from wild populations, either because of the success of captive breeding or because of other reasons, and

(B) Whether the wild populations of the species are effectively protected from unauthorized taking as a result of the inaccessibility of their habitat to humans or as a result of the effectiveness of law enforcement.

(ii) The Director will follow the procedures set forth in the Act and in the regulations thereunder with respect to petitions and notification of the public and governors of affected States when determining the eligibility of species for purposes of this paragraph.

(iii) In accordance with the criteria in paragraph (g)(5)(i) of this section, the Director has determined the following species to be eligible for the provisions of this paragraph:

Laysan duck (*Anas laysanensis*).

(6) Any person subject to the jurisdiction of the United States seeking to engage in any of the activities authorized by paragraph (g)(1) of this section may do so without first registering with the Service with respect to the bar-tailed pheasant (*Syrnaticus humiae*), Elliot's pheasant (*S. ellioti*), Mikado pheasant (*S. mikado*), brown eared pheasant (*Crossoptilon mantchuricum*), white eared pheasant (*C. crossoptilon*), cheer pheasant (*Catreus wallichii*), Edward's pheasant (*Lophura edwardsi*), Swinhoe's pheasant (*L. swinhoii*), Chinese monal pheasant (*Lophophorus lhuysii*), and Palawan peacock pheasant (*Polyplectron emphanum*); parakeets of the species *Neophema pulchella* and *N. splendida*; the Laysan duck (*Anas laysanensis*); the white-winged wood duck (*Cairina scutulata*); and the inter-subspecific crossed or "generic" tiger (*Panthera tigris*) (*i.e.*, specimens not identified or identifiable as members of the Bengal, Sumatran, Siberian or Indochinese subspecies (*Panthera tigris tigris*, *P.t. sumatrae*, *P.t. altaica* and *P.t. corbetti*, respectively) provided:

(i) The purpose of such activity is to enhance the propagation or survival of the affected exempted species;

(ii) Such activity does not involve interstate or foreign commerce, in the course of a commercial activity, with respect to non-living wildlife;

(iii) Each specimen to be re-imported is uniquely identified by a band, tattoo or other means that was reported in writing to an official of the Service at a port of export prior to export of the specimen from the United States;

(iv) No specimens of the taxa in this paragraph (g)(6) of this section that were taken from the wild may be imported for breeding purposes absent a definitive showing that the need for new bloodlines can only be met by wild specimens, that suitable foreign-bred,

captive individuals are unavailable, and that wild populations can sustain limited taking, and an import permit is issued under § 17.22;

(v) Any permanent exports of such specimens meet the requirements of paragraph (g)(4) of this section; and

(vi) Each person claiming the benefit of the exception in paragraph (g)(1) of this section must maintain accurate written records of activities, including births, deaths and transfers of specimens, and make those records accessible to Service agents for inspection at reasonable hours as set forth in §§ 13.46 and 13.47.

Dated: May 26, 1998.

Donald J. Barry,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 98-24384 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 285

[I.D. 090498A]

Atlantic Tuna Fisheries; Atlantic Bluefin Tuna; Closure

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

ACTION: General category closure.

SUMMARY: NMFS has determined that the 1998 Atlantic bluefin tuna (BFT) General category subquota for the September period will be attained by September 8, 1998. Therefore, General category fishery for September will be closed effective 11:30 p.m. on September 8, 1998. This action is being taken to prevent overharvest of the adjusted subquota of 201 metric tons (mt) for the September period.

DATES: Effective 11:30 p.m. local time on September 8, 1998, through September 30, 1998.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin, 301-713-2347, or Pat Scida, 978-281-9260.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 285. Section 285.22 subdivides the U.S. quota recommended by the International Commission for the Conservation of

Atlantic Tunas among the various domestic fishing categories.

General Category Closure

NMFS is required, under § 285.20(b)(1), to monitor the catch and landing statistics and, on the basis of these statistics, to project a date when the catch of BFT will equal the quota and publish a **Federal Register** announcement to close the applicable fishery.

Implementing regulations for the Atlantic tuna fisheries at 50 CFR 285.22 provide for a subquota of 194 mt of large medium and giant BFT to be harvested from the regulatory area by vessels permitted in the General category during the period beginning September 1 and ending September 30. Due to an underharvest of 7 mt in the June-August period subquota, the September period subquota was adjusted to 201 mt. Based on reported catch and effort, NMFS projects that this revised subquota will be reached by September 8, 1998. Therefore, fishing for, retaining, possessing, or landing large medium or giant BFT by vessels in the General category must cease at 11:30 p.m. local time September 8, 1998. The General category will reopen October 1, 1998, with a quota of 65 mt for the October-December period. If necessary, the October-December subquota will be adjusted based on actual landings from September. While the General category is open, General category permit holders are restricted from all BFT fishing, including tag-and-release fishing, on restricted-fishing days. However, for the remainder of September, previously designated restricted-fishing days are waived; therefore, General category permit holders may tag and release BFT while the General category is closed prior to the October 1 opening, subject to the requirements of the tag and release program at 50 CFR 285.27.

The intent of this closure is to prevent overharvest of the September period subquota established for the General category.

Classification

This action is taken under 50 CFR 285.20(b) and 50 CFR 285.22 and is exempt from review under E.O. 12866.

Authority: 16 U.S.C. 971 *et seq.*

Dated: September 4, 1998.

Richard W. Surdi,

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

[FR Doc. 98-24405 Filed 9-8-98; 2:00 pm]

BILLING CODE 3510-22-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 980903229-8229-01; I.D. 051898A]

RIN 0648-AK73

Fisheries of the Exclusive Economic Zone Off Alaska; Stand Down Requirements for Trawl Catcher Vessels Transiting Between the Bering Sea and the Gulf of Alaska

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement a stand down requirement for trawl catcher vessels transiting between the Bering Sea and Aleutian Islands Management Area (BSAI) and Gulf of Alaska (GOA). This action is necessary to prevent unexpected shifts of fishing effort between BSAI and GOA fisheries that can lead to overharvests of total allowable catch (TAC) in the Western and Central (W/C) Regulatory Areas of the GOA. This action is intended to further the goals and objectives of the Fishery Management Plan for Groundfish of the Gulf of Alaska and the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMPs).

DATES: Effective September 8, 1998.

ADDRESSES: Copies of the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for this action are available from the Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802, Attn: Lori J. Gravel, or by calling the Alaska Region, NMFS, at 907-586-7228.

FOR FURTHER INFORMATION CONTACT: Kent Lind, 907-586-7228 or kent.lind@noaa.gov.

SUPPLEMENTARY INFORMATION: The groundfish fisheries off Alaska are managed by NMFS under the FMPs. The FMPs were prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Fishery Conservation and Management Act. Federal regulations governing the groundfish fisheries appear at 50 CFR parts 600 and 679.

Background and Need for Action

In recent years, management of the inshore pollock and Pacific cod fisheries

of the W/C Regulatory Areas of the GOA has become increasingly difficult. The risk of harvest overruns has grown due to TAC amounts that are small relative to the potential fishing effort. The problem has been most acute in the Western Regulatory Area of the GOA due to the constant potential that numerous large catcher vessels based in the Bering Sea could cross into the GOA to participate in pollock and Pacific cod openings that have relatively small TACs. NMFS currently lacks a preseason vessel registration program that could gauge potential effort in these fisheries prior to openings, and inseason catch information in these fisheries is neither timely nor accurate enough to allow adequate management.

At its February 1998 meeting, the Council recommended two distinct management solutions to respond to the difficulties associated with managing the pollock and Pacific cod fisheries of the W/C Regulatory Areas. The first solution was a stand down requirement that is contained in this final rule. Trawl catcher vessels transiting between the BSAI and GOA would be required to offload and refrain from fishing for a period of time before beginning fishing in the new area. The second solution, currently under development by NMFS, is a vessel registration program that would require vessels to register with NMFS in advance of entering certain critical fisheries. Both of these programs are described in detail in the EA/RIR/FRFA prepared for this action.

On July 21, 1998, NMFS published a proposed rule in the **Federal Register** (63 FR 39065) to implement the Council's recommended stand down requirement for trawl catcher vessels transiting between the BSAI and GOA. Comments on the proposed rule were invited through August 20, 1998. No comments were received by the end of the comment period. The following is a summary of the major elements of the final rule. One clarifying change was made from the proposed rule.

This final rule establishes a stand down requirement for all trawl catcher vessels transiting between the BSAI and GOA that is in effect when non-CDQ pollock or Pacific cod fisheries are open in the BSAI or GOA. Vessels leaving the BSAI to fish in the GOA are required to offload all fish caught in the BSAI and are prohibited from deploying trawl gear in the W/C Regulatory Areas of the GOA until 1200 hours A.I.t. on the third day after the date that offloading was completed. Vessels transiting from the Western Regulatory Area to the BSAI are

subject to the same 3-day stand down requirement. However, vessels transiting from the Central Regulatory Area to the BSAI are subject to a 2-day stand down period. Further justification of the stand down requirement implemented by this final rule is contained in the preamble to the proposed rule and in the EA/RIR/FRFA prepared for this action.

Changes from the Proposed Rule

In the final rule, the table at § 679.23(h) was revised to specify that the stand down requirements do not apply to vessels engaged in Community Development Quota (CDQ) fishing in the BSAI. The proposed rule did not specifically mention whether the stand down requirements apply to vessels engaged in CDQ fishing. Vessels fishing under a CDQ management system use an individual vessel quota monitoring system. Consequently, a stand down requirement is unnecessary to prevent overharvest. The Council intended that this action apply only to open access fishing for pollock and Atka mackerel. There was no intent that it apply to vessels fishing under a CDQ management system.

Classification

This final rule has been determined to be not significant for the purposes of E.O. 12866.

NMFS prepared a final regulatory flexibility analysis that consists of the EA/RIR/FRFA and the preambles to the proposed and final rules. A copy of the EA/RIR/FRFA is available from NMFS (see ADDRESSES).

The FRFA concluded that the stand down requirement will affect an estimated 275 trawl catcher vessels fishing for groundfish in the GOA and BSAI, all of which are considered small entities, because it would restrict their ability to make rapid transits between the BSAI and GOA groundfish fisheries. Managing pollock and Pacific cod fisheries in the GOA has become increasingly difficult due to the potential for large catcher vessels based in the BSAI to participate in pollock and Pacific cod openings in the GOA that have relatively small TACs and risk harvest overruns. Ten to 15 catcher vessels, believed to be based in the BSAI, made rapid transits from one area to another in 1997. NMFS cannot calculate how many such vessels might transit in 1998, but the possibility exists that more than 10–15 catcher vessels could participate in GOA pollock and Pacific cod fisheries and risk harvest

overruns. NMFS projects that the stand down requirement could result in the foregone harvest of pollock to BSAI-based catcher vessels, which could exceed the estimated 7,663 mt of pollock harvested in 1997 by these vessels. NMFS cannot calculate this action's impact on the affected vessels, but the possibility exists that it could result in losses of 5 percent or more of these vessels' gross revenues and/or increase the costs of production by more than 5 percent.

No entities are expected to be forced out of business as a result of this action. Nevertheless, based on NMFS threshold guidelines, this action could result in a significant economic impact on a substantial number of small entities. A discussion of the regulatory alternatives and steps taken to minimize the significant economic impacts of this action are included in the EA/RIR/FRFA. No comments were received regarding this conclusion.

The immediate effectiveness of this action is required to prevent possible harvest overruns during the third pollock season in the W/C Regulatory Areas of the GOA, which opened on September 1. Accordingly, the Assistant Administrator for Fisheries, NOAA finds there is good cause to waive the 30-day delayed effectiveness period for this action under 5 U.S.C. 553(d)(3).

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: September 4, 1998.

Roland A. Schmitt,

Assistant Administrator for Fisheries,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 679 is amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for part 679 continues to read as follows:

Authority: 773 *et seq.*, 16 U.S.C. 1801 *et seq.*, and 3631 *et seq.*

2. In § 679.23 a new paragraph (h) is added to read as follows:

§ 679.23 Seasons.

* * * * *

(h) *Stand down requirements for trawl catcher vessels transiting between the BSAI and GOA.*

If you own or operate a catcher vessel and fish for groundfish with trawl gear in the* * *	You are prohibited from subsequently deploying trawl gear in the* * *	Until* * *
(1) BSAI while pollock or Pacific cod is open to directed fishing in the BSAI.	Western and Central Regulatory Areas of the GOA.	1200 hours A.I.t. on the third day after the date of landing or transfer of all groundfish on board the vessel harvested in the BSAI, unless you are engaged in directed fishing for Pacific cod in the GOA for processing by the offshore component.
(2) Western Regulatory Area of the GOA while pollock or inshore Pacific cod is open to directed fishing in the Western Regulatory Area of the GOA.	BSAI	1200 hours A.I.t. on the third day after the date of landing or transfer of all groundfish on board the vessel harvested in the Western Regulatory Area of the GOA, unless you are participating in a CDQ fishery.
(3) Central Regulatory Area of the GOA while pollock or inshore Pacific cod is open to directed fishing in the Central Regulatory Area of the GOA.	BSAI	1200 hours A.I.t. on the second day after the date of landing or transfer of all groundfish on board the vessel harvested in the Central Regulatory Area of the GOA, unless you are participating in a CDQ fishery.

[FR Doc. 98-24451 Filed 9-8-98; 3:15 pm]

BILLING CODE 3510-22-P

Proposed Rules

Federal Register

Vol. 63, No. 176

Friday, September 11, 1998

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.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2 and 51

RIN 3150—AG09

Streamlined Hearing Process for NRC Approval of License Transfers

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is proposing an amendment to its regulations that would provide specific uniform procedures and rules of practice for handling requests for hearings associated with license transfer applications involving both material and reactor licensees. Conforming amendments are also made to certain other parts of the Commission's regulations. These new provisions would provide for public participation and opportunity for an informal hearing on matters relating to license transfers, specify procedures for filing and docketing applications for license transfers, and assign appropriate authorities for issuance of administrative amendments to reflect approved license transfers. This rulemaking would also add a categorical exclusion that would permit processing of transfer applications without preparation of Environmental Assessments.

DATES: The comment period expires October 13, 1998. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date. Comments may be submitted either electronically or in written form.

ADDRESSES: Written comments should be sent to: Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff.

You may also provide comments via the NRC's interactive rulemaking web site through the NRC home page (<http://www.nrc.gov>).

From the home page, select "Rulemaking" from the tool bar. The interactive rulemaking web site can then be accessed by selecting "Rulemaking Forum." This site provides the ability to upload comments as files (any format), if your web browser supports that function. For information about the interactive rulemaking web site, contact Ms. Carol Gallagher, (301) 415-5905; e-mail CAG@nrc.gov.

Comments received on this rulemaking may be examined at the NRC Public Document Room, 2120 L Street NW (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Joseph R. Gray, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-1740, E-mail JRG@NRC.GOV.

SUPPLEMENTARY INFORMATION:

Introduction and Purpose

As part of broader efforts to improve the effectiveness of the agency's programs and processes, the Commission has begun an examination of its practices and procedures for considering proposed licensing and regulatory actions before it. The Commission recently issued a "Statement of Policy on Conduct of Adjudicatory Proceedings" directing its hearing boards and presiding officers to employ certain measures to ensure efficient conduct of proceedings within the framework of 10 CFR Part 2, Subpart G, the agency's formal adjudicatory hearing procedures. (See 63 FR 41872; August 5, 1998).

A number of categories of NRC licensees, but in particular the electric power industry, have undergone and will continue to undergo significant transformations as a result of changes to the economic and regulatory environment in which they operate. Electric utilities in particular are now operating in an environment which is increasingly characterized by restructuring and organizational change. In recent years, the Commission has seen a significant increase in the number of requests for transfers of NRC licenses. The number of requests related to reactor licenses has increased from a historical average of 2-3 per year to more than 20 requests in fiscal year 1997. With the restructuring that the

energy industry is undergoing, we expect this high rate of requests for approval of license transfers to continue. Because of the need for expeditious decision making from all agencies, including the Commission, for these kinds of transactions, timely and effectively resolution of requests for transfers on the part of the Commission is essential.

In general, license transfers do not involve any changes to plant operations or significant changes in personnel of consequence to the continued reasonable assurance of public health and safety, but rather involve changes in ownership or partial ownership of facilities at a corporate level. Section 184 of the Atomic Energy Act of 1954, as amended (AEA), specifies, however, that:

[N]o license granted hereunder * * * shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing. (42 U.S.C. 2234; 10 CFR 30.34(b), 40.46, 50.80.)

Transfers falling within the foregoing provision include indirect transfers which might entail, for example, the establishment of a holding company over an existing licensee, as well as direct transfers, such as transfer of an ownership interest held by a non-operating, minority owner, and the complete transfer of the ownership and operating authority of a single or majority owner. Although other requirements of the Commission's licensing provisions may also be addressed to the extent relevant to the particular transfer action, typical staff review of such applications consists largely of assuring that the ultimately licensed entity has the capability to meet financial qualification and decommissioning funding aspects of NRC regulations. These financial capabilities are important over the long term, but have no direct or immediate impact on the requirements for day-to-day operations at a licensed facility. The same is generally true of applications involving the transfer of materials licenses.

Notwithstanding the nature of the issues relevant to a decision on whether to give consent to a license transfer, past

Commission practice has generally used formal hearing procedures in accordance with the provisions of 10 CFR Part 2, Subpart G, for reactor license transfers or informal hearing procedures as provided by 10 CFR Part 2, Subpart L, in connection with materials licenses. As explained above, however, such transfers do not, as a general proposition, involve the type of technical issues with immediate impact on the actual operation of the facilities that could benefit from review by a multi-member, multi-disciplined Atomic Safety and Licensing Board historically used by the Commission in hearings on initial licensing or issuing amendments to licenses that substantially affect the technical operations of a licensed reactor facility. It is a matter suitable for reasonable discussion whether such complex hearing procedures provide the best means of reaching decisions on such technical issues, but, be they the best or not, they clearly are not required and are not the most efficient means for resolving the issues encountered in license transfers. Accordingly, the Commission has determined that requests for hearings on applications for license transfers would be more effectively handled by a separate Subpart of 10 CFR Part 2 which establishes an efficient and appropriate process for handling hearing requests associated with transfer applications commensurate with the nature of the issues involved and the rights of all parties.

The basic requirement for an opportunity for a hearing on a license transfer is found in Section 189.a of the Atomic Energy Act of 1954, as amended (AEA), which provides that:

[I]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. (42 U.S.C. 2239(a)(1).)

The Commission believes AEA sections 184 and 189 give the Commission the flexibility to fashion procedures which provide for a fair process to consider any issues raised concerning license transfers while still proceeding in an expedited manner. In 1983, a hearing on a materials license amendment was held not to be required by statute, i.e. (Sec. 189.a of the Atomic Energy Act, to be conducted "on the record". *City of West Chicago v. U.S. Nuclear Regulatory Commission*, 701 F.2d 632, 641-45 (7th Cir. 1983). There, the court declined to read section 189.a

as requiring "on-the-record" hearings, in the absence of clear Congressional "intent to trigger the formal on-the-record hearing provisions of the APA." Id. at 641. The Commission has since stated that it interprets section 189.a as not requiring formal hearings in reactor licensing proceedings. En Banc Brief for Respondents dated August 30, 1991 (filed in the U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1381, *Nuclear Information and Resource Service v. NRC*, at pp. 32-38).

During the past several years, the Commission has, on several occasions, undertaken to tailor procedures appropriate to reaching decisions on particular types of proposed actions. These approaches have been upheld by the courts using the principles set forth in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-844 (1984). In *Nuclear Information Resource Service v. Nuclear Regulatory Commission*, 969 F.2d 1169, 1173 (D.C. Cir. 1992), upholding the Commission's new procedures for issuance of a combined license for standardized reactor designs, the Court noted that

While this section [189.a] plainly requires a "hearing upon request" before the "granting" of a license, it provides no unambiguous instruction as to how the "hearing" is to be held; nor does it speak in any direct fashion to the question of whether the Commission must rehear issues already resolved at earlier stages in the licensing process. As we noted in *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 53-54 (D.C. Cir. 1990) ("UCS II"):

[T]he [Atomic Energy] Act itself nowhere describes the content of a hearing or prescribes the manner in which this "hearing" is to be run. * * * We are, of course, obliged to defer to the operating procedures employed by the agency [i.e., move to a Chevron step II analysis] when the governing statute requires only that a "hearing" be held. (emphasis in original).

In *Kelley v. Selin*, 42 F.3d 1501, 1511 (6th Cir. 1995), the court followed a similar line of reasoning in concluding that the procedures adopted by the Commission to approve casks for spent nuclear fuel storage were acceptable. These decisions give the Commission confidence that an interpretation of section 189.a to permit the kind of procedures we propose here will find judicial support.¹

¹ Further, the Commission has specifically found that the statute does not mandate pre-effectiveness hearings for transfers of NRC licenses, an action which the Commission has noted is not a licensing action under Section 189.a(1) of the AEA. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 77 (1992). In this decision, the Commission determined that the consent called for by Section 184 of the AEA was to be granted by order, not by license amendment, though it was recognized that

To promote uniformity, the proposed hearing procedures for license transfers will apply to both materials and reactor licenses. The procedures are designed to provide for public participation in the event of requests for a hearing under these provisions, while at the same time providing an efficient process that recognizes the time-sensitivity normally present in transfer cases.

The proposed procedures would cover any direct or indirect transfer for which NRC approval is required pursuant to the regulatory provisions under which the license was issued. NRC regulations and the Atomic Energy Act require approval of any transfer of control of a license. See AEA, Sec. 184. 42 U.S.C. 2234. This would include those transfers that require license amendments and those that do not. It should be recognized that not all license transfers will require license amendments. For example, the total acquisition of a licensee, without a change in the name of the licensee, (e.g., through the creation of a holding company which acquires the existing licensee but which, beyond ownership of the licensee, does not otherwise affect activities for which a license is required), would require NRC approval, but would not necessarily require any changes in the NRC license for the facilities owned by the licensee.

These procedures do not expand or change the circumstances under which NRC approval of a transfer is necessary nor do they change the circumstances under which a license amendment would be required to reflect an approved transfer. Amendments to licenses are required only to the extent that ownership or operating authority of a licensee, as reflected in the license itself, is changed by a transfer. A discussion of the process for issuing amendments associated with an approved transfer, when necessary, is provided below.

The proposed procedures, similar to those used by the Commission in cases involving export and import licensing hearings under 10 CFR Part 110, provide for a legislative type hearing for license transfers. These procedures will provide opportunities for meaningful public participation while minimizing areas where a formal adjudicatory process could introduce delays without any commensurate benefit to the substance of the Commission's decisionmaking.

The Commission will either elect to develop an evidentiary record and

conforming license amendments, of an administrative nature, might also be required to reflect a change in the name of the licensee. 35 NRC at 76-77 and n.6.

render a final decision itself, or will appoint a Presiding Officer who will be responsible for collecting evidence and developing a record for submission to the Commission. For such proceedings, the Commission may appoint a Presiding Officer from the Atomic Safety and Licensing Board Panel (ASLBP), although the proposed regulations do not restrict the sources from which the Commission may select.

It should be noted that the regulations do not require the NRC staff to participate in the proceedings as a formal party unless the Commission directs the use of Subpart G procedures or otherwise directs the staff to participate as a party. The Commission expects, nevertheless, that, in most cases, the staff will participate to the extent that it will offer into evidence staff's Safety Evaluation Report that supports its conclusions on whether to initially grant or deny the requested license transfer and provide one or more appropriate sponsoring witnesses. Greater staff involvement may be directed by the Commission on its own initiative or at the staff's choosing, as circumstances warrant.

One aspect of the proposed rule designed to improve efficiency is the decision to require oral hearings on all transfers where a hearing is to be held under Subpart M, with very limited exceptions. It has been the Commission's experience under Subpart L proceedings that intervenors are particularly interested in having the opportunity to make oral presentations or arguments for inclusion in the record. Even though such requests are rarely granted,² intervenors can and do introduce the issue of whether to have oral presentations in individual proceedings. Rather than allow the issue of oral presentations to become a point of contention in individual proceedings (which could introduce unnecessary delays in completing the record) the proposed rule would resolve this concern by ensuring that all parties have the opportunity to present oral arguments and evidence. The question of whether cross examination of witnesses should be allowed has also introduced an area for argument in Subpart L proceedings.³ The Commission has addressed this area of potential dispute in the proposed rules by providing for questioning of witnesses only by the Presiding Officer. Although only the Presiding Officer may question witnesses, the proposed rules specifically provide parties the

opportunity to present recommended questions to the Presiding Officer.

Another aspect of the rule intended to improve the efficiency of the adjudicatory process is that, while it does not provide for any separate discovery, it does require that a Hearing Docket containing all relevant documents and correspondence be established and be made available at the Commission's Public Document Room. This approach is in keeping with establishment of a case file as described in the Commission's recent Statement of Policy on Conduct of Adjudicatory Proceedings (63 FR 41872; August 5, 1998).

Finally, to improve the efficiency of the adjudicatory process, the proposed rules would impose scheduler milestones for the filing of testimony and responses and for the commencement of oral hearings. Subject to the Presiding Officer's scheduling adjustments in particular proceedings, the proposed procedures would require initial testimony, statements of position on the issues and responsive testimony to be filed within 50 days of the Commission's decision to grant a request for a hearing, and the hearing would commence in just over two months from the Commission's decision to hold a hearing. Assuming that the NRC staff is able to complete its technical review and take initial action on the transfer application within three to four months of its notice of receipt of the application, these procedures are expected to result in the issuance of a final Commission decision on the license transfer within about six to eight months of the notice of receipt of the application in routine cases. Complex cases requiring more extensive review or the use of different hearing procedures may take more time.

Administrative License Amendments Associated With License Transfers

As discussed above, not all license transfers require license amendments. Only when the license specifically has reference to entities or persons that no longer are accurate following the approved transfer will a situation exist that requires amendments to the license. Such amendments are essentially administrative in nature. That is, in determining whether to approve such amendments, the only issue is whether the license amendment accurately reflects the approved transfer. Substantive issues regarding requests for a hearing on the appropriateness of the transfer itself may only be considered using the procedures in this proposed rule. The Commission has previously noted that issuance of such an

administrative amendment, following the review and approval of the transfer itself, "presents no safety questions and clearly involves no significant hazards considerations." Long Island Lighting Company, *supra*, 35 NRC at 77, n.6.

Safety Evaluation Reports (SERs) prepared in connection with previous license transfers confirm that such transfers do not, as a general matter, have significant impacts on the public health and safety. Accordingly, the proposed regulations provide that conforming amendments to the license may be issued by the staff at any time after the staff has reviewed and approved the proposed transfer, notwithstanding the pendency of any hearing under the proposed Subpart M. As is done currently, staff approval of a transfer application will take the form of an order. Such order will also identify any license amendment issued.

The Commission, through this rulemaking, is making a generic finding that, for purposes of 10 CFR 50.58(b)(5), 50.91 and 50.92, administrative amendments which do no more than reflect an approved transfer and do not directly affect actual operating methods and actual operation of the facility do not involve a "significant hazards consideration" and do not require that a hearing opportunity be provided prior to issuance. It must be emphasized that any post-effectiveness hearing on such administrative amendments will be limited to the question of whether the amendment accurately reflects the approved transfer. The Commission does note, however, that it retains the authority, as a matter of discretion, to direct completion of hearings prior to issuance of the transfer approval and any required amendments in individual cases and to direct the use of other hearing procedures, if the Commission believes it is in the interest of public health and safety to do so.

Environmental Issues

The staff has completed numerous Environmental Assessments related to license transfers. These assessments have uniformly demonstrated that there are no significant environmental effects from license transfers. Indeed, as the Commission has noted previously, amendments effectuating an approved transfer present no safety questions and involve no significant hazards considerations.⁴ Accordingly, the Commission has determined that a new categorical exclusion should be added to 10 CFR Part 51 which will obviate the need for the staff to continue to conduct

² Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 120 (1995)

³ *Id.*

⁴ Long Island Lighting Company, *supra*, 35 NRC at 77, n. 6.

individual Environmental Assessments in each transfer case.

Limitation to License Transfers

The Commission wishes to emphasize that the proposed rules address only license transfers and associated administrative amendments to reflect transfers. Requests for license amendments which involve changes in actual operations or requirements directly involving health and safety-related activities will continue to be subject to the amendment processes currently in use, including the requirement for individualized findings under 10 CFR 50.58, 50.91 and 50.92 that address the necessity for pre-effectiveness hearings.

Finding of No Significant Environmental Impact and Categorical Exclusion

The Commission has determined under the National Environmental Policy Act (NEPA) of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR Part 51, that this rule, if adopted, falls within the categorical exclusion appearing at 10 CFR 51.22 (c)(1) for which neither an Environmental Assessment nor an Environmental Impact Statement is required.

Further, under its procedures for implementing NEPA, the Commission may exclude from preparation of an environmental impact statement, or an environmental assessment, a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in NRC proceedings. In this rulemaking, the Commission proposes to find that the approval of a direct or indirect license transfer, as well as any required administrative license amendments to reflect the approved transfer, comprise a category of actions which do not individually or cumulatively have a significant effect on the human environment. Actions in this category are similar in that, under the AEA and Commission regulations, transfers of licenses (and associated administrative amendments to licenses) will not in and of themselves permit the licensee to operate the facility in any manner different from that which has previously been permitted under the existing license. Thus, the transfer will usually not raise issues of environmental impact that differ from those considered in initial licensing of a facility. In addition, the denial of a transfer would also have, in and of itself, no impact on the environment, since the licensee would

still be authorized to operate the facility in accordance with the existing license.

Environmental assessments that have been conducted regarding numerous license transfers under existing regulations have not demonstrated the existence of a major federal action significantly affecting the environment. Further, the proposed regulations do not apply to any request for an amendment that would directly affect the actual operation of a facility. Amendments that directly affect the actual operation of a facility would be subject to consideration pursuant to the existing license amendment processes, including the requirements in 10 CFR Part 2, Subparts G or L, as appropriate and applicable environmental review requirements of 10 CFR Part 51.

Paperwork Reduction Act Statement

The proposed rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et. seq.). Existing requirements for 10 CFR Part 51 were approved by the Office of Management and Budget, approval number 3150-0021.

Public Protection Notification

If an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

Regulatory Analysis

To determine whether the amendments to 10 CFR Part 2 contained in this proposed rule were appropriate, the Commission considered the following options:

1. The No-Action Alternative

This alternative was not deemed acceptable for the following reasons. First, this option would leave reactor transfers subject to hearings using multi-member, multi-disciplined licensing boards, even though such transfers do not involve the type of complex technical questions for which multi-member boards of diverse background may provide a useful technical pool of experience.

Second, the formal adjudicatory hearing process would needlessly add formality and resource burdens to the development of a record for reaching a decision on applications for transfer approval without any commensurate benefit to the public health and safety or the common defense and security.

Third, the current process for materials licensees under 10 CFR Part 2, Subpart L, while not utilizing the multi-member licensing boards, does not

necessarily result in uniform treatment of all license transfer requests, and provides at least the potential for more formal hearings. Even if the requests for more formal procedures are not granted in typical materials cases, the process of receiving motions for more formal procedures, allowing responses from all parties to those requests, and the need for the Presiding Officer to consider and rule on such requests introduces issues and litigation on matters not involving the merits of the particular application and thus introduces the potential for delays in materials license transfer proceedings, without clear benefit to the public health and safety or the common defense and security.

2. Use 10 CFR Part 2, Subpart G for All License Transfers

While assuring uniformity for all license transfer requests, this option would not result in an expeditious process that would avoid the use of multi-member licensing boards which is unnecessary given the nature of typical transfer applications. It would also result in added formality and resources being devoted to materials license transfers on the part of all parties to the hearing, without any resulting benefit to public health and safety.

3. Use of 10 CFR Part 2, Subpart L for All License Transfers

This option was considered as viable to achieve uniformity and to avoid the need for multi-member licensing boards for conducting requested hearings. Subpart L provides for paper hearings unless oral presentations are ordered by the Presiding Officer. Further, Subpart L allows the Presiding Officer the option of recommending to the Commission that more formal procedures be used. Even though such requests are rarely granted, as a practical matter, there are delays in the proceeding while parties petition the Presiding Officer and/or the Commission to have oral hearings and to use additional procedures, such as cross-examination and formal discovery. Such discretion in structuring individual hearings is appropriate where the breadth of potential actions and licensees (covering essentially all amendments for a wide variety of materials licensees) is governed by a single hearing process. This flexibility, however, inevitably leads to delays as each party to the hearings proposes and presents arguments to the Presiding Officer concerning how the hearing should be structured.

Where, as in the proposed rule, the Commission is concerned with only one type of approval, the Commission has the ability to resolve through

rulemaking many of these procedural points concerning the conduct of the hearing. The resolution of these issues will allow the parties in license transfer proceedings to move expeditiously to examination of the substantive issues in the proceeding. The proposed process, similar to a legislative-type hearing, will also result in the record promptly reaching the Commission where a final agency determination can be made. The proposed rule dictates that oral hearings be held on each application for which a hearing request is granted unless the parties unanimously agree to forgo the oral hearing. This will remove the potential for a delay while parties petition the Presiding Officer for an oral hearing. Further, the proposed rule provides that the Presiding Officer will conduct all questioning of witnesses and there are no provisions for formal discovery, although docket files with relevant materials will be publicly available. The proposed rule resolves several areas of frequent dispute in Subpart L proceedings and was seen, therefore, as being more appropriate for license transfer proceedings where a timely decision is important to the public interest. These efficiencies can be achieved without any negative effect on substantive decisionmaking or the rights of all parties to a full and fair hearing since all parties will be allowed to present relevant witnesses, written testimony, and oral arguments, which should result in a high quality record on substantive issues for use by the Commission in reaching a decision on contested issues.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule does not change any requirements for submittal of license transfer requests to NRC, rather, the procedures designate how NRC will handle requests for hearings on applications for license transfers. Most requested hearings on license transfer applications involve reactor licensees which are large organizations which do not fall within the definition of a small business found in section 3 of the Small Business Action, 15 U.S.C. 632, or within the small Business Standards set forth in 13 CFR Part 121 or in the size standards adopted by the NRC (10 CFR 2.810). Based on the historically low number of requests for hearings involving materials licensees, it is not expected that this rule will have any

significant economic impact on a substantial number of small businesses.

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule and a backfit analysis is not required, because these amendments do not involve any provisions that would impose backfits as defined in 10 CFR 50.109. The rule does not constitute a backfit under 10 CFR 50.109, because it does not propose a change to or additions to requirements for existing structures, systems, components, procedures, organizations or designs associated with the construction or operation of a facility.

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalties, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 51

Administrative practice and procedure, Environmental impact statement, Nuclear materials, Nuclear power plants and reactors, Reporting and record keeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Parts 2 and 51.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 is revised to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f); Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183i 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 161 b, i, o, 182, 186, 234, 68 Stat. 948-951, 955, 83 Stat. 444, as

amended (42 U.S.C. 2201 (b), (i), (o), 2236, 2282); sec. 206, 88 Stat 1246 (42 U.S.C. 5846). Sections 2.205(j) also issued under Pub. L. 101-410, 104 Stat. 890, as amended by section 31001(s), Pub. L. 104-134, 110 Stat. 1321-373 (28 U.S.C. 2461 note). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553, Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Subpart M also issued under sec. 184 (42 U.S.C. 2234) and sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135).

2. In § 2.101 paragraph (a)(1) is revised to read as follows:

§ 2.101 Filing of application.

(a)(1) An application for a license, a license transfer, or an amendment to a license shall be filed with the Director of the Office of Nuclear Reactor Regulation or Director of the Office of Nuclear Material Safety and Safeguards, as prescribed by the applicable provisions of this chapter. A prospective applicant may confer informally with the staff prior to the filing of an application.

* * * * *

3. In § 2.1201 paragraph (a)(1) is revised to read as follows:

§ 2.1201 Scope of subpart.

(a) * * *

(1) The grant, renewal or licensee-initiated amendment of a materials license subject to parts 30, 32 through 35, 39, 40, or 70 of this chapter, with the exception of license amendments related to an application to transfer a license; or

* * * * *

4. In § 2.1205, paragraphs (a) and (b) are revised to read as follows:

§ 2.1205 Request for a hearing: petition for leave to intervene.

(a) Any person whose interest may be affected by a proceeding for the grant, renewal, or licensee-initiated amendment of a license subject to this subpart may file a request for a hearing.

(b) An applicant for a license, a license amendment, or a license renewal who is issued a notice of proposed

denial or a notice of denial and who desires a hearing shall file the request for the hearing within the time specified in § 2.103 in all cases. An applicant may include in the request for hearing a request that the presiding officer recommend to the Commission that procedures other than those authorized under this subpart be used in the proceeding, provided that the applicant identifies the special factual circumstances or issues which support the use of other procedures.

* * * * *

5. In Part 2, a new Subpart M is added to read as follows:

Subpart M—Public Notification, Availability of Documents and Records, Hearing Requests and Procedures for Hearings on License Transfer Applications

Sec.

- 2.1300 Scope of subpart M.
- 2.1301 Public notice of receipt of a license transfer application.
- 2.1302 Notice of withdrawal of an application.
- 2.1303 Availability of documents in the Public Document Room.
- 2.1304 Hearing procedures.
- 2.1305 Written comments.
- 2.1306 Hearing request or intervention petition.
- 2.1307 Answers and replies.
- 2.1308 Commission action on a hearing request or intervention petition.
- 2.1309 Notice of oral hearing.
- 2.1310 Notice of hearing consisting of written comments.
- 2.1311 Conditions in a notice or order.
- 2.1312 Authority of the Secretary.
- 2.1313 Filing and service.
- 2.1314 Computation of time.
- 2.1315 Generic determination regarding license amendments to reflect transfer.
- 2.1316 Authority and role of NRC staff.
- 2.1317 Hearing docket.
- 2.1318 Acceptance of hearing documents.
- 2.1319 Presiding officer.
- 2.1320 Responsibility and power of the presiding officer in an oral hearing.
- 2.1321 Participation and schedule for submissions in a hearing consisting of written comments.
- 2.1322 Participation and schedule for submissions in an oral hearing.
- 2.1323 Presentation of testimony in an oral hearing.
- 2.1324 Appearance in an oral hearing.
- 2.1325 Motions and requests.
- 2.1326 Burden of proof.
- 2.1327 Application for a stay of the effectiveness of NRC staff action on license transfer.
- 2.1328 Default.
- 2.1329 Waiver of a rule or regulation.
- 2.1330 Reporter and transcript for an oral hearing.
- 2.1331 Commission action.

Subpart M—Public Notification, Availability of Documents and Records, Hearing Requests and Procedures for Hearings on Licensed Transfer Applications

§ 2.1300 Scope of Subpart M.

This subpart governs requests for, and procedures for conducting, hearings on any application for the direct or indirect transfer of control of an NRC license which transfer requires prior approval of the NRC under the Commission's regulations, governing statutes, or pursuant to a license condition. This subpart is to provide the only mechanism for requesting hearings on license transfer requests, unless contrary case specific orders are issued by the Commission.

§ 2.1301 Public notice of receipt of a license transfer application.

(a) The Commission will notice the receipt of each application for direct or indirect transfer of a specific NRC license by placing a copy of the application in the NRC Public Document Room.

(b) The Commission will also publish in the **Federal Register** a notice of receipt of an application for approval of a license transfer involving 10 CFR part 50 and part 52 licenses and major fuel cycle facility licenses issued under 10 CFR part 70. This notice constitutes the notice required by § 2.105 with respect to all matters related to the application requiring NRC approval.

(c) Periodic lists of applications received may be obtained upon request addressed to the Public Document Room, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

§ 2.1302 Notice of withdrawal of an application.

The Commission will notice the withdrawal of an application by publishing the notice of withdrawal in the same manner as the notice of receipt of the application was published under § 2.1301.

§ 2.1303 Availability of documents in the Public Document Room.

Unless exempt from disclosure under part 9 of this chapter, the following documents pertaining to each application for a license transfer requiring Commission approval will be placed in the Public Document Room when available:

- (a) The license transfer application and any associated requests;
- (b) Commission correspondence with the applicant or licensee related to the application;
- (c) **Federal Register** notices;
- (d) The NRC staff Safety Evaluation Report (SER).

(e) Any NRC staff order which acts on the license transfer application; and

(f) If a hearing is held, the hearing record and decision.

§ 2.1304 Hearing procedures.

The procedures in this subpart will constitute the exclusive basis for hearings on license transfer applications for all NRC specific licenses.

§ 2.1305 Written comments.

(a) As an alternative to requests for hearings and petitions to intervene, persons may submit written comments regarding license transfer applications. The Commission will consider and, if appropriate, respond to these comments, but these comments do not otherwise constitute part of the decisional record.

(b) These comments should be submitted within 30 days after public notice of receipt of the application and addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff.

(c) The Commission will provide the applicant with a copy of the comments. Any response the applicant chooses to make to the comments must be submitted within 10 days of service of the comments on the applicant. Such responses do not constitute part of the decisional record.

§ 2.1306 Hearing request or intervention petition.

(a) Any person whose interest may be affected by the Commission's action on the application may request a hearing or petition for leave to intervene on a license application for approval of a direct or indirect transfer of a specific license.

(b) Hearing requests and intervention petitions must—

(1) State the name, address, and telephone number of the requestor or petitioner;

(2) Set forth the issues sought to be raised and

(i) Demonstrate that such issues are within the scope of the proceeding on the license transfer application,

(ii) Demonstrate that such issues are relevant to the findings the NRC must make to grant the application for license transfer,

(iii) Provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issues and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issues, and

(iv) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

(3) Specify both the facts pertaining to the petitioner's interest and how the interest may be affected, with particular reference to the factors in § 2.1308(a).

(4) Be served on both the applicant and the NRC Office of the Secretary by any of the methods for service specified in § 2.1313.

(c) Hearing requests and intervention petitions will be considered timely only if filed not later than:

(1) 20 days after notice of receipt is published in the **Federal Register**, for those applications published in the **Federal Register**;

(2) 45 days after notice of receipt is placed in the Public Document Room for all other applications; or

(3) Such other time as may be provided by the Commission.

§ 2.1307 Answers and replies.

(a) Unless otherwise specified by the Commission, an answer to a hearing request or intervention petition may be filed within 10 days after the request or petition has been served.

(b) Unless otherwise specified by the Commission, a reply to an answer may be filed within 5 days after service of that answer.

(c) Answers and replies should address the factors in § 2.1308.

§ 2.1308 Commission action on a hearing request or intervention petition.

(a) In considering a hearing request or intervention petition on an application for a transfer of an NRC license, the Commission will consider:

(1) The nature of the Petitioner's alleged interest;

(2) Whether that interest will be affected by an approval or denial of the application for transfer;

(3) The possible effect of an order granting the request for license transfer on that interest, including whether the relief requested is within the Commission's authority, and, if so, whether granting the relief requested would redress the alleged injury;

and
(4) Whether the issues sought to be litigated are

(i) Within the scope of the proceeding;

(ii) Relevant to the findings the Commission must make to act on the application for license transfer;

(iii) Appropriate for litigation in the proceeding, and

(iv) Adequately supported by the statements, allegations, and documentation required by § 2.1306(b)(2)(iii) and (iv).

(b) Untimely hearing requests or intervention petitions may be denied

unless good cause for failure to file on time is established. In reviewing untimely requests or petitions, the Commission will also consider:

(1) The availability of other means by which the requestor's or petitioners' interest will be protected or represented by other participants in a hearing; and

(2) The extent to which the issues will be broadened or final action on the application delayed.

(c) The Commission will deny a request or petition to the extent it pertains solely to matters outside its jurisdiction.

(d)(1) After consideration of the factors covered by paragraphs (a) through (c) of this section, the Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

(2) Hearings under this subpart will be oral hearings, unless, within 15 days of the service of the notice or order granting a hearing, the parties unanimously agree and file a joint motion requesting a hearing consisting of written comments. No motion to hold a hearing consisting of written comments will be entertained absent unanimous consent of all parties.

(3) A denial of a request for hearing and a denial of any petition to intervene will set forth the reasons for the denial.

§ 2.1309 Notice of oral hearing.

(a) A notice of oral hearing will—

(1) State the time, place and issues to be considered;

(2) Provide names and addresses of participants,

(3) Specify the time limit for participants and others to indicate whether they wish to present views;

(4) Specify the schedule for the filing of written testimony, statements of position, proposed questions for the Presiding Officer to consider, and rebuttal testimony consistent with the schedule provisions of § 2.1321;

(5) Specify that the oral hearing shall commence within 15 days of the date for submittal of rebuttal testimony unless otherwise ordered;

(6) State any other instructions the Commission deems appropriate;

(7) If so determined by the NRC staff or otherwise directed by the Commission, direct that the staff participate as a party with respect to some or all issues.

(b) If the Commission is not the Presiding Officer, the notice of oral hearing will also state:

(1) When the jurisdiction of the Presiding Officer commences and terminates;

(2) The powers of the Presiding Officer;

(3) Instructions to the Presiding Officer to certify promptly the completed hearing record to the Commission without a recommended or preliminary decision.

§ 2.1310 Notice of hearing consisting of written comments.

A notice of hearing consisting of written comments will:

(a) State the issues to be considered;

(b) Provide the names and addresses of participants;

(c) Specify the schedule for the filing of written testimony, statements of position, proposed questions for the Presiding Officer to consider for submission to the other parties, and rebuttal testimony, consistent with the schedule provisions of § 2.1321.

(d) State any other instructions the Commission deems appropriate.

§ 2.1311 Conditions in a notice or order.

(a) A notice or order granting a hearing or permitting intervention shall—

(1) Restrict irrelevant or duplicative testimony; and

(2) Require common interests to be represented by a single participant.

(b) If a participant's interests do not extend to all the issues in the hearing, the notice or order may limit her/his participation accordingly.

§ 2.1312 Authority of the Secretary.

The Secretary or the Assistant Secretary may rule on procedural matters relating to proceedings conducted by the Commission itself under this subpart to the same extent they can do so under § 2.772 for proceedings under subpart G.

§ 2.1313 Filing and service.

(a) Hearing requests, intervention petitions, answers, replies and accompanying documents must be served as described in paragraph (b) of this section by delivery, facsimile transmission, e-mail or other means that will ensure receipt by close of business on the due date for filing. Any participant filing hearing requests, intervention petitions, replies and accompanying documents should include information on mail and delivery addresses, e-mail addresses, and facsimile numbers in their initial filings which may be used by the Commission, Presiding Officer and other parties for serving documents on the participant.

(b) All filings must be served upon the applicant; the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and participants if any. If service to the Secretary is by delivery or by mail, the filings should be addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff. E-mail filings may be sent to the Secretary at the following e-mail address: SECY@NRC.GOV. Facsimile transmission filings may be filed with the Secretary using the following number: 301-415-1101.

(c) Service is completed by:

(1) Delivering the paper to the person; or leaving it in her or his office with someone in charge; or, if there is no one in charge, leaving it in a conspicuous place in the office; or, if the recipient has no office or it is closed, leaving it at her or his usual place of residence with some occupant of suitable age and discretion;

(2) Depositing it in the United States mail, properly stamped and addressed; or

(3) Any other manner authorized by law, when service cannot be made as provided in paragraphs (c)(1) or (2) of this section.

(4) For facsimile transmission, sending copies to the facsimile machine of the person being served;

(5) For e-mail, sending the filing in electronic form attached to an e-mail message directed to the person being served.

(d) Proof of service, stating the name and address of the person served and the manner and date of service, shall be shown, and may be made by—

(1) Written acknowledgment of the person served or an authorized representative; or

(2) The certificate or affidavit of the person making the service.

(e) The Commission may make special provisions for service when circumstances warrant.

§ 2.1314 Computation of time.

(a) In computing time, the first day of a designated time period is not included and the last day is included. If the last day is a Saturday, Sunday or legal holiday at the place where the required action is to be accomplished, the time period will end on the next day which is not a Saturday, Sunday or legal holiday.

(b) In time periods of 7 days or less, Saturdays, Sundays and holidays are not counted.

(c) Whenever an action is required within a prescribed period by a paper served pursuant to § 2.1307, 3 days shall be added to the prescribed period if service is by regular mail.

§ 2.1315 Generic determination regarding license amendments to reflect transfers.

(a) Unless otherwise determined by the Commission with regard to a specific application, the Commission has determined that any utilization facility license amendment conforming the license to reflect the transfer action is administrative in nature and involves no significant hazards considerations.

(b) Where administrative license amendments are necessary to reflect an approved transfer, such amendments will be included in the order that approves the transfer. Any challenge to the administrative license amendment is limited to the question of whether the license amendment accurately reflects the approved transfer.

§ 2.1316 Authority and role of NRC staff.

(a) During the pendency of any hearing under this subpart, consistent with the NRC staff's findings in its Safety Evaluation Report (SER), the staff is expected to promptly issue approval or denial of license transfer requests. Notice of such action shall be promptly transmitted to the Presiding Officer and parties to the proceeding.

(b) Except as otherwise directed in accordance with § 2.1309(a)(7), the staff is not required to be a party to proceedings under this subpart but will offer into evidence its SER associated with the transfer application and provide one or more sponsoring witnesses.

(c) If the staff desires to participate as a party, the staff shall notify the Presiding Officer and the parties and shall thereupon be deemed to be a party with all the rights and responsibilities of a party.

§ 2.1317 Hearing docket.

For each hearing, the Secretary will, maintain a docket which will include the hearing transcript, exhibits and all papers filed or issued in connection with the hearing. This file will be made available to all parties in accordance with the provisions of § 2.1303 and will constitute the only discovery in proceedings under this subpart.

§ 2.1318 Acceptance of hearing documents.

(a) Each document filed or issued must be clearly legible and bear the docket number, license application number, and hearing title.

(b) Each document shall be filed in one original and signed by the

participant or its authorized representative, with the address and date of signature indicated. The signature is a representation that the document is submitted with full authority, the person signing knows its contents and that, to the best of their knowledge, the statements made in it are true.

(c) A document not meeting the requirements of this section may be returned with an explanation for nonacceptance and, if so, will not be docketed.

§ 2.1319 Presiding officer.

(a) The Commission will ordinarily be the Presiding Officer at a hearing under this part. However, the Commission may provide in a hearing notice that one or more Commissioners, or any other person permitted by law, will preside.

(b) A participant may submit a written motion for the disqualification of any person presiding. The motion shall be supported by an affidavit setting forth the alleged grounds for disqualification. If the Presiding Officer does not grant the motion or the person does not disqualify himself and the Presiding Officer or such other person is not the Commission or a Commissioner, the Commission will decide the matter.

(c) If any person presiding deems himself or herself disqualified, he or she shall withdraw by notice on the record after notifying the Commission.

(d) If a Presiding Officer becomes unavailable, the Commission will designate a replacement.

(e) Any motion concerning the designation of a replacement Presiding Officer shall be made within 5 days after the designation.

(f) Unless otherwise ordered by the Commission, the jurisdiction of a Presiding Officer other than the Commission commences as designated in the hearing notice and terminates upon certification of the hearing record to the Commission, or when the Presiding Officer is disqualified.

§ 2.1320 Responsibility and power of the presiding officer in an oral hearing.

(a) The Presiding Officer in any oral hearing shall conduct a fair hearing, develop a record that will contribute to informed decisionmaking, and, within the framework of the Commission's orders, have the power necessary to achieve these ends, including the power to:

(1) Take action to avoid unnecessary delay and maintain order;

(2) Dispose of procedural requests;

(3) Question participants and witnesses, and entertain suggestions as to questions which may be asked of participants and witnesses.

- (4) Order consolidation of participants;
 - (5) Establish the order of presentation;
 - (6) Hold conferences before or during the hearing;
 - (7) Establish time limits;
 - (8) Limit the number of witnesses; and
 - (9) Strike or reject duplicative or irrelevant presentations.
- (b) Where the Commission itself does not preside:

- (1) The Presiding Officer may certify questions or refer rulings to the Commission for decision;
- (2) Any hearing order may be modified by the Commission; and
- (3) The Presiding Officer will certify the completed hearing record to the Commission, which may then issue its decision on the hearing or provide that additional testimony be presented.

§ 2.1321 Participation and schedule for submission in a hearing consisting of written comments.

Unless otherwise limited by this subpart or by the Commission, participants in a hearing consisting of written comments may submit:

- (a) Initial written statements of position and written testimony with supporting affidavits on the issues. These materials shall be filed within 30 days of the date of the Commission's Notice granting a hearing pursuant to § 2.1308(d)(1), unless the Commission or Presiding Officer directs otherwise.

- (b) Written responses, rebuttal testimony with supporting affidavits directed to the initial statements and testimony of other participants, and proposed written questions for the Presiding Officer to consider for submittal to persons sponsoring testimony submitted under paragraph (a) of this section. These materials shall be filed within 20 days of the filing of the materials submitted under paragraph (a) of this section, unless the Commission or Presiding Officer directs otherwise.

- (c) Written concluding statements of position on the issues. These materials shall be filed within 20 days of the filing of the materials submitted under paragraph (b) of this section, unless the Commission or the Presiding Officer Directs otherwise.

§ 2.1322 Participation schedule for submissions in an oral hearing.

(a) Unless otherwise limited by this subpart or by the Commission, participants in an oral hearing may submit and sponsor in the hearing:

- (1) Initial written statements of position and written testimony with supporting affidavits on the issues.

These materials shall be filed within 30 days of the date of the Commission's notice granting a hearing pursuant to § 2.1308(d)(1), unless the Commission or Presiding Officer directs otherwise.

- (2) (i) Written responses and rebuttal testimony with supporting affidavits directed to the initial statements and testimony of other participants;

(ii) Proposed questions for the Presiding Officer to consider for propounding to persons sponsoring testimony.

- (3) These materials must be filed within 20 days of the filing of the materials submitted under paragraph (a)(1) of this section, unless the Commission or Presiding Officer directs otherwise.

(b) The oral hearing should commence within 65 days of the date of the Commission's notice granting a hearing unless the Commission or Presiding Officer directs otherwise. Ordinarily, questioning in the oral hearing will be conducted by the Presiding Officer, using either the Presiding Officer's questions or questions submitted by the participants or a combination of both.

- (c) Written post-hearing statements of position on the issues addressed in the oral hearing may be submitted within 20 days of the close of the oral hearing.

(d) The Commission, on its own motion, or in response to a request from a Presiding Officer other than the Commission, may use additional procedures, such as direct and cross-examination, or may convene a formal hearing under subpart G of 10 CFR part 2 on specific and substantial disputes of fact, necessary for the Commission's decision, that cannot be resolved with sufficient accuracy except in a formal hearing. The staff will be a party in any such formal hearing. Neither the Commission nor the Presiding Officer will entertain motions from the parties that request such special procedures or formal hearings.

§ 2.1323 Presentation of testimony in an oral hearing.

(a) All direct testimony in an oral hearing shall be filed no later than 15 days before the hearing or as otherwise ordered or allowed pursuant to the provisions of § 2.1322.

- (b) Written testimony will be received into evidence in exhibit form.

(c) Participants may designate and present their own witnesses to the Presiding Officer.

(d) Testimony for the NRC staff will be presented only by persons designated by the Executive Director for Operations for that purpose.

(e) Participants and witnesses will be questioned orally or in writing and only by the Presiding Officer. Questions may be addressed to individuals or to panels of participants or witnesses.

(f) The Presiding Officer may accept written testimony from a person unable to appear at the hearing, and may request him or her to respond to questions.

(g) No subpoenas will be granted at the request of participants for attendance and testimony of participants or witnesses or the production of evidence.

§ 2.1324 Appearance in an oral hearing.

(a) A participant may appear in a hearing on her or his own behalf or be represented by an authorized representative.

(b) A person appearing shall file a written notice stating her or his name, address and telephone number, and if an authorized representative, the basis of her or his eligibility and the name and address of the participant on whose behalf she or he appears.

(c) A person may be excluded from a hearing for disorderly, dilatory or contemptuous conduct, provided he or she is informed of the grounds and given an opportunity to respond.

§ 2.1325 Motions and requests.

(a) Motions and requests shall be addressed to the Presiding Officer, and, if written, also filed with the Secretary and served on other participants.

(b) Other participants may respond to the motion or request. Responses to written motions or requests shall be filed within 5 days after service unless the Commission or Presiding Officer directs otherwise.

(c) The Presiding Officer may entertain motions for extension of time and changes in schedule in accordance with paragraphs (a) and (b) of this section.

(d) When the Commission does not preside, in response to a motion or request, the Presiding Officer may refer a ruling or certify a question to the Commission for decision and notify the participants.

(e) Unless otherwise ordered by the Commission, a motion or request, or the certification of a question or referral of a ruling, shall not stay or extend any aspect of the hearing.

§ 2.1326 Burden of proof.

The applicant or the proponent of an order has the burden of proof.

§ 2.1327 Application for a stay of the effectiveness of NRC staff action on license transfer.

(a) Any application for a stay of the effectiveness of the NRC staff's order on the license transfer application shall be filed with the Commission within 5 days of the issuance of the notice of staff action pursuant to § 2.1316(a).

(b) An application for a stay must be no longer than 10 pages, exclusive of affidavits, and must contain:

(1) A concise summary of the action which is requested to be stayed; and
(2) A concise statement of the grounds for a stay, with reference to the factors specified in paragraph (d) of this section.

(c) Within 10 days after service of an application for a stay under this section, any participant may file an answer supporting or opposing the granting of a stay. Answers must be no longer than 10 pages, exclusive of affidavits, and should concisely address the matters in paragraph (b) of this section, as appropriate. No further replies to answers will be entertained.

(d) In determining whether to grant or deny an application for a stay, the Commission will consider

(1) Whether the requestor will be irreparably injured unless a stay is granted;

(2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;

(3) Whether the granting of a stay would harm other participants; and

(4) Where the public interest lies.

§ 2.1328 Default.

When a participant fails to act within a specified time, the Presiding Officer may consider that participant in default, issue an appropriate ruling and proceed without further notice to the defaulting participant.

§ 2.1329 Waiver of a rule or regulation.

(a) A participant may petition that a Commission rule or regulation be waived with respect to the license transfer application under consideration.

(b) The sole ground for a waiver shall be that, because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted.

(c) Waiver petitions shall specify why application of the rule or regulation would not serve the purposes for which it was adopted and shall be supported by affidavits to the extent applicable.

(d) Other participants may, within 10 days, file a response to a waiver petition.

(e) When the Commission does not preside, the Presiding Officer will certify the waiver petition to the Commission, which, in response, will grant or deny the waiver or direct any further proceedings.

§ 2.1330 Reporter and transcript for an oral hearing.

(a) A reporter designated by the Commission will record an oral hearing and prepare the official hearing transcript.

(b) Except for any portions that must be protected from disclosure under 10 CFR 2.790, transcripts will be placed in the Public Document Room, and copies may be purchased from the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

(c) Corrections of the official transcript may be made only as specified by the Secretary.

§ 2.1331 Commission action.

(a) Upon completion of a hearing, the Commission will issue a written opinion including its decision on the license transfer application and the reasons for the decision.

(b) The decision on the application following the hearing will be based on the record developed at hearing.

PART 51—ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

6. the authority citation for Part 51 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953. (42 U.S.C. 2201, 2297f); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842).

Subpart A also issued under National Environmental Policy Act of 1969, secs. 102, 104, 105, 83 Stat. 853–854, as amended (42 U.S.C. 4332, 4334, 4335); and Pub. L. 95–604, Title II, 92 Stat. 3033–3041; and sec. 193, Pub. L. 101–575, 104 Stat. 2835 42 U.S.C. 2243). Section 51.20, 51.30, 51.60, 51.80, and 51.97 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241, and sec. 148, Pub. L. 100–203, 101 Stat. 1330–223 (42 U.S.C. 10155, 10161, 10168). Section 51.22 also issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036–3038 (42 U.S.C. 2021) and under Nuclear Waste Policy Act of 1982, sec 121, 96 Stat. 2228 (42 U.S.C. 10141). Sections 51.43, 51.67, and 51.109 also under Nuclear Waste Policy Act of 1982, sec 114(f), 96 Stat. 2216, as amended (42 U.S.C. 10134).

7. In § 51.22, a new paragraph (c)(21) is added to read as follows:

§ 51.22 Criterion for categorical exclusion; identification of licensing and regulatory actions eligible for categorical exclusion or otherwise not requiring environmental review.

* * * * *

(c) * * *

(21) Approvals of direct or indirect transfers of any license issued by NRC and any associated amendments of license required to reflect the approval of a direct or indirect transfer of an NRC license.

* * * * *

Dated at Rockville, Maryland, this 4th day of September 1998.

For Nuclear Regulatory Commission.

John C. Hoyle,

Secretary of the Commission.

[FR Doc. 98–24456 Filed 9–10–98; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. 98–CE–68–AD]

RIN 2120–AA64

Airworthiness Directives; Burkhart Grob Luft-und Raumfahrt Models G115, G115A, G115B, G115C, G115C2, G115D, and G115D2 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to adopt a new airworthiness directive (AD) that would apply to all Burkhart Grob Luft-und Raumfahrt (Grob) Models G115, G115A, G115B, G115C, G115C2, G115D, and G115D2 airplanes. The proposed AD would require inspecting the area of the elevator trim tab hinges for cracks and a secure fit, and repairing any elevator trim tab hinges with cracks or where a proper secure fit is not found. The proposed AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Germany. The actions specified by the proposed AD are intended to prevent structural damage of the trim tab hinges caused by cracks, which could result in trim tab failure with consequent loss of control of the airplane.

DATES: Comments must be received on or before October 15, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 98–CE–68–

AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

Service information that applies to the proposed AD may be obtained from Burkhart Grob Luft-und Raumfahrt, D-8939 Mattsies, Federal Republic of Germany. This information also may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Mr. Karl M. Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106; telephone: (816) 426-6932; facsimile: (816) 426-2169.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 98-CE-68-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 98-CE-68-AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Discussion

The Luftfahrt-Bundesamt (LBA), which is the airworthiness authority for Germany, recently notified the FAA that an unsafe condition may exist on all Grob Models G115, G115A, G115B, G115C, G115C2, G115D, and G115D2 airplanes. The LBA reports incidents of cracks found in the area of the trim tab hinges on the affected airplanes. The LBA states that the cracks could be forming due to the trim tab end touching the upper elevator shell at full deflection. This would indicate a loose or non-secure fit of the trim tab hinges.

This condition, if not detected and corrected, could result in trim tab failure with consequent loss of control of the airplane.

Relevant Service Information

Grob has issued Service Bulletin 1078-75, dated May 15, 1998, which specifies procedures for inspecting the area of the elevator trim tab hinges for cracks and a secure fit. Included with this service bulletin are Installation Instructions No. 1078-75, dated May 15, 1998, which specify procedures for repairing any elevator trim tab hinges with cracks or where a proper secure fit is not found.

The LBA of Germany classified this service bulletin as mandatory and issued German AD 1998-299, dated June 4, 1998, in order to assure the continued airworthiness of these airplanes in Germany.

The FAA's Determination

These airplane models are manufactured in Germany and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the LBA of Germany has kept the FAA informed of the situation described above.

The FAA has examined the findings of the LBA; reviewed all available information, including the service information referenced above; and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of the Provisions of the Proposed AD

Since an unsafe condition has been identified that is likely to exist or develop in other Grob Models G115, G115A, G115B, G115C, G115C2, G115D, and G115D2 airplanes of the same type design registered in the United States, the FAA is proposing AD action. The

proposed AD would require inspecting the area of the elevator trim tab hinges for cracks and a secure fit, and repairing any elevator trim tab hinges with cracks or where a proper secure fit is not found. Accomplishment of the proposed inspection would be in accordance with Grob Service Bulletin 1078-75, dated May 15, 1998. Accomplishment of the proposed repairs, if necessary, would be accomplished in accordance with Grob Installation Instructions No. 1078-75, dated May 15, 1998.

Cost Impact

The FAA estimates that 26 airplanes in the U.S. registry would be affected by the proposed inspection, that it would take approximately 1 workhour per airplane to accomplish the proposed inspection, and that the average labor rate is approximately \$60 an hour. Based on these figures, the total cost impact of the proposed inspection on U.S. operators is estimated to be \$1,560, or \$60 per airplane.

If any of the affected airplanes would have trim tab hinges that were found cracked or where a proper secure fit was not found, the proposed repair would take approximately 5 workhours per airplane at an average labor rate of \$60 per hour. Parts would cost approximately \$25 per airplane. Based on these figures, the cost to repair any trim tab hinges found cracked, or where a proper secure fit was not found, would be approximately \$325 per airplane.

Regulatory Impact

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (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) if promulgated, 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. A copy of the draft regulatory evaluation prepared for this action has been placed in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the

location provided under the caption
ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (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. Section 39.13 is amended by adding a new airworthiness directive (AD) to read as follows:

Burkhart Grob Luft-und Raumfahrt: Docket No. 98-CE-68-AD.

Applicability: Model G115, G115A, G115B, G115C, G115C2, G115D, and G115D2 airplanes, all serial numbers, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (d) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated in the body of this AD, unless already accomplished.

To prevent structural damage of the trim tab hinges caused by cracks, which could result in trim tab failure with consequent loss of control of the airplane, accomplish the following:

(a) Within the next 50 hours time-in-service (TIS) after the effective date of this AD, inspect the area of the elevator trim tab hinges for cracks and a secure fit. Accomplish this inspection in accordance with the Action section of Grob Service Bulletin No. 1078-75, dated May 15, 1998.

(b) Prior to further flight, repair any elevator trim tab hinges with cracks or where a proper secure fit is not found. Accomplish these repairs in accordance with the Procedure section of Grob Installation Instructions No. 1078-75, dated May 15, 1998.

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199

of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) An alternative method of compliance or adjustment of the compliance times that provides an equivalent level of safety may be approved by the Manager, Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Small Airplane Directorate.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Small Airplane Directorate.

(e) Questions or technical information related to Grob Service Bulletin 1078-75, dated May 15, 1998, should be directed to Burkhart Grob Luft-und Raumfahrt, D-8939 Mattsies, Federal Republic of Germany. This service information may be examined at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Note 3: The subject of this AD is addressed in German AD 1998-299, dated June 4, 1998.

Issued in Kansas City, Missouri, on September 3, 1998.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98-24383 Filed 9-10-98; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97-NM-315-AD]

RIN 2120-AA64

Airworthiness Directives; Lockheed Model L-1011-385 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the superseding of an existing airworthiness directive (AD), applicable to all Lockheed Model L-1011-385 series airplanes, that currently requires a one-time inspection to detect cracking of the bulkhead at fuselage station (FS) 1363 at butt line 42.5, and repair or additional inspections, if necessary. This action would add repetitive inspections to detect cracking of the bulkhead web and bulkhead cap (frame cap) at FS 1363, and repair, if necessary. This proposal is prompted by reports that additional, more extensive, fatigue cracking was found in the bulkhead web and cap. The

actions specified by the proposed AD are intended to detect and correct cracking of the bulkhead web and cap, which could result in reduced structural integrity of the fuselage.

DATES: Comments must be received by October 26, 1998.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 97-NM-315-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Lockheed Aeronautical Systems Support Company (LASSC), Field Support Department, Dept. 693, Zone 0755, 2251 Lake Park Drive, Smyrna, Georgia 30080. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia.

FOR FURTHER INFORMATION CONTACT: Thomas Peters, Aerospace Engineer, Systems and Flight Test Branch, ACE-116A, FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia 30349; telephone (770) 703-6063; fax (770) 703-6097.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this

proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 97-NM-315-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 97-NM-315-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

On June 9, 1995, the FAA issued AD 95-12-24, amendment 39-9277 (60 FR 31624, June 16, 1995), applicable to all Lockheed Model L-1011-385 series airplanes, to require a one-time visual inspection to detect cracking of the bulkhead at fuselage station (FS) 1363 in the area of the stiffeners at left and right butt line 42.5, and repair or additional inspections, if necessary. That action was prompted by reports indicating that fatigue cracking was found in the rear bulkhead at FS 1363. The requirements of that AD are intended to detect and correct fatigue cracking of the pressure bulkhead, which could result in reduced structural integrity of the fuselage.

Actions Since Issuance of Previous Rule

Since the issuance of that AD, additional, more extensive, cracking has been found in the bulkhead web and cap in the area of FS 1363. Such cracking in the web has been attributed to high tension and shear stresses in the web and high tension loads in discontinuous stiffeners. Cracks initiated independently and concurrently at various locations in the web and cap. Cracks in the bulkhead cap initiated secondary fatigue cracks in the adjacent bulkhead web. Growth of such cracks could result in damage to the structure and consequent reduced structural integrity of the fuselage.

Further, in the preamble to AD 95-12-24, the FAA indicated that the actions required by that AD were considered "interim action" and that further rulemaking action was being considered. The FAA now has determined that further rulemaking action is indeed necessary, and this proposed AD follows from that determination.

Explanation of Relevant Service Information

The FAA has reviewed and approved Lockheed L-1011 Service Bulletin 093-53-268, Revision 1, dated July 2, 1996. That service bulletin describes procedures for repetitive visual and eddy current surface scan inspections to detect cracking of the bulkhead web at FS 1363, and repair, if necessary. The procedures include inspections for cracking of webs, web stiffeners, and fastener holes. Procedures for repair include installing web doublers and a splice. That service bulletin also specifies that repair of cracking may be deferred if the cracking meets certain conditions.

The service bulletin also describes an optional modification that involves removing fasteners; performing an eddy current bolt hole inspection; repair, if necessary; cold working of the fastener holes; and installation of new fasteners. The service bulletin specifies that this modification, if accomplished, would introduce a new threshold of 18,000 flight cycles for the repetitive inspections of the bulkhead web.

The FAA also has reviewed and approved Lockheed L-1011 Service Bulletin 093-53-272, dated November 12, 1996. That service bulletin describes procedures for repetitive visual, eddy current surface scan, eddy current bolt hole, and X-ray inspections to detect cracking of the bulkhead cap at FS 1363; and repair, if necessary. That service bulletin also describes an optional modification, which involves replacing the bulkhead cap, and cold working fastener holes. The service bulletin specifies that this modification, if accomplished, would introduce a new threshold of 18,000 flight cycles for the repetitive inspections of the bulkhead cap.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would supersede AD 95-12-24 to continue to require a one-time visual inspection to detect cracking of the bulkhead at FS 1363 at butt line 42.5, and repair or additional inspections, if necessary. The proposed AD also would add repetitive visual and eddy current surface scan inspections to detect cracking of the bulkhead web at FS 1363; repetitive visual, eddy current bolt hole, eddy current surface scan, and X-ray inspections to detect cracking of the bulkhead cap at FS 1363; and repair, if necessary. The inspections would be

required to be accomplished in accordance with the service bulletins described previously. This proposed AD also provides for modification of the bulkhead web or bulkhead cap, which, if accomplished, introduces a new threshold of 18,000 flight cycles for the repetitive inspections of the modified area.

This proposed AD specifies that flight with a crack in the bulkhead web is allowed, provided that (1) the crack does not extend beyond a certain area, (2) the crack does not exceed a certain maximum length, (3) the horizontal stiffeners above and below the web crack have no detectable cracks, and (4) inspections of the bulkhead are repeated on a more frequent basis until repair is accomplished.

Other Relevant Rulemaking

The FAA has previously issued AD 95-20-04 R1, amendment 39-9454 (60 FR 63414, December 12, 1995), applicable to all Lockheed Model L-1011-385-1 series airplanes. That AD requires implementation of a Supplemental Inspection Document program of structural inspections to detect fatigue cracking; and repair, if necessary. Because inspections specified by this proposed AD may overlap with certain inspections presently mandated by AD 95-20-04 R1, the FAA is considering further rulemaking action that would remove those inspections from the requirements of AD 95-20-04 R1.

Cost Impact

There are approximately 236 airplanes of the affected design in the worldwide fleet. The FAA estimates that 118 airplanes of U.S. registry would be affected by this proposed AD.

The inspection that is currently required by AD 95-12-24 takes approximately 16 work hours per airplane to accomplish, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of the currently required inspection on U.S. operators is estimated to be \$113,280, or \$960 per airplane.

The new inspections of the bulkhead web that are proposed in this AD action would take approximately 16 work hours per airplane to accomplish, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of the inspections of the bulkhead web proposed by this AD on U.S. operators is estimated to be \$113,280, or \$960 per airplane, per inspection cycle.

The new inspections of the bulkhead cap that are proposed in this AD action would take approximately 40 work hours per airplane to accomplish, at an

average labor rate of \$60 per work hour. Based on these figures, the cost impact of the inspections of the bulkhead cap proposed by this AD on U.S. operators is estimated to be \$283,200, or \$2,400 per airplane, per inspection cycle.

Should an operator be required to accomplish the repair of cracking in the bulkhead web, it would take between 8 to 32 work hours per airplane (8 work hours for each cracked area) to accomplish the repair, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of any necessary repair of the bulkhead web is estimated to be between \$480 to \$1,920 per airplane.

Should an operator be required to accomplish the repair of cracking in the bulkhead cap, it would take approximately 200 work hours per airplane to accomplish the repair, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of any necessary repair of the bulkhead cap is estimated to be \$12,000 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the current or proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Should an operator elect to accomplish the optional modification of the bulkhead web that would be provided by this AD action, it would take approximately 48 work hours to accomplish, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of the optional modification of the bulkhead web would be \$2,880 per airplane.

Should an operator elect to accomplish the optional modification of the bulkhead cap that would be provided by this AD action, it would take approximately 200 work hours to accomplish, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of the optional modification of the bulkhead cap would be \$12,000 per airplane.

Regulatory Impact

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that 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); and (3) if promulgated, 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. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (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. Section 39.13 is amended by removing amendment 39-9277 (60 FR 31624, June 16, 1995), and by adding a new airworthiness directive (AD), to read as follows:

Lockheed: Docket 97-NM-315-AD.

Supersedes AD 95-12-24, amendment 39-9277.

Applicability: All Model L-1011-385 series airplanes, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (i) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct cracking of the bulkhead web and cap, which could result in

reduced structural integrity of the fuselage, accomplish the following:

Restatement of the Requirements of AD 95-12-24, Amendment 39-9277

(a) Prior to the accumulation of 18,000 total landings, or within 30 days after July 3, 1995 (the effective date of AD 95-12-24, amendment 39-9277), whichever occurs later, perform a visual inspection to detect cracking of the bulkhead at fuselage station (FS) 1363 in the area of the stiffeners at left and right butt line (BL) 42.5; in accordance with the procedures specified in paragraphs 2.A. and 2.B. of Part I of the Accomplishment Instructions of Lockheed L-1011 Service Bulletin 093-53-268, dated April 15, 1993; or in accordance with the procedures specified in paragraphs 2.A. and 2.B. of Part II of the Accomplishment Instructions of Lockheed L-1011 Service Bulletin 093-53-268, Revision 1, dated July 2, 1996.

Note 2: This AD does not require that the eddy current inspection referenced in paragraph 2.B. of Part I of the Accomplishment Instructions of Lockheed L-1011 Service Bulletin 093-53-268, dated April 15, 1993; and referenced in paragraph 2.B. of Part II of the Accomplishment Instructions of Lockheed L-1011 Service Bulletin 093-53-268, Revision 1, dated July 2, 1996; be accomplished as a requirement of paragraph (a) of this AD.

(b) Except as provided by paragraph (d) of this AD, if any cracking of the bulkhead is detected below waterline (WL) 117 during any inspection performed in accordance with paragraph (a) of this AD: Prior to further flight, perform the inspections required by paragraphs (b)(1), (b)(2), and (b)(3) of this AD, in accordance with Lockheed Document LCC-7622-373, dated May 9, 1995. Prior to further flight, repair any cracking of the bulkhead cap found during these inspections, in accordance with Lockheed Document LCC-7622-374, dated May 9, 1995.

(1) Perform a bolt hole eddy current inspection to detect cracking of the eight fastener holes at the intersection of the vertical stiffener at BL 42.5 and the bulkhead cap vertical flange; and

(2) Perform a bolt hole eddy current inspection to detect cracking at eight fastener locations in the bulkhead cap lower flange that connect the lower fuselage skin panel to the frame at the BL 42.5 vertical stiffener; and

(3) Perform a visual inspection to detect stress corrosion cracking of the accessible portions of the fillet radius of the bulkhead cap.

(c) Except as provided by paragraph (d) of this AD, if any cracking of the bulkhead is detected at or above WL 117 during any inspection performed in accordance with paragraph (a) of this AD: Prior to further flight, repair the bulkhead cracking in accordance with the procedures specified in Part II of the Accomplishment Instructions of Lockheed L-1011 Service Bulletin 093-53-268, dated April 15, 1993; or in accordance with the procedures specified in Part III of the Accomplishment Instructions of Lockheed L-1011 Service Bulletin 093-53-268, Revision 1, dated July 2, 1996.

(d) Continued flight with cracking of the bulkhead is permitted, provided that the

conditions specified in paragraph 1.C. of the Planning Information of Lockheed L-1011 Service Bulletin 093-53-268, dated April 15, 1993; or Revision 1, dated July 2, 1996; are met. For flight with cracking, both the visual and eddy current inspections specified in paragraphs 2.B. and 2.C. of Part I of the Accomplishment Instructions of Lockheed L-1011 Service Bulletin 093-53-268, dated April 15, 1993; or specified in paragraphs 2.B. and 2.C. of Part II of the Accomplishment Instructions of Lockheed L-1011 Service Bulletin 093-53-268, Revision 1, dated July 2, 1996; must be accomplished prior to returning the aircraft to service. These visual and eddy current inspections must be repeated within 900 landings. Prior to the accumulation of 1,800 total landings, these inspections must be terminated by the installation of the repair specified in Part II of the Accomplishment Instructions of Lockheed L-1011 Service Bulletin 093-53-268, dated April 15, 1993; or by installation of the repair specified in Part III of the Accomplishment Instructions of Lockheed L-1011 Service Bulletin 093-53-268, Revision 1, dated July 2, 1996.

New Requirements of This of AD

(e) Prior to the accumulation of 18,000 total landings, or within 6 months after the effective date of the AD, whichever occurs later, perform a visual and eddy current surface scan inspection for cracking of the bulkhead web at FS 1363, in accordance with Lockheed L-1011 Service Bulletin 093-53-268, Revision 1, dated July 2, 1996.

(1) If no cracking of the bulkhead web is detected, except as provided by paragraph (f) of this AD, repeat the visual and eddy current surface scan inspections thereafter at intervals not to exceed 2,000 landings.

(2) If cracking of the bulkhead web is detected, and that cracking is within the limits specified in Part I of the Accomplishment Instructions of the service bulletin: Accomplish the requirements of either paragraph (e)(2)(i) or (e)(2)(ii) of this AD, in accordance with the service bulletin. Except as provided by paragraph (f) of this AD, repeat the inspections thereafter at intervals not to exceed 2,000 landings after repair of the cracking.

(i) Prior to further flight, repair the cracking. Or

(ii) Repeat the inspections specified in Part I of the Accomplishment Instructions of the service bulletin at intervals not to exceed 900 landings, and repair the cracking within 1,800 landings after the cracking was detected.

(3) If cracking of the bulkhead web is detected, and that cracking is outside the limits specified in Part I of the Accomplishment Instructions of the service bulletin: Prior to further flight, repair in accordance with Part III of the Accomplishment Instructions of the service bulletin. Except as provided by paragraph (f) of this AD, repeat the inspections thereafter at intervals not to exceed 2,000 landings.

(f) For airplanes on which modification of the bulkhead web is accomplished in accordance with Part IV of the Accomplishment Instructions of Lockheed L-1011 Service Bulletin 093-53-268, Revision

1, dated July 2, 1996: Repeat the inspections specified in paragraph (e) of this AD within 18,000 landings after accomplishment of the modification, in accordance with the service bulletin.

(g) Prior to the accumulation of 18,000 total landings, or within 6 months after the effective date of this AD, whichever occurs later, perform visual, bolt hole eddy current, eddy current surface scan, and X-ray inspections for cracking of the bulkhead cap at FS 1363, in accordance with Lockheed L-1011 Service Bulletin 093-53-272, dated November 12, 1996.

(1) If no cracking of the bulkhead cap is detected, except as provided by paragraph (h) of this AD, repeat the inspections thereafter at intervals not to exceed 2,000 landings, in accordance with the service bulletin.

(2) If any cracking of the bulkhead cap is detected, accomplish the requirements of either paragraph (g)(2)(i) or (g)(2)(ii) of this AD, in accordance with the service bulletin.

(i) Prior to further flight, repair in accordance with Part I of the Accomplishment Instructions of the service bulletin. Thereafter, repeat the inspections at intervals not to exceed 2,000 landings. Or

(ii) Prior to further flight, replace the bulkhead cap, in accordance with Part II of the Accomplishment Instructions of the service bulletin. Following such replacement, repeat the inspection within 18,000 landings, in accordance with the service bulletin.

(h) For airplanes on which replacement of the bulkhead cap is accomplished in accordance with Part II of the Accomplishment Instructions of Lockheed L-1011 Service Bulletin 093-53-272, dated November 12, 1996: Repeat the inspections specified in paragraph (g) of this AD within 18,000 landings after accomplishment of the replacement, in accordance with the service bulletin.

(i) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Atlanta Aircraft Certification Office (ACO), FAA, Small Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Atlanta ACO.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Atlanta ACO.

(j) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on September 4, 1998.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98-24406 Filed 9-10-98; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 9

[Notice No. 866]

RIN 1512-AA07

Proposal To Establish a Santa Rita Hills Viticultural Area (98R-129 P)

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF), Department of Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Bureau of Alcohol, Tobacco and Firearms (ATF) has received a petition proposing the establishment of a viticultural area located in Santa Barbara County, California, to be known as "Santa Rita Hills." The proposed area occupies more than 48 square miles. The proposal constitutes a petition from viticulturists and vintners of the proposed area under the direction of J. Richard Sanford (Sanford Winery), Bryan Babcock (Babcock Vineyards and Winery), and Wesley D. Hagen (Vineyard Manager of Clos Pepe Vineyards).

DATES: Written comments must be received by December 10, 1998.

ADDRESSES: Send written comments to: Chief, Regulations Division, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 50221, Washington, DC 20091-0221 (*Attn: Notice No. 866*). Copies of the petition, the proposed regulation, the appropriate maps, and written comments received will be available for public inspection during normal business hours at: ATF Public Reading Room, Office of Public Affairs and Disclosure, Room 6480, 650 Massachusetts Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Marsha D. Baker, Regulations Division, Bureau of Alcohol, Tobacco and Firearms, 650 Massachusetts Avenue, NW., Washington, DC. 20226 (202) 927-8230.

SUPPLEMENTARY INFORMATION:

Background

On August 23, 1978, ATF published Treasury Decision ATF-53 (43 FR 37672, 54624) revising regulations in 27 CFR part 4. These regulations allow the establishment of definitive viticultural areas. The regulations also allow the name of an approved viticultural area to be used as an appellation of origin in the labeling and advertising of wine.

On October 2, 1979, ATF published Treasury Decision ATF-60 (44 FR 56692) which added a new part 9 to 27 CFR, providing for the listing of approved American viticultural areas. Section 4.25a(e)(1), Title 27, CFR, defines an American Viticultural Area (AVA) as a delimited grape-growing region distinguishable by geographical features, the boundaries of which have been recognized and defined in subpart C of part 9. Section 4.25a(e)(2) outlines the procedure for proposing an AVA. Any interested person may petition ATF to establish a grape-growing region as a viticultural area. The petition should include:

- (a) Evidence that the name of the proposed viticultural area is locally and/or nationally known as referring to the area specified in the petition;
- (b) Historical or current evidence that the boundaries of the viticultural area are as specified in the petition;
- (c) Evidence relating to the geographical features (climate, soil, elevation, physical features, etc.) which distinguish the viticultural features of the proposed area from surrounding areas;
- (d) A description of the specific boundaries of the viticultural area, based on features which can be found on United States Geological Survey (U.S.G.S.) maps of the largest applicable scale; and
- (e) A copy (or copies) of the appropriate U.S.G.S. map(s) with the boundaries prominently marked.

Petition

ATF received a petition from J. Richard Sanford (Sanford Winery) which was drafted by Wesley D. Hagen (Vineyard Manager of Clos Pepe Vineyards), on behalf of viticulturists and vintners working in Santa Barbara County, California. The petition proposes to establish a viticultural area surrounded by but separate from the Western Santa Ynez Valley AVA of California to be known as "Santa Rita Hills." According to the petitioner, the proposed boundary encloses an estimated area slightly greater than forty-eight (48) square miles and contains approximately 500 acres of planted varietal winegrapes. The petition also states that currently two (2) wineries and seventeen (17) vineyards exist within the proposed Santa Rita Hills area. Two additional vineyards are in the works.

Evidence of Name

The petitioner provided evidence that the name "Santa Rita" is locally known as referring to the area specified in the petition. In the exhibits and maps

furnished with the petition, there are numerous references to the area.

The Land Records of Santa Barbara County from the U.S.G.S. furnished by the petitioner show the Santa Rita area dating back to 1845. According to this information, Santa Rita was established as a recognized political and geographical region when a land grant for Santa Rita was made to Jose Ramon Malo from Spanish governor Pio Pico on April 12, 1845. The title was accredited to Jose Ramon Malo on June 25, 1875 by President Ulysses S. Grant as confirmed in the U.S. Patent Book "A." (Pertinent pages are shown as exhibits to the petition.) The patent issued included 13,316 acres within the boundary of the Santa Rita Land Grant.

Evidence submitted with the petition to support the use of the name "Santa Rita Hills" as an AVA includes:

(a) The U.S.G.S. Lompoc, Lompoc Hills, Los Alamos, and Santa Rosa. Hills Quadrangle maps used to show the boundaries of the proposed area use the name "Santa Rita Hills" to identify the area.

(b) The U.S.G.S. Water-Resources Investigations Report 970-4056 (Evaluation of Ground Water Flow and Solute Transport in the Lompoc Area, Santa Barbara County, California) discusses the "Santa Rita Upland Basin." The report indicates that "Santa Rita" is a recognized geological, geographical, and hydrological appellation in Santa Barbara County, California.

(c) An excerpt, "From the Missions to Prohibition", in the publication *Aged in Oak: The Story of the Santa Barbara County Wine Industry* (1998), provided by the petitioner shows the vineyards and wineries in Santa Barbara County prior to 1900 to include the name "Santa Rita."

(d) The text provided by the petitioner from *History of Santa Barbara County* (1939) states, "Following the secularization of the Mission La Purisima, the rest of the valley was broken up into seven great ranchos granted to private owners. They were Santa Rosa, *Santa Rita*, Salsipuedes, La Purisima, Mission Vieja, Lompoc and a portion of the Jesus Maria." (Italics added for emphasis.)

Evidence of Boundaries

Per the submission of the petitioner, the proposed "Santa Rita Hills" AVA is located in Northern Santa Barbara County, California, east of Lompoc (U.S. Highway 1) and west of Buellton (U.S. Highway 101). The petitioner stated that a committee of viticulturists, consultants and vintners with formal geological, geographic and agricultural

education selected specific hilltops in the Purisima Hills to the north and the Santa Rosa Hills to the south which isolate the area to serve as the boundaries.

Precise boundaries can be found on the five (5) U.S.G.S. Quadrangle maps (7.5 minute series originally dated 1959) submitted with the petition. On these maps, the Santa Rita Hills are the dominant central feature of the proposed AVA with its transverse (east/west) maritime throat stretching from Lompoc to a few miles west of the Buellton Flats. The Santa Rosa Hills to the south and the Purisima Hills to the north isolate the proposed area geographically and climatically.

Again, the U.S.G.S. Water-Resources Investigations Report 970-4056 describes the Santa Rita Upland Basin as being "in hydrologic continuity with the Lompoc Plain, Lompoc Upland and Buellton Upland basins, but separated from the Santa Ynez River alluvium by non-water-bearing rocks." It goes on to state, "[a]n ongoing U.S.G.S. study treats the Santa Rita Valley as a separate unit * * *" and "* * * the eastern surface drainage divide between Santa Rita and Lompoc basins was used as a ground-water divide by the U.S.G.S."

Climate

According to the petitioner, the climatic features of the proposed viticultural area and thus the varietals grown therein, set it apart from the Santa Ynez Valley AVA, which borders the proposed area. According to the petitioner, the Santa Ynez Valley area east of U.S. Highway 101 is characterized by higher temperatures than the proposed "Santa Rita Hills" AVA to the west, which has a cool climate and is thus more conducive to growing "Region One" cool-climate winegrape varietals. By contrast, the eastern area of the Santa Ynez Valley, a "Region Two" growing area, provides a warmer climate and is well known for the production of varietal winegrapes such as Cabernet Sauvignon, Cabernet Franc, Merlot, Sauvignon Blanc, Mourvedre, and other varietals that require a significantly higher temperature (degree days) for adequate ripening. The proposed "Santa Rita Hills" AVA to the west of U.S. Highway 101 is better known for varietals such as Chardonnay and Pinot Noir which are the predominant winegrapes there. The petitioner states, "It is much more difficult to gain a balance of high ripeness to strong acid content in cool-climate varietals grown in the eastern Santa Ynez Valley * * * the proposed Santa Rita Hills AVA will correctly identify and distinguish a unique cool-

climate wine production area of Santa Barbara County, California.”

In a 1991 article from *Expansion and Experimentation* submitted by the petitioner to substantiate this claim, viticulturist Jeff Newton states, “The best Chardonnays and Pinots come from the cooler areas west of U.S. [Highway] 101 closer to the sea, and the best Sauvignon Blanc and reds like Cabernet come from the warmer region to the east.” The petitioner also submitted other articles highlighting the area’s notoriety for producing “top-rated” Chardonnays and “sumptuous” Pinot Noirs and proclaiming it to be “probably the greatest grape-growing area anywhere in the United States, particularly when it comes to great Chardonnay and Pinot Noir.”

In addition, the petitioner provided copies of a comparative study of the University of California weather station records, records of the National Weather Service, the Western Regional Climate Center, the National Climatic Data Center, and those of the CIRUS Weather Station system accessed in Santa Ynez and Cachuma Lake (which is located within the eastern boundary of the Santa Ynez Valley AVA). The petitioner states that, according to this study, ambient temperature and evapotranspiration rates during veraison and ripening are disparate for two adjacent viticultural locales. The petitioner’s analysis of the study indicates that the average post-veraison ripening temperature is 14.7°F hotter within the Santa Ynez Valley AVA than in the proposed “Santa Rita Hills” AVA to the west. Similarly, the petitioner estimates the heating degree day differential (with the base of 50°F) between the two areas to be 61 heat degree days, indicating an annual 92 heating degree days in the western Lompoc boundary and an annual 153 heating degree days in the eastern Cachuma Lake boundary.

These temperature differences, according to the petitioner, are the result of a unique set of topographical, geological and climatic influences, particularly coastal in origin. According to the petitioner, the proposed “Santa Rita Hills” AVA is situated within the clearly defined east/west transverse maritime throat, and thus is susceptible to the ocean’s cooling influence. This enables diurnal ocean breezes direct access to the coastal valleys between the Purisima Hills and the Santa Rosa Hills, which house the proposed AVA. The petitioner goes on to state that this coastal influence is not nearly as pronounced in the Santa Ynez Valley east of U.S. Highway 101 and the Buellton Flats. In addition, the

petitioner asserts that the proximity of the proposed AVA to the coastal fog from the Pacific Ocean fills the hills and valleys of the proposed “Santa Rita Hills” AVA in the late night and early morning hours. This intensifies the cool-climate influence on varietal winegrape production between the geological boundaries of the Purisima Hills and the Santa Rosa Hills.

Soil

The petitioner states that the soils of the Santa Rita Hills are broken down from an array of geological parent material, with the most common types being loams, sandy loams, silt loams, and clay loams. These soils are based on large percentages of dune sand, marine deposits, recent alluvium, riverwash, and terrace deposits, which are shown on maps provided in the exhibits of the petition. According to the petitioner, soil samples collected from selected sites within the proposed “Santa Rita Hills” AVA and the adjacent Santa Ynez Valley AVA show a distinct difference resulting from a high percentage of alluvial and marine sand within the proposed area. While the soil samples from the proposed “Santa Rita Hills” AVA show higher percentages of sand, silt and sandy loams, the soil samples from the eastern Santa Ynez Valley show a higher percentage of gravelly and clay loams, according to the petitioner.

The petitioner also included soil analysis test results from several vineyards in the proposed “Santa Rita Hills” AVA conducted by various labs in the area to support the distinct soil data claims.

Topography

The topography of the proposed “Santa Rita Hills” AVA is distinct and isolated from the rest of the Pacific Coast, the Central Coast, and the Santa Ynez Valley east of U.S. Highway 101 and the Buellton Flats, according to the petitioner. The proposed AVA is demarcated by the east-west ranges of the Purisima Hills on the north and the Santa Rosa Hills on the south, framing Santa Rita Hills. When surveying the land within the proposed boundaries to determine what locales would be the outer “edges,” the petitioner states the following was taken into account: viticultural viability (primarily hillside and alluvial basin plantings) and the coastal influence suitable for cool-climate still winegrape production. The petitioner goes on to state that “The actual topography of the proposed Santa Rita Hills AVA is an oak studded, hill-laden maritime throat that runs east to west, a few miles east of Lompoc to a

few miles west of Buellton Flats. The coastal influence enters from the west, through Lompoc, and abruptly loses its influence at the proposed eastern boundary as demarcated on the enclosed U.S.G.S. maps. Elevations within the proposed boundary range from near sea-level to ridge-line 1800 feet above sea level.”

Proposed Boundary

The boundary of the proposed “Santa Rita Hills” AVA may be found on the five (5) 1:24:000 scale U.S.G.S. Quadrangle 7.5-Minute Series maps included with the petition. The boundary is described in § 9.162.

Public Participation—Written Comments

ATF requests comments from all interested parties. Comments received on or before the closing date will be carefully considered. Comments received after that date will be given the same consideration if it is practical to do so. However, assurance of consideration can only be given to those received on or before the closing date.

ATF will not recognize any comment as confidential. All comments may be disclosed to the public. Any material that the commenter considers to be confidential or inappropriate for disclosure to the public should not be included in the comment. The name of the person submitting the comment is not exempt from disclosure.

Any person who desires an opportunity to comment orally at a public hearing on the proposed regulation should submit his or her request, in writing, to the Director within the 90-day comment period. However, the Director reserves the right to determine, in light of all circumstances, whether a public hearing will be held.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(j)) and its implementing regulations, 5 CFR Part 1320, do not apply to this notice of proposed rulemaking because no requirement to collect information is proposed.

Regulatory Flexibility Act

It is hereby certified that this proposed regulation will not have a significant economic impact on a substantial number of small entities. Any benefit derived from the use of a viticultural area name is the result of the proprietor’s own efforts and consumer acceptance of wines from a particular area. No new requirements are

proposed. Accordingly, a regulatory flexibility analysis is not required.

Executive Order 12866

It has been determined that this proposed regulation is not a significant regulatory action as defined in Executive Order 12866. Accordingly, this proposal is not subject to the analysis required by this Executive Order.

Drafting Information

The author of this document is Marsha D. Baker, Regulations Division, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects in 27 CFR Part 9

Administrative practices and procedures, Consumer protection, Viticultural areas, and Wine.

Authority and Issuance

Title 27, Code of Federal Regulations, Part 9, American Viticultural Areas, is proposed to be amended as follows:

PART 9—AMERICAN VITICULTURAL AREAS

Paragraph 1. The authority citation for Part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

Par. 2. Subpart C is amended by adding § 9.162 to read as follows:

* * * * *

§ 9.162 Santa Rita Hills.

- (a) Name. The name of the viticultural area described in this section is "Santa Rita Hills."
- (b) Approved maps. The appropriate maps for determining the boundary of the Santa Rita Hills viticultural area are five (5) U.S.G.S. Quadrangle 7.5 Minute Series maps titled:
- (1) "Lompoc, Calif.," edition of 1959 (photorevised in 1982).
 - (2) "Lompoc Hills, Calif.," edition of 1959 (photinspected 1971).
 - (3) "Los Alamos, Calif.," edition of 1959.
 - (4) "Santa Rosa Hills, Calif.," edition of 1959 (photinspected 1978).
 - (5) "Solvang, Calif.," edition of 1959 (photorevised 1982).
- (c) Boundary. The "Santa Rita Hills" viticultural area is located within Santa Barbara County, California. The boundary is as follows:
- (1) The beginning point is found on the Solvang, California U.S.G.S. Quadrangle map at an unnamed hilltop, elevation 1600 feet, in section 27, T.6N., R. 32W, on the Solvang, Calif., Quadrangle U.S.G.S. map.

- (2) Then proceed north and slightly west 2.3 miles to an unnamed hilltop elevation 1174 feet, Section 15, T.6N., R. 32W.

- (3) Proceed west and slightly north 1.85 miles to an unnamed hilltop elevation 899 feet within the heart of the Santa Rosa Land Grant, T.7N., R. 32W, on the Santa Rosa Hills, Calif., Quadrangle U.S.G.S. map.

- (4) Proceed north approximately 2 miles to an unnamed hilltop elevation 1063 feet within the northeastern part of the Santa Rosa Land Grant, T.7N, R. 32W, on the Los Alamos, Calif., Quadrangle U.S.G.S. map.

- (5) Proceed northwest 1.1 miles to an unnamed hilltop elevation 961 feet. Section 29, T.7N., R. 32W.

- (6) Proceed north and slightly east 1.1 miles to an unnamed elevation 1443 feet. Section 20, T.7N., R. 32W.

- (7) Proceed west 1.4 miles to an unnamed hilltop elevation 1479 feet. Section 24, T.7N., R. 33W.

- (8) Proceed north 1.2 miles to an unnamed hilltop elevation 1705 feet. Section 13, T.7N., R. 33W.

- (9) Proceed northwest approximately 2 miles to an unnamed hilltop elevation 1543. Section 10, T.7N., R. 33W.

- (10) Proceed west and slightly south 1.6 miles to an unnamed hilltop elevation 935 feet within the northern section of the Santa Rosa Land Grant. T.7N., R. 33W.

- (11) Proceed south by southwest 1.5 miles to an unnamed hilltop elevation 605 feet in the northern section of the Santa Rosa Land Grant. T.7N., R. 33W.

- (12) Proceed west by southwest approximately 2 miles to the point where California Highway 246 intersects with the 200-foot elevation contour line comprising the western border of the Santa Rita Hills, within the Santa Rosa Land Grant. T.7N., R. 34W, on the Lompoc, Calif., Quadrangle U.S.G.S. map.

- (13) Proceed following the 200 foot elevation contour line south along the western border of the Santa Rita Hills to an extreme southern tip of the 200 foot elevation contour that is .6 miles due west of an unnamed hilltop 361 feet in elevation in the Canada de Salispuedes Land Grant. T.6N., R. 34W.

- (14) Proceed southeast 2.35 miles to an unnamed hilltop elevation 1070 feet. Section 18, T.6N., R. 33W, on the Lompoc Hills, Calif., Quadrangle U.S.G.S. map.

- (15) Proceed east and slightly south 1.95 miles to an unnamed hilltop elevation 921 feet. Section 16, T.6N., R. 33W, on the Santa Rosa Hills, Calif., Quadrangle U.S.G.S. map.

- (16) Proceed east by southeast 1.35 miles to an unnamed hilltop elevation 1307 feet. Section: on intersection

between Sections 22 and 23, T.6N., R. 33W.

- (17) Proceed east 2.35 miles to an unnamed hilltop elevation 1507 feet in the southern area of the Santa Rosa Land Grant. T.6N., 32W.

- (18) Proceed east by southeast 2.1 miles to an unnamed hilltop elevation 1279 feet in the southern area of the Santa Rosa Land Grant. T.6N., 32W.

- (19) Then proceed east by southeast 1.45 miles to the point of the beginning.

Approved: September 3, 1998.

John W. Magaw,

Director.

[FR Doc. 98-24417 Filed 9-10-98; 8:45 am]

BILLING CODE 4810-31-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 904

[SPATS No. AR-032-FOR]

Arkansas Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing and withdrawal of proposed amendment.

SUMMARY: OSM is announcing the withdrawal of a previously proposed amendment and the receipt of a new amendment to the Arkansas regulatory program (Arkansas program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Arkansas is replacing its previously proposed amendment with a new amendment. Both amendments pertain to revegetation success standards. We announced receipt of Arkansas' previously proposed amendment in the January 9, 1998, **Federal Register** (63 FR 1396). In the new amendment, Arkansas proposes to revise its regulations and to add policy guidelines for determining Phase III revegetation success for areas being restored to various land uses. Arkansas intends to revise its program to be consistent with the corresponding Federal regulations.

This document gives the times and locations that the Arkansas program and new amendment to that program are available for public inspection, the comment period during which interested persons may submit written comments on the proposed amendment, and the procedures that will be followed

regarding the public hearing, if one is requested.

DATES: We will accept written comments until 4:00 p.m., c.d.t. on October 13, 1998. Upon request, we will hold a public hearing on the proposed amendment on October 6, 1998. We will accept requests to speak at the hearing until 4:00 p.m., c.d.t. on September 28, 1998.

ADDRESSES: You should mail or hand deliver written comments and requests to speak at the hearing to Michael C. Wolfrom, Director, Tulsa Field Office, at the address listed below.

You may review copies of the Arkansas program, the proposed amendment, a listing of any scheduled public hearings, and all written comments received in response to this document at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the proposed amendment by contacting OSM's Tulsa Field Office.

Michael C. Wolfrom, Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, 5100 East Skelly Drive, Suite 470, Tulsa, Oklahoma 74135-6547, Telephone: (918) 581-6430.

Arkansas Department of Pollution Control and Ecology, Surface Mining and Reclamation Division, 8001 National Drive, Little Rock, Arkansas 72219-8913, Telephone (501) 682-0744.

FOR FURTHER INFORMATION CONTACT:

Michael C. Wolfrom, Director, Tulsa Field Office. Telephone: (918) 581-6430. Internet:

mwolfrom@mcrgw.osmre.gov.

SUPPLEMENTARY INFORMATION:

I. Background on the Arkansas Program

On November 21, 1980, the Secretary of the Interior conditionally approved the Arkansas program. You can find background information on the Arkansas program, including the Secretary's findings, the disposition of comments, and the conditions of approval in the November 21, 1980, **Federal Register** (45 FR 77003). You can find information on the removal of the conditions in the January 22, 1982, **Federal Register** (47 FR 3108). You can find later actions concerning the Arkansas program at 30 CFR 904.12, 904.15, and 904.16.

II. Withdrawal of Proposed Amendment

By way of a letter dated November 24, 1997 (Administrative Record No. AR-560), Arkansas sent us a proposed amendment to its program in

accordance with SMCRA. Arkansas proposed to amend the Arkansas Surface Coal Mining and Reclamation Code (ASCMRC) to include revegetation success standards at section 816.116.

We announced receipt of the proposed amendment in the January 9, 1998, **Federal Register** (63 FR 1396) and invited public comment on its adequacy. The public comment period ended February 9, 1998. On February 11, 1998, we notified Arkansas of deficiencies in its amendment. By way of a letter dated August 27, 1998 (Administrative Record No. AR-562), Arkansas sent us a new amendment. The new amendment replaces Arkansas' amendment dated November 24, 1997. Therefore, we are withdrawing the proposed amendment announced in the January 9, 1998 **Federal Register**.

III. Description of the Proposed Amendment

By way of a letter dated August 27, 1998 (Administrative Record No. AR-562), Arkansas sent us a new amendment to its program in accordance with SMCRA. The proposed amendment responds to our November 26, 1985, and October 14, 1997, letters (Administrative Record Nos. AR-332 and AR-559.02, respectively) that we sent to Arkansas in accordance with 30 CFR 732.17(c). The amendment also includes changes made at Arkansas' own initiative. Arkansas proposes to amend the Arkansas Surface Coal Mining and Reclamation Code and to add revegetation success standard guidelines to its program. The full text of the proposed program amendment that Arkansas submitted is available for public inspection at the locations listed above under **ADDRESSES**. Below is a brief discussion of the proposed amendment.

1. ASCMRC Section 701.5 Definition of Land Use

Arkansas is removing and reserving paragraph (c). Paragraph (c) defined the land use category of "grazingland."

2. ASCMRC Section 701.5 Definition of Renewal Resource Lands

Arkansas is revising the definition of "Renewal Resource Lands" by correcting a typographical error and removing a reference to the land use category of "grazingland."

3. ASCMRC Section 816.116(b)(1) Revegetation Success Standards for Areas Developed for Use as Pasture Land

Arkansas proposes to amend section 816.116(b)(1) by removing the reference to the land use category of "grazingland." Arkansas also proposes

to replace the general phrase "such other success standards approved by the Department" with language that requires ground cover and production of living plants on the revegetated area to comply with the criteria contained in its Phase III Revegetation Success Standards for Pasture and Previously Mined Areas.

4. ASCMRC Section 816.116(b)(2) Revegetation Success Standards for Areas Developed for Use as Cropland

Arkansas proposes to amend section 816.116(b)(2) by replacing the general phrase "such other success standards approved by the Department" with language that requires crop production on the revegetated area to comply with the criteria contained in its Phase III Revegetation Success Standards for Cropland.

5. ASCMRC Section 816.116(b)(3)(iv) Revegetation Success Standards for Areas To Be Developed for Fish and Wildlife Habitat, Recreation, Shelter Belts, or Forest Products

Arkansas is adding a new paragraph (b)(3)(iv) that requires vegetation success for these areas to comply with the criteria contained in its Phase III Revegetation Success Standards for Forest Products or its Phase III Revegetation Success Standards for Recreation and Wildlife Habitat.

6. ASCMRC Section 816.116(b)(4) Revegetation Success Standards for Areas To Be Developed for Industrial, Commercial, or Residential Use

Arkansas proposes to amend section 816.116(b)(4) to require that vegetative ground cover comply with the criteria contained in its Phase III Revegetation Success Standards for Industrial, Commercial, and Residential Revegetation.

7. ASCMRC Section 816.116(b)(5) Revegetation Success for Areas Previously Disturbed by Mining

Arkansas proposes to revise subsection 816.116(b)(5) to require that vegetative ground cover comply with the criteria contained in its Phase III Revegetation Success Standards for Pasture and Previously Mined Areas.

8. Phase III Revegetation Success Standards for Pasture and Previously Mined Areas

Arkansas is adding policy guidelines for pasture land use areas and previously mined areas. This policy describes the criteria and procedures for determining Phase III ground cover and production success for areas being restored to pasture and for areas that

were previously mined. It provides general revegetation requirements and success standards and measurement frequency for ground cover and forage production. It also includes sampling procedures and techniques, data submission and analysis criteria, and mitigation plan requirements.

9. Phase III Revegetation Success Standards for Cropland

Arkansas is adding policy guidelines for cropland. This policy describes the criteria and procedures for determining Phase III production success standards for areas being restored to cropland. It provides success standards and measurement frequency for ground cover and crop production. It also includes sampling procedures and techniques, data submission and analysis criteria, and mitigation plan requirements.

10. Phase III Revegetation Success Standards for Forest Products

Arkansas is adding policy guidelines for forest land use areas. This policy describes the criteria and procedures for determining Phase III ground cover and tree and shrub stocking success for areas being restored to forest. It provides general revegetation requirements and success standards and measurement frequency for ground cover and tree and shrub stocking rates. It also includes sampling procedures and techniques, data submission and analysis criteria, and mitigation plan requirements.

11. Phase III Revegetation Success Standards for Recreation and Wildlife Habitat

Arkansas is adding policy guidelines for recreation and wildlife habitat land use areas. This policy describes the criteria and procedures for determining Phase III success for areas being restored to recreation and wildlife habitat. It provides success standards and measurement frequency for ground cover and tree and shrub stocking. It also includes sampling procedures and techniques, data analysis criteria, and mitigation plan requirements.

12. Phase III Success Standards for Industrial/Commercial and Residential Revegetation

Arkansas is adding policy guidelines for industrial/commercial or residential land use areas. This policy describes the criteria and procedures for determining Phase III ground cover success for areas being restored to an industrial/commercial or residential land use. It provides general revegetation requirements and success standards and measurement frequency for ground

cover. It also includes sampling procedures and techniques, data submission and analysis criteria, and mitigation plan requirements.

IV. Public Comment Procedures

According to the provisions of 30 CFR 732.17(h), we are seeking comments on whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is approved, it will become part of the Arkansas program.

Written Comments

Your written comments should be specific and should pertain only to the issues proposed in this rulemaking. You should explain the reason for any recommended change. We may not consider in the final rulemaking or include in the Administrative Record any comments we receive after the close of the comment period (see **DATES**) or at locations other than the Tulsa Field Office.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., c.d.t. on September 28, 1998. We will arrange the location and time of the hearing with those persons requesting the hearing. If you are disabled and need special accommodations to attend a public hearing, contact the individual listed under **FOR FURTHER INFORMATION CONTACT**. The hearing will not be held if no one requests an opportunity to speak at the public hearing.

You should file a written statement at the time you request the hearing. This will allow us to prepare adequate responses and appropriate questions. The public hearing will continue on the specified date until all persons scheduled to speak have been heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after all persons scheduled to speak and persons present in the audience who wish to speak have been heard.

Public Meeting

If only one person requests an opportunity to speak at a hearing, a public meeting, rather than a public hearing, may be held. If you wish to meet with us to discuss the proposed amendment, request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of

meetings at the locations listed under **ADDRESSES**. We also make a written summary of each meeting a part of the Administrative Record.

V. Procedural Determinations

Executive Order 12866

The Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review) exempts this rule from review.

Executive Order 12988

The Department of the Interior conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

This rule does not require an environmental impact statement since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a

significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Unfunded Mandates

OSM determined and certifies under the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of \$100 million or more in any given year on local, state, or tribal governments or private entities.

List of Subjects in 30 CFR Part 904

Intergovernmental relations, Surface mining, Underground mining.

Dated: September 3, 1998.

Charles E. Sandberg,

Acting Regional Director, Mid-Continent Regional Coordinating Center.

[FR Doc. 98-24380 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-05-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 86

[FRL-6159-9]

Optional Certification Streamlining Procedures for Light-Duty Vehicles, Light-Duty Trucks, and Heavy-Duty Engines for Original Equipment Manufacturers and for Aftermarket Conversion Manufacturers

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of public comment period.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is extending the public comment period on the Notice of Proposed Rulemaking (NPRM), which proposes optional certification procedures for light-duty vehicles, light duty trucks, and heavy-duty engines that meet Clean-Fuel Vehicle requirements as well as for certain gaseous-fueled vehicles certified to EPA's Tier 1 standards. The NPRM was published in the **Federal Register** on July 20, 1998 (63 FR 38767). The purpose of this document is to extend the comment period from August 19, 1998 to October 13, 1998, to allow commenters additional time to respond to the NPRM.

The document provided an opportunity for a public hearing, if

requested by August 19, 1998. No request for a hearing was made and, therefore, no public hearing will be scheduled for this proposal.

DATES: EPA will accept comments on the NPRM until October 13, 1998.

ADDRESSES: Comments should be submitted in duplicate to the EPA Air & Radiation Docket #A-97-27, Room 1500-M (Mail Code 6102), 401 M Street SW., Washington, D.C. 20460. Copies of information relevant to this NPRM are available for inspection in public docket A-97-27 at the above address, between the hours of 8:00 a.m. to 5:30 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: For information concerning the NPRM, contact Clifford Tyree, Sr. Project Manager, Vehicle Programs and Compliance Division, U.S. Environmental Protection Agency, 2000 Traverwood, Ann Arbor, MI 48105, Phone (734) 214-4310, E-mail: tyree.clifford@epa.gov.

Dated: September 4, 1998.

Robert Perciasepe,

Assistant Administrator, Air and Radiation.

[FR Doc. 98-24476 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP-300710; FRL-6026-8]

RIN 2070-AB78

Azoxystrobin; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This is a proposed regulation to establish a temporary tolerance for 1 year for the combined residues of azoxystrobin [methyl (E)-2-{2-[6-(2-cyanophenoxy)pyrimidin-4-yl]oxy}phenyl]-3-methoxyacrylate] and its Z isomer in or on potatoes. This action is in response to Wisconsin potato growers and University extension specialists, Zeneca Ag Products and EPA's combined efforts to generate the information necessary for registration of the reduced risk pesticide, azoxystrobin, on late blight and early blight of potatoes. This proposed temporary tolerance supports a non-crop destruct experimental use permit (EUP) under section 5 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of azoxystrobin on potatoes in Wisconsin. This regulation proposes to establish a maximum

permissible level for residues of azoxystrobin in this food commodity pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act of 1996.

DATES: Comments must be received on or before September 28, 1998.

ADDRESSES: By mail, submit written comments in triplicate to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, deliver comments to: Rm. 119, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Comments and data may also be submitted electronically to: opp-docket@epamail.epa.gov. Follow the instructions under Unit VII. of this document. No Confidential Business Information (CBI) should be submitted through e-mail.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential will be included in the public docket by EPA without prior notice. The public docket is available for public inspection in Rm. 119 at the Virginia address given above, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: John Bazuin, Registration Division 7505C, Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 305-7381, e-mail: bazuin.john@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA, in cooperation with Wisconsin potato growers, University extension specialists, and Zeneca Ag Products, Inc., and pursuant to section 408(e) and (r) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e) and (r), is proposing to establish a temporary tolerance for 1 year for the combined residues of the fungicide azoxystrobin and its Z isomer, in or on potatoes at 0.03 parts per million (ppm).

I. Background and Statutory Authority

The Food Quality Protection Act of 1996 (FQPA) (Pub. L. 104-170) was signed into law August 3, 1996. FQPA amends both the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 301 *et seq.*, and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.* The FQPA amendments went into effect immediately. Among other things, FQPA amends FFDCA to bring all EPA pesticide tolerance-setting activities under a new section 408 with a new safety standard and new procedures. These activities are described below and discussed in greater detail in the final rule establishing the time-limited tolerance associated with the emergency exemption for use of propiconazole on sorghum (61 FR 58135, November 13, 1996) (FRL-5572-9).

New section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . ."

Section 5 of FIFRA authorizes EPA to issue an experimental use permit for a pesticide. This provision was not amended by FQPA. EPA has established regulations governing such experimental use permits in 40 CFR part 172. Section 408(r) of FFDCA authorizes EPA to issue temporary tolerances for pesticide residues resulting from FIFRA experimental use permits.

II. Risk Assessment and Statutory Findings

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides based primarily on toxicological studies using laboratory animals. These studies address many adverse health effects, including (but

not limited to) reproductive effects, developmental toxicity, toxicity to the nervous system, and carcinogenicity. Second, EPA examines exposure to the pesticide through the diet (e.g., food and drinking water) and through exposures that occur as a result of pesticide use in residential settings. The Agency has determined that azoxystrobin is a reduced risk pesticide for use on potatoes.

A. Toxicity

1. *Threshold and non-threshold effects.* For many animal studies, a dose response relationship can be determined, which provides a dose that causes adverse effects (threshold effects) and doses causing no observed effects (the "no observed adverse effect level" or "NOAEL").

Once a study has been evaluated and the observed effects have been determined to be threshold effects, EPA generally divides the NOAEL from the study with the lowest NOAEL by an uncertainty factor (usually 100 or more) to determine the Reference Dose (RfD). The RfD is a level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. An uncertainty factor (sometimes called a "safety factor") of 100 is commonly used since it is assumed that people may be up to 10 times more sensitive to pesticides than the test animals, and that one person or subgroup of the population (such as infants and children) could be up to 10 times more sensitive to a pesticide than another. In addition, EPA assesses the potential risks to infants and children based on the weight of the evidence of the toxicology studies and determines whether an additional uncertainty factor is warranted. Thus, an aggregate daily exposure to a pesticide residue at or below the RfD (expressed as 100% or less of the RfD) is generally considered acceptable by EPA. EPA generally uses the RfD to evaluate the chronic risks posed by pesticide exposure. For shorter term risks, EPA calculates a margin of exposure (MOE) by dividing the estimated human exposure into the NOAEL from the appropriate animal study. Commonly, EPA finds MOEs lower than 100 to be unacceptable. This 100-fold MOE is based on the same rationale as the 100-fold uncertainty factor.

Lifetime feeding studies in two species of laboratory animals are conducted to screen pesticides for cancer effects. When evidence of increased cancer is noted in these studies, the Agency conducts a weight of the evidence review of all relevant toxicological data including short-term

and mutagenicity studies and structure activity relationship. Once a pesticide has been classified as a potential human carcinogen, different types of risk assessments (e.g., linear low dose extrapolations or MOE calculation based on the appropriate NOAEL) will be carried out based on the nature of the carcinogenic response and the Agency's knowledge of its mode of action.

2. *Differences in toxic effect due to exposure duration.* The toxicological effects of a pesticide can vary with different exposure durations. EPA considers the entire toxicity data base, and based on the effects seen for different durations and routes of exposure, determines which risk assessments should be done to assure that the public is adequately protected from any pesticide exposure scenario. Both short and long durations of exposure are always considered. Typically, risk assessments include "acute," "short-term," "intermediate term," and "chronic" risks. These assessments are defined by the Agency as follows.

Acute risk, by the Agency's definition, results from 1 day consumption of food and water, and reflects toxicity which could be expressed following a single oral exposure to the pesticide residues. High end exposure to food and water residues is typically assumed.

Short-term risk results from exposure to the pesticide for a period of 1 to 7 days, and therefore overlaps with the acute risk assessment. Historically, this risk assessment was intended to address primarily dermal and inhalation exposure which could result, for example, from residential pesticide applications. However, since enactment of FQPA, this assessment has been expanded to include both dietary and non-dietary sources of exposure, and will typically consider exposure from food, water, and residential uses when reliable data are available. In this assessment, risks from average food and water exposure, and high-end residential exposure, are aggregated. High-end exposures from all three sources are not typically added because of the very low probability of this occurring in most cases, and because the other conservative assumptions built into the assessment assure adequate protection of public health. However, for cases in which high-end exposure can reasonably be expected from multiple sources (e.g. frequent and widespread homeowner use in a specific geographical area), multiple high-end risks will be aggregated and presented as part of the comprehensive risk assessment/characterization. Since the toxicological endpoint considered in

this assessment reflects exposure over a period of at least 7 days, an additional degree of conservatism is built into the assessment; i.e., the risk assessment nominally covers 1 to 7 days exposure, and the toxicological endpoint/NOAEL is selected to be adequate for at least 7 days of exposure. (Toxicity results at lower levels when the dosing duration is increased.)

Intermediate-term risk results from exposure for 7 days to several months. This assessment is handled in a manner similar to the short-term risk assessment.

Chronic risk assessment describes risk which could result from several months to a lifetime of exposure. For this assessment, risks are aggregated considering average exposure from all sources for representative population subgroups including infants and children.

B. Aggregate Exposure

In examining aggregate exposure, FFDC section 408 requires that EPA take into account available and reliable information concerning exposure from the pesticide residue in the food in question, residues in other foods for which there are tolerances, residues in ground water or surface water that is consumed as drinking water, and other non-occupational exposures through pesticide use in gardens, lawns, or buildings (residential and other indoor uses). Dietary exposure to residues of a pesticide in a food commodity is estimated by multiplying the average daily consumption of the food forms of that commodity by the tolerance level or the anticipated pesticide residue level. The Theoretical Maximum Residue Contribution (TMRC) is an estimate of the level of residues consumed daily if each food item contained pesticide residues equal to the tolerance. In evaluating food exposures, EPA takes into account varying consumption patterns of major identifiable subgroups of consumers, including infants and children. The TMRC is a "worst case" estimate since it is based on the assumptions that food contains pesticide residues at the tolerance level and that 100% of the crop is treated by pesticides that have established tolerances. If the TMRC exceeds the RfD or poses a lifetime cancer risk that is greater than approximately one in a million, EPA attempts to derive a more accurate exposure estimate for the pesticide by evaluating additional types of information (anticipated residue data and/or percent of crop treated data) which show, generally, that pesticide residues in most foods when they are

eaten are well below established tolerances.

Percent of crop treated estimates are derived from Federal and private market survey data. Typically, a range of estimates is supplied and the upper end of this range is assumed for the exposure assessment. By using this upper end estimate of percent of crop treated, the Agency is reasonably certain that exposure is not understated for any significant subpopulation group. Further, regional consumption information is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups, to pesticide residues. For this pesticide, the most highly exposed population subgroup (non-nursing infants (<1 year old)) was not regionally based.

III. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action, EPA has sufficient data to assess the hazards of azoxystrobin and to make a determination on aggregate exposure, consistent with section 408(b)(2), for a temporary tolerance for 1 year for combined residues of azoxystrobin and its Z isomer on potatoes at 0.03 ppm. EPA's assessment of the dietary exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects and the Agency's selection of toxicological endpoints upon which to assess risk caused by azoxystrobin are discussed below.

1. *Acute toxicity.* The Agency evaluated the existing toxicology data base for azoxystrobin. No acute dietary endpoint was identified, no developmental toxicity was observed in the rabbit and rat studies reviewed, and no primary neurotoxicity was seen in the acute neurotoxicity study. Therefore, no risk has been identified for this scenario and a risk assessment is not needed.

2. *Short - and intermediate-term toxicity.* The Agency evaluated the existing toxicology data base for short-

and intermediate-term dermal and inhalation exposure and determined that this risk assessment is also not required. In a 21-day dermal toxicity study the NOAEL was 1,000 milligrams/kilograms/day (mg/kg/day) at the highest dose tested (acute inhalation toxicity category III).

3. *Chronic toxicity.* EPA has established the RfD for azoxystrobin at 0.18 mg/kg/day. This RfD is based on a chronic toxicity study in rats with a NOAEL of 18.2 mg/kg/day. The endpoint effects were reduced body weights and bile duct lesions at the lowest effect level (LEL) of 34 mg/kg/day. An Uncertainty Factor (UF) of 100 was used to account for both the interspecies extrapolation and the intraspecies variability.

4. *Carcinogenicity.* Carcinogenicity testing of azoxystrobin in two appropriate species of mammals revealed no evidence that this fungicide is carcinogenic. Therefore, EPA classifies azoxystrobin as "not likely" to be a human carcinogen in line with the proposed revised cancer guidelines.

B. Exposures and Risks

1. *From food and feed uses.* Permanent tolerances have been established (40 CFR 180.507(a)) for the combined residues of azoxystrobin and its Z isomer, in or on a variety of raw agricultural commodities at levels ranging from 0.01 ppm in pecans to 1.0 ppm in grapes. In addition, time-limited tolerances have been established (40 CFR 180.507(b)) at levels ranging from 0.006 ppm in milk to 20 ppm in rice hulls) in conjunction with section 18 requests. Risk assessments were conducted by EPA to assess dietary exposures and risks from azoxystrobin as follows:

i. *Acute exposure and risk.* Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1 day or single exposure. The Agency did not conduct an acute risk assessment because no toxicological endpoint of concern was identified during review of available data.

ii. *Chronic exposure and risk.* In conducting this chronic dietary risk assessment, the Agency has made very conservative assumptions—100% of potatoes and all other commodities having azoxystrobin tolerances will contain azoxystrobin residues and those residues would be at the level of the tolerance—which result in an overestimation of human dietary exposure. Thus, in making a safety determination for this tolerance, EPA is taking into account this conservative

exposure assessment. The existing azoxystrobin tolerances (published, pending, and including the necessary section 18 tolerance(s)) result in a Theoretical Maximum Residue Contribution (TMRC) that is equivalent to the following percentages of the RfD:

Population Sub-Group	TMRC (mg/kg/day)	% RFD
U.S. Population (48 States)	0.003	1.8%
Nursing Infants (<1 year old)	0.004	2%
Non-Nursing Infants (<1 year old)	0.011	8%
Children (1-6 years old)	0.007	4%
Children (7-12 years old)	0.004	2%
Hispanics	0.004	2%
Non-Hispanics Others	0.005	3%
U.S. Population (summer season)	0.003	2%
U.S. Population (Northeast region)	0.003	2%

Population Sub-Group	TMRC (mg/kg/day)	% RFD
U.S. Population (Western region)	0.003	2%
U.S. Population (Pacific region)	0.003	2%
Females (13+, nursing)	0.003	2%
Females (13-19, not pregnant or nursing)	0.002	1%

Neither the U.S. population as a whole nor any of the subgroups whose food consumption patterns were analyzed for dietary exposure and risk to azoxystrobin reached even one-twelfth of the RfD under these assumed theoretical maximum exposures to azoxystrobin for all published, pending, and proposed tolerances. Moreover, real-world exposure is likely to be substantially lower than this.

2. *From drinking water.* There is no established Maximum Contaminant Level for residues of azoxystrobin in

drinking water. No health advisory levels for azoxystrobin in drinking water have been established.

i. *Acute exposure and risk.* An acute risk assessment was not appropriate since no toxicological endpoint of concern was identified for this scenario during review of the available data.

ii. *Chronic exposure and risk.* Based on the chronic dietary (food) exposure estimates, chronic drinking water levels of concern (DWLOC) for azoxystrobin were calculated and are summarized in the following table. Estimated environmental concentrations (EECs) using GENEEC for azoxystrobin on bananas, grapes, peaches, peanuts, pecans, tomatoes, and wheat are listed in SWAT Team Second Interim Report (June 20, 1997). The highest EEC for azoxystrobin in surface water is from the application of azoxystrobin on grapes (39 µg/L) and is substantially lower than the DWLOCs calculated. Therefore, chronic exposure to azoxystrobin residues in drinking water do not exceed the Agency's level of concern.

	RfD (mg/kg/day)	TMRC [Food Exposure] (mg/kg/day)	Maximum Water Exposure ¹ (mg/kg/day)	DWLOC ^{2,3,4} (µg/L)
U.S. Population (48 States)	0.18	0.0027	0.178	6,200
Females (13 + years old, not pregnant or nursing)	0.18	0.0019	0.178	5,300
Non-nursing Infants (<1 year old)	0.18	0.0113	0.169	1,680

¹ Maximum water exposure (mg/kg/day) = RfD (mg/kg/day) - TMRC from DRES (mg/kg/day)

² DWLOC (µg/L) = Max water exposure (mg/kg/day) * body wt (kg)/[(10⁻³ mg/µg)*water consumed daily (L/day)]

³ HED default body wts for males, females, and children are 70 kg, 60 kg, and 10 kg respectively

⁴ HED default daily drinking rates are 2 L/day for adults and 1 L/day for children

3. *From non-dietary exposure.*

Azoxystrobin is not currently registered for use on residential non-food sites.

4. *Cumulative exposure to substances with common mechanism of toxicity.*

Azoxystrobin is related to the naturally occurring strobilurins. There are no other members of this class of fungicides registered with the Agency. Section 408(b)(2)(D)(v) requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity." The Agency believes that "available information" in this context might include not only toxicity, chemistry, and exposure data, but also scientific policies and methodologies for understanding common mechanisms of toxicity and conducting cumulative risk assessments. For most pesticides,

although the Agency has some information in its files that may turn out to be helpful in eventually determining whether a pesticide shares a common mechanism of toxicity with any other substances, EPA does not at this time have the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity in a meaningful way. EPA has begun a pilot process to study this issue further through the examination of particular classes of pesticides. The Agency hopes that the results of this pilot process will increase the Agency's scientific understanding of this question such that EPA will be able to develop and apply scientific principles for better determining which chemicals have a common mechanism of toxicity and evaluating the cumulative effects of such chemicals. The Agency anticipates, however, that even as its understanding of the science of common mechanisms increases, decisions on specific classes

of chemicals will be heavily dependent on chemical specific data, much of which may not be presently available.

Although at present the Agency does not know how to apply the information in its files concerning common mechanism issues to most risk assessments, there are pesticides as to which the common mechanism issues can be resolved. These pesticides include pesticides that are toxicologically dissimilar to existing chemical substances (in which case the Agency can conclude that it is unlikely that a pesticide shares a common mechanism of activity with other substances) and pesticides that produce a common toxic metabolite (in which case common mechanism of activity will be assumed).

EPA does not have, at this time, available data to determine whether azoxystrobin has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative

risk assessment. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, azoxystrobin does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that azoxystrobin has a common mechanism of toxicity with other substances.

C. Aggregate Risks and Determination of Safety for U.S. Population

1. *Acute risk.* This risk assessment is not necessary since no acute toxicological end-point of concern was identified for this exposure scenario during review of the available data.

2. *Chronic risk.* Using the conservative TMRC exposure assumptions described above, and taking into account the completeness and reliability of the toxicity data, the Agency has estimated that exposure to azoxystrobin from food will utilize 2% of the RfD for the U.S. population as a whole. The Agency generally is not concerned about exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to azoxystrobin in drinking water, the Agency does not expect the aggregate exposure to exceed 100% of the RfD. Under current Agency guidelines, the registered non-dietary uses of azoxystrobin do not constitute a chronic exposure scenario and EPA concludes that there is a reasonable certainty that no harm will result from aggregate exposure to currently registered azoxystrobin residues.

3. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account chronic dietary food and water (considered to be a background exposure level) plus indoor and outdoor residential exposure. This risk assessment is not needed because no dermal or systemic effects were seen in the repeated dose dermal study at the limit dose. Additionally, no indoor or outdoor residential exposure uses are currently registered for azoxystrobin.

D. Aggregate Cancer Risk for U.S. Population

This risk assessment is also not needed. Azoxystrobin is classified as "not likely" to be a carcinogen under the proposed revised carcinogenicity guidelines because carcinogenicity testing was performed on two appropriate species and no evidence of carcinogenicity was found.

E. Aggregate Risks and Determination of Safety for Infants and Children

1. *Safety factor for infants and children—i. In general.* In assessing the potential for additional sensitivity of infants and children to residues of azoxystrobin, EPA considered data from developmental toxicity studies in the rat and rabbit and a 2-generation reproduction study in the rat. The developmental toxicity studies are designed to evaluate adverse effects on the developing organism resulting from maternal pesticide exposure during gestation. Reproduction studies provide information relating to effects from exposure to the pesticide on the reproductive capability of mating animals and data on systemic toxicity.

FFDCA section 408 provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for pre- and post-natal toxicity and the completeness of the data base unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. EPA believes that reliable data support using the standard MOE and uncertainty factor (usually 100 for combined inter- and intra-species variability) and not the additional tenfold MOE/uncertainty factor when EPA has a complete data base under existing guidelines and when the severity of the effect in infants or children or the potency or unusual toxic properties of a compound do not raise concerns regarding the adequacy of the standard MOE/safety factor.

ii. *Developmental toxicity studies—*a. *Rabbit.* In the developmental toxicity study in rabbits, developmental NOAEL was 500 mg/kg/day, at the highest dose tested (HDT). Because there were no treatment-related effects, the developmental LEL was ≥ 500 mg/kg/day. The maternal NOAEL was 150 mg/kg/day. The maternal LEL of 500 mg/kg/day was based on decreased body weight gain during dosing.

b. *Rat.* In the developmental toxicity study in rats, the maternal (systemic) NOAEL was not established. The maternal LEL of 25 mg/kg/day at the lowest dose tested (LDT) was based on increased salivation. The developmental (fetal) NOAEL was 100 mg/kg/day (HDT).

iii. *Reproductive toxicity study—*a. *Rat.* In the reproductive toxicity study (MRID No. 43678144) in rats, the

parental (systemic) NOAEL was 32.3 mg/kg/day. The parental LEL of 165.4 mg/kg/day was based on decreased body weights in males and females, decreased food consumption and increased adjusted liver weights in females, and cholangitis. The reproductive NOAEL was 32.3 mg/kg/day. The reproductive LEL of 165.4 mg/kg/day was based on increased weanling liver weights and decreased body weights for pups of both generations.

iv. *Conclusion.* The pre- and post-natal toxicology data base for azoxystrobin is complete with respect to current toxicological data requirements. The results of these studies indicate that infants and children are no more sensitive to exposure to azoxystrobin than are adults, based on the results of the rat and rabbit developmental toxicity studies and the 2-generation reproductive toxicity study in rats. Accordingly, EPA has determined that the standard margin of safety will protect the safety of infants and children and the additional tenfold safety factor can therefore be removed.

2. *Chronic risk.* Using the conservative exposure assumptions described above, EPA has concluded that aggregate exposure to azoxystrobin from food will utilize 2 to 8% of the RfD for infants and children. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. Despite the potential for exposure to azoxystrobin in drinking water and from non-dietary, non-occupational exposure, EPA does not expect the aggregate exposure to exceed 100% of the RfD. EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to azoxystrobin residues.

IV. Other Considerations

A. Metabolism in Plants and Animals

a. *The metabolism of azoxystrobin as well as the nature of the residues is adequately understood for purposes of the temporary tolerance.* Plant metabolism has been evaluated in three diverse crops; grapes, wheat, and peanuts, which is required to define similar metabolism of azoxystrobin in a wide range of crops. Parent azoxystrobin is the major component found in crops. Azoxystrobin does not accumulate in crop seeds or fruits. Metabolism of azoxystrobin in plants is complex, with more than 15 metabolites identified. These metabolites are present at low

levels, typically much less than 5% of the total radioactive residue level.

b. *The qualitative nature of the residue in animals is adequately understood for the purposes of this proposed 1 year temporary tolerance.* Establishment of a temporary tolerance of 0.03 ppm for azoxystrobin in/on potatoes is not expected to lead to detectable azoxystrobin residues in animal commodities.

B. Analytical Enforcement Methodology

An analytical method, gas chromatography with nitrogen-phosphorus detection (GC-NDP) or, in mobile phase, by high performance liquid chromatography with ultraviolet detection (HPLC-UV), is available for enforcement purposes with a limit of detection that allows monitoring of food with residues at or above the level proposed for this temporary tolerance. The Agency has concluded that the method is adequate for enforcement of tolerances in/on other non-oily raw agricultural commodities. The Agency concludes this method is adequate for enforcement of the proposed temporary tolerance in/on potatoes.

C. Magnitude of Residues

Residues of azoxystrobin and its Z isomer are not expected to exceed 0.03 ppm in/on potatoes as a result of the EUP use. A temporary tolerance should be established at this level.

D. International Residue Limits

There are no CODEX, Canadian, or Mexican Maximum Residue Limits for azoxystrobin in/on potatoes.

E. Rotational Crop Restrictions

Rotational crop data were previously submitted. Based on this information, a 45-day plantback interval is appropriate for all crops other than those with azoxystrobin tolerances.

V. Conclusion

A 15-day comment period is being allowed for this proposed rule because of the speed of growth and of resistance development of early and late blight, and because these fungal diseases are so devastating to potato crops once they become established. The Agency desires to be supportive of efforts by potato growers to combat these diseases and to protect their crops. The Agency also desires to be supportive of efforts by researchers to find control methods for the pests early and late blight. Additionally, the Agency feels that there is strong evidence in support of the safety of this proposed action.

Therefore, a temporary tolerance is proposed for 1 year for the combined

residues of azoxystrobin and its Z isomer in/on potatoes at 0.03 ppm.

VI. Public Record and Electronic Submissions

The official record for this rulemaking, as well as the public version, has been established for this rulemaking under docket control number "OPP-300710" (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The official rulemaking record is located at the Virginia address in "ADDRESSES" at the beginning of this document.

Electronic comments can be sent directly to EPA at:

opp-docket@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment and data will also be accepted on disks in Wordperfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket control number "OPP-300710." Electronic comments on this proposed rule may be filed online at many Federal Depository Libraries.

VII. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

This document proposes establishing a temporary tolerance under FFDCA section 408(d). EPA is proposing this regulation in cooperation with Wisconsin potato growers, University extension specialists, and Zeneca Ag Products, Inc. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled "Regulatory Planning and Review" (58 FR 51735, October 4, 1993). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). Nor does it require any special considerations as required by Executive Order 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income

Populations" (59 FR 7629, February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997).

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Agency previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950), and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

B. Executive Order 12875

Under Executive Order 12875, "entitled Enhancing Intergovernmental Partnerships (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget (OMB) a description of the extent of EPA's prior consultation with representatives of affected State, local and Tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and Tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's proposed rule does not create an unfunded Federal mandate on State, local or Tribal governments. The proposed rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this proposed rule.

C. Executive Order 13084

Under Executive Order 13084, entitled "Consultation and Coordination with Indian Tribal Governments" (63 FR 27655, May 19, 1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal

governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the Tribal governments. If the mandate is unfunded, EPA must provide OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected Tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's proposed rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this proposed rule.

List of Subjects in 40 CFR Part 180

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

Dated: September 2, 1998.

Stephen L. Johnson,

Acting Director, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR chapter I be amended as follows:

PART 180—[AMENDED]

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

Authority: 21 U.S.C. 346a and 371.

2. Section 180.507(a) is amended by redesignating the existing text as paragraph (a)(1) and adding paragraph (a)(2) to read as follows:

§ 180.507 Azoxystrobin; tolerances for residues.

(a)(1) * * *

(2) *Temporary tolerance.* A tolerance to expire on September 13, 1999 is established for the combined residues of azoxystrobin [methyl (E)-2-{2-[6-(2-cyanophenoxy)pyrimidin-4-yl]oxy]phenyl}-3-methoxyacrylate] and its Z isomer in or on potatoes at 0.03 parts per million (ppm).

* * * * *

[FR Doc. 98-24338 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 970129015-8157-07; I.D. 042597B]

RIN 0648-A184

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Harbor Porpoise Take Reduction Plan Regulations

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

ACTION: Proposed rule; notice of availability of proposed take reduction plan.

SUMMARY: NMFS announces the availability of a proposed harbor porpoise take reduction plan (HPTRP) to reduce the bycatch of harbor porpoise (*Phocoena phocoena*) in gillnet fisheries throughout the stock's U.S. range. NMFS also proposes regulations to implement the HPTRP. The proposed plan, including a discussion of the recommendations of the Gulf of Maine Take Reduction Team (GOMTRT) and the Mid-Atlantic Take Reduction Team (MATRT), is contained in the HPTRP/Environmental Assessment/Initial Regulatory Flexibility Analysis (HPTRP/EA/IRFA), available upon request (see addresses below). Changes to the recommendations of the GOMTRT and the MATRT are described within this document. This action replaces the proposed rule issued on August 13, 1997 (62 FR 43302).

The potential biological removal (PBR) level for Gulf of Maine harbor porpoise throughout their range is 483 animals (62 FR 3005, January 21, 1997). The incidental bycatch of harbor porpoise in the Gulf of Maine (GOM) and Mid-Atlantic gillnet fisheries exceeds the PBR level. The proposed HPTRP would use a wide range of management measures to reduce the bycatch and mortality of harbor porpoise. In the GOM, the HPTRP proposes time and area closures and time/area periods during which pinger use would be required in the Northeast, Mid-coast, Massachusetts Bay, Cape Cod South and Offshore Closure Areas. In the Mid-Atlantic area, the HPTRP

proposes time/area closures and modifications to gear characteristics, including floatline length, twine size, tie downs, and number of nets, in the large mesh and small mesh fisheries. NMFS seeks comment on the proposed HPTRP/EA/IRFA, and the proposed regulations to implement the plan.

DATES: Comments due October 13, 1998.

ADDRESSES: Copies of the draft plan prepared by the GOMTRT, the final report from the MATRT and the HPTRP/EA/IRFA may be obtained from Donna Wieting, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3226.

FOR FURTHER INFORMATION CONTACT: Donna Wieting, NMFS, 301-713-2322 or Laurie Allen, NMFS, Northeast Region, 978-281-9291.

SUPPLEMENTARY INFORMATION: The 1994 amendments to the Marine Mammal Protection Act (MMPA) require the preparation and implementation of TRPs for strategic marine mammal stocks that interact with Category I or II fisheries. A Category I fishery is a fishery that has frequent incidental mortality and serious injury of marine mammals. A Category II fishery is a fishery that has occasional incidental mortality and serious injury of marine mammals. A Category III fishery is a fishery that has a remote likelihood of causing incidental mortality or serious injury of marine mammals.

This proposed rule addresses preparation and implementation of a take reduction plan (TRP) for harbor porpoise, a strategic marine mammal stock, that interacts with the NE multispecies gillnet fishery and with the Mid-Atlantic coastal gillnet fisheries. The 1996 Stock Assessment Report (SAR) (Waring et al., 1997) states that harbor porpoise bycatch has been observed by the NMFS Sea Sampling program in the following fisheries: (1) the Northeast (NE) multispecies sink gillnet, (2) the mid-Atlantic coastal gillnet, (3) the Atlantic drift gillnet, (4) the North Atlantic bottom trawl fisheries, and (5) the Canadian Bay of Fundy sink gillnet fishery. The fisheries of greatest concern, and the subject of this TRP, are the NE multispecies sink gillnet fishery (Category I), and the Mid-Atlantic coastal gillnet fishery (Category II).

The Atlantic drift gillnet fishery, a Category I fishery, is being addressed by the Atlantic Offshore Cetacean Take Reduction Team (AOCTRT). The North Atlantic bottom trawl fishery is a Category III fishery and is not the subject of take reduction efforts at this time. The Canadian sink gillnet fishery

takes approximately 100 harbor porpoise per year. This proposed rule is expected to reduce harbor porpoise bycatch below the PBR level, including the 100 takes by the Canadian fishery.

The NE multispecies sink gillnet fishery comprises the majority of the overall multispecies gillnet activity in New England. Harbor porpoise may, however, interact with other gillnet fisheries capable of capturing multispecies. Additionally, new non-sink gillnet fisheries could be introduced into harbor porpoise conservation areas. Therefore, this proposed rule would apply to all gillnets in New England capable of catching NE multispecies.

Under the 1994 Amendments to the MMPA, the short-term goal of a TRP is to reduce, within 6 months of its implementation, the mortality and serious injury of strategic stock(s) incidentally taken in the course of commercial fishing operations to less than the PBR level established for those stock(s). The PBR level is the maximum number of animals, not including natural mortalities, that may be annually removed from a marine mammal stock without compromising the ability of that stock to reach or maintain its optimum population level. The goal of this TRP is to bring the combined incidental take of the GOM harbor porpoise stock below the PBR level for all U.S. fisheries that interact with that stock.

NMFS convened the GOMTRT in February 1996. The goal of the GOMTRT was to develop a consensus draft TRP to reduce the incidental take of harbor porpoise in sink gillnets in the GOM to the PBR level for that stock within 6 months of the TRP's implementation. NMFS limited the geographic scope of the 1996 team to focus only on bycatch off New England's coast (Maine to Rhode Island). The reason for this approach was because the proportion of incidental take in the NE multispecies sink gillnet fishery constituted the majority of the total fishery-related mortality in the United States and because of uncertainty about the extent of fisheries interactions south of New England. Data on the bycatch of harbor porpoise in the Mid-Atlantic were not available until 1996 due to low observer effort prior to 1995 and the lag in availability of appropriate effort data to estimate bycatch. The GOMTRT convened with the understanding that a separate take reduction team would be convened to address the harbor porpoise bycatch problem in the Mid-Atlantic (discussed here).

The GOMTRT included representatives of the NE multispecies sink gillnet fishery, NMFS, state marine resource management agencies, the New England Fishery Management Council (NEFMC), environmental organizations, and academic and scientific organizations. The GOMTRT met five times between February and July 1996 and submitted a consensus draft TRP (the GOMTRP) to NMFS in August 1996.

Soon after the GOMTRT submitted a draft TRP, the NEFMC enacted Framework Adjustment 19 (61 FR 55774, October 29, 1996) to the NE Multispecies Fishery Management Plan (FMP) which changed the time and area of the NE Multispecies FMP Mid-Coast Closure Area within the GOM and established an exemption to allow sink gillnet vessels to fish the reopened area when utilizing pingers on their nets. Based on this action, NMFS modified the draft TRP submitted by the GOMTRT to be consistent with Framework Adjustment 19 and, on August 13, 1997, published a proposed rule to implement a TRP for harbor porpoise in the GOM (GOMTRP) (62 FR 43302, August 13, 1997).

NMFS convened the MATRT in February 1997 to address the incidental bycatch of harbor porpoise in Mid-Atlantic gillnet fisheries (from New York through North Carolina). The MATRT included representatives of the Mid-Atlantic coastal gillnet fisheries, NMFS, state marine resource management agencies, the Mid-Atlantic Fishery Management Council, the NEFMC, the Atlantic States Marine Fisheries Commission (ASMFC), environmental organizations, and academic and scientific organizations. The MATRT did not reach consensus on all issues discussed. The MATRT submitted a report to NMFS on August 25, 1997 which included both consensus and non-consensus recommendations. NMFS has not previously published a proposed rule to implement a Mid-Atlantic Take Reduction Plan (MATRP).

Harbor Porpoise Take Reduction Plan

This proposed rule would implement the HPTRP for the GOM and Mid-Atlantic geographic areas. This HPTRP is based in large part on recommendations in the draft GOMTRP and the MATRT Report. This proposed rule replaces the previous proposed rule published to implement the GOMTRP (62 FR 43302, August 13, 1997). The GOMTRP proposed rule is being replaced because three developments have occurred since the publication of that rule. First, new bycatch information

became available which indicated that significant changes were needed in the GOMTRP to achieve the PBR level for harbor porpoise. NMFS reconvened the GOMTRT on December 16 and 17, 1997, to discuss this new information and to provide additional comments to NMFS. Secondly, Framework 25 to the NE Multispecies FMP, published on March 31, 1998 (63 FR 15326), was implemented on May 1, 1998; this framework implements gillnet fishing closures throughout the GOM to conserve cod (*Gadus morhua*). Some of these closures may indirectly provide harbor porpoise conservation. Thirdly, the MATRT submitted its report to NMFS which presented new information on the level of harbor porpoise bycatch in the mid-Atlantic region.

The combination of these actions led NMFS to integrate the initially separate plans into one comprehensive TRP. Since the revised plan is substantially different from the 1997 GOMTRP, NMFS is replacing the 1997 proposed rule with this proposed rule.

Stock Assessment

The range of the harbor porpoise extends from the Bay of Fundy, Canada, to the southern border of North Carolina. The cumulative levels of incidental mortality and serious injury of harbor porpoise occurring in the New England, Mid-Atlantic, and Canadian gillnet fisheries exceed the PBR level for this stock.

The PBR level for harbor porpoise is 483 animals per year. This is a strategic stock because average annual fishery-related mortality and serious injury exceeds the PBR level. There are insufficient data to determine population trends for this species. NMFS proposed listing the GOM harbor porpoise as threatened under the Endangered Species Act (58 FR 3108, January 7, 1993), but no final action has been taken on that proposal.

Incidental Takes by Fishery

The estimated total annual average mortality from New England and Mid-Atlantic gillnet fisheries is 2,040. This estimate is based on a 5-year (1990–1995) average mortality estimate of 1,833 (Waring et al., 1997) for the GOM and based on preliminary analysis of 1995 and 1996 data from the Mid-Atlantic of 207 animals (Palka, unpublished data).

The NE multispecies sink gillnet fishery sets nets on the ocean bottom, where they are fixed by anchors. These nets are primarily used to catch groundfish (cod, haddock, hake, pollock and flounders), monkfish, and dogfish.

The fishery primarily consists of small vessels, (about 30–50 feet (10–17 meters) in length), that operate from numerous ports throughout New England. A vessel may fish between 40 and 200 nets, depending on target species. Nets are usually approximately 300 feet (92 meters) long and are tied together in strings of one to 30 nets.

The Mid-Atlantic coastal gillnet fishery comprises several gillnet fisheries, which operate from New York to North Carolina. The mesh sizes range from 2.5 to 12 inches (6.35 to 30.48 cm), with the smallest mesh sizes used to capture small fish, such as spot and shad. Medium mesh sizes are used to capture weakfish, striped bass, spiny dogfish, and bluefish. The largest mesh sizes are used for Atlantic sturgeon and monkfish. Observer coverage of the Mid-Atlantic coastal gillnet fishery was initiated by the Northeast Fisheries Science Center (NEFSC) Sea Sampling Program in July 1993.

HPTRP: Gulf of Maine Component

The GOM portion of the HPTRP would govern and pertain to all fishing with sink gillnets and other gillnets capable of catching multispecies, in the inshore and offshore waters of New England, from Maine through Rhode Island, east of 72°30' W. longitude.

NMFS proposes a schedule of periods and areas which would be closed to multispecies gillnet fishing unless pingers are employed in the prescribed manner (Table 1). Some areas are total

fishery closures where no fishing is allowed. In all closed areas, where pingers are required, vessel operators must complete training in pinger use and have a valid pinger training certificate on board the vessel.

TABLE 1.—GULF OF MAINE TIME/AREA CLOSURES TO GILLNET FISHING AND PERIODS DURING WHICH PINGER USE WOULD BE REQUIRED

Northeast Area:	
August 15–September 13—Closed.	
Mid-Coast Area:	
September 15–May 31—Closed, gillnet with pingers allowed.	
Massachusetts Bay Area:	
February 1–28/29—Closed, gillnet with pingers allowed.	
March 1–31—Closed	
April 1–May 31—Closed, gillnet with pingers allowed.	
Cape Cod South Area:	
September 15–February 28/29—Closed, gillnet with pingers allowed.	
March 1–31—Closed	
April 1–30—Closed, gillnet with pingers allowed.	
Offshore Area:	
September 15–May 31—Closed, gillnet with pingers allowed.	
Cashes Ledge Area:	
February 1–28/29—Closed	

Discussion of the Gulf of Maine Component

NMFS determined that the August 13, 1997, proposed rule (62 FR 43302) would not adequately reduce harbor

porpoise bycatch in the GOM. The results of the new GOM bycatch estimates presented at the December 16–17, 1997 GOMTRT meeting suggest that: (1) bycatch reduction is being achieved in the Mid-Coast and Northern Maine closure areas; (2) bycatch in 1997 was greater than in 1996 in the Massachusetts Bay and the Cape Cod South areas; (3) bycatch offshore was noted in 1996 and 1997; however, it is difficult to compare these data with years prior to 1996, since the offshore fishery had very little observer coverage in those years; (4) although bycatch reduction is occurring in specific areas and times, the PBR level is not being achieved overall; and (5) the August 13, 1997, proposed rule to implement the GOMTRP is unlikely to achieve the PBR level. Additionally, Framework 25 to the NE Multispecies FMP has significantly changed the management measures that are implemented under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) to protect GOM cod. Existing closures for marine mammals (which were a key part of the GOMTRP) and Framework 25 closure periods partially overlap and result in a very complex system of closures (see Figure 1).

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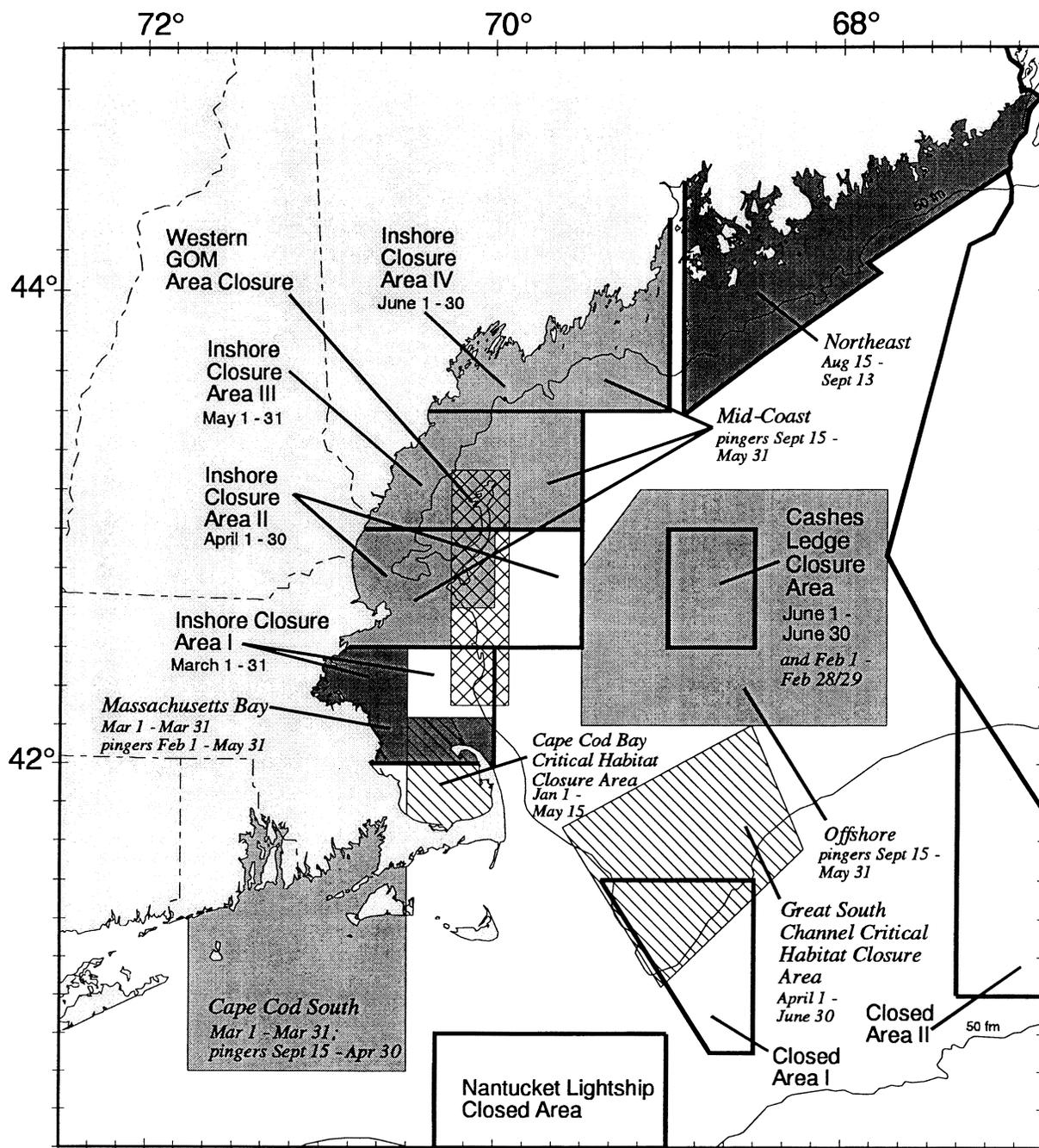


Figure 1. Chart of closures under the Gulf of Maine component of the proposed Harbor Porpoise Take Reduction Plan and closures under the Northeast Multispecies Fishery Management Plan (FMP). Areas on the chart delineated by bold, linear outline with labels in regular type correspond to NE Multispecies FMP; labels in italic type identify shaded areas of proposed harbor porpoise measures.

Figure 1 illustrates the change the "rolling closure" for cod conservation makes to current marine mammal closure boundaries and times in the GOM. The entire old Massachusetts Bay and Mid-Coast Closure Areas would be divided into four approximately even areas.

The Massachusetts Bay Closure Area would not change on the northern boundary but would be larger to the east; it would still be closed March 1–31. The Mid-Coast Closure Area would then be closed completely in relatively equal sections, Inshore Closure Area II (April), Inshore Closure Area III (May), and Inshore Closure Area IV (June). Previously, the entire shaded area labeled "Mid-Coast" was closed May 10–30 for NE Multispecies FMP concerns and March 25–April 25 for harbor porpoise conservation. Under this proposed rule, the boundary of the Mid-Coast Closure Area would not change, with the exception of a small area just east of Inshore Closure Area III, but pingers would be allowed.

The Inshore Area closures provide some protection for harbor porpoise in Areas II and III; however, the closure in Area IV is relatively insignificant for reducing bycatch of harbor porpoise due to the timing of the measures. A year round closure of parts of Jeffreys Ledge and Stellwagen Bank (Western GOM area closure) has been added by Framework 25 to the NE Multispecies FMP and it also provides protection for harbor porpoise. The northeast closure area remains unchanged for either purpose.

Overall, NMFS expects that these proposed HPTRP implementing regulations would reduce harbor porpoise bycatch from the current level of approximately 1,833 animals per year in the Gulf of Maine area to 309 animals per year.

HPTRP: Mid-Atlantic Component

The Mid-Atlantic portion of the HPTRP would govern and pertain to all fishing with gillnets in the inshore and offshore waters of the Mid-Atlantic west

of 72°30' W. longitude to the Mid-Atlantic shoreline from NY to NC, with exemptions inshore of the first bridge over embayments and other similar areas as specified by the proposed regulations.

Tables 2 and 3 set forth management measures for large mesh and small mesh gillnet fisheries in the Mid-Atlantic. Separate gear requirements are specified for large mesh (7 inches (17.78cm) to 18 inches (45.72cm)) and small mesh gear (less than 7 inches (17.78 cm)). There remain some areas that are total closures where no fishing is allowed at all. The effective period for the Mid-Atlantic Component of the HPTRP is:

- New Jersey waters, and U.S. waters off New Jersey out to 72°30' W. longitude offshore—January 1 through April 30
- Southern Mid-Atlantic (MD, DE, VA, NC) and U.S. waters off the southern Mid-Atlantic out to 72°30' W. longitude offshore—February 1 through April 30.

TABLE 2.—MANAGEMENT MEASURES FOR THE LARGE MESH GILLNET FISHERY¹ IN THE MID-ATLANTIC

Floatline Length:	
New Jersey Mudhole	Less than or equal to 3,900 ft (1188.7 m).
New Jersey Waters (excluding Mudhole)	Less than or equal to 4,800 ft (1463.0 m).
Southern Mid-Atlantic	Less than or equal to 3,900 feet (1188.7 m).
Twine Size:	
All Mid-Atlantic Waters	Greater than or equal to .90 mm (.035 inches).
Tie Downs:	
All Mid-Atlantic Waters	Required.
Net Cap:	
All Mid-Atlantic Waters	80 nets ² (nets are 300 ft (91.4 m) long).
Time/Area Closures:	
New Jersey waters out to 72°30' W. longitude offshore (including the Mudhole).	Closed from April 1–April 20.
New Jersey Mudhole	Closed from February 15–March 15.
Southern Mid-Atlantic waters (MD, DE, VA, NC) out to 72°30' W. longitude offshore.	Closed from February 15–March 15.

¹ Includes gillnet with mesh size of 7 inches (17.78cm) to 18 inches (45.72cm).
² Requires all nets to be tagged by January 01, 2000.

TABLE 3.—MANAGEMENT MEASURES FOR THE SMALL MESH GILLNET FISHERY³ IN THE MID-ATLANTIC

Floatline Length:	
New Jersey waters—less than or equal to 3,000 feet (914.4 m) Southern Mid-Atlantic waters—less than or equal to 2,118 feet (645.6 m).	
Twine Size (applies only to mesh sizes greater than 4 inches (10.2 cm)): greater than or equal to .81 mm (.091 inches) in all Mid-Atlantic waters.	
Net Cap: 45 nets ⁴ (nets are 300 feet (91.4 m) long) in all Mid-Atlantic waters.	
Time/Area Closures: New Jersey Mudhole Closed from February 15–March 15.	

³ Includes gillnet with mesh size of less than 7 inches (17.78cm).
⁴ Requires all nets to be tagged by January 01, 2000.

The New Jersey Mudhole is defined as an area bounded as follows: from the point 40°30' N. latitude where it intersects with the shoreline of New Jersey east to its intersection with 73°20' W. longitude, then south to its intersection with 40°05' N. latitude, then west to its intersection with the shoreline of New Jersey.

Discussion of the Mid-Atlantic Component

The Mid-Atlantic portion of the plan divides gillnet activity into large and small mesh categories and requires gear modifications for those mesh categories based on observer data. Observer data showed patterns or trends where reduced bycatch might be achieved if

certain combinations of gear characteristics were used. The gear characteristics that demonstrated the most potential for bycatch reduction in the large mesh and small mesh fisheries were floatline length, twine size, tie downs and soak time. There are no proposed measures to reduce soak time because this measure is very difficult to

enforce. Since NMFS believes that the combination of gear modifications and time/area closures will achieve the PBR goal, soak time is not proposed as a management measure.

None of the gear characteristics alone were strongly correlated with reduced bycatch, therefore a number of measures were combined to achieve the bycatch reduction goal. Since these measures would be ineffective if effort increases, a net cap or net limit is proposed to keep effort at current levels.

Additionally, the proposed rule sets forth a schedule of fishery closures in areas and at times most closely linked with high harbor porpoise bycatch based on the observer data. NMFS agreed with the MATRT that closures were essential to achieving the PBR level given that the correlation between gear modifications and specific levels of reduced bycatch is not clear.

The small mesh and large mesh categories are specifically designed to exclude both the large mesh pelagic fishery for swordfish, tuna, and shark (greater than 18 inches (45.7 cm)) and, for some gear modifications, the very small mesh gear that is commonly used close to shore (less than 4 inches (10.16 cm)). The gear modifications include twine size specifications, net caps, floatline length limits, tie-down specifications and net panel length limits. The large mesh pelagic drift gillnet fishery (Category I fishery) is not addressed in this rule because it is being addressed by the AOCTRT. The inshore fishery, which would include very small mesh, is not subject to this rule because observer data is inadequate at this time to determine the expected take in the inshore fishery. The proposed rule would completely close the large mesh gillnet fishery for three periods and the small mesh gillnet fishery for one period. The proposed TRP would prohibit tie-downs in the small mesh gillnet category to prevent fishers from effectively fishing for certain species, e.g., monkfish, using smaller mesh during the closed period for large mesh. This measure is expected to avoid the potential for effort shifts.

This component of the plan differs from the GOM component because rather than using a series of time and areas closed to fishing and times and areas where acoustic deterrents are required, the Mid-Atlantic portion requires a suite of gear modifications. The distinction in management measures between the two regions is appropriate in this case for a number of reasons. The regions differ markedly in stages of development with regard to harbor porpoise conservation. Whereas the GOMTRT has been meeting and

proposing various bycatch reduction measures for the GOM for many years, the MATRT has only met in the last two years. The GOMTRT proposed a number of measures initially which did not include mandated pinger use prior to the current recommendation. Based on new information, those measures were determined to be unsuccessful in achieving the PBR level. With regard to the use of pingers as an appropriate management measure in the GOM, no data exist to support other options, except for total closure to sink gillnet fishing. In the Mid-Atlantic, data indicated other options in the form of gear modifications that might be successful in reducing bycatch without some of the uncertainties surrounding widespread pinger use.

For the Mid-Atlantic area, the HPTRP would institute the first set of management measures to reduce harbor porpoise bycatch in that region. Since a number of options are available which may be successful, NMFS would implement non-acoustic measures before proposing pinger testing. Additionally, the MATRT did not fully support a pinger experiment in the Mid-Atlantic area at this time. The gear modifications and time/area closures recommended by the MATRT and proposed in this proposed rule are expected to be sufficient to reduce the incidental mortality of harbor porpoise from approximately 207 animals per year to less than 50 animals per year in the Mid-Atlantic area. Non-Regulatory Components of the HPTRP

In addition to recommending regulatory measures, both the GOMTRT and the MATRT recommended certain non-regulatory measures. The GOMTRT provided specific recommendations at the December 1997 meeting upon which its acceptance of more widespread pinger use and closures was contingent. These recommendations included the need for: (1) an assessment of pingers on habituation and displacement of harbor porpoise, and long term ecosystem impacts, (2) a census of the gillnet fleet, (3) investigation of funding for pinger technology development and purchase, (4) development and implementation of a training and certification program for fishers that will use pingers, and (5) additional analytical support for NMFS to ensure the progress of the plan's effectiveness can be adequately monitored. These components are part of the proposed HPTRP. A specific discussion of these recommendations and NMFS' response to the recommendations are contained in the HPTRP/EA/IRFA. The following summarizes NMFS efforts to address the concerns raised by the GOMTRT:

(1) A study to evaluate the habituation and displacement question is already funded and underway. As part of the HPTRP, NMFS is developing a research plan to assess long-term ecosystem impacts from widespread use of pingers.

(2) As part of monitoring strategy for the HPTRP, NMFS is working with the ASMFC on the Atlantic Coastal Cooperative Statistics Program (ACCSP) in order to provide managers with more timely bycatch and fisheries information on the Atlantic Coast. Meanwhile, NMFS is continuing to look for ways to improve data collection efforts within the current system.

(3) NMFS is investigating options for providing support to fishers for pinger technology.

(4) The proposed rule would require all fishers who wish to use pingers in the closed areas to attend training and obtain certification. This certification program would not only provide training in technical aspects of pinger use, but also provide information on the bycatch problem and the need for fishers to use pinger technology properly to meet bycatch reduction objectives. NMFS is investigating the best method of delivering this program to fishers.

(5) NMFS will consider the GOMTRT's recommendation for analytical resources during normal funding and staffing allocation discussions in light of other agency responsibilities.

The MATRT made several recommendations that were considered important in achieving the long-term goals for bycatch reduction in the Mid-Atlantic. The non-regulatory measures recommended by the team primarily focus on NMFS' long-term research, monitoring, and management objectives.

The MATRT recommended that NMFS obtain a characterization of winter coastal gillnet and small boat fisheries and to designate observer coverage accordingly.

NMFS has proposed to expand its observer coverage of the Mid-Atlantic fisheries in 1998 to obtain a better characterization of other coastal fisheries to ensure observer coverage is representative of actual fishing effort.

The MATRT recommended that an outreach program be conducted to inform fishers of both new and existing regulations regarding incidental takes in their fisheries. The MATRT believes that these educational efforts should, if possible, be specifically directed toward those fishers using the fishing gear and/or practices that have higher levels of harbor porpoise bycatch.

NMFS agrees. The HPTRP provides for voluntary skipper education

workshops. Additionally, NMFS plans to prepare educational materials which will describe the take reduction process and explain the key components of the MATRP and its accompanying regulations. NMFS will ensure that these educational materials are widely distributed throughout the fishery.

The MATRT recommended several measures to enhance the effectiveness of NMFS' observer program, including expanding marine mammal observer coverage to include all areas covered by the MATRT, increased observer coverage in small mesh fisheries and better coordination between the activities of the stranding and observer programs to allow shifts of observer coverage in response to stranding information.

NMFS is planning to expand observer coverage to ensure that all components of the fishery are observed. Due to limited resources, NMFS will not be able to increase observer coverage in areas of the fishery that are already being observed at some level. Additionally, NMFS is expanding stranding observer coverage to allow for responsiveness to observed strandings.

To provide the necessary coordination between the teams and consistency across the regions, NMFS, at the recommendation of the GOMTRT, included several members of the GOMTRT on the MATRT. NMFS will strive to ensure that data on bycatch and effort in both areas will be shared with both teams.

NMFS' long-term goal is to combine the GOMTRT and the MATRT to allow for the development of comprehensive strategies to reduce harbor porpoise bycatch on the east coast. Team Recommendations and NMFS' Proposed Changes

Gulf of Maine Component

The GOMTRT developed a comprehensive approach to the problem and included: (1) a core management plan that consisted of a schedule of time/area closures and periods when pingers would be required for each of the established management areas, (2) an implementation plan, and (3) a series of recommendations regarding data collection and analysis (details regarding these elements can be found in 62 FR 43302, August 13, 1997, and is incorporated by reference).

The August 13, 1997 proposed rule (62 FR 43302) would have implemented a schedule of time/area closures and periods during which pingers would be required for each of the established sink gillnet management areas. The proposed regulations included a comprehensive approach based on the GOMTRT's draft

plan and on the measures implemented by the NEFMC as discussed above. The proposed GOMTRP regulations maintained the comprehensive approach recommended by the GOMTRT. Comments on the proposed rule are addressed in this document.

Following is a discussion of the area-by-area management recommendations and data and the explanations for why NMFS is proposing to retain some provisions as recommended by the GOMTRT at its December 16 and 17, 1997 meeting, and why some changes to the GOMTRT's recommendations are being proposed.

Northeast Area

Currently, the Northeast Area is closed to sink gillnet fishing from August 15 through September 13 of each year. This closure remains in effect under Framework 25 to the NE Multispecies FMP so no further management measures (pingers) are being considered at this time. This measure was considered sufficient by the GOMTRT and NMFS, and represents no change from the proposed rule issued on August 13, 1997.

Mid-Coast Area

Since Framework 4 to the NE Multispecies FMP (59 FR 26972, May 25, 1994) went into effect, the Mid-Coast Area has been closed to fishing with sink gillnets from March 25 to April 25 of each year (this first took effect in 1995). In the past, the Mid-Coast Area has been closed from September 15 through the end of the year. In 1995, sink gillnet fishers were allowed to operate in the area with no restrictions from September 15 through October 31, and were allowed to participate in an experimental fishery in certain parts of the area in November and December, provided they used pingers in accordance with NMFS specifications. In 1996, gillnetters were also allowed to participate in an experimental fishery from September 15 to October 31, and Framework Adjustment 19 to the NEFMP authorized sink gillnet fishing with pingers in the area for the months of November and December. Framework Adjustment 19 also closed a portion of the Mid-Coast Area known as Jeffreys Ledge Closure Area from May 1–May 31 in 1997.

While the HPTRP does not include a complete closure in the Mid-Coast Area, Framework 25 to the NE Multispecies FMP provides three, month-long closures in different parts of the Mid-Coast Area (previously described). The months of April and May had significant harbor porpoise bycatch in 1994–1996 and therefore, the

Framework 25 closure is expected to reduce harbor porpoise bycatch, but it is not clear to what extent. The requirement for pingers in March will reduce the likelihood that significant takes would occur because of effort shifts back into that month. The Western GOM Area Closure (includes portions of Jeffreys Ledge and Stellwagen Bank) is being implemented as a year-round closure under Framework 25 to the NE Multispecies FMP. This overlaps the eastern edge of the current Mid-Coast closure.

The GOMTRT agreed that pingers were likely to reduce harbor porpoise bycatch by 90 percent during the fall in the Mid-Coast area. This plan assumes 80 percent effectiveness which would allow for some uncertainty in spring.

Massachusetts Bay

Currently, Massachusetts Bay is closed to fishing with sink gillnets during the month of March. This is the time of year during which most known takes in the region were recorded. This measure is considered sufficient by the GOMTRT and NMFS and is consistent with Framework 25 to the NE Multispecies FMP. When combined with the pinger measure described here, no change in the closures for this area appears warranted.

In March 1996, NMFS authorized fishers to operate in Massachusetts Bay as part of an experimental fishery, provided they used pingers in accordance with NMFS's instructions. The GOMTRT was uncertain that pingers would significantly reduce the take of harbor porpoises during the spring in Massachusetts Bay. The GOMTRT agreed, however, to assume that pingers might reduce the take of harbor porpoises by 50 percent during the spring, and it recommended that pingers be required during February, April, and May. Again, NMFS is reluctant to assume percentages contradictory to the results of controlled scientific experiments and is proposing to assume 80 percent for the first year of plan implementation. Refer to the section on acoustic deterrent devices for further explanation.

Closures during these months would decrease fishing opportunity significantly, with relatively little additional reduction in bycatch of harbor porpoises. Because March is the month with the highest risk of entanglement, the Team recommended that March be closed to sink gillnet fishing. April bycatch in 1996 was high for this area, possibly a result of shifted effort from March to April, or differences in harbor porpoise abundance and distribution. The goal of

the HPTRP is to reduce the bycatch resulting from such effects by requiring pingers on the months on either side of the complete closure.

Cape Cod South Closure Area

The possibility that harbor porpoise may be entangled in sink gillnets operating just south of Cape Cod has only recently been documented. Observer coverage of sink gillnet trips in this area began in 1992.

Currently, the Cape Cod South Closure Area is closed to fishing with sink gillnets during the month of March. Up until 1996, most known takes in the region occurred during this month. The current closures are considered sufficient by the GOMTRT and NMFS, and no change in the complete closures for this area is warranted. Given the relatively low level of bycatch during these months, the Team believed that the use of pingers to minimize bycatch would be sufficient.

Offshore Closure Area

Observer coverage in the offshore closure area was limited until 1996, and harbor porpoise takes that year were very high, estimated at 258 in the winter (mostly February) and 45 in the fall (September–December). This raised significant concerns at the GOMTRT meeting in December 1997 and offset some of the expected positive effects of many of the other harbor porpoise measures at reducing the overall bycatch estimate from 1995 (total bycatch in GOM was approximately 1400 in 1995 and 1500 in 1996). In 1997, there were observed takes in January and May, again demonstrating the variable nature of these interactions.

Consequently, a complete closure in this area was discussed by the GOMTRT in December 1997, with a closure requiring pingers in the months adjacent to that closure to address the possible shifts in bycatch. Since 71 percent of the bycatch occurred in the Cashes Ledge Area during February in 1996, complete closure of this area was a logical choice, with pinger use required in the larger offshore area from September through May.

Mid-Atlantic Component

The MATRT draft report recommended modifications of those gear characteristics and fishing activities that appeared to be most closely linked with higher harbor porpoise bycatch. The intent of the MATRT was to focus management measures on those fisheries that appeared most responsible for higher bycatch. In the Mid-Atlantic, those fisheries are the monkfish and dogfish fisheries. Based on observer data, the draft report also recommended a schedule of fishery closures in areas and at times most closely linked with high harbor porpoise.

The MATRT's report reflected the results of the data analysis, indicating that nets with finer twine size and longer floatline lengths were correlated with more cetacean interactions than were nets with larger twine sizes and shorter nets. The MATRT recommended that, in observed areas of high bycatch, decreasing the total length of nets and increasing the twine size in fisheries operating in those areas at critical times might reduce the number of interactions.

The MATRT determined the time frame for effectiveness of the

management measures based on when and where harbor porpoise takes have been observed to occur. Harbor porpoise takes were observed between January and April from New Jersey to North Carolina, although January takes were only observed in New Jersey. The month with the highest bycatch was March, followed by January. Areas with highest bycatch were in New Jersey waters and, particularly for the monkfish subfishery, in the area off New Jersey called the Mudhole.

The MATRT recommended that a number of management measures be combined to achieve bycatch reduction below the PBR level because none of the gear characteristics alone were strongly correlated with reduced bycatch. Since these measures would be ineffective if effort increased, the MATRT recommended a net cap or net limit to keep effort at current levels. The net cap was set at the current average of 80 nets for monkfish and 45 nets for dogfish. Additionally, because of the uncertainty inherent in the data analysis, the MATRT recommended the use of time and area closures during times and within areas of highest bycatch.

Specifically, the MATRT report recommended the following gear modifications and time/area closures for the monkfish and dogfish fisheries (Tables 4 and 5): Effective period for both Tables.

- New Jersey waters, and U.S. waters off New Jersey out to 200 miles—January 1 through April 30.
- Southern Mid-Atlantic (MD, DE, VA, NC) and U.S. waters off the southern Mid-Atlantic out to 200 miles—February 1 through April 30.

TABLE 4.—MANAGEMENT MEASURES FOR THE MONKFISH FISHERY, AS RECOMMENDED BY THE MATRT IN ITS REPORT TO NMFS

Floatline Length:

New Jersey Mudhole: Less than or equal to 3,900 ft (1188.7 m) New Jersey Waters (excluding Mudhole): Less than or equal to 4,800 ft (1463.0 m).

Southern Mid-Atlantic: Less than or equal to 3,900 ft (1188.7 m).

Twine Size:

All Mid-Atlantic Waters: Greater than or equal to .90 mm (.35 inches).

Mesh Size:

All Mid-Atlantic Waters: 12 inches (3.1 cm).

Tie Downs:

All Mid-Atlantic Waters: Required.

Net Cap:

All Mid-Atlantic Waters: 80 nets (nets are 300 ft (91.4 m) long).

Time/Area Closures:

New Jersey waters and 200 nm (370.4 km) offshore (including the Mudhole): Closed from February 15—March 15.

Southern Mid-Atlantic (MD, DE, VA, NC) waters and 200 nm (370.4 km) offshore: Closed for a block of 20 days between February and April.¹

¹ The specific timing of the southern Mid-Atlantic 20-day closure would be determined by individual fishers.

TABLE 5.—MANAGEMENT MEASURES FOR THE DOGFISH FISHERY, AS RECOMMENDED BY THE MATRT IN ITS REPORT TO NMFS

Floatline Length:	New Jersey waters: Less than or equal to 3,000 feet (914.4 m) Southern Mid-Atlantic waters: Less than or equal to 2,118 feet (645.6 m).
Twine Size:	All Mid-Atlantic Waters: Greater than or equal to .81 mm (.32 inches).
Mesh Size:	All Mid-Atlantic Waters: Less than or equal to 6.5 inches (1.7 cm).
Net Cap:	All Mid-Atlantic waters: ² 45 nets.
Time/area Closures:	None.

² Nets are 300 feet long.

The Mid-Atlantic component of the HPTRP follows the MATRT's recommendations, except as discussed below. The non-consensus portions of the MATRT's report are discussed in the HPTRP/EA/IRFA. NMFS concurs with the MATRT's determination that the proposed management measures be effective from January 1 through April 30 in waters off New Jersey and from February 1 to April 30 in the southern Mid-Atlantic waters. The difference in effective dates between New Jersey and the southern Mid-Atlantic is based on the difference in observed harbor porpoise takes between those areas. There were no observed takes of harbor porpoise between July and December throughout the Mid-Atlantic because there is little evidence that harbor porpoise are present in the Mid-Atlantic during the summer, fall, and winter months.

The proposed HPTRP varies from the recommendations of the MATRT because the HPTRP proposes extending jurisdiction from the seaward edge of the coast to 72°30' W. longitude offshore instead of 200 miles offshore.

The proposed HPTRP differs from the MATRT's recommendations with regard to basing management measures on subfisheries. The Mid-Atlantic coastal gillnet fishery consists of both local Mid-Atlantic vessels and New England vessels that fish in Mid-Atlantic waters during the winter months. The New England vessels fishing in the Mid-Atlantic region use a finer-twine gear type and more nets than the local Mid-Atlantic vessels.

Current data indicate that the fine-twine gear used by New England vessels is associated with a higher level of harbor porpoise bycatch than the gear used by local fishers. As a result, the MATRT's Report was based on bycatch reduction options that reinforced or were based on the fishing practices used by local Mid-Atlantic fishers. The intent of the MATRT was to address those fisheries that appeared to be correlated with higher bycatch.

The MATRT recommended management measures specific to the two predominant coastal gillnet fisheries, i.e., the monkfish and dogfish fisheries. NMFS proposes management measures specific to large and small mesh size fisheries. This approach should not change the effectiveness of the management measures in achieving the PBR level because the mesh size categories are consistent with the mesh size categories of the dogfish (small mesh) and monkfish (large mesh) fisheries. The major benefits of this modification is to make the provisions of this action more enforceable.

Given the considerable assumptions inherent in the bycatch analysis by subfishery, NMFS determined that regulatory measures should not be based on subfisheries, as the MATRT intended. Rather, the regulatory measures should be based on the characteristic(s) that appear most related to harbor porpoise bycatch, regardless of which subfishery employs such gear characteristics. It is the nature of the gear and how that gear is employed, rather than the target species, that determines whether harbor porpoise are entangled. In addition, basing regulatory measures on the dogfish and monkfish subfisheries would be very difficult to enforce, since the definition and prosecution of those fisheries differs greatly among fishermen and no FMP or permit system is currently in place under the Magnuson-Stevens Act for either fishery. Likewise, defining "directed fishing" for these species and imposing bycatch restrictions would be difficult to administer and enforce.

In this case, twine size and floatline length appear to be the predominant gear characteristics that are correlated with harbor porpoise bycatch in the Mid-Atlantic. NMFS has partitioned the regulatory measures according to large and small mesh categories. The large mesh category, defined as mesh of 7 inches (17.78 cm) to 18 inches (45.72 cm), includes the monkfish subfishery; the small mesh category, defined as

mesh size less than 7 inches (17.78 cm), includes the dogfish fishery.

Given the models used in the subfishery bycatch analysis, and with the same assumptions that were used in the subfishery bycatch analysis (with the exception of the assumption that the only subfisheries that could potentially ever catch harbor porpoise are the dogfish and monkfish subfisheries), the predicted effect of using the recommended gear characteristics based on large mesh and small mesh gillnet categories instead of dogfish and monkfish subfisheries is still expected to result in a 79 percent or greater reduction in harbor porpoise bycatch in the Mid-Atlantic.

The proposed HPTRP differs from the MATRT's recommendations with regard to the timing of area closures. For the large mesh fishery (the monkfish fishery), the MATRT recommended New Jersey waters, including the Mudhole be closed from February 15 through March 15. NMFS proposes that the February 15 through March 15 closure apply only to vessels fishing in the Mudhole. Data indicate high bycatch in the rest of New Jersey in April, therefore NMFS proposes a closure in the rest of New Jersey from April 1 through April 20. The MATRT also recommended that the southern Mid-Atlantic be closed for a block of 20 days between February and April, the timing of the closure to be determined by the individual fishers. Such a closure would be very difficult to enforce, therefore NMFS proposes a set closure from February 15 through March 15 in the southern Mid-Atlantic. The timing of this closure is consistent with the timing of high harbor porpoise bycatch and is consistent with the timeframe envisioned by the MATRT.

For the small mesh fishery (the dogfish fishery), the MATRT recommended no time and area closures. Closures may not be necessary for most of the small mesh fishery, except in the Mudhole. The majority of the takes in the northern area are from

vessels landing in New Jersey from February through April and the fishing activity in the is particularly high during the February through March time period. The level of effort for both the small mesh and large mesh fisheries are very high in the Mudhole, therefore NMFS proposes a one month closure from February 15 through March 15 in the Mudhole for the small mesh fishery consistent with the one month closure for the large mesh fishery. Data on Acoustic Deterrent Devices and Implications for TRP Bycatch Reduction

NMFS, the fishing community, and the NEFMC have been exploring the potential of mitigating incidental bycatch of harbor porpoise in gillnets by using active acoustic alarms to warn harbor porpoise of the presence of a gillnet. These devices have shown promise as a bycatch reduction measure with varying success rates in both controlled scientific experimentation and experimental fisheries. However, scientists note that the results of these experiments should be cautiously applied when evaluating the success or failure of bycatch reduction in very different geographic areas or during other times than those investigated within the experiment. Harbor porpoise may respond differently seasonally, between geographic areas, or with differing oceanographic conditions.

In the fall of 1994, NMFS authorized and provided support for a cooperative scientific experiment by New England gillnet fishers and scientists. Building on work completed in previous years (1992–1993), the experiment sought to evaluate the effectiveness of pingers attached to gillnets to prevent entanglement of harbor porpoise. The pingers used in this experiment employed a wide range of frequencies, and acoustic features of the devices may have varied due to battery life; yet the result was a dramatic reduction in harbor porpoise bycatch (Kraus et al., 1995). Scientific concerns remained after this experiment. It was still uncertain why the alarms worked; harbor porpoise may have responded directly to the sound or the sound may have mediated the behavior of harbor porpoise prey (herring). Other unanswered questions include the possibility of habituation of harbor porpoise and other mammals to pingers over time and the overall environmental effects of widespread pinger use.

As a result of the success of the scientific experiment, experimental fisheries (an experimental fishery is not a scientifically designed experiment, but pinger use under uncontrolled fishing conditions) operated in the fall of both 1995 and 1996 and in the spring of

1996. In the fall of 1996 (Sept. 15–Oct 31) experimental fishery, three harbor porpoise were caught in 51 observed trips (198 hauls). Unfortunately, the results of the spring 1996 experimental fishery were different from the other experiments—11 harbor porpoise were caught in nets with pingers in the Jeffreys Ledge area (88 hauls, 9 harbor porpoise), Massachusetts Bay (171 hauls, 2 harbor porpoise), and in the Cape Cod South Closure Area (53 hauls, no harbor porpoise) (Waring et al., 1997).

One possible explanation is that the positive fall results may have been due to the pingers' deterrent effects on herring (a prey species), which are not present in the region in spring. Consequently, the GOMTRT recommended an additional scientific pinger experiment in the spring of 1997. No harbor porpoise were caught in nets with active pingers in the 1997 experiment, demonstrating that pingers reduced the incidental catch of harbor porpoise in sink gillnets during the spring by almost 100 percent (Kraus et al., 1997). Based on these findings, Kraus concluded that these results appear to disprove the hypothesis that deterrent effects on herring explain the discrepancy between results of the fall and spring experimental fisheries. However, the 1997 experiment did not yield any alternative explanations for the contradictory results of the spring experimental fishery.

The unanswered questions regarding pinger success add uncertainty to predictions of pinger effectiveness in areas other than those where the experiments occurred (in both time and area). In addition, because of a lack of a control in the 1996 experimental fishery, conclusions cannot be drawn about the high bycatch observed during that experiment. Because of these uncertainties, this proposed rule uses the results of the scientific experiments to assess the effectiveness of pingers in reducing harbor porpoise bycatch in the GOM. NMFS recognizes that sufficient monitoring of this fishery must occur during plan implementation to ensure that pingers adequately reduce harbor porpoise bycatch.

Closures for short periods of time in discrete areas have a number of problems that decrease their effectiveness in reducing marine mammal bycatch. Changes in distribution of fishing effort or in annual abundance and distribution of harbor porpoise may render these closures ineffective. The advantage of using pingers is that they can be employed over a wide geographic area for a long period of time while still allowing the

fishery to continue. The principle findings of the Acoustic Deterrence Workshop in 1996 (Reeves, et al.) noted that "it is appropriate to proceed with the full-scale integration of pingers into the management regime for the NE multispecies sink gillnet fishery provided that the regime includes observer and monitoring programs adequate to verify that the bycatch remains acceptably low and that no non-target species is affected adversely."

Summary

In summary, based on reviewing the results of previous pinger experiments, the recommendations from the 1996 Acoustic Deterrence Workshop, and the discussion during the GOMTRT meeting in December 1997, this proposed rule would require widespread pinger use in the NE multispecies sink gillnet fishery. Data from the scientific experiments support a minimum 80 percent effectiveness rate estimate in the Mid-Coast area in the fall and in the spring. Therefore, NMFS will apply these pinger effectiveness rates to fall and spring pinger closures proposed in other areas (Cape Cod South and Offshore) that lack experimental data.

After implementation of this plan, NMFS will review harbor porpoise bycatch rate by June 30 (i.e., after the spring fishing season) of each calendar year to ensure that the expected pinger effectiveness rate is being realized. Additionally, this proposed rule includes a provision that would allow the Assistant Administrator to make adjustments in the time or area of closures if unexpected high bycatch occurs during a given year.

The major benefit of this aspect of the HPTRP is that by establishing closures requiring pingers, it implements a bycatch reduction strategy for several months on either side of complete closures. This should help with the inter-annual and monthly variability problem that may have contributed to keeping total bycatch at relatively unchanged or increasing levels for the last several years.

Pingers were discussed at length as a management option by the MATRT. As a management strategy, it is appropriate for many reasons to proceed with full scale integration of pingers to reduce the incidental bycatch of marine mammals in the NE multispecies sink gillnet fishery as a whole. However, caution has been urged by scientists and the GOMTRT and MATRT in applying the assumptions demonstrated in New England to other geographic areas, gear types, and times. Based on recommendations of the Acoustic Deterrence Workshop, acoustic

deterrents should not be used in fisheries where other non-acoustic management strategies are likely to be equally effective.

Comments and Responses

NMFS received numerous comments during the 60-day comment period following its August 13, 1997, proposed rule. NMFS received further comments when it reopened the public comment period following the December 16–17, 1997, meeting of the GOMTRT (97 FR 32474). The following are NMFS' responses to the comments received on the August 1997 proposed rule.

Proposed Schedule of Closures/Pinger Use

NMFS received several comments regarding the proposed schedule of fishery closures and required pinger use. NMFS has considered these comments in light of new information on harbor porpoise bycatch and relevant fishery management actions that have occurred since the publication of the proposed rule. NMFS believes that the proposed HPTRP represents the best comprehensive management strategy for both reducing U.S. harbor porpoise bycatch and rebuilding groundfish stocks under Framework 25 the NE Multispecies FMP.

Comment 1: For the Mid-Coast Area, several commenters suggested alternative schedules of fishery closures and required pinger use from that proposed.

Response: The new proposed rule would close the Mid-Coast Area from September 15 through May 31, but allow sink gillnet gear with pingers during that time period. The proposed rule does not include a complete closure in the Mid-Coast Area. However, Framework 25 to the NE Multispecies FMP provides three 1-month closures in different sections of the Mid-Coast Area. Additionally, Framework 25 includes a year-round closure of parts of Jeffreys Ledge and Stellwagen Bank which NMFS expects will provide protection for harbor porpoise.

NMFS expects that the closures under Framework 25, in combination with pinger requirements for extended periods of time in the months on either side of the closure, will ensure adequate bycatch reduction. If the NEFMC makes changes to Framework 25 that NMFS expects would result in increased harbor porpoise bycatch, the Assistant Administrator could, under the new proposed rule, make adjustments to the timing or area of a closure.

Comment 2: One commenter proposed an alternative schedule of closures and pinger use for the

Massachusetts Bay area as follows: (1) maintain March 1 through March 31 closure and (2) close this area to fishing during February and April except to vessels participating in an experimental fishery with pingers.

Response: NMFS is proposing for the Massachusetts Bay Area: (1) March 1 through March 31 closure, (2) February 1 through February 28/29 and April 1 through May 31 closures, but fishing with pingers allowed. Therefore, an experimental fishery under the Magnuson-Stevens Act will not be necessary because the NEFMC will be asked to mirror the MMPA regulations in the current Magnuson-Stevens Act closures.

Comment 3: One commenter supported the Downeast closure as proposed by both the GOMTRT and NMFS in its draft plan.

Response: NMFS is maintaining this closure, referred to as the Northeast closure, in the proposed rule.

Comment 4: One commenter proposed an alternative schedule of closures South of Cape Cod: (1) maintain March 1 through March 31 closure and (2) close this area to fishing during January, February, April, May, September, October, November, and December except to vessels participating in an experimental fishery with pingers.

Response: NMFS is proposing a similar schedule of closures and pinger use for the Cape Cod South Area: (1) March 1 through March 31 closure and (2) September 15 through February 28/29 and April 1 through April 30 closures, but fishing with pingers allowed.

Comment 5: One commenter mentioned that harbor porpoise takes have now been observed in the offshore gillnet area, which was previously unobserved. The commenter proposed closing the offshore gillnet area from January 1 through May 31, and September 1 through December 31, except to vessels participating in an experimental fishery with pingers.

Response: NMFS is proposing to close the offshore area from September 15 through May 31, allowing pingers during that time period, with the exception of the Cashes Ledge Closure Area (as defined in Framework 25 to the NEFMP), which will be closed February 1 through February 28/29. In 1996, the Cashes Ledge Closure Area contained 71 percent of approximately 258 total takes in the month of February. The high bycatch previously undocumented in the offshore area was one of the reasons that overall bycatch in the GOM has not decreased, in spite of efforts by the NEFMC. Consequently, in order for the overall plan to achieve its bycatch

reduction objectives, NMFS is proposing a closure in February with pingers required in the months adjacent to that closure to address possible shifts in bycatch. This is the approach used in all the other high bycatch areas (Mid-Coast, Massachusetts Bay, and Cape Cod South).

Comment 6: One commenter stated that the harbor porpoise bycatch data presented to the GOMTRT for the Southern New England area exhibited significant inter-annual variability within the 3 years of data collected. The GOMTRT agreed to extend pinger usage to this area, but expressed concern over the minimal amount of observed data (1992–1994) and the lack of current data. As a result, the commenter recommended a re-examination of the alternatives for the area to better substantiate the optimal period for closures and pinger usage.

Response: NMFS agrees that there is seasonal variability in both harbor porpoise bycatch and fishing effort. However, based on recent data, overall harbor porpoise distribution, and fishing effort distribution, the HPTRP incorporates adequate bycatch reduction measures during those months (September–April) when harbor porpoise and fishing effort are most likely to result in high bycatch, taking into account possible shifts in harbor porpoise distribution and abundance or shifts in fishing effort.

Comment 7: One commenter urged NMFS to maintain and enforce the current closures mandated by the NEFMC.

Response: See response to Comment 1 for a description of NEFMC and harbor porpoise proposed closures. The only change to the current NEFMC closures is in the Mid-Coast where pingers would be allowed during March 25 through April 25. In combination with the other components of the HPTRP, this is not expected to result in increased bycatch overall.

Pingers: Specifications and Implementation Issues

Comment 8: Two commenters noted that NMFS defined pinger broadcast parameters in the proposed rule, but did not provide regulatory guidance as to how it intends to either certify pingers as "NMFS approved" or test and enforce the defined parameters.

Response: The proposed rule included specifications for pingers that are required to be used in the NE multispecies sink gillnet fishery. All pingers used in this fishery must meet those specifications. Pinger manufacturers would be required to provide documentation that their

pingers meet the specifications of this proposed rule. NMFS is not requiring that manufacturers have their pingers certified by an independent company to ensure they meet the specifications. NMFS will periodically monitor whether the pingers used by the fishery meet the specifications.

Because the harbor porpoise bycatch rate will be carefully monitored, NMFS expects that both manufacturers and fishers will be aware of the importance of technically correct and properly maintained pingers. If bycatch increases because of improper pinger use or non-effective acoustics, more restrictive measures to reduce bycatch may be warranted. Additionally, a program that is part of the HPTRP would be in place to monitor pingers during normal use to ensure that acoustics of pingers do not change with time and that they maintain the acoustical characteristics specified by the manufacturer.

Comment 9: In the proposed rule, NMFS included a description of a pinger, including specific pinger parameters. The manufacturer and technical supporter which provided pingers used in the GOM pinger tests believes the following to be a more accurate description of the acoustic deterrent device used in the NE multispecies sink gillnet fishery: "operates at 10kHz (plus-minus 1 kHz) broadband (contains important harmonics) frequency at 134dB (plus-minus 4dB) re 1 micropascal at 1 meter output level, with 300 milliseconds (plus-minus 30 milliseconds) pulse width, and 4 seconds (plus-minus 400 milliseconds) pulse rate".

Response: The pinger specifications defined in NMFS' August 13, 1997, proposed rule accurately reflect the pingers used in the GOM pinger experiments, yet allow for a reasonable range of manufacturing variability to ensure these pinger broadcast parameters can be produced by different manufacturers. Therefore, no change in the specifications is proposed.

Comment 10: One commenter suggested that NMFS require that vessels carry four spare pingers in case of pinger malfunction.

Response: NMFS does not agree that vessel owners should be required to carry a specific number of spare pingers in case of pinger malfunction; the requirement that all pingers deployed must be "operating and functional" provides adequate direction to vessel owners.

Comment 11: One commenter supported the NMFS proposal that gillnetters be required to use the same pinger placement as was used in the GOM pinger experiment.

Response: NMFS has maintained this provision in this proposed rule.

Comment 12: Two commenters urged NMFS to immediately conduct the GOMTRT's recommended research on the effect of pingers on harbor porpoise and other marine life and on the habituation of harbor porpoise to pingers.

Response: A study to evaluate the habituation and displacement question has been funded. As part of the non-regulatory components of this HPTRP, NMFS is developing a research plan to assess long-term ecosystem impacts from widespread use of pingers.

Comment 13: One commenter suggested that if pingers are shown to have an adverse impact on harbor porpoise and other animals in the ecosystem, NMFS should close those areas that are currently proposed to be open with required pinger usage.

Response: If pingers are shown to have an adverse impact on harbor porpoise, NMFS will reconvene the TRTs to evaluate other alternatives, including, but not limited to, fishery closures.

Comment 14: Three commenters stated that NMFS' proposal to provide printed educational material on pingers is inadequate, and that NMFS should conduct pinger workshops and make attendance mandatory. Additionally, one comment added that the GOMTRT, at its December 1997 meeting, strongly urged NMFS to undertake the recommended certification process.

Response: NMFS agrees and plans to conduct a pinger certification training program. After reviewing the 1996 bycatch data and proposing to rely further on the widespread use of pingers in this proposed rule, NMFS determined that a pinger certification program should be required for fishers that want to fish with pingers in closed areas. NMFS believes that this is an important aspect of the plan, especially given the anomalous results of the 1996 experimental fishery. If these results were partially due to improper pinger use by fishers, NMFS would expect that this mandatory training and certification program would increase the chances that pingers would be highly effective.

The GOM component of the HPTRP would require that all fishers who wish to fish in an area where pingers are required must attend a pinger certification training program. The exact delivery method of this program has not been determined, but operators of fishing vessels would be required to have a certificate documenting that they have received training/certification on board their vessels if they are fishing in a closed area, with pingers.

Comment 15: Two commenters stated that concerns of unintended effects of pinger use are greatly overblown. Based on the results of the spring 1997 experiment, NMFS should allow widespread use of pingers in GOM.

Response: Uncertainties do exist surrounding potential unintended effects of pinger use, but these effects are not expected to be significant. However, this cannot be tested until put into application. Therefore, NMFS is proposing widespread pinger use, accompanied by scientific studies, to evaluate both habituation and displacement of harbor porpoise and over-reaching environmental effects from widespread use. If data from the monitoring program indicate that pingers are not working, the Assistant Administrator could, under this proposed rule, make adjustments in the time or area of closures.

Census of Gillnet Fleet

Comment 16: Several commenters stressed the need for NMFS to conduct a census of the NE multispecies sink gillnet fishery. Without this, one commenter questioned how NMFS will conduct outreach to the fishing community, determine if all fishers are registered, calculate an accurate bycatch estimate, or evaluate whether it is achieving the goals of the MMPA.

Response: The GOMTRT recommended that NMFS conduct or support a census of the sink gillnet fleet to determine seasonal effort type, and amount of gear fished, target species, and areas fished. NMFS has assessed the usefulness of vessel logbooks for a number of purposes and has more clearly defined the procedures used in collecting both fisher and dealer information to insure accuracy. However, the GOMTRT noted that development of a reporting system that provides timely, consistent, and thorough measures of fishery effort may require an overhaul of existing reporting mechanisms. Toward this end, NMFS is working as a partner in a cooperative effort between the Atlantic coastal states and the ASMFC on development of the ACCSP. The ACCSP has been designed to solve some of the inherent problems of current fishery statistic data collection systems. NMFS partially funded and participated in development of the bycatch component of this system and expects that it will improve the agency's ability to accurately reflect fishing effort and bycatch in both state and Federal fisheries. When fully operational, this system is expected to solve some of the problems addressed by this comment.

Comment 17: In the preamble to the earlier proposed rule, NMFS stated that it was examining the usefulness of fishing logbooks for effort estimation and the feasibility of technological alternatives and requested comments. One commenter recommended that NMFS summarize what it has done to investigate the possible alternative methods of estimating fishing effort and the results of such efforts. Two additional commenters urged NMFS to make the technological changes necessary to achieve real-time monitoring of effort, landings, and bycatch.

Response: The ACCSP (discussed in response to Comment 16) has been designed to solve some of the inherent problems of current fishery statistic data collection systems. This system was designed with considerations such as whether or not new reporting mechanisms or new methods of effort calculation were needed. The program's implementation phase has already begun, but NMFS expects that such a comprehensive system will require a significant amount of time to become completely operational. NMFS will provide an update on the progress of this program at the next meeting of the GOMTRT.

Reconvening the GOMTRT

Comment 18: Three commenters suggested that NMFS reconvene the GOMTRT and provide it with the results of the spring 1997 pinger experiment.

Response: NMFS reconvened the GOMTRT on December 16 through 17, 1997. NMFS provided the GOMTRT with an analysis of the results of the spring 1997 pinger experiment and with updated estimates of harbor porpoise takes in both the GOM and Mid-Atlantic. Based on this information, the GOMTRT made recommendations to NMFS for further reducing the incidental take of harbor porpoise in the GOM which have been incorporated into this proposed rule.

Comment 19: One commenter commended NMFS for conducting the spring 1997 pinger experiment, immediately completing the experimental analysis, and providing this information to the GOMTRT.

Response: No response necessary.

Comment 20: NMFS should consider combining the two harbor porpoise TRTs, or having joint meetings to more effectively reduce harbor porpoise bycatch throughout the range of the species.

Response: NMFS is considering combining the GOMTRT and MATRT (see response to Comment 23). NMFS is proposing one HPTRP to address the

bycatch of harbor porpoise throughout their U.S. range. The gillnet fisheries in the GOM and Mid-Atlantic have different characteristics and, thus, have different management strategies available for reducing bycatch. To address the individual management needs of these gillnet fisheries, NMFS' proposed HPTRP includes separate GOM and Mid-Atlantic components.

Comment 21: NMFS should reconvene the GOMTRT semi-annually and provide it with data necessary to review whether the HPTRP is meeting its objectives.

Response: NMFS intends to continually review the data to determine when a team meeting is warranted. The GOMTRT is expected to be reconvened no less than annually.

Bycatch Reduction—Allocation of PBR

Comment 22: One commenter supported the approach recommended by the GOMTRT for allocating PBR between the GOM and the Mid-Atlantic areas. The commenter stated that PBR can not be allocated by region, and that each fishery should reduce takes by the same percentage.

Response: NMFS has taken this approach, proposing a 79 percent reduction in both regions as agreed to by the TRTs.

Comment 23: Two commenters suggested that NMFS reconvene both teams jointly to address the PBR allocation issue, and that NMFS should provide guidance on what type of allocation would be acceptable.

Response: NMFS agrees that this idea has merit with respect to looking at harbor porpoise bycatch issues overall, but the fisheries involved are so different that it would be difficult to deal with specific plan elements in combination. Accordingly, NMFS will consider reconvening both teams jointly to address several aspects of the bycatch reduction strategies for harbor porpoise.

Comment 24: One commenter noted that the preamble to the earlier proposed rule stated that "an equitable allocation scheme will be developed for each segment of the fishery". The commenter further noted that separate plans have been developed between the regions with available PBR accounted for within each plan, and any allocation scheme or reallocation scheme is unnecessary for discussion in the final rule.

Response: No reallocation is proposed. See response to Comment 22.

Implementation of HPTRP

Comment 25: Several commenters opposed implementation of a TRP under the Magnuson-Stevens Act. Three

commenters noted that it would not have as broad effect as implementation under the MMPA and would exempt those fishers who fish in state waters but do not have a Federal permit. Two commenters expressed concern that implementation under the Magnuson-Stevens Act would further delay the implementation of the TRP. Two commenters objected because fishery management councils were officially represented on the GOMTRT, and their subsequent involvement in this plan might undermine the take reduction process. Two commenters stated that implementation solely under the Magnuson-Stevens Act violates the intent of the MMPA. Finally, one commenter noted that NMFS would not be able to effectively monitor whether the TRP is achieving its objectives if implemented under the Magnuson-Stevens Act.

Response: The current proposed rule would implement the proposed HPTRP under the authority of the MMPA. Therefore, fisheries in state waters would be subject to the regulations. Baitnets are exempted in this proposed rule, as discussed in NMFS' response to Comment 28. Through the ACCSP program of cooperation with the States, and through NMFS' monitoring activities, fisheries in state waters will be monitored for potential bycatch (see response to Comment 16).

NMFS disagrees that implementation under the Magnuson-Stevens Act violates the MMPA. The MMPA requires NMFS to reduce the incidental bycatch of marine mammals in commercial fisheries to below the PBR level for strategic stocks. If this goal could be accomplished through Magnuson-Stevens Act actions, it would not be in violation of MMPA requirements.

Comment 26: Two commenters urged NMFS to implement a TRP under the emergency authority of the MMPA because harbor porpoise takes exceed the PBR level and because it is illegal for NMFS to delay further.

Response: An emergency action under MMPA requires any such action to be based on a commercial fisheries bycatch that is "having, or is likely to have, an immediate and significant adverse impact." The current bycatch levels have long been recognized as having a significant and adverse, but not immediate, impact on this population. This is recognized by the agency in recent Stock Assessment Reports and the establishment of the GOMTRT. The total bycatch is high, but does not trigger the need for an immediate response due to the possibility for irreversible harm to the population.

Outreach

Comment 27: One commenter commended NMFS for its extensive efforts to educate the fishing industry about whale bycatch issues and to bring about more whale-friendly fishing gear and practices. The commenter suggested that NMFS include harbor porpoise in this initiative. Because the constituent groups largely overlap, the two initiatives could reinforce each other with little additional effort. One commenter suggested that public outreach programs encompass all take reduction plans so that such efforts could be focused and coordinated.

Response: NMFS agrees and has coordinated the public outreach efforts for the Atlantic coast take reduction efforts. NMFS has recently conducted TRP informational programs to communicate the purposes and goals of the plans to the commercial fishing industry. These programs, conducted in conjunction with East Coast commercial fishermen's exhibitions, gave commercial fishers the opportunity to learn more about the TRP process, and to express their concerns in person to NMFS managers and biologists. Informational programs were held in several locations in the Northeast and Mid-Atlantic region. Handouts were developed and distributed describing the TRPs and the new mandated process for managing interactions between commercial fisheries and marine mammals. Educational fact sheets informed fishers of appropriate action to take in cases of whale entanglement and provided guidance on identifying specific species of marine mammals. Seminars and panel discussions were conducted detailing the specific requirements of the existing take reduction process and provided an opportunity for input from fishers and other interest groups.

Harbor Porpoise Mortality in Other Fisheries

Comment 28: Several commenters noted that harbor porpoise bycatch is likely in other fisheries, including baitnets and other fisheries in state waters. NMFS should ensure that bycatch in these fisheries is addressed. One commenter further noted that baitnets and other fisheries in state waters may be exempt from the restrictions of the HPTRP if it is implemented under the Magnuson-Stevens Act.

Response: Because the regulations would be issued under the authority of the MMPA, fisheries in state waters would be subject to them. Baitnets would be exempt under the new

proposed rule because they are tended, are limited in length, and only fished for short periods of time. The GOMTRT agreed that they are unlikely to take harbor porpoise. Through the ACCSP program of cooperation with the States, and through NMFS monitoring activities, fisheries in state waters will be monitored for potential bycatch.

Comment 29: One commenter expressed concern that mid-water trawls are operating in harbor porpoise habitat at times of high use by the animals, and urged NMFS to investigate this possible source of mortality.

Response: NMFS is aware that an Atlantic herring trawl fishery may be operating in the Northeast at times and in locations where there is a high density of harbor porpoise. This fishery is comprised of approximately 35 vessels operating in the Northwest Atlantic. NMFS currently has the authority to place observers on pelagic herring trawl vessels under the Magnuson-Stevens Act.

Because this herring trawl fishery uses similar gear to the Atlantic squid, mackerel, butterfish trawl fishery (a Category II fishery), and because of its potential to interact with harbor porpoise, NMFS is analyzing existing information on the levels of serious injury and mortality of marine mammals that are occurring incidental to this fishery and will propose adding this fishery to the List of Fisheries for 1999.

Enforcement

Comment 30: Two comments were received concerning enforcement. At the re-convening of the GOMTRT in December 1997, data indicated that fishers are fishing in closed areas and, in some cases, are fishing without pingers in areas and during periods when they are required. No enforcement action had been taken. Both the U.S. Coast Guard and NMFS Enforcement representatives present at the meeting admitted that, at this time, they have no means to monitor compliance with requirements for using pingers. The commenter urged NMFS to enforce the provisions of the HPTRP and the Multispecies FMP.

Response: NMFS is concerned about enforcement. The primary objective of the observer program, which is a function of the Northeast Fisheries Science Center, is to provide NMFS with unbiased scientific information on protected species and fishery issues for purposes of stock assessments and bycatch estimates. For fisheries where observer coverage is mandated, those data can be made available to investigators if requested. NMFS Enforcement is investigating this

information and has already initiated dialogue with the observer program on the issue of confidentiality of observer data, but this has not yet been resolved. However, an important part of the message to fishers is that if pingers are not used, or are used improperly, bycatch will most likely increase. If this occurs, more restrictive measures (i.e., closures) to reduce bycatch will be considered.

Comment 31: One commenter supported NMFS' proposal to have Special Agents from the NMFS' Enforcement Division attend upcoming GOMTRT meetings in an effort to facilitate enforcement of the HPTRP.

Response: Officials from both NMFS Enforcement Division and the U.S. Coast Guard attended the December 1997 meeting of the GOMTRT. This is expected to continue.

Re-Evaluate Proposed HPTRP

Comment 32: Several commenters noted that new information suggests the proposed GOMTRP will not be sufficient to reduce harbor porpoise takes below the PBR level and urged NMFS to reconsider its proposal. One of the commenters recommended that NMFS proceed with a separate emergency rule to reduce harbor porpoise bycatch south of New England in winter/spring 1998 and/or modify the proposed GOMTRP to further reduce projected bycatch levels, given the expected takes south of New England.

Response: NMFS has re-evaluated its August 1997 proposed rule in light of new information on harbor porpoise bycatch, the results of the spring 1997 pinger experiment, and relevant fishery management actions and agrees that the 1997 proposed rule would not be adequate to reduce bycatch to required levels. This new proposed rule is expected to reduce the incidental takes of harbor porpoise in the GOM and Mid-Atlantic to the PBR level.

Comment 33: One commenter indicated that a vessel buyback program in the GOM, designed to reduce groundfish effort, has reduced the number of sink gillnet vessels. Additionally, the commenter noted that some vessels have left the fishery for other fisheries or for other reasons. The commenter urges NMFS to consider this issue, as a reduction in fishing effort should effect the potential for interactions with harbor porpoise.

Response: The bycatch rate for harbor porpoise in the GOM provides the basis for the plan and considers fishing effort. In the past, regardless of the possible decrease in fleet size and/or fishing effort, neither the bycatch rate nor the

total bycatch of harbor porpoise in the GOM has decreased.

General Comments

Comment 34: One commenter was concerned that Canadian bycatch of harbor porpoise has decreased significantly due to the extraordinary limitation of fishing effort in Canada to protect groundfish. As these groundfish stocks recover, and fisheries resume normal operations, the commenter was concerned that mortality of harbor porpoise in Canadian waters will increase. The commenter recommended that NMFS work formally with the Department of Fisheries and Oceans in Canada to assure equivalent planning to reduce mortality.

Response: Canada has, within the last few years, developed its own harbor porpoise conservation strategy. It has developed an observer program to document takes and has also developed its own bycatch estimates. Canada also has a restriction in place that allows them to immediately close the fishery if more than a certain number of animals are caught. Canada has also incorporated pingers into its management strategy. NMFS intends to keep abreast of Canadian conservation activities and the status of the fisheries.

Comment 35: One commenter expressed overall support for the proposed GOMTRP.

Response: Given the information on bycatch and the distribution of fishing effort available when the proposed GOMTRP was published, the proposed take reduction measures were expected to adequately reduce harbor porpoise bycatch levels in the GOM.

Since the publication of the earlier proposed rule, however, new bycatch and fishery information became available which indicated significant changes were needed in the original draft HPTRP and proposed rule to achieve the PBR level. In addition, the MATRT submitted its report to NMFS which presented new information on the level of bycatch in the Mid-Atlantic region. The GOMTRT reconvened on December 16 through 17, 1997, to discuss this information and to provide additional comments to NMFS. The combination of these actions led NMFS to decide to integrate the initially separate plans into one comprehensive plan. Since the HPTRP is substantially different than the GOMTRP, NMFS is publishing this new proposed rule to replace the earlier proposal.

Comment 36: One commenter stated that NMFS is in violation of the MMPA for inadequately protecting harbor porpoise. The most recent data indicate that: (1) current harbor porpoise bycatch

is three times the PBR level, and there has been no meaningful reduction in harbor porpoise bycatch; bycatch has actually increased in some areas, (2) there are takes occurring in the offshore gillnet fishery (which was previously unobserved), (3) pingers are not as effective in experimental fisheries as in controlled experiments, (4) NMFS has not completed research on the unintended effects of pingers, (5) illegal fishing with harbor porpoise takes are occurring in closed areas, and (6) no enforcement actions are being taken. Additionally, the commenter noted that NMFS has not complied with the statutory deadlines for convening a GOMTRT or publishing an HPTRP. The commenter noted that NMFS must take strict and immediate action to reduce the deaths of harbor porpoise in the GOM.

Response: NMFS agrees that data indicate that harbor porpoise bycatch is close to 3.5 times the PBR level. Bycatch has decreased in those areas where take reduction measures have been applied, and bycatch has increased outside of those areas. Consequently, the overall bycatch has remained relatively unchanged. NMFS acknowledges that there are harbor porpoise takes in offshore areas and has incorporated management measures into this proposed rule to reduce this bycatch. It is currently unknown whether pingers are as effective in experimental fisheries as they were in scientific experiments since the experimental fisheries had no controls—therefore, it was unknown whether the bycatch rate would have been higher in nets without pingers and if so, how much higher. Consequently, NMFS is preparing to monitor bycatch as an indicator of whether or not pingers are enough of a management option. NMFS is currently supporting a research project to study habituation and displacement of harbor porpoise by pingers. NMFS agrees that observer data are available that appears to indicate that fishers may have been in closed areas, and is conducting an investigation that will result in enforcement actions.

Comment 37: One commenter suggested that NMFS reevaluate the current weighout landings system for determining bycatch levels because commenter believes it is an inaccurate method of derivation of actual bycatch rate.

Response: In order to estimate bycatch levels, the unit of fishing effort must be correlated to bycatch and must be an accurate representation of what is occurring in the fishery. Currently, weighout data are considered the best and most complete unit of effort for the

sink gillnet fishery that meets this requirement. Logbooks are being evaluated for their contributions to effort projections and were used in the 1996 analysis to estimate the distribution of effort by area. As logbooks improve, they may become more useful. However, at the current time many of them are inaccurately or incompletely filled out. Therefore, fishers need to realize the importance of providing complete and accurate information that allows NMFS to make better analyses in many areas including bycatch.

Comment 38: One commenter requested that NMFS consider the trip boat category in developing the final GOMTRP. The commenter noted that this would promote the use of "day setting" where vessels retrieve gear before returning to port; this results in shorter trips and a cleaner, more directed fishery.

Response: The HPTRP is expected to meet bycatch reduction goals. However, this idea has merit for future discussions at take reduction team meetings should additional measures be necessary in the future.

Comment 39: One commenter noted that NMFS should specifically state in the final HPTRP that the goal of the HPTRP was to reduce incidental takes of harbor porpoise to below the PBR level within 6 months of the plan's implementation.

Response: This is described above in the supplemental information section.

Comment 40: One commenter requested that NMFS specifically state in the final rule that the HPTRP had determined that its draft plan would reduce incidental take levels in the New England fisheries to 376 harbor porpoises. NMFS should further specify the total number of harbor porpoises projected to be taken under its proposed plan.

Response: The HPTRP and EA document includes a discussion of the expected harbor porpoise bycatch levels under this proposed HPTRP. Overall, NMFS expects harbor porpoise bycatch in the NE multispecies sink gillnet fishery to be reduced to 309 animals per year and expects harbor porpoise bycatch in the Mid-Atlantic coastal gillnet fishery to be reduced to below 50 animals per year.

Comment 41: One commenter requested that NMFS explain the reason for delay in publishing the TRP and how it will avoid delays in future. NMFS should commit to acting expeditiously on future TRPs.

Response: Two primary reasons caused delays in acting on the rule proposed in 1997: (1) New information

on bycatch was available and the GOMTRT had requested that NMFS convene the team when the 1996 bycatch estimates became available and (2) management actions being considered under the Magnuson-Stevens Act for GOM cod were expected to have a significant impact on the sink gillnet fishery in New England in the areas that are also responsible for high bycatch of harbor porpoise. Development of a revised proposal was pending an analysis of the impacts of this new information.

Classification

The proposed rule has been determined to be significant for purposes of E.O. 12866.

NMFS prepared an IRFA that describes the impact this proposed rule, if adopted, would have on small entities. The need for, and objectives of this proposed rule and a summary of the significant issues are described elsewhere in this preamble. The GOM sink gillnet and Mid-Atlantic coastal gillnet fisheries are directly affected by the proposed action and are composed primarily of small business entities.

In formulating this proposed rule, NMFS considered a number of alternatives: Alternative 1, the proposed action; Alternative 2, no action; Alternative 3, wide-spread use of pingers; and Alternative 4, wide-spread time and area closures.

Alternative 1, the proposed action, a combination of area closures and pinger requirements, is the preferred alternative because it will achieve the goals of the MMPA while minimizing the overall economic impact.

Under Alternative 1, it is estimated that 113 vessels (41% of total, 64% of impacted) would see their total costs increase more than 5%. If the 10% threshold is used, 70 vessels (26% of total, 40% of impacted) would see their total costs increase more than 10%. The cost increase was due to purchasing new gear or pingers, and the cost of gear marking requirements. Vessels could avoid these cost increases by not fishing during the time periods when they would have to modify their gear or use pingers. However, they would then lose some percentage of their yearly profit. The total economic losses of the proposed action from the New England and the Mid-Atlantic regions are estimated to be between \$613 thousand dollars and \$5.3 million dollars depending on the number of vessels which can shift their effort to open areas and the number which use pingers.

The costs associated with this proposed rule are not related to reporting requirements. To the extent

that the proposed rule would allow fishery participants to select whether to acquire a new gear type or avoid the time/area closures, performance requirements can be substituted for design requirements at the participant's discretion. Since most of the affected entities are small entities, providing an exemption for small entities would not enable the agency to meet the conservation and management goals of the MMPA.

Currently, the NE sink gillnet fishery is subject to regulations under the NE Multispecies Fishery Management Plan. Recent NE groundfish conservation measures were proposed under Framework Adjustment 25 to the NE Multispecies FMP. The predominant Mid-Atlantic gillnet fisheries are not subject to regulations under a fishery management plan at this time. The proposed rule is designed to complement Framework 25 and other fishery management regulations. The recommendations of the GOMTRT were modified by NMFS to take into consideration the combined effect of Framework 25 and the HPTRP on NE fishermen.

Under Alternative 2, there would be no additional costs to the fleet either through gear modifications, purchase of pingers or losses in surplus due to time and area closures. Therefore, based on costs which the fleet would incur, this alternative is the least costly when compared to the proposed action or non-preferred alternatives. However, there is a much larger cost in terms of foregone harbor porpoise protection. Based on the contingent valuation study conducted by the University of Maryland (Strand, et al., 1994), households in Massachusetts were willing to pay between \$176 dollars and \$364 dollars to eliminate human induced mortality of 1,000 harbor porpoise. Using the lower figure of \$176 dollars multiplied by the number of Massachusetts households, and amortizing the total using a 7% rate yielded a yearly value of roughly \$28 million dollars. This means that decreasing mortality by 1,000 animals would increase consumer surplus by \$28 million dollars. Therefore, when compared against the other alternatives, the status quo is far inferior because it does not achieve the same level of consumer surplus due to a higher level of harbor porpoise mortality.

Alternative 3 would require all vessels fishing between September and May in New England, and between January and April in the Mid-Atlantic to use pingers. Each vessel owner would decide whether to purchase pingers based on their own set of circumstances.

Each pinger was estimated to cost \$50 dollars based on information obtained from Sea Sampling personnel. It is assumed that there would be one pinger required per net, and one on each buoy line. Using the average number of nets and strings fished in each region, a weighted average \$3,437 dollars per vessel was estimated for the cost of pingers which translates into a total fleet cost of \$608 thousand dollars.

The cost of pingers was estimated to be \$608 thousand dollars if all vessels purchase pingers. However, some vessels may be unable to afford pingers. This would increase the total losses because vessels which were unable to afford pingers would have to stay tied up at the dock and therefore lose revenue. It is assumed that losses in producer surplus are linearly related to the percent of vessels which purchase pingers. For example, if 50 percent of the vessels use pingers, then the losses in producer surplus and crew rents will be reduced by 50 percent. Total pinger costs are also estimated based on the percent of vessels which purchase pingers. Losses calculated using these assumptions are estimated to be between zero and \$7.4 million dollars.

In reality, vessels can either purchase pingers and continue to fish, shift their effort to other areas, or elect not to purchase pingers and stay tied up at the dock. Because the time and areas where pingers are required are quite extensive, it is unlikely that vessels will be able to switch areas and continue fishing without pingers. Without a more formal model, it is not possible to predict the number of vessels which will adopt either strategy.

This alternative is not preferred because it is highly unlikely that it could achieve the bycatch reduction goals of the MMPA for harbor porpoise because pingers have not been proven to be effective in all areas at all times. In addition, there are a number of scientific concerns regarding the impacts of widespread pinger use on harbor porpoise and other marine organisms.

The total loss in producer surplus and crew rents for both regions from Alternative 4 would be \$7.4 million dollars. Overall, 177 vessels would be impacted for a per vessel loss of roughly \$42 thousand dollars. As described in the IRFA, the cost to the fishery in terms of economic impacts would vary by area closure. Refer to the IRFA for a discussion of the impacts of this alternative based on the closure variations.

Vessels could shift their operations to other areas and make up for any revenue loss. This puts bounds on the losses of

between zero, if revenue was totally replaced in other areas, and \$7.4 million dollars. For this alternative, it will be more difficult for vessels to shift to other times and areas because the areas are all closed at the same time. There is the opportunity for New England vessels to move to the Mid-Atlantic in the fall, or the NE closure area. Some may do so, but it is likely that most would not be able to switch. Gillnet vessels have traditionally fished in certain times and areas depending on many factors, including the vessels homeport. Because these times and areas are so extensive, it is unlikely that many vessels will be able to shift their operations and replace lost revenue.

Because the times and areas designated for closure are so extensive, it is likely that this alternative would reduce harbor porpoise mortality to close to zero. The trade-off for this reduction would be a much higher cost to the fishing fleet, and possibly higher likelihood of business failure, therefore this alternative is not preferred. However, it is not possible to evaluate the trade-off between reduced harbor porpoise mortality and increased costs. Based on the contingent valuation study (Strand et al., 94) discussed earlier, harbor porpoise are highly valued by consumers.

This proposed rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA). This collection-of-information requirement has been submitted to the Office of Management and Budget for approval. Under the PRA, gear marking regulations are considered a reporting requirement, and the burden hours need to be estimated.

The proposed rule requires nets in the Mid-Atlantic region to be marked in order to identify the vessel and enforce net cap provisions. It is estimated that each tag will take 1 minute to attach to the net. Each net requires two net tags. The total number of nets which will need to be tagged is estimated by assuming that combination gillnet vessels are, on average, fishing 60 nets, and all other vessels are, on average, fishing 30 nets. This gives a weighted average of 49 nets per vessel. Using these figures, the total burden hours for all vessels impacted in the Mid-Atlantic region is estimated to be 123.9 hours, or 1.63 hours per vessel.

The 76 vessel owner/operators will have to order net tags. Estimated at 2 minutes per request, this adds a burden of 2.5 hours. Depending on whether net tags are lost or damaged, vessels are expected to only have to comply once over three years. The annual average

over the 3 years would be 25.3 vessels affected and 42 hours.

Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology.

Send comments regarding these burden estimates or any other aspect of the data requirements, including suggestions for reducing the burden, to NMFS (see ADDRESSES) and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (ATTN: NOAA Desk Officer).

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 PRA unless that collection of information displays a currently valid OMB control number.

References

- Kraus, S., A. Read, E. Anderson, A. Solow, T. Spradlin, and J. Williamson. 1995. A field test of the use of acoustic alarms to reduce incidental mortality of harbor porpoise in gillnets. Draft final report to the Gulf of Maine Take Reduction Team.
- Kraus, S., A. Read, E. Anderson, A. Solow, T. Spradlin, and J. Williamson. 1997. Acoustic alarms reduce porpoise mortality. *Nature*. Vol. 388: p. 525.
- Kraus, S., S. Brault, and K. Baldwin. 1997. A springtime field test of the use of pingers to reduce incidental mortality of harbor porpoises in gill nets. Draft Final Report.
- Reeves, R., R. Hofman, G. Silber, and D. Wilkinson. 1996. Acoustic deterrence of harmful marine mammal-fishery interactions: Proceedings of a workshop held in Seattle, Washington, 20-22 March 1996. U.S. Dept. Commerce, NOAA Tech. Memo. NMFS-OPR-10, 68 pp.
- Waring, G., D. Palka, K. Mullin, J. Hain, L. Hansen, and K. Bisack. 1997. U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments—1996. Woods Hole, MA: NMFS, NEFSC, NOAA Technical Memo., NMFS-NE-114

List of Subjects in 50 CFR Part 229

Administrative practice and procedure, Confidential business information, Fisheries, Marine mammals, Reporting and recordkeeping requirements.

Dated: September 3, 1998.

Rolland A. Schmittin,

*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 229 is proposed to be amended as follows:

PART 229—AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972

1. The authority citation for part 229 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

2. In § 229.2, definitions for “large mesh gillnet,” “mesh size,” “Mudhole,” “small mesh gillnet,” “southern Mid-Atlantic waters,” “stowed,” “tie-down,” and “waters off New Jersey” are added, in alphabetical order, to read as follows:

§ 229.2 Definitions.

* * * * *

Large mesh gillnet means a gillnet constructed with a mesh size of 7(17.78 cm) inches to 18 inches (45.72 cm).

* * * * *

Mesh size means the distance between inside knot to inside knot. Mesh size is measured as described in § 648.80(f)(1).

* * * * *

Mudhole means waters off New Jersey bounded as follows: From the point 40°30' N. latitude where it intersects with the shoreline of New Jersey east to its intersection with 73°20' W. longitude, then south to its intersection with 40°05' N. latitude, then west to its intersection with the shoreline of New Jersey.

* * * * *

Small mesh gillnet means a gillnet constructed with a mesh size less than 7 inches (17.78 cm).

Southern Mid-Atlantic waters means all state and Federal waters off the States of Delaware, Maryland, Virginia, and North Carolina, bounded on the north by a line extending eastward from the northern shoreline of Delaware at 38°47' N. latitude (the latitude that corresponds with Cape Henlopen, DE), east to its intersection with 72°30' W longitude, south to the 33°51' N. latitude (the latitude that corresponds with the North Carolina/South Carolina border), and then west to its intersection with the shoreline of the North Carolina/South Carolina border.

* * * * *

Stowed means nets that are unavailable for use and that are stored in accordance with the regulations found in § 648.81(e) of this title.

* * * * *

Tie-down refers to twine used between the floatline and the lead line as a way to create a pocket or bag of netting to trap fish alive.

* * * * *

Waters off New Jersey means all state and Federal waters off New Jersey, bounded on the north by a line extending eastward from the southern shoreline of Long Island, NY at 40°40' N. latitude, on the south by a line extending eastward from the northern shoreline of Delaware at 38°47' N. latitude (the latitude that corresponds with Cape Henlopen, DE), and on the east by the 72°30'W longitude. This area includes the Mudhole.

* * * * *

3. In § 229.3, paragraphs (l) through (q) are added to read as follows:

§ 229.3 Prohibitions.

* * * * *

(l) It is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove sink gillnet gear or gillnet gear capable of catching multispecies, with the exception of a single pelagic gillnet (as described and used as set forth in § 648.81(f)(2)(ii) of this title, from the areas and for the times specified in § 229.33(a)(1) through (a)(6), except as provided in § 229.33(d)(1) through (d)(4).

(m) It is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any gillnet gear from the areas and for the times as specified in § 229.34(b)(1)(ii) or (iii) or (b)(2)(ii).

(n) It is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any large mesh or small mesh gillnet gear from the areas and for the times specified in § 229.34(c)(1) through (4) unless the gear complies with the specified gear restrictions set forth in those provisions.

(o) Beginning on January 1, 1999, it is prohibited to fish with, set, or haul back sink gillnets or gillnet gear, or leave such gear in closed areas where pingers are required, as specified under § 229.33(c)(1) through (4), unless the operator possesses on board the vessel a valid pinger certification training certificate issued by NMFS.

(p) Beginning on January 1, 2000, it is prohibited to fish with, set, haul back, or possess any gillnet gear in Mid-Atlantic waters in the areas and during the times specified under § 229.34(d) unless the gear is properly tagged in compliance with that provision and unless a net tag certificate is on board the vessel. It is prohibited to refuse to produce a net tag certificate or net tags

upon the request of an authorized officer.

(q) *Net tag requirement.* Beginning on January 1, 2000, no vessel may fish with gillnet gear in New Jersey waters from January 1 through April 30 or in southern Mid-Atlantic waters from February 1 through April 30 unless the gillnet is properly tagged. In order to be properly tagged, one tag must be secured to each bridle of every net within the string of nets. The owner or operator of fishing vessels must indicate to NMFS the number of gillnet tags that they are requesting up to the maximum number of nets allowed in those paragraphs and must include a check for the cost of the tags. Vessel owners and operators will be given notice with instructions informing them of the costs associated with this tagging requirement and directions for obtaining tags. Tag numbers will be unique for each vessel and recorded on a certificate. The vessel operator must produce the certificate and all net tags upon request by an authorized officer.

4. In subpart C, a new § 229.33 is added to read as follows:

§ 229.33 Harbor Porpoise Take Reduction Plan implementing regulations—Gulf of Maine.

(a) *Restrictions*—(1) *Northeast Closure Area.* From August 15 through September 13 of each fishing year, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove sink gillnet gear or gillnet gear capable of catching multispecies, with the exception of a single pelagic gillnet (as described in § 648.81(f)(2)(ii) of this title), from Northeast Closure Area. The Northeast Closure Area is the area bounded by straight lines connecting the following points in the order stated.

NORTHEAST CLOSURE AREA

Point	N. Lat.	W. Long.
NE1	(1)	68°55.0'
NE2	43°29.6'	68°55.0'
NE3	44°04.4 ¹	67°48.7'
NE4	44°06.9'	67°52.8'
NE5	44°31.2'	67°02.7'
NE6	(1)	67°02.7'

¹ Maine shoreline.

(2) *Mid-coast Closure Area.* From September 15 through May 31, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove sink gillnet gear or gillnet gear capable of catching multispecies, with the exception of a single pelagic gillnet (as described in § 648.81(f)(2)(ii) of this title), from the Mid-Coast Closure Area, except as provided in § 229.33(d)(1).

The Mid-Coast Closure Area is the area bounded by straight lines connecting the following points in the order stated:

Mid-Coast Closure Area

Point	N. Lat.	W. Long.
MC1	42°30'	(1)
MC2	42°30 ¹	70°15'
MC3	42°40'	70°15'
MC4	42°40'	70°00'
MC5	43°00'	70°00'
MC6	43°00'	69°030'
MC7	43°30'	69°30'
MC8	43°30'	69°00'
MC9	(2)	69°00'

¹ Massachusetts shoreline.

² Maine shoreline.

(3) *Massachusetts Bay Closure Area.* From February 1 through May 31, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove sink gillnet gear or gillnet gear capable of catching multispecies, with the exception of a single pelagic gillnet (as described in § 648.81(f)(2)(ii) of this title), from the Massachusetts Bay Closure Area, except as provided in § 229.33(d)(2). The Massachusetts Bay Closure Area is the area bounded by straight lines connecting the following points in the order stated.

MASSACHUSETTS BAY CLOSURE AREA

Point	N. Lat.	W. Long.
MB1	42°30'	(1),
MB2	42°30'	70°30',
MB3	42°12'	70°30',
MB4	42°12'	70°00',
MB5	(2)	70°00',
MB6	42°00'	(2),
MB7	42°00'	(1)

¹ Massachusetts shoreline.

² Cape Cod shoreline.

(4) *Cape Cod South Closure Area.* From September 15 through April 30, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove sink gillnet gear or gillnet gear capable of catching multispecies, with the exception of a single pelagic gillnet (as described in § 648.81(f)(2)(ii) of this title), from Cape Cod South Closure Area, except as provided in § 229.33(d)(3).

The Cape Cod South Closure Area is the area bounded by straight lines connecting the following points in the order stated.

CAPE COD SOUTH CLOSURE AREA

Point	N. Lat.	W. Long.
CCS1	(1)	71°45',

CAPE COD SOUTH CLOSURE AREA—
Continued

Point	N. Lat.	W. Long.
CCS2	40°40'	71°45'
CCS3	40°40'	70°30'
CCS4	(2)	70°30'

¹ Rhode Island shoreline
² Massachusetts shoreline.

(5) *Offshore Closure Area.* From September 15 through May 31, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove sink gillnet gear or gillnet gear capable of catching multispecies, with the exception of a single pelagic gillnet (as described in § 648.81(f)(2)(ii) of this title), from Offshore Closure Area, except as provided in § 229.33(d)(4). This requirement becomes effective November 1, 1998.

The Offshore Closure Area is the area bounded by straight lines connecting the following points in the order stated:

OFFSHORE CLOSURE AREA

Point	N. Lat.	W. Long.
OFS1	42°50'	69°35'
OFS2	43°10'	69°10'
OFS3	43°10'	67°40'
OFS4	42°10'	69°10'
OFS5	42°10'	69°30'

(6) *Cashes Ledge Closure Area.* For the month of February of each fishing year, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove sink gillnet gear or gillnet gear capable of catching multispecies, with the exception of a single pelagic gillnet (as described in § 648.81(f)(2)(ii) of this title), from the Cashes Ledge Closure Area. The Cashes Ledge Closure Area is the area bounded by straight lines connecting the following points in the order stated:

CASHES LEDGE CLOSURE AREA

Point	N. Lat.	W. Long.
CL1	42°30'	69°00'
CL2	42°30'	68°30'
CL3	43°00'	68°30'
CL4	43°00'	69°00'
CL5	42°30'	69°00'

(b) *Pingers.* (1) *Pinger Specifications.* For the purposes of this subpart, a pinger is an acoustic deterrent device which, when immersed in water, broadcasts a 10 kHz (±2 kHz) sound at 132 dB (±4 dB) re 1 micropascal at 1 m, lasting 300 milliseconds (± 15

milliseconds), and repeating every 4 seconds (± .2 seconds).

(2) *Pinger attachment.* An operating and functional pinger must be attached at the end of each string of the gillnets and at the bridle of every net within a string of nets.

(c) *Pinger training and certification.* Beginning on January 1, 1999, the operator of a vessel may not fish with, set or haul back sink gillnets or gillnet gear, or allow such gear to be in closed areas where pingers are required as specified under paragraph (b) of this section, unless the operator has satisfactorily completed the pinger certification training program, and, possesses on board the vessel a valid pinger training certificate issued by NMFS. Notice will be given announcing the times and locations of pinger certification training programs.

(d) *Use of pingers in closed areas.* (1) Vessels, subject to the restrictions and regulations specified in paragraph (a) of this section, may fish in the Mid-coast Closure Area from September 15 through May 31 of each fishing year, provided that pingers are used in accordance with the requirements of paragraph (b) of this section.

(2) Vessels, subject to the restrictions and regulations specified in paragraph (a) of this section, may fish in the Massachusetts Bay Closure Area from February 1 through the last day of February and from April 1 through May 31 of each fishing year, provided that pingers are used in accordance with the requirements of paragraph (b) of this section.

(3) Vessels, subject to the restrictions and regulations specified in paragraph (a) of this section, may fish in the Cape Cod South Closure Area from September 15 through the last day of February and from April 1 through April 30 of each fishing year, provided that pingers are used in accordance with the requirements of paragraph (b) of this section.

(4) Vessels, subject to the restrictions and regulations specified in paragraph (a) of this section, may fish in the Offshore Closure Area from September 15 through May 31 of each fishing year, with the exception of the Cashes Ledge Closure Area. From February 1 through the end of February the area within the Offshore Closure Area defined as "Cashes Ledge" is closed to all fishing with sink gillnets. Vessels subject to the restrictions and regulation specified in paragraph (a) of this section may fish in the Offshore Closure Area outside of the Cashes Ledge Area from February 1 through the end of February provided that pingers are used in accordance with

the requirements of paragraph (b) of this section.

(e) Other special measures. The Assistant Administrator may revise the requirements of this section through notification published in the **Federal Register** if:

(1) NMFS verifies one year after plan implementation, that pinger operating effectiveness in the commercial fishery is not adequate to reduce bycatch to acceptable levels with the current plan.

(2) NMFS determines that the boundary or timing of a closed area are not appropriate, or that gear modifications (including pingers) are not meeting bycatch reduction expectations. Specifically, observer data shows that PBR has been exceeded between January 1 and April 30 every year between 1992–1996. Therefore, NMFS will review effort and bycatch data and make a determination by June 30 each year if additional bycatch reduction measures beyond the TRP are needed for the remainder of the calendar year to keep the annual bycatch level below the PBR level.

5. In subpart C, a new § 229.34 is added to read as follows:

§ 229.34 Harbor Porpoise Take Reduction Plan—Mid-Atlantic.

(a)(1) *Regulated waters.* The regulations in this section apply to all waters in the Mid-Atlantic bounded on the east by 72°30' W. longitude and on the south by the North Carolina/South Carolina border (33°51' N. latitude), except for the areas exempted in paragraph (a)(2) of this section.

(2) *Exempted waters.* All waters landward of the first bridge over any embayment, harbor, or inlet will be exempted. The regulations in this section do not apply to waters landward of the following lines:

New York

- 40°45.70' N 72°45.15' W TO 40° 45.72' N 72°45.30' W (Moriches Bay Inlet)
- 40°37.32' N 73° 18.40' W TO 40° 38.00' N 73°18.56' W (Fire Island Inlet)
- 40°34.40' N 73°34.55' W TO 40°35.08' N 73°35.22' W (Jones Inlet)

New Jersey

- 39° 45.90 N 74°05.90' W TO 39°45.15' N 74° 06.20' W (Barnegat Inlet)
- 39°30.70' N 74°16.70' W TO 39°26.30' N 74°19.75' W (Beach Haven to Brigantine Inlet)
- 38°56.20' N 74°51.70' W TO 38°56.20' N 74°51.90' W (Cape May Inlet)
- 39°16.70 N 75°14.60' W TO 39°11.25' N 75°23.90' W (Delaware Bay)

Maryland/Virginia 38°19.48' N 75°05.10' W TO 38°19.35' N 75°05.25' W (Ocean City Inlet)

37°52.7' N 75°24.30' W TO 37°11.90' N
75°48.30' W (Chincoteague to Ship Shoal
Inlet)

37°11.10' N 75°49.30' W TO 37°10.65' N
75°49.60' W (Little Inlet)

37°07.00' N 75°53.75' W TO 37°05.30' N
75°56.7' W (Smith Island Inlet)

North Carolina

All marine and tidal waters landward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by the National Oceanic and Atmospheric Administration (Coast Charts 1:80,000 scale), and as described in 33 CFR part 80.

(b) Restrictions—(1) Waters off New Jersey.

(i) General Restrictions. From January 1 through April 30, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any gillnet gear from the waters off New Jersey unless the gear complies with the applicable gear characteristics specified under paragraph (c)(1) or (2) of this section.

(ii) Closure for large mesh gear. From April 1 through April 20, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any large mesh gillnet gear from the waters off New Jersey.

(iii) Mudhole closure. From February 15 through March 15, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any gillnet gear from the waters off New Jersey known as the Mudhole.

(2) *Southern Mid-Atlantic waters.* (i) General restrictions. From February 1 through April 30, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any gillnet gear from the southern Mid-Atlantic waters unless the gear complies with the applicable gear characteristics specified under paragraph (c)(2) or (3) of this section.

(ii) Closure for large mesh gear. From February 15 through March 15, it is prohibited to fish with, set, haul back, possess on board a vessel unless stowed, or fail to remove any large mesh gillnet gear from the southern Mid-Atlantic waters.

(c) Gear requirements and limitations. (1) Waters off New Jersey—large mesh gear requirements and limitations. From January 1 through April 30 of each year, no person may fish with large mesh gillnet gear in waters off New Jersey unless the gear complies with the specified gear characteristics. During this period, no person who owns or operates the vessel may allow the vessel to enter or remain in waters off New Jersey with large mesh gillnet gear on board unless the gear complies with the

specified gear characteristics or unless the gear is stowed. In order to comply with these specified gear characteristics, the gear must have all the following characteristics:

(i) *Floatline Length.* The floatline is no longer than 4,800 ft (1,463.0 m), and if the gear is used in the Mudhole, the floatline is no longer than 3,900 ft (1,188.7 m).

(ii) *Twine Size.* The twine is at least 0.04 inches (0.090 cm) in diameter.

(iii) *Size of nets.* Individual nets or net panels are not more than 300 ft (91.44 m), or 50 fathoms, in length.

(iv) *Number of nets.* The total number of individual nets or net panels for a vessel, including all nets on board the vessel, hauled by the vessel or deployed by the vessel, does not exceed 80.

(v) *Tie-down system.* The gillnet is equipped with tie-downs spaced not more than 15 ft (4.6 m) apart along the floatline, and each tie-down is not more than 48 inches (18.90 cm) in length from the point where it connects to the floatline to the point where it connects to the lead line.

(vi) *Tagging requirements.* Beginning January 1, 2000, the gillnet is equipped with two tags per net, with one tag secured to each bridle of every net within a string of nets.

(2) *Waters off New Jersey—small mesh gillnet gear requirements and limitations.* From January 1 through April 30 of each year, no person may fish with small mesh gillnet gear in waters off New Jersey unless the gear complies with the specified gear characteristics. During this period, no person who owns or operates the vessel may allow the vessel to enter or remain in waters off New Jersey with small mesh gillnet gear on board unless the gear complies with the specified gear characteristics or unless the gear is stowed. In order to comply with these specified gear characteristics, the gear must have all the following characteristics:

(i) *Floatline Length.* The floatline is less than 3,000 ft (914.4 m).

(ii) *Twine Size.* The twine is at least 0.03 inches (0.080 cm) in diameter. This requirement only applies to mesh more than 4 inches (10.2 cm) but less than 7 inches (17.78 cm) in size.

(iii) *Size of nets.* Individual nets or net panels are not more than 300 ft (1.4 m or 50 fathoms) in length.

(iv) *Number of nets.* The total number of individual nets or net panels for a vessel, including all nets on board the vessel, hauled by the vessel or deployed by the vessel, does not exceed 45.

(v) *Tie-down System.* Tie-downs are prohibited.

(vi) *Tagging requirements.* Beginning January 1, 2000, the gillnet is equipped with two tags per net, with one tag secured to each bridle of every net within a string of nets.

(3) *Southern Mid-Atlantic waters—large mesh gear requirements and limitations.* From February 1 through April 30 of each year, no person may fish with large mesh gillnet gear in Southern Mid-Atlantic waters unless the gear complies with the specified gear characteristics. During this period, no person who owns or operates the vessel may allow the vessel to enter or remain in Southern Mid-Atlantic waters with large mesh sink gillnet gear on board unless the gear complies with the specified gear characteristics or unless the gear is stowed. In order to comply with these specified gear characteristics, the gear must have all the following characteristics:

(i) *Floatline Length.* The floatline is no longer than 3,900 ft (1,188.7 m).

(ii) *Twine Size.* The twine is at least 0.04 inches (0.090 cm) in diameter.

(iii) *Size of nets.* Individual nets or net panels are not more than 300 ft (91.4 m or 50 fathoms) in length.

(iv) *Number of nets.* The total number of individual nets or net panels for a vessel, including all nets on board the vessel, hauled by the vessel or deployed by the vessel, does not exceed 80.

(v) *Tie-down system.* The gillnet is equipped with tie-downs spaced not more than 15 ft (4.6 m) apart along the floatline, and each tie-down is not more than 48 inches (18.90 cm) in length from the point where it connects to the floatline to the point where it connects to the lead line.

(vi) *Tagging requirements.* Beginning January 1, 2000, the gillnet is equipped with two tags per net, with one tag secured to each bridle of every net within a string of nets.

(4) *Southern Mid-Atlantic waters—small mesh gillnet gear requirements and limitations.* From February 1 through April 30 of each year, no person may fish with small mesh gillnet gear in waters off New Jersey unless the gear complies with the specified gear characteristics. During this period, no person who owns or operates the vessel may allow the vessel to enter or remain in Southern Mid-Atlantic waters with small mesh gillnet gear on board unless the gear complies with the specified gear characteristics or unless the gear is stowed. In order to comply with these specified gear characteristics, the gear must have all the following characteristics:

(i) *Floatline Length.* The floatline is no longer than 2118 ft (645.6 m).

(ii) *Twine Size.* The twine is at least 0.03 inches (0.080 cm) in diameter. This requirement applies only to mesh sizes <4 inches but >7 inches.

(iii) *Size of nets.* Individual nets or net panels are not more than 300 ft (91.4 m or 50 fathoms) in length.

(iv) *Number of nets.* The total number of individual nets or net panels for a vessel, including all nets on board the vessel, hauled by the vessel or deployed by the vessel, does not exceed 45.

(v) *Tie-down System.* Tie-downs are prohibited.

(vi) *Tagging requirements.* Beginning January 1, 2000, the gillnet is equipped with two tags per net, with one tag secured to each bridle of every net within a string of nets.

(d) *Other special measures.* The Assistant Administrator may revise the requirements of this section through notification published in the **Federal Register** if:

(1) NMFS verifies one year after plan implementation, that pinger operating effectiveness in the commercial fishery is not adequate to reduce bycatch to acceptable levels with the current plan.

(2) NMFS determines that the boundary or timing of a closed area are not appropriate, or that gear modifications (including pingers) are not meeting bycatch reduction expectations. Specifically, NMFS will review effort and bycatch data and make a determination by June 30 each year if additional bycatch reduction measures are needed for the remainder of the calendar year to keep the annual bycatch level below the PBR level.

[FR Doc. 98-24306 Filed 9-8-98; 11:40 am]

BILLING CODE 3510-22-P

Notices

Federal Register

Vol. 63, No. 176

Friday, September 11, 1998

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

National Agricultural Statistics Service

Notice of Intent To Revise a Currently Approved Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. No. 104-13) and Office of Management and Budget (OMB) regulations at 5 CFR Part 1320 (60 FR 44978, August 29, 1995), this notice announces the National Agricultural Statistics Service's (NASS) intention to request a revision to a currently approved information collection, the 1997 Census of Agriculture, to include the Territory of American Samoa.

DATES: Comments on this notice must be received by November 16, 1998 to be assured of consideration.

ADDITIONAL INFORMATION OR COMMENTS: Contact Rich Allen, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, 1400 Independence Avenue SW, Room 4117 South Building, Washington, D.C. 20250-2000, (202) 720-4333.

SUPPLEMENTARY INFORMATION:

Title: 1997 Census of Agriculture.

OMB Number: 0535-0226.

Expiration Date of Approval: November 30, 1999.

Type of Request: Intent to revise a currently approved information collection.

Abstract: The original request for authorization to conduct the 1997 Census of Agriculture, prepared by the Bureau of the Census, provided for data to be collected for farm operations in the 50 States, Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of Northern Mariana Islands. The agriculture census in American Samoa

has historically been conducted as an extension of the Decennial Census program, and so was not included in the 1997 Census of Agriculture authorization. The transfer of the agriculture census program from the Bureau of the Census to the National Agricultural Statistics Service has created a void for agriculture data in American Samoa, as the Census Bureau no longer has staff involved in agriculture and will not be collecting agriculture data along with population data in the year 2000. The National Agricultural Statistics Service has recently been asked by the government of American Samoa to conduct an agriculture census there. The data on American Samoa agriculture are important to government officials trying to measure the economic health of the island group and provide crucial benchmarks for disaster relief agencies in times of natural disasters, such as hurricanes. The proposed census will be a joint effort between the National Agricultural Statistics Service, U.S. Department of Agriculture; the Office of Insular Affairs, U.S. Department of Interior; and the American Samoa government.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 30 minutes per response.

Respondents: Farms and households.

Estimated Number of Respondents: 2,500.

Estimated Total Annual Burden on Respondents: 1,250 hours.

Copies of this information collection and related instructions can be obtained without charge from Larry Gambrell, the Agency OMB Clearance Officer, at (202) 720-5778.

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 will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or

other technological collection techniques or other forms of information technology. Comments may be sent to: Larry Gambrell, Agency OMB Clearance Officer, U.S. Department of Agriculture, 1400 Independence Avenue SW, Room 4162 South Building, Washington, D.C. 20250-2000. 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.

Signed at Washington, D.C., September 2, 1998.

Rich Allen,

Associate Administrator, National Agricultural Statistics Service.

[FR Doc. 98-24464 Filed 9-10-98; 8:45 am]

BILLING CODE 3410-20-P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Emergency Watershed Protection (EWP) Program

AGENCY: Department of Agriculture, Natural Resources Conservation Service.

ACTION: Notice of Intent (NOI) to prepare a programmatic environmental impact statement.

SUMMARY: The U.S. Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS) announces its intention to prepare a programmatic environmental impact statement (PEIS), pursuant to the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.) for the Emergency Watershed Protection (EWP) Program. The draft PEIS will assess the potential environmental impacts of alternatives for administration of the EWP program. This program which provides funding and assistance to localities requesting EWP assistance to address watershed impairments, caused by a natural disaster, which pose an immediate threat to life and property.

A PEIS for the current EWP program was prepared in 1975. NRCS is now conducting a comprehensive review of the program which may result in substantive changes to improve the environmental, economic and technical soundness of activities conducted under the program. This draft PEIS will support management decisions on how best to revise the EWP program to

continue to effectively and efficiently meet EWP statutory requirements. NRCS and its cooperating agencies will analyze a range of reasonable alternatives to ensure compliance with all applicable laws and regulations while minimizing, to the greatest extent practicable, any potential adverse environmental or socioeconomic impacts. The draft PEIS also provides the public a substantive opportunity to voice their concerns and ideas for improving the program. This notice informs the public of the proposal, and announces the dates, times, and places for public scoping meetings. It also, solicits public comment, and describes in general the preliminary draft PEIS proposed action and alternatives.

SCOPING MEETINGS: Six public scoping meetings will be held to provide information on the EWP program and to discuss the issues and alternatives relating to the program. Written and oral comments will be received. The meetings will be held on the following dates and locations:

September 29, 1998

Kansas City, Missouri—Holiday Inn-Airport, 11832 Plaza Circle, Kansas City, MO 64153, (816) 464-2345

October 6, 1998

College Park, GA—Georgia Int'l Convention Center, 1902 Sullivan Road, College Park, GA 30337, (770) 907-3074

October 8, 1998

Sacramento, California—The Hawthorne Suites Hotel, 321 Bercut Drive, Sacramento, CA 95814, (916) 441-1444

October 20, 1998

Bloomington, Minneapolis—Doubletree Guest Suites-Airport, 2800 W 80th Street, Bloomington, MN 55431-1205, (612) 884-4811

October 22, 1998

Albany, New York—Howard Johnson-Albany Center, 1375 Washington Avenue, Albany, NY 12206-1009, (518) 459-3100

October 26, 1998

Washington, D.C.—USDA, Jefferson Auditorium, 14th & Independence Ave., S.W., Washington, D.C. 20013

Each scoping meeting will be conducted in two sessions—the first in the afternoon from 1:00 p.m. to 4:00 p.m. and the second in the evening from 7:00 p.m. to 10:00 p.m. (except Washington, D.C., where only an afternoon session will be held).

COMMENTS INVITED: To ensure that the full range of issues and alternatives related to the EWP program are addressed, NRCS invites comments on the scope of this proposed draft PEIS. Written comments should be

postmarked by *close of business on October 30, 1998*, to ensure consideration. Comments postmarked after this date will be considered to the extent practicable.

WHERE TO COMMENT: Written comments on the scope of the draft PEIS and requests for copies of the draft PEIS information packages should be directed to: EWP—PEIS, Post Office Box 745, Falls Church, Virginia 22040-0745, telephone (toll free) 1-877-534-8692, or e-mail at ewp@mangi.com.

FOR FURTHER INFORMATION CONTACT: For matters relating to the EWP Program, please contact Warren M. Lee, Director, Watersheds and Wetlands Division, USDA-NRCS, Post Office Box 2890, Washington, D.C. 20013-2890; telephone: (202) 720-3527.

For matters relating to USDA/ NRCS compliance with NEPA please contact: Andree DuVarney, National Environmental Specialist, Ecological Sciences Division, USDA-NRCS, Post Office Box 2890, Washington, D.C. 20013-2890; telephone: (202) 720-4925.

Information may also be obtained from the NRCS Worldwide website at: <http://www.ftw.nrcs.usda.gov/BCS/enviro/nepa.htm> (general NEPA compliance information) <http://www.ftw.nrcs.usda.gov/programs.html> (EWP program).

SUPPLEMENTARY INFORMATION: The EWP program funds and provides technical assistance to sponsoring organizations (entities of government) to implement emergency measures for runoff retardation and soil erosion prevention to assist in relieving imminent hazards to life and property from floods, drought, and the products of erosion created by natural disasters that have caused or are causing sudden impairment of a watershed. The program is authorized by Section 216 of the Flood Control Act of May 17, 1950 (P.L. 81-516; 33 U.S.C. 701b-1) and by Section 403 of Title IV of the Agricultural Credit Act of 1978, (Pub. L. 95-334), as amended by Section 382 of the Federal Agricultural Improvement and Reform Act of 1996 (Pub. L. 104-127) 16 U.S.C. 2204. NRCS regulations implementing the EWP program are set forth in 7 CFR 624.

NEPA only requires an PEIS be prepared for major Federal actions significantly affecting the environment. It is NRCS's preliminary opinion that the programmatic decisions being made about the EWP program do not constitute such action, particularly when considered on a nation-wide basis. Nonetheless, NRCS considers NEPA and the PEIS process to be a useful tool to assist decision makers

under certain circumstances. Therefore, the agency has made the decision to prepare a PEIS in this case to take full advantage of NEPA's public participation provisions as a means of considering the concerns of individual members of the public and the state and local government sponsors who play a critical role in EWP and to fully consider the impacts of alternative EWP program policies and activities.

The final PEIS on the EWP program will supersede the PEIS prepared on the program in 1975. The purpose of the draft PEIS is to assess the impacts of a range of EWP programmatic alternatives. It will also factor in changes that are being proposed to the administrative rule such as the use of floodplain easements to address recurring hazards. NRCS expects that states may desire to tier to the national programmatic NEPA analysis to facilitate rapid response to EWP program emergency requirements in the future while maintaining adequate environmental review coverage for the necessary decision making.

The draft PEIS will begin to define the criteria to be used to approve projects for EWP funding. The Record of Decision resulting from the final PEIS would serve as guidance to NRCS state offices. The draft PEIS will likely use scenarios to evaluate the environmental and socioeconomic impacts of EWP measures in relation to their effectiveness in removing the immediate threat to loss of life and property. Tiering to the PEIS would allow NRCS decision makers to move forward quickly with project review.

At the same time that NRCS is preparing the draft PEIS, it is also revising the administrative rule for the EWP program (7 CFR 624), as well as revising the National EWP Manual, and the National EWP Handbook.

Background

The EWP program was created by Congress to respond to emergencies resulting from natural disasters. USDA, NRCS administers the EWP program, providing technical and financial assistance for runoff retardation and soil erosion control to relieve imminent hazards to life and property caused by floods, fires, windstorms, and other natural occurrences. Individuals are not eligible for EWP assistance unless represented by a project sponsor—a State government or a political subdivision of a State, such as a city, county, tribal organization, general improvement district, or a conservation district.

All EWP work is designed exclusively to reduce threats to life and property

while being economically, environmentally, and socially defensible and technically sound. EWP work can include removing debris from stream channels, road culverts, and bridges; reshaping and protecting eroded banks; correcting damaged drainage facilities; repairing levees and flood control structures; reseeding damaged areas; and purchasing floodplain easements. EWP work is not limited to any one set of prescribed measures. A case by case investigation of the needed work is made by NRCS. Under current provisions, the work can be done either through Federal or local contracts. NRCS may bear up to 75 percent of the construction cost of the emergency measures. The remaining 25 percent must come from local sponsors and can be in the form of cash or in-kind services. Sponsors are responsible for providing landrights to do repair work, for securing the necessary permits, for furnishing the local cost share, and for operation and maintenance of the work installed.

Because the statutory authorities allow funding only for activities required to relieve imminent hazards to life and property caused by natural disasters, EWP funds cannot be used to install measures not essential to the reduction of hazards or to solve problems that existed before the disaster. EWP funds cannot be used to improve the level of protection above that which existed prior to the disaster, unless required by current technical standards. In addition, EWP cannot fund operation and maintenance work, repair private or public transportation facilities or utilities. EWP work also cannot affect downstream water rights. Work will not be performed on measures installed by another Federal agency, though EWP funds may be used to perform work on measures installed by a state or local agency.

Description of Preliminary PEIS Alternatives

NRCS has developed a "Proposed Action" alternative and the "No Action" alternative for the draft PEIS to initiate the NEPA process. The proposed action is not necessarily the final alternative, but it may be amended, refined, or supplemented, as appropriate, based on input by the public and agencies during the public scoping process. Additional alternatives also may emerge as well.

Proposed Action Alternative

The proposed action is for NRCS to continue administering the EWP program but with substantial revision for improvement, by providing funding and technical assistance to aid

appropriately sponsored entities in restoring watershed components to pre-disaster conditions.

Some of the changes NRCS is considering as part of the proposed action, and on which comments are requested, include:

1. Use floodplain easements in lieu of recovery work.
2. Dedicate 15 percent of the monies appropriated by Congress for floodplain easements.
3. Eliminate the use of the terms "Exigency" and "Nonexigency".
4. Establish the cost-share rate at up to 75 percent for all but limited resource sponsors who may receive up to 90 percent.
5. Stipulate that measures must be economically, socially, and environmentally defensible to be installed and identify criteria to meet those requirements.
6. Stipulate that urgent and compelling situations should be handled immediately after discovery.
7. Allow organizations certified by the Internal Revenue Service as 501c organizations to become sponsors of floodplain easements.
8. Use of Disaster Assistance Recovery Teams to train NRCS employees.
9. Evaluate ways to better coordinate EWP with other available emergency programs.

No Action Alternative

This alternative would continue NRCS administration of the EWP program as it is now carried out. Under this alternative, NRCS will not make any substantive changes in its role, the mechanisms for review of projects before funding or follow-up after completion, and with no changes in monitoring of exigency and non-exigency situations.

These alternatives are beginning points for discussion and, based upon comments received, modifications may be made to them and others may be added.

Signed in Washington, D.C., on September 3, 1998.

Lawrence E. Clark,
Deputy Chief for Programs.

[FR Doc. 98-24409 Filed 9-10-98; 8:45am]
BILLING CODE 3410-16-P

AMERICAN BATTLE MONUMENTS COMMISSION

Notification of a New System of Records; Privacy Act

AGENCY: American Battle Monuments Commission.

ACTION: Notification of a new system of records.

SUMMARY: In accordance with the Privacy Act (5 U.S.C. 552a), the American Battle Monuments Commission (ABMC) is publishing a notice of a new system of records, "Fund Raising Solicitation Files."

DATES: Persons wishing to comment on the proposed routine use must do so by 10 October 1998. ABMC has sent a report of a New System, as required by 5 U.S.C. 552a® of the Privacy Act, to the Committee on Government Reform and Oversight of the House of Representatives, the Committee on Government Affairs of the Senate, and the Office of Management and Budget (OMB) on 1 September 1998 pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130. The new system will be effective 10 October 1998, unless comments dictate otherwise.

ADDRESSES: Interested individuals may comment on this publication by writing to LTC Theodore Gloukhoff, Courthouse Plaza II, Suite 500, 2300 Clarendon Boulevard, Arlington, Virginia, 22201-3367, Fax: (703) 696-6666. All comments received will be available for public inspection at that address.

FOR FURTHER INFORMATION CONTACT: LTC Theodore Gloukhoff, Courthouse Plaza II, Suite 500, 2300 Clarendon Boulevard, Arlington, Virginia, 22201-3367, Tel: (703) 696-6908, Fax: (703) 696-6666.

SUPPLEMENTARY INFORMATION: Pursuant to Pub. L. 103-32, American Battle Monuments Commission is authorized to solicit and accept private contributions for the establishment of a memorial on Federal land in the District of Columbia or its environs to honor members of the Armed Forces who served in World War II and to commemorate the participation of the United States in that war. ABMC proposes to establish a new system of records: "Fund Raising Solicitation Files." This system of records is being established in order to record responses to requests for contributions, actual contributions, gift acknowledgments and general information provided by contributors in memory of the national World War II effort.

Theodore Gloukhoff,
Director, Personnel and Administration.

American Battle Monuments Commission

SYSTEM NAME:

Fund Raising Solicitation Files.

SYSTEM CLASSIFICATION:

None.

SYSTEM LOCATION:

American Battle Monuments Commission, Courthouse Plaza II, Suite 500, 2300 Clarendon Boulevard, Arlington, VA 22201.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who respond to requests for contributions to the National World War II Memorial.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records documenting contributions, gift acknowledgments and information provided by contributors in memory of the national effort that led to victory in World War II.

Authority for maintenance of the system: 36 U.S.C. 121, et. seq., generally and Pub. L. 103-32.

PURPOSE(S):

Records are maintained for the purpose of raising funds for the construction of the National World War II Memorial authorized by Pub. L. 103-32.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

A record maintained in this system of records may be disseminated as a routine use of such record as follows:

(1) The names, addresses and other information voluntarily provided by contributors and maintained in this system are used to by the Commission to solicit funds from private sources for the construction of the National World War II Memorial authorized by Pub. L. 103-32 and to acknowledge such contributions.

(2) The records may be made available to contractors or other agents of the Commission in the course of comprehensive fund raising efforts.

(3) A record may be disclosed in response to a court subpoena, to appropriate parties engaged in litigation or in preparation of possible litigation such as potential witnesses for the purpose of securing their testimony when necessary to courts, magistrate or administrative tribunals, to parties and their attorneys for the purposes of proceeding with litigation or settlement of disputes, to individuals seeking information by using establishing discovery procedures, whether in connection with civil, criminal or regulatory proceedings.

(4) A record pertaining to an individual may be disclosed to a congressional office, in response to an inquiry which such congressional office presents as being made on behalf of, and at the request of, that individual.

(5) to facilitate processing Freedom of Information and Privacy Act requests for these records, information may be disclosed to another Federal agency to (a) permit a decision as to access, amendment or correction of records to be made in consultation with or by that agency, or (b) verify the identity of an individual or the accuracy of information submitted by an individual who has requested access to, or amendment or correction of records;

(6) information may be released to the news media and the public unless it is determined that release would constitute an unwarranted invasion of personal privacy;

(7) a record may be disclosed to the National Archives and Records Administration and the General Services Administration in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

STORAGE:

Manual records are stored in file cabinets and on index cards. Automated records are stored on magnetic disks. The disks are stored on the premises of the Commission or a firm contracted by the Commission in a room designated as a disk library. Two hard copy printouts of the tapes are retained by the Commission or a firm contracted by the Commission in metal cabinets with key locks.

RETRIEVABILITY:

The records are maintained in alphabetical order.

SAFEGUARDS:

Records are maintained by the Commission or its contractor so as to permit access only to employees or others acting on behalf of the Commission who have a need to know in connection with their duties.

RETENTION AND DISPOSAL:

The records are updated as contributions are made, or as additional information is otherwise received from contributors and obsolete names and related information is deleted.

SYSTEM MANAGER AND ADDRESS:

Director, Personnel and Administration, American Battle Monuments Commission, Courthouse Plaza II, Suite 500, 2300 Clarendon Boulevard Arlington, VA 22201

NOTIFICATION PROCEDURE:

Contact the system manager listed above.

RECORD ACCESS PROCEDURES:

Submit in writing all requests for access to the system manager identified

above. Clearly mark the envelope and letter "FOI/PA Request" and provide a return address. The subject of the record should also provide his/her full name and notarized signature, date and place of birth, or other information which may assist in locating the records sought.

CONTESTING RECORD PROCEDURES:

Individuals desiring to contest or amend information maintained in the system should direct their request to the system manager listed above. The request should clearly state what information is being contested, the reasons for contesting it, and the proposed amendment to the information sought.

RECORD SOURCE CATEGORIES:

Information is obtained from individuals voluntarily making contributions to the National World War II Memorial or providing information on individuals who contributed to the war effort.

[FR Doc. 98-24442 Filed 9-10-98; 8:45 am]

BILLING CODE 6120-01-M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed collection; comment request.

SUMMARY: The Committee for Purchase From People Who Are Blind or Severely Disabled is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on requirements relating to the annual certification of nonprofit agencies serving people who are blind (Form 403), to the initial certification of nonprofit agencies serving people with severe disabilities (Form 402), and to record maintenance.

DATES: Comments must be submitted on or before November 10, 1998.

ADDRESSES: Written comments should be sent to: Daniel Werfel, Desk Officer for the Committee for Purchase, Office of Information and Regulatory Affairs,

Office of Management and Budget, 725 17th Street, N.W., Room 10235, New Executive Office Building, Washington, DC 20503. Requests for information, including copies of the forms and supporting documentation, should be directed to: Beverly L. Milkman, Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Gateway 3, Suite 310, 1215 Jefferson Davis Highway, Arlington, VA 22202-4302, (703) 603-7740.

Title: Annual Certification-Qualified Nonprofit Agency Serving People Who Are Blind (Form 403).

SUPPLEMENTARY INFORMATION: The Committee has an annual certification form for nonprofit agencies serving people who are blind. The information included on the form is required to ensure that nonprofit agencies participating in the Committee's program meet the requirements of 41 USC 46-48c.

Title: Initial Certification-Qualified Nonprofit Agency Serving People with Severe Disabilities (Form 402).

SUPPLEMENTARY INFORMATION: The Committee has an initial certification form for nonprofit agencies serving people who have severe disabilities. The information included on the form is required to ensure that nonprofit agencies seeking to participate in the Committee's program meet the requirements of 41 USC 46-48c.

Title: Nonprofit Agency Responsibilities.

SUPPLEMENTARY INFORMATION: In order to meet the requirements of Public Law 92-28, participating nonprofit agencies are required to maintain records of their blind or severely disabled direct labor employees.

Dated: September 1, 1998.

Beverly L. Milkman,

Executive Director.

[FR Doc. 98-24467 Filed 9-10-98; 8:45 am]

BILLING CODE 6353-01-P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the procurement list.

SUMMARY: This action adds to the Procurement List commodities and a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: October 13, 1998.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Gateway 3, Suite 310, 1215 Jefferson Davis Highway, Arlington, Virginia 22202-4302.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603-7740.

SUPPLEMENTARY INFORMATION: On January 16 and July 24, 1998, the Committee for Purchase From People Who Are Blind or Severely Disabled published notices (63 FR 2658 and 39812) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the commodities and service and impact of the additions on the current or most recent contractors, the Committee has determined that the commodities and service listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46-48c and 41 CFR 51-2.4.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodities and service to the Government.

2. The action will not have a severe economic impact on current contractors for the commodities and service.

3. The action will result in authorizing small entities to furnish the commodities and service to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) in connection with the commodities and service proposed for addition to the Procurement List.

Accordingly, the following commodities and service are hereby added to the Procurement List:

Commodities

Impulse Merchandising Program (IMP)

Shippers

M.R. 11522

M.R. 11577

M.R. 11602

M.R. 11618

M.R. 11640

M.R. 11668

M.R. 11695

M.R. 11696

Service

Furnishings Management Services, Travis Air Force Base, California

This action does not affect current contracts awarded prior to the effective date of this addition or options that may be exercised under those contracts.

Beverly L. Milkman,

Executive Director.

[FR Doc. 98-24465 Filed 9-10-98; 8:45 am]

BILLING CODE 6353-01-P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to and deletions from procurement list.

SUMMARY: The Committee has received proposal(s) to add to the Procurement List commodities and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and to delete commodities previously furnished by such agencies.

COMMENTS MUST BE RECEIVED ON OR BEFORE: October 13, 1998.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Gateway 3, Suite 310, 1215 Jefferson Davis Highway, Arlington, Virginia 22202-4302.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603-7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a) (2) and 41 CFR 51-2.3. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

Additions

If the Committee approves the proposed addition, all entities of the Federal Government (except as otherwise indicated) will be required to procure the commodities and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities. I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small

entities other than the small organizations that will furnish the commodities and services to the Government.

2. The action does not appear to have a severe economic impact on current contractors for the commodities and services.

3. The action will result in authorizing small entities to furnish the commodities and services to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) in connection with the commodities and services proposed for addition to the Procurement List. Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

The following commodities and services have been proposed for addition to Procurement List for production by the nonprofit agencies listed:

Commodities

Battleboard Kit, ID

2590-01-392-0285 thru -0292
 2590-01-392-1565
 2590-01-392-1566
 2590-01-392-6898
 2590-01-394-2530
 2590-01-394-2531
 2590-01-394-2534
 2590-01-394-5635
 2590-01-394-5638 thru -5641
 2590-01-394-7635
 2590-01-394-7636
 2590-01-394-7838
 2590-01-394-8449
 2590-01-398-3172
 2590-01-398-3835 thru -3839
 2590-01-398-3841 thru -3847
 2590-01-398-5161
 2590-01-398-5163 thru -5180
 2590-01-398-6291
 2590-01-398-6718
 2590-01-398-6719
 2590-01-398-6722 thru -6749
 2590-01-398-7187 thru -7198
 2590-01-398-8072 thru -8090
 2590-01-399-1362 thru -1365
 2590-01-399-1935
 2590-01-399-2932 thru -2934
 2590-01-399-2936
 2590-01-399-2937
 2590-01-399-3840
 2590-01-399-5100
 2590-01-399-5863 thru -5867
 2590-01-399-6773
 2590-01-399-6774
 2590-01-399-7502
 2590-01-400-0372

2590-01-400-1809
 2590-01-400-1810
 2590-01-406-0481
 2590-01-411-2566
 2590-01-411-3170
 2590-01-411-3171
 2590-01-411-3172
 2590-01-411-3174
 2590-01-411-4390
 2590-01-411-4391
 2590-01-411-4393
 2590-01-420-2875
 2590-01-420-2877
 2590-01-420-2878
 2590-01-420-5984
 2590-01-421-7060
 2590-01-421-7067
 NPA: Crossroads Rehabilitation Center, Inc., Indianapolis, Indiana
 Target
 6920-01-NSH-9020 thru -9022 (Requirements for Fort Bragg, NC)
 NPA: Cumberland Sheltered Workshop, Fayetteville, North Carolina
 Red Shop Towels
 7920-01-454-1148
 NPA: Winston-Salem Industries for the Blind, Winston-Salem, North Carolina

Services

Base Supply Center
 Vandenberg Air Force Base, California
 NPA: Industries for the Blind, Inc., Milwaukee, Wisconsin
 Janitorial/Custodial
 Basewide
 Fort Detrick, Maryland
 NPA: Hagerstown Goodwill Industries, Inc., Hagerstown, Maryland
 Janitorial/Custodial
 Hill City Office and Shop
 Hill City, South Dakota
 NPA: Southern Hills Developmental Services, Inc., Hot Springs, South Dakota
 Warehouse Operation
 The Dredge WHEELER Spare Parts Warehouse, 400 Edwards Avenue, Suite F, Harahan, Louisiana
 NPA: The Lighthouse for the Blind in New Orleans, New Orleans, Louisiana

Deletions

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities.
 2. The action does not appear to have a severe economic impact on future contractors for the commodities.

3. The action will result in authorizing small entities to furnish the commodities to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) in connection with the commodities proposed for deletion from the Procurement List.

The following commodities have been proposed for deletion from the Procurement List:

Blackboard

7110-00-843-7917
 7110-00-132-6650

Rod Straight, Headless

5340-01-102-4539

Soap, Toilet

8520-00-228-0598
 8520-01-058-7463
 8520-00-141-2519

Cap, Garrison

8405-01-232-5342
 8405-01-232-5341
 8405-01-232-5336
 8405-01-232-5335
 8405-01-232-5332
 8405-01-232-5331
 8405-01-232-5340
 8405-01-232-5333
 8405-01-232-5330
 8405-01-232-5339
 8405-01-232-5338
 8405-01-232-5337
 8405-01-232-5334
 8405-01-375-8987
 8405-01-375-8988
 8405-01-375-8989
 8405-01-375-8990
 8405-01-375-8991
 8405-01-375-8992
 8405-01-375-8993
 8405-01-375-8994
 8405-01-375-8995
 8405-01-375-8996
 8405-01-375-8997
 8405-01-375-8998
 8405-01-375-8999
 8405-01-232-5353
 8405-01-232-5350
 8405-01-232-5343
 8405-01-232-5349
 8405-01-232-5354
 8405-01-232-5348
 8405-01-232-5347
 8405-01-232-5344
 8405-01-232-5355
 8405-01-232-5352
 8405-01-232-5351
 8405-01-232-5346
 8405-01-232-5345
 8405-01-375-8974
 8405-01-375-8975
 8405-01-375-8976

8405-01-375-8977
 8405-01-375-8978
 8405-01-375-8979
 8405-01-375-8980
 8405-01-375-8981
 8405-01-375-8982
 8405-01-375-8983
 8405-01-375-8984
 8405-01-375-8985
 8405-01-375-8986

Beverly L. Milkman,

Executive Director.

[FR Doc. 98-24466 Filed 9-10-98; 8:45 am]

BILLING CODE 6353-01-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-827]

Certain Cased Pencils From the People's Republic of China: Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results and partial rescission of antidumping duty administrative review.

SUMMARY: On January 26, 1998, the Department of Commerce published a notice of initiation of administrative review of the antidumping duty order on certain cased pencils from the People's Republic of China covering the period December 1, 1996 through November 30, 1997.

We are now rescinding this review in part with respect to respondents who had no shipments of the subject merchandise during the period of review. We are basing our preliminary results on "facts available" for those companies that did not respond to our questionnaire. If these preliminary results are adopted in our final results of administrative review, we will instruct the U.S. Customs Service to assess antidumping duties on entries during the period.

Interested parties are invited to comment on these preliminary results. Parties who submit arguments in this proceeding are requested to submit with the argument: (1) A statement of the issue; and (2) a brief summary of the argument.

EFFECTIVE DATE: September 11, 1998.

FOR FURTHER INFORMATION CONTACT: Jack Dulberger or Wendy Frankel, Antidumping/Countervailing Duty Enforcement Group II, Office Four, Import Administration, U.S. Department

of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, telephone (202) 482-5505 and 482-5849, respectively.

SUPPLEMENTARY INFORMATION:

The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department of Commerce's (the Department) regulations are to the regulations set forth at 19 CFR part 351, 62 FR 27296 (May 19, 1997).

Period of Review

The period of review (POR) is December 1, 1996 through November 30, 1997.

Scope of the Review

The products covered by this review are certain cased pencils of any shape or dimension which are writing and/or drawing instruments that feature cores of graphite or other materials encased in wood and/or man-made materials, whether or not decorated and whether or not tipped (e.g., with erasers, etc.) in any fashion, and either sharpened or unsharpened. The pencils subject to this review are classified under subheading 9609.10.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Specifically excluded from the scope of this order are mechanical pencils, cosmetic pencils, pens, non-case crayons (wax), pastels, charcoals, and chalks. Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this review is dispositive.

Background

On December 28, 1994, we published an antidumping duty order (see *Antidumping Duty Order: Certain Cased Pencils from the People's Republic of China*, 59 FR 66909 (December 28, 1994)) (*Pencils Order*) which stated that imports of the two producer/exporter combinations identified in the less-than-fair-value (LTFV) investigation had margins of zero. We stated in the *Pencils Order* that we would exclude from the order imports of subject merchandise that are sold by China First Pencil Company, Ltd. (China First) or Guangdong Provincial Stationery & Sporting Goods Import and Export Corporation (Guangdong) "and manufactured by the producers whose

factors formed the basis for the zero margin" (59 FR at 66910). Those exporter/producer combinations were identified in the order as: (1) China First/China First, and (2) Guangdong/Shanghai Three Star Stationery Industry Corporation (Three Star).

In response to our notice of opportunity to request administrative review for this third POR, the petitioner, the Writing Instrument Manufacturers Association, Pencil Section (WIMA), requested, by letter dated December 29, 1997, that the Department conduct an administrative review of China First, Guangdong, Three Star, and others. (See Letter from WIMA to the Department, December 29, 1997 (WIMA Request Letter) at 2).

On January 26, 1998, the Department published a notice of initiation of an administrative review of China First, Guangdong, Three Star, and 38 other potential producers/exporters named by the petitioner in its review request (63 FR 3702). On February 13, 1998, we sent a questionnaire to each of the companies for which the petitioner requested a review, including China First, Guangdong, and Three Star. We also sent a questionnaire to the Ministry of Foreign Trade and Economic Cooperation requesting its assistance in transmitting the questionnaire to companies for which we lacked complete addresses. Several of the questionnaires were returned to the Department by the carrier service as undeliverable due to incorrect or insufficient addresses. After soliciting assistance from the U.S. Embassy in Beijing, we re-sent those questionnaires in April and May 1998 to the proper addresses.

With respect to China First, pencils both produced and exported by China First were originally excluded from this order. See *Pencils Order* at 66910. However, pursuant to litigation brought to challenge the Department's final determination in the original investigation (*Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People's Republic of China*, 59 FR 55625 (November 8, 1994) (*Pencils Final Determination*)), the Department issued a remand determination which was subsequently affirmed by the U.S. Court of International Trade (CIT). See *Writing Instrument Manufacturers Ass'n Pencil Section, et al., v. United States*, 984 F. Supp. 629 (CIT 1997) (*Writing Instrument Manufacturers*). In this remand determination, the Department determined, among other things, that merchandise exported and produced by China First is, in fact, covered by the order. On November 13, 1997, the CIT

affirmed the Department's remand determination. On December 11, 1997, the Department published its notice of court decision. See *Notice of Court Decision: Certain Cased Pencils from the People's Republic of China*, 62 FR 65243 (December 11, 1997) (*Notice of Court Decision*).¹

On March 13, 1998, China First and Guangdong responded to the Department's February 13, 1998 questionnaire. Guangdong stated that it had "sold no subject merchandise to the United States" during the POR. See Letter from Guangdong to the Department (March 13, 1998) at 2. China First stated that it had "sold no subject merchandise manufactured by any other producer to the United States," (i.e., a producer other than China First), during the POR. See Letter from China First to the Department (March 13, 1998) (China First Letter) at 4. At the same time, China First and Guangdong requested that the Department terminate its review of these companies, arguing that they were excluded from the antidumping duty order. See Letter from Guangdong to the Department (March 13, 1998) and Letter from China First to the Department (March 13, 1998). We received no comment on the respondents' request from the petitioner.

After due consideration, we decided that it was appropriate to continue our review of China First and Guangdong, concerning producers other than those specified in the order as excluded

¹ In its *Notice of Court Decision*, the Department stated:

On November 13, 1997, the CIT affirmed the Department's remand determination. In its decision in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) (*Timken*), the United States Court of Appeals for the Federal Circuit held that, pursuant to 19 U.S.C. section 1516a (e), the Department must publish a notice of a court decision which is not "in harmony" with a Department determination, and must suspend liquidation of entries pending "conclusive" court decision. The CIT's decision in *Writing Instrument Manufacturers* on November 13, 1997, constitutes a decision not in harmony with the Department's final affirmative determination. Publication of this notice fulfills the *Timken* requirement. Accordingly, the Department will continue to suspend liquidation pending the expiration of the period of appeal, or, if appealed, until a "conclusive" court decision. In addition, pursuant to the affirmed remand results, China First is no longer excluded from the antidumping duty order issued in this case (*Antidumping Duty Order: Certain Cased Pencils from the People's Republic of China*, 59 FR 66909 (December 28, 1994)). Therefore, liquidation shall be suspended on entries, or withdrawals from warehouse, for consumption of the subject merchandise from China First effective ten days from the date of the decision in *Writing Instrument Manufacturers*. Absent an appeal, or, if appealed, upon a "conclusive" court decision affirming the CIT's opinion, the Department will amend the final LTFV determination and the antidumping duty order on certain cased pencils from the PRC to reflect the Department's remand results.

exporter/producer combinations, in accordance with our practice in previous reviews of this order. See *Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Cased Pencils from the People's Republic of China*, 62 FR 46945, 46946 (September 5, 1997).

We note that China First also stated in its March 13, 1998 letter that it made no entries of China First-produced merchandise between November 23, 1997 and November 30, 1997. See China First Letter at 3. As we stated in our *Notice of Court Decision*, we instructed the U.S. Customs Service (Customs) to commence suspension of liquidation of any such merchandise effective November 23, 1997 pending issuance of a final and conclusive court decision on this matter. When there is a final and conclusive court decision, the Department will publish an amended final determination and an amended antidumping duty order, as appropriate. Because the Department has not yet published an amended order with respect to entries of merchandise both produced and exported by China First, the Department currently lacks authority to conduct an administrative review of any such entries.

On April 14, 1998, we sent a questionnaire to Jinan Pencil Factory (Jinan), a company named in WIMA's request (see WIMA Request Letter), setting original deadlines of May 8, 1998 for its Section A questionnaire response and May 29, 1998 for the remainder of its response. Jinan later requested, and we granted, several extensions of the deadline for submitting its response; ultimately, we granted Jinan an extension to June 30, 1998 for submitting its entire response. We granted these requests for extensions of the response deadlines in an attempt to accommodate Jinan, because of the communication complications we encountered with Jinan and its status as a first-time, *pro se* respondent, among other factors. (See Memorandum from Pencils Team Analyst to Holly A. Kuga, Senior Director, AD/CVD Enforcement, Group II, June 9, 1998; see also Letter from Holly A. Kuga, Senior Director, AD/CVD Enforcement, Group II, to Jinan Pencil Factory, June 18, 1998 (June 18, 1998 letter)). We expressly informed Jinan that June 30, 1998 would be its "absolute final deadline," due to the statutory time constraints for issuing these preliminary results of review, delays we had earlier encountered in sending questionnaires to respondents in the PRC, and the previous time extensions granted to Jinan. See June 18, 1998 letter. We also specified that any

information Jinan submitted after that date would be considered untimely and could result in our applying facts available (FA) for the preliminary results of this review for Jinan. *Id.* Because we received no questionnaire response from Jinan, we have determined that we must resort to FA for Jinan pursuant to section 776(a) of the Act. (See "Facts Available" section, below).

Rescission

In response to respondents' assertions of having sold no subject merchandise that entered the United States during the POR, we sought to determine whether, during the POR, China First exported pencils that entered the United States during the POR that were manufactured by producers other than China First, and whether Guangdong exported pencils that entered the United States during the POR that were manufactured by producers other than Three Star.

In order to make our determination, we conducted a query of the Customs database and found no information that contradicted the claim made by respondents that no subject merchandise manufactured by producers other than China First or Three Star was shipped by the exporters China First and Guangdong, respectively, to the United States during the POR. (See Decision Memorandum Regarding Whether China First and Guangdong Should be Considered Non-Shippers in this Review from Case Analyst to Holly Kuga, dated September 1, 1998). Based on this information, we have determined to rescind this review with respect to China First and Guangdong. See 19 CFR 351.213(d)(3).

Facts Available

Section 776(a)(1) of the Act mandates that the Department use FA if necessary information is not available on the record of an antidumping proceeding. In addition, section 776(a)(2) of the Act mandates that the Department use FA where an interested party or any other person: (A) withholds information requested by the Department; (B) fails to provide requested information by the requested date or in the form and manner requested; (C) significantly impedes an antidumping proceeding; or (D) provides information that cannot be verified. In this case, all of the named respondents, other than China First and Guangdong, failed to respond to the Department's questionnaire. Where the Department must base the entire dumping margin for a respondent in an administrative review on FA because that respondent failed to cooperate by

not acting to the best of its ability, section 776(b) authorizes the Department to use an inference adverse to the interests of that respondent in choosing FA. Section 776(b) also authorizes the Department to use as adverse FA information derived from the petition, the final determination in the investigation, a previous administrative review, or other information placed on the record. Information from prior segments of a proceeding constitutes secondary information. Section 776(c) of the Act provides that the Department shall, to the extent practicable, corroborate secondary information from independent sources reasonably at its disposal. The Statement of Administrative Action (SAA) (H. Doc. 316, 103d Cong., 2nd Sess. 870) provides that "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. The SAA, at page 870, clarifies that the petition is "secondary information."

As noted above, various exporters, including Jinan, of certain cased pencils from the PRC failed to respond to our questionnaire (see "Background" section of this notice). Therefore, we considered these exporters to have failed to cooperate by not acting to the best of their ability to comply with the Department's requests for information. Therefore, we preliminarily decided to use adverse FA with respect to Jinan and all other non-responding exporters, in accordance with section 776(b) of the Act. See Memorandum from Pencils Team Analyst to Holly A. Kuga, Senior Director, AD/CVD Enforcement, Group II, July 18, 1998 (July 18, 1998 Memorandum) at 3. Further, these exporters, together with all other exporters that have not established they are entitled to a separate rate, are presumed to be under common government control and, therefore, receive a single PRC-wide rate. Consequently, we are basing the PRC-wide rate on adverse FA, in accordance with section 776(b) of the Act.

For the preliminary results of this review, we determine it appropriate to use, as adverse FA, the petition rate (which was the basis for the PRC-wide rate in the LTFV investigation), as amended by our August 1995 remand determination, of 53.65 percent. This is consistent with our decision in the amended final results of the first administrative review and the final results of the second administrative review of this order. See *Certain Cased Pencils From the People's Republic of China; Amended Final Results of Antidumping Duty Administrative*

Review, 62 FR 36491 (July 8, 1997) (*Pencils Amended Final*); see also *Certain Cased Pencils From the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 63 FR 779 (January 7, 1998). Further, we determined this rate to be corroborated based on our analysis in the previous segment of the proceeding (see *Pencils Amended Final*, 62 FR at 36492). There is no new information in the record of the instant proceeding to lead us to re-examine this issue.

Accordingly, we are applying a single dumping rate—the PRC-wide rate established in the *Pencils Amended Final*—to all exporters in the PRC, except for China First and Guangdong, as discussed above, and Shanghai Foreign Trade Corporation, an exporter which was previously determined to be entitled to a separate rate and for which the petitioner did not request an administrative review.

The weighted-average dumping margin is as follows:

Manufacturer/producer/exporter	Weighted-average margin percentage
PRC-wide Rate	53.65

Parties to this proceeding may request disclosure within 5 days of the date of publication of this notice (see section 351.224(b) of the Department's regulations). In accordance with section 351.310(c) of the Department's regulations, any interested party may request a hearing within 30 days of publication of this notice. Any hearing, if requested, will be held 44 days after the publication of this notice, or the first workday thereafter. Interested parties may submit case briefs within 30 days of the date of publication of this notice. Rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed not later than 35 days after the date of publication. See sections 351.309 and 351.310 of the Department's regulations. The Department will publish a notice of final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, not later than 120 days after the date of publication of these preliminary results.

The Department shall determine, and Customs shall assess, antidumping duties on all appropriate entries. We intend to issue assessment instructions to Customs for the exporters subject to this review based on the dumping rate stated above. The Department will issue appraisal instructions directly to Customs. Further, the following deposit

requirements will be effective upon publication of the final results of this administrative review for all shipments of certain cased pencils from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Act: (1) the cash deposit rate for all Chinese exporters, except for China First, Guangdong, and SFTC, will be the rate established in the final results of this review; (2) for merchandise exported by SFTC, China First (with respect to merchandise produced by anyone other than China First), and Guangdong (with respect to merchandise produced by anyone other than Three Star), the cash deposit rate will continue to be the most recent rate published in the determination or final results for that firm; and (3) for non-PRC exporters of subject merchandise from the PRC, the cash deposit rate will be the rate of their suppliers. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a preliminary reminder to importers of their responsibility under section 351.402(f) of the Department's regulations to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. 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 section 751(a)(1) of the Act (19 U.S.C. section 1675(a)(1)), section 777(i) of the Act (19 U.S.C. section 1677f(i)), and 19 CFR 351.221.

Dated: September 1, 1998.

Joseph A. Spetrini,
Acting Assistant Secretary for Import Administration.

[FR Doc. 98-24487 Filed 9-10-98; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-201-817]

Oil Country Tubular Goods From Mexico: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative review.

SUMMARY: In response to a request from respondents, the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on oil country tubular goods ("OCTG") from Mexico. The review covers two manufacturers/exporters of the subject merchandise to the United States and the period August 1, 1996 through July 31, 1997. We preliminarily determine that sales have not been made below normal value ("NV"). If these preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs to assess antidumping duties based on the difference between export price ("EP") or constructed export price ("CEP") and NV.

Interested parties are invited to comment on these preliminary results. Parties who submit argument in this proceeding are requested to submit with the argument (1) a statement of the issue and (2) a brief summary of the argument (no longer than five pages, including footnotes).

EFFECTIVE DATE: September 11, 1998.

FOR FURTHER INFORMATION CONTACT: John Drury, Nancy Decker or Linda Ludwig, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482-3208 (Drury), (202) 482-0196 (Decker), (202) 482-3833 (Ludwig).

SUPPLEMENTARY INFORMATION:

Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act) are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are references to the provisions codified at 19 CFR Part 351 (62 FR 27296, May 19, 1997).

Background

The Department of Commerce published a final determination of sales at less than fair value for OCTG from Mexico on June 28, 1995 (60 FR 33567), and subsequently published the antidumping duty order on August 11, 1995 (60 FR 41056). The Department of Commerce published a notice of "Opportunity To Request Administrative Review" of the

antidumping order for the 1996/1997 review period on August 4, 1997 (62 FR 41925). Upon receiving requests for administrative review from two respondents, Hylsa S.A. de C.V. ("Hylsa") and Tubos de Acero de Mexico, S.A. ("TAMSA"), we initiated a review on September 25, 1997 (62 FR 50292).

Under Section 751(a)(3)(A) of the Act, the Department may extend the deadline for completion of an administrative review if it determines that it is not practicable to complete the review within the statutory time limit of 365 days. On March 19, 1998, the Department extended the time limits for these preliminary results to August 31, 1998. See *Oil Country Tubular Goods from Mexico; Extension of Time Limits for Antidumping Duty Administrative Review* (63 FR 14422, March 25, 1998).

Duty Absorption

On October 2, 1997, Maverick Tube Corporation, Lone Star Steel Company, and IPSCO Tubulars, Inc. requested that the Department determine, with respect to Hylsa, whether antidumping duties had been absorbed during the POR. On October 23, 1997, North Star Steel Ohio requested that the Department determine, with respect to TAMSA, whether antidumping duties had been absorbed during the POR. Section 751(a)(4) of the Act provides for the Department, if requested, to determine during an administrative review initiated two or four years after the publication of the order, whether antidumping duties have been absorbed by a foreign producer or exporter, if the subject merchandise is sold in the United States through an affiliated importer. Because this review was initiated two years after the publication of the order, we will make a duty absorption determination in this segment of the proceeding.

Since we have preliminarily determined that there are no dumping margins for the respondents with respect to its U.S. sales, we also preliminarily determine that there is no duty absorption. As our analysis of the dumping margin may be modified in our final results, if interested parties wish to submit evidence that the unaffiliated purchasers in the United States will pay any ultimately assessed duty charged to affiliated importers, they must do so no later than 15 days after publication of these preliminary results. This information would be considered by the Department if we determine in our final results that there are dumping margins on certain U.S. sales.

In this case, both TAMSA and Hylsa sold to the United States through importers that are affiliated within the meaning of section 751(a)(4) of the Act. We preliminarily determine that there is a no dumping margin for either TAMSA's sales or Hylsa's sales during the POR.

Scope of the Review

Imports covered by this review are oil country tubular goods, hollow steel products of circular cross-section, including oil well casing, tubing, and drill pipe, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, whether or not conforming to American Petroleum Institute (API) or non-API specifications, whether finished or unfinished (including green tubes and limited service OCTG products). This scope does not cover casing, tubing, or drill pipe containing 10.5 percent or more of chromium. The OCTG subject to this order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7304.20.10.10, 7304.20.10.20, 7304.20.10.30, 7304.20.10.40, 7304.20.10.50, 7304.20.10.60, 7304.20.10.80, 7304.20.20.10, 7304.20.20.20, 7304.20.20.30, 7304.20.20.40, 7304.20.20.50, 7304.20.20.60, 7304.20.20.80, 7304.20.30.10, 7304.20.30.20, 7304.20.30.30, 7304.20.30.40, 7304.20.30.50, 7304.20.30.60, 7304.20.30.80, 7304.20.40.10, 7304.20.40.20, 7304.20.40.30, 7304.20.40.40, 7304.20.40.50, 7304.20.40.60, 7304.20.40.80, 7304.20.50.15, 7304.20.50.30, 7304.20.50.45, 7304.20.50.60, 7304.20.50.75, 7304.20.60.15, 7304.20.60.30, 7304.20.60.45, 7304.20.60.60, 7304.20.60.75, 7304.20.70.00, 7304.20.80.30, 7304.20.80.45, 7304.20.80.60, 7305.20.20.00, 7305.20.40.00, 7305.20.60.00, 7305.20.80.00, 7306.20.10.30, 7306.20.10.90, 7306.20.20.00, 7306.20.30.00, 7306.20.40.00, 7306.20.60.10, 7306.20.60.50, 7306.20.80.10, and 7306.20.80.50.

Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

The Department has determined that couplings, and coupling stock, are not within the scope of the antidumping duty order on OCTG from Mexico. See Letter to Interested Parties; Final Affirmative Scope Decision, August 27, 1998.

Period of Review

The review covers the period August 1, 1996 through July 31, 1997. The Department is conducting this review in accordance with section 751 of the Act, as amended.

Verification

As provided in section 782(i) of the Act, we verified information provided by both Hylsa and TAMSA (sales and cost) using standard verification procedures, including on-site inspection of the manufacturer's facilities and the examination of the relevant sales and financial records.

Our verification results are outlined in the public versions of the verification reports.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products produced by the respondents, covered by the description in the Scope of the Review section, above, and sold in the home market during the period of review (POR), to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the most similar foreign like product on the basis of the characteristics listed in the Department's September 16, 1997 questionnaires or to constructed value ("CV").

Fair Value Comparisons

To determine whether sales of the subject merchandise by TAMSA and Hylsa were made at less than fair value ("LTFV"), we compared the EP or CEP to the NV, as described in the EP, CEP, and NV sections of this notice, below. In accordance with section 777A(d)(1)(A)(i) of the Act, we compared EPs or CEPs to weight-averaged NVs.

Hylsa reported that it had no viable home market or third country sales during the POR. Therefore, for Hylsa we used CV for NV. See the NV section of this notice, below, for further discussion.

United States Price (USP)

TAMSA

In its response to the Department, TAMSA claimed that its sales to the United States were EP sales. After careful examination of the record, and based upon our analysis using the three-pronged test defined below, the Department has preliminarily determined to treat TAMSA's U.S. sales

as CEP sales, as defined in section 772(b) of the Act. See Analysis Memorandum for TAMSA for a further discussion.

Pursuant to section 772(a) and (b) of the Act (19 U.S.C. § 1677a(a) and (b)), an EP sale is a sale of merchandise for export to the United States made prior to importation, and a CEP sale is a sale made in the United States before or after importation. In determining whether the sales activity of a U.S. subsidiary rises to such a level that a sale also involving the producer or exporter outside the United States will be considered a CEP sale, the Department has examined the following criteria: (1) Whether the merchandise was shipped directly from the manufacturer to the unaffiliated U.S. customer (rather than being introduced into the inventory of the U.S. affiliate), (2) whether this was a customary commercial channel between the parties involved; and (3) whether the function of the U.S. affiliate is limited to that of a "processor of sales-related documentation" and a "communication link" with the unaffiliated U.S. buyer. See, e.g., *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Review* ("Canadian Steel"), 63 Fed. Reg. 12725, 12738 (March 16, 1998).

In the *Canadian Steel* case, the Department clarified its interpretation of the third prong of this test, as follows. "Where the factors indicate that the activities of the U.S. affiliate are ancillary to the sale (e.g., arranging transportation or customs clearance, invoicing), we treat the transactions as EP sales. Where the U.S. affiliate has more than an incidental involvement in making sales (e.g., solicits sales, negotiates contracts or prices) or providing customer support, we treat the transactions as CEP sales." *Id.*

Based on our examination of the record, TAMSA's U.S. affiliate (Siderca Corp.) has more than an incidental involvement in making sales or providing customer support. Siderca Corp. has an exclusive export agent agreement to distribute TAMSA merchandise in the U.S., Siderca Corp. solicits sales, and matches customer orders to TAMSA's production or inventory. Siderca Corp. invoices the U.S. customer, and receives payment. Siderca Corp. pays for import charges as well as insurance for the merchandise. Conversely, TAMSA does not communicate directly with the customer. Only Siderca Corp. communicates with the customer. Based on these facts, it is clear that the U.S. affiliate has more than an incidental

involvement in making these sales. Since the sales in question do not meet the third prong of the test for indirect EP sales described above, we need not consider the other two prongs. Based on our analysis, we are treating TAMSA's U.S. transactions as CEP sales.

We based CEP on the delivered price to affiliated customers in the United States. We made adjustments, where applicable, for movement expenses (U.S. inland freight, U.S. brokerage and handling expenses, and U.S. customs duties), credit expenses, and indirect selling expenses that were associated with economic activity in the United States. Finally, we made an adjustment for CEP profit in accordance with section 772(d)(3) of the Act.

Hylsa

We used EP in accordance with section 772(a) of the Act because the subject merchandise was sold to unaffiliated customers before importation and the CEP methodology was not indicated by the facts on the record. While Hylsa did sell the subject merchandise through a U.S. affiliate, we found the following fact pattern when applying the three-prong test. First, the merchandise was shipped directly from the manufacturer to the unaffiliated U.S. customer and was not introduced into the inventory of the U.S. affiliate. Concerning the second prong of the test, the Court of International Trade has recognized that if a majority of a company's sales are not warehoused by the U.S. affiliate, this indicates that the direct shipments of merchandise were a customary commercial channel of trade. *E.I. Du Pont de Nemours & Co., Inc. v. United States*, 841 F. Sup. 1237, 1248-50 (1993). The majority of Hylsa's sales are not warehoused by the United States affiliate. Finally, as to the third prong of the test, we found that the functions of Hylsa's U.S. affiliate are limited to that of "processor of sales-related documentation" in connection with the unaffiliated U.S. buyer. We found that Hylsa communicates directly with the unaffiliated customer, sets the price, and pays for all related expenses. The affiliate's role is confined to issuing an invoice and collecting payment. Therefore, we preliminarily conclude that Hylsa's sales of subject merchandise to the U.S. are EP sales.

We calculated EP based on packed, prepaid or delivered prices to customers in the United States. We made adjustments, where applicable, for movement expenses (U.S. inland freight, U.S. brokerage and handling expenses, and U.S. Customs duties).

Based on findings at verification, we have adjusted Hylsa's reported credit

expense. We found that the rate used to calculate the credit expense had been understated due to the exclusion of a tax expense. We instead have used the weighted average of Hylsa's short-term borrowings for the POR plus an amount equal to the tax expense. See Analysis Memorandum for Hylsa for further details.

Normal Value

In order to determine whether there were sufficient sales of OCTG in the home market ("HM") to serve as a viable basis for calculating NV, we compared the volume of home market sales of subject merchandise to the volume of subject merchandise sold in the United States, in accordance with section 773(a)(1)(C) of the Act.

TAMSA

TAMSA's aggregate volume of HM sales of the foreign like product was greater than five percent of its respective aggregate volume of U.S. sales of the subject merchandise. Therefore, for TAMSA, we have based NV on HM sales. We made adjustments to NV for HM inland freight, discounts, credit expenses, warehousing expenses, packing, and warranty expenses.

Based on our findings at verification, we made adjustments to the reported values for direct selling expenses. See Analysis Memorandum for further discussion.

Cost of Production Analysis

Because the Department found sales below cost for TAMSA in the comparison market during the last completed segment of the proceeding, we initiated a cost of production ("COP") analysis. We conducted the COP analysis as described below.

A. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated the weighted-average COP, by model, based on the sum of the cost of materials, fabrication and general expenses, and packing costs. We relied on the submitted COPs, except in the following specific instances where the submitted costs were not appropriately quantified or valued.

We made the following company-specific adjustments to the submitted costs. See Analysis Memorandum for a further discussion.

1. We revised TAMSA's depreciation expense to allocate the year end adjustment evenly throughout 1996. See Cost Verification Report from Theresa L. Caherty and Michael P. Harrison to Christian B. Marsh dated August 24, 1998.

2. For products which were not produced during the POR, we used the COP for the period in which the products were produced.

3. We calculated TAMSA's FOH 2 and FOH 3 expense allocation using a percentage of standard costs. See Analysis Memorandum for further discussion.

4. We revised TAMSA's general and administrative expense rate to include the mandatory employee profit sharing contribution.

5. We revised TAMSA's net financial expense to include the premium paid to retire its debentures and to allocate expenses between short-term and long-term liabilities.

B. Test of Home Market Prices

We used respondent's weighted-average COP for the period August 1, 1996 to July 31, 1997. We compared the weighted-average COP figures to home market sales of the foreign like product as required under section 773(b) of the Act. In determining whether to disregard home-market sales made at prices below the COP, we examined whether (1) within an extended period of time, such sales were made in substantial quantities, and (2) such sales were made at prices which permitted the recovery of all costs within a reasonable period of time. On a product-specific basis, we compared the COP to the home market prices, less any applicable movement charges, rebates, and discounts.

C. Results of COP Test

Pursuant to section 773(b)(2)(C), where less than 20 percent of TAMSA's sales of a given product were at prices less than the COP, we did not disregard any below-cost sales of that product because we determined that the below-cost sales were not made in "substantial quantities." Where 20 percent or more of respondent's sales of a given product during the POR were at prices less than the COP, we determined such sales to have been made in "substantial quantities" within an extended period of time in accordance with section 773(b)(2)(B) of the Act. We also determined that such sales were also not made at prices which would permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act; therefore, we disregarded the below-cost sales.

D. Calculation of CV

In accordance with section 773(e) of the Act, we calculated CV based on the sum of TAMSA's cost of materials, fabrication, SG&A, U.S. packing costs,

and interest expenses as reported and a calculated profit. In accordance with section 773(e)(2)(A) of the Act, we based SG&A and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade, for consumption in the foreign country. For selling expenses, we used the weighted-average home market selling expenses.

Hylsa. Hylsa reported that it had no viable home or third country market during the POR. Therefore, in accordance with section 773(a)(4) of the Act, we based NV for Hylsa on CV. In accordance with section 773(e)(1) of the Act, we calculated CV based on the sum of the costs of materials, labor, overhead, SG&A, profit, interest expenses, and U.S. packing costs. We adjusted SG&A, packing and cost of manufacture ("COM") based on our findings at verification. See analysis memorandum for further information.

Section 773(e)(2)(A) states that SG&A and profit are to be based on the actual amounts incurred in connection with sales of a foreign like product. In the event such data is not available, section 773(e)(2)(B) of the Act sets forth three alternatives for computing profit and SG&A without establishing a hierarchy or preference among the alternative methods. The alternative methods are: (1) Calculate SG&A and profit incurred by the producer based on the sale of merchandise of the same general type as the exports in question; (2) average SG&A and profit of other producers of the foreign like product for sales in the home market; or (3) any other reasonable method, capped by the amount normally realized on sales in the foreign country of the general category of the products. In addition, the Statement of Administrative Action ("SAA") states that, if the Department does not have the data to determine amounts for profit under alternatives one and two, or a profit cap under alternative three, it still may apply alternative three (without the cap) on the basis of the "facts available." SAA at 841.

In this case, since Hylsa did not have a viable home market or third country market for this product, we based Hylsa's SG&A and profit values on the following methodology. For profit and SG&A expenses, we used data from Hylsa's financial statements. We based our profit calculations on the income statement of the tubular products division of Hylsa, and SG&A on Hylsa's consolidated financial statement. See Analysis Memorandum for further discussion.

There were no allegations of below-cost sales for Hylsa during this POR. Consequently, we did not initiate a COP analysis for Hylsa.

Price to CV Comparisons

Where we compared CV to EP for Hylsa, we increased CV by U.S. credit expenses pursuant to section 773(a)(6)(C)(iii) of the Act and 19 CFR § 351.410(a)(c).

Level of Trade

In accordance with section 773(a)(1)(A) of the Act, and the SAA at pages 829–831, to the extent practicable, the Department will calculate NV based on sales at the same level of trade (LOT) as the U.S. sale (either EP or CEP). When there are no sales in the comparison market at the same LOT as the U.S. sale(s), the Department may compare sales in the U.S. and foreign markets at a different LOT, and adjust NV if appropriate. The NV LOT is that of the starting-price sales in the home market. When NV is based on CV, the level of trade is that of the sales from which we derive selling, general and administrative (“SG&A”) expenses and profit.

As the Department explained in *Gray Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review* (Cement from Mexico), 62 FR 17156 (April 9, 1997), for both EP and CEP the relevant transaction for the LOT analysis is the sale from the exporter to the importer. While the starting price for CEP is that of a subsequent resale to an unaffiliated buyer, the construction of the CEP results in a price that would have been charged by the exporter to the importer if the importer had not been affiliated. We calculate the CEP by removing from the first resale to an unaffiliated U.S. customer the expenses referenced in section 772(d) of the Act and the profit associated with these expenses. These expenses represent activities undertaken by the affiliated importer in making the sale to the unaffiliated customers. Because the expenses deducted under section 772(d) of the Act are incurred for selling activities in the United States, the deduction of these expenses may yield a different LOT for the CEP than for the later resale (which we use for the starting price). Movement charges, duties, and taxes deducted under section 772(c) of the Act do not represent activities of the affiliated importer, and we do not remove them to obtain the price on which the CEP LOT is based.

To determine whether some or all home market sales are at a different LOT than U.S. sales, we apply a two-prong

test. Customer categories such as distributors, retailers, or end-users are commonly used by respondents to describe LOTs, but, without substantiation, they are insufficient to establish that a claimed LOT is valid. An analysis of the chain of distribution and of the selling functions substantiates or invalidates the claimed LOTs.

In the first part of the test, we examine whether the home market sales are at different stages in the marketing process than the U.S. sales. The marketing process in both markets begins with goods being sold by the producer and extends to the sale to the final user. The chain of distribution between the producer and the final user may have many or few links, and each respondent's sales occur somewhere along this chain. In the United States the respondent's sales are generally to an importer, whether independent or affiliated. We review and compare the distribution systems in the home market and the United States, including selling functions, class of customer, and the extent and level of selling expenses for each claimed LOT. Unless the sales being compared are at different stages in the marketing process, the Department will not find that a difference in LOT exists, even if selling functions are different.

The second prong of the Department's LOT test concerns selling functions. If the claimed LOTs are different, the selling functions performed in selling to each level should also be different. Therefore, unless we find at a minimum that there are different selling functions and different stages in the marketing process for sales to the U.S. and HM sales, we will not determine that there are separate LOTs. Different LOTs necessarily involve differences in selling functions, but differences in selling functions, even substantial ones, are not alone sufficient to establish a difference in the LOTs. Differences in LOTs are characterized by purchasers at different stages of marketing or their equivalent which, in this case, are the different stages in the chain of distribution, and by sellers performing qualitatively different functions in selling to them.

When we compare U.S. sales to home market sales made at a different LOT, we make a LOT adjustment if the difference in LOTs affect price comparability. We determine any effect on price comparability by examining sales at different LOTs in a single market (the home market or the third-country market used to calculate NV when the aggregate volume of sales in the home market is less than five

percent of the aggregate volume of U.S. sales). Any price effect must be manifested in a pattern of consistent price differences between home market (or third-country) sales used for comparison and sales at the equivalent LOT of the export transaction. See, e.g., *Granular Polytetrafluorethylene Resin from Italy; Preliminary Results of Antidumping Duty Administrative Review*, 62 FR 26285 (May 13, 1997), and *Cement from Mexico*, at 17148. To quantify the price differences, we calculate the difference in the average of the net prices of the same models sold at different LOTs. We use the average percentage difference between these net prices to adjust NV when the LOT of NV is different from that of the export sale. If there is no pattern of price differences, then the difference in LOTs does not have a price effect, and, therefore, no adjustment is necessary.

Section 773 of the Act also provides for an adjustment to NV when NV is based on a LOT different from that of the CEP if the NV is more remote from the factory than the CEP and, even though the respondent has acted to the best of its ability in providing data for this purpose, we are unable to determine whether the differences in LOT between CEP and NV affect the comparability of their prices. This latter situation might occur when there is no home market (or third-country) LOT equivalent to the U.S. sales level or where there is an equivalent home market (or third-country) level but the data are insufficient to support a conclusion on price effect. See, e.g., *Certain Corrosion Resistant Carbon Steel Flat Products and Cut-to-Length Carbon Steel Plate from Canada, Final Results of Antidumping Duty Administrative Reviews*, 62 FR 18466 (April 15, 1997). This adjustment, the CEP offset, is identified in section 773(a)(7)(B) of the Act and is the lesser of the following:

- * The indirect selling expenses of the home market (or third-country) sale; or
- * The indirect selling expenses deducted from the starting price used to calculate CEP.

The CEP offset is not automatic each time we use CEP. See *Mechanical Transfer Presses from Japan, Final Results of Antidumping Administrative Review* (62 FR 17156, October 9, 1996). The CEP offset is made only when the home market (or third-country) sale's LOT is more advanced than the LOT of the CEP sale and there is not an appropriate basis for determining whether there is an effect on price comparability. See, e.g., *Cement from Mexico* at 17156.

The Department's analysis of the LOT comparisons for the two respondents is as follows:

TAMSA. It is the Department's policy to match, whenever possible, U.S. sales to home market sales of identical merchandise. If there are identical matches, the Department then undertakes a LOT analysis as previously described. See Import Administration Policy Bulletin 92/1, "Matching at Levels of Trade," July 29, 1992.

Consistent with this policy, the Department determined that the U.S. sales made by TAMSA had matches in the home market of identical merchandise within the same month of the U.S. sale. The U.S. sales matched exclusively to home market sales made to PEMEX. We then sought to determine whether sales to PEMEX were at the same level of trade as TAMSA's sales to the United States. To determine whether TAMSA's CEP and NV sales were at the same LOT, we compared the CEP sales to the PEMEX HM sales in accordance with the methodology discussed above.

Our analysis of the stages in the marketing process indicates that the sales to the U.S. are made at a different point in the chain of distribution than sales to PEMEX. Whereas sales to PEMEX are to an end user, its U.S. sales are to a distributor (Siderca). Therefore, the Department analyzed the different selling functions and services which TAMSA provides to its customers.

We requested information concerning the selling functions associated with sales in each market for TAMSA. In addition to the standard selling functions that TAMSA provides to all home market customers, such as inventory maintenance, technical advice, and others, TAMSA provides other services on a just-in-time basis to PEMEX. Provision of these services requires staff dedicated to administering the just-in-time agreements, and entails certain expenses for TAMSA. Such expenses include provisions and expenditures for breach of contract, salaries and overhead for extra personnel to administer the just-in-time agreements, and other costs. These expenses and selling functions do not exist for TAMSA's sales to the U.S. See Analysis Memorandum for further discussion. Based on this analysis, we preliminarily determine that TAMSA's home market sales to PEMEX and its CEP sales are at different LOTs.

Section 773(a)(7)(B) of the Act directs us to make an adjustment for differences in LOTs where such differences affect price comparability. Where such an adjustment is not feasible, and the home market LOT is more advanced than the CEP LOT, the Department must make a

CEP offset. We examined the data for TAMSA and have determined that a LOT adjustment is not feasible. Specifically, we note that although TAMSA made sales to other customers which involved different sales functions, it made no sales in Mexico at the LOT of the U.S. sales which could be used to calculate the extent to which price comparability can be attributed to LOT. Thus, the Department is precluded from making a LOT adjustment.

Therefore, as indicated above, in accordance with Section 773(a)(7)(B) of the Act, a CEP offset is warranted where NV is established at a LOT which constitutes a more advanced stage of distribution (or the equivalent) than the LOT of the CEP sale. Because we have determined that TAMSA's home market LOT is different from the CEP LOT and is at a more advanced stage of distribution, as well as that a LOT adjustment is not feasible, we made a CEP offset pursuant to Section 773(a)(7)(B) of the Act.

Hylsa. Since NV for Hylsa is based on CV, the level of trade is that of the sales from which we derive SG&A expenses and profit used in the CV calculations. We derived profit and SG&A expenses from Hylsa's tubular products division financial sheets and submitted worksheets, which we examined at verification. Although Hylsa's U.S. sale involves ministerial functions performed by a U.S. affiliate, we consider this to be a sale which we categorized as an EP sale made indirectly by Hylsa to the unaffiliated end-user customer. We find that there is no evidence on the record to suggest that these sales to the U.S., when compared to the HM sales made by Hylsa's tubular products division, which were used in CV, are at a different level of trade. Therefore, a LOT adjustment is not appropriate for Hylsa's sales.

Preliminary Results of Review

We preliminarily determine that the following margins exist for the period August 1, 1996 through July 31, 1997:

Hylsa—0%
TAMSA—0%

Parties to this proceeding may request disclosure within five days of publication of this notice and any interested party may request a hearing within 30 days of publication. Any hearing, if requested, will be held 37 days after the date of publication, or the first working day thereafter. Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication. Rebuttal briefs and rebuttals to written

comments, limited to issues raised in such briefs or comments, may be filed no later than 35 days after the date of publication. The Department will publish the final results of this administrative review, which will include the results of its analysis of issues raised in any such written comments or at a hearing, within 120 days after the publication of this notice.

The Department shall determine, and Customs shall assess, antidumping duties on all appropriate entries. The Department will issue appraisal instructions directly to Customs. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the determination and for future deposits of estimated duties. We will base the assessment of antidumping duties on the entered value of the covered merchandise.

Furthermore, the following deposit requirements will be effective upon completion of the final results of these administrative reviews for all shipments of OCTG from Mexico entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of these administrative reviews, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate for reviewed firms will be the rate established in the final results of administrative review, except if the rate is less than 0.50 percent, and therefore, *de minimis* within the meaning of 351.106(d)(1), in which case the cash deposit rate will be zero; (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in the original less-than-fair-value (LTFV) investigation or a previous review, the cash deposit will continue to be the most recent rate published in the final determination or final results for which the manufacturer or exporter received a company-specific rate; (3) if the exporter is not a firm covered in this review, or the original investigation, but the manufacturer is, the cash deposit rate will be that established for the manufacturer of the merchandise in the final results of these reviews, or the LTFV investigation; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review or the original fair value investigation, the cash deposit rate will be 23.79%.

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 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 section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 CFR 351.201 and 351.221.

Dated: August 31, 1998.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 98-24488 Filed 9-10-98; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 98-55]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Assistance Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the

requirements of section 155 of Pub. L. 104-164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. J. Hurd, DSAA/COMPT/RM, (703) 604-6575.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 98-55, with attached transmittal and policy justification.

Dated: September 4, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5000-04-M



DEFENSE SECURITY ASSISTANCE AGENCY

WASHINGTON, DC 20301-2800

27 Aug 1998

In reply refer to:

I-71922/98

Honorable Newt Gingrich
Speaker of the House of
Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, we are forwarding herewith Transmittal No. 98-55 and under separate cover the classified annex thereto. This Transmittal concerns the Department of the Navy's proposed Letter(s) of Offer and Acceptance (LOA) to Taipei Economic and Cultural Representative Office in the United States for defense articles and services estimated to cost \$69 million. Soon after this letter is delivered to your office, we plan to notify the news media of the unclassified portion of this Transmittal.

Sincerely,

A handwritten signature in black ink, appearing to read "Diehl McKalip".

H. Diehl McKalip
Acting Director

Attachments

**Separate Cover:
Classified Annex**

**Same ltr to: House Committee on International Relations
Senate Committee on Appropriations
Senate Committee on Foreign Relations
House Committee on National Security
Senate Committee on Armed Services
House Committee on Appropriations**

Transmittal No. 98-55

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act

- (i) Prospective Purchaser: Taipei Economic and Cultural Representative Office (TECRO) in the United States pursuant to P.L. 96-8
- (ii) Total Estimated Value:
- | | |
|--------------------------|----------------------|
| Major Defense Equipment* | \$ 58 million |
| Other | \$ <u>11 million</u> |
| TOTAL | \$ 69 million |
- (iii) Description of Articles or Services Offered:
One hundred thirty-one MK 46 MOD 5(A)S torpedoes, containers, support and test equipment, spare and repair parts, personnel training and training equipment, publications and technical documentation, engineering and technical assistance, supply support and other related elements of logistics support.
- (iv) Military Department: Navy (AKA and AKB)
- (v) Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: None
- (vi) Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:
See Annex under separate cover.
- (vii) Date Report Delivered to Congress: 27 Aug 1998

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATIONTaipei Economic and Cultural Representative Office in the United States - MK 46 MOD 5(A)S Torpedoes

The Taipei Economic and Cultural Representative Office (TECRO) in the United States has requested a possible sale of 131 MK 46 MOD 5(A)S torpedoes, containers, support and test equipment, spare and repair parts, personnel training and training equipment, publications and technical documentation, engineering and technical assistance, supply support and other related elements of logistics support. The estimated cost is \$69 million.

This proposed sale is consistent with United States law and policy as expressed in Public Law 96-8.

Taiwan will use these torpedoes on their S-70 helicopters to maintain an operational Anti-Submarine Warfare (ASW) capability. Taiwan currently has air launched MK 46 torpedoes in its inventory and will have no difficulty absorbing these additional torpedoes into its armed forces.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be Hughes Missile System Company, Mukilteo, Washington. There are no offset agreements proposed to be entered into in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any U.S. Government personnel or contractor representatives to Taiwan.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 98-54]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Assistance Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Pub. L. 104-164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. J. Hurd, DSAA/COMPT/RM, (703) 604-6575.

The following is a copy of a letter to the Speaker of the House of

Representatives, Transmittal 98-54, with attached transmittal, policy justification and sensitivity of technology.

Dated: September 4, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5000-04-M



DEFENSE SECURITY ASSISTANCE AGENCY

WASHINGTON, DC 20301-2800

27 Aug 1998
In reply refer to:
I-71921/98

Honorable Newt Gingrich
Speaker of the House of
Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, we are forwarding herewith Transmittal No. 98-54, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance (LOA) to Taipei Economic and Cultural Representative Office in the United States for defense articles and services estimated to cost \$180 million. Soon after this letter is delivered to your office, we plan to notify the news media.

Sincerely,

A handwritten signature in cursive script, appearing to read "H. Diehl McKalip".

H. Diehl McKalip
Acting Director

Attachments

Same ltr to: House Committee on International Relations
Senate Committee on Appropriations
Senate Committee on Foreign Relations
House Committee on National Security
Senate Committee on Armed Services
House Committee on Appropriations

Transmittal No. 98-54

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act

- (i) Prospective Purchaser: Taipei Economic and Cultural Representative Office (TECRO) in the United States pursuant to P.L. 96-8
- (ii) Total Estimated Value:
- | | |
|--------------------------|----------------------|
| Major Defense Equipment* | \$ 96 million |
| Other | \$ <u>84 million</u> |
| TOTAL | \$ 180 million |
- (iii) Description of Articles or Services Offered:
Sixty-one Dual Mount STINGER Missile Systems consisting of: 61 Dual Mount STINGER (DMS) launchers (includes elevation assembly, tripod assembly, and sights) with coolant units, 61 STINGER RMP (-) captive flight trainers, 728 complete STINGER RMP (-) missile rounds (less battery coolant unit), 132 AN/VRC-91 export version SINGGAR radios, spare and repair parts, support equipment, Interrogator Friend or Foe interrogator sets, interrogator programmers, utility carrier trucks, aerial flight handling and launcher trainers, gas bottles, coolant units, publications and documentation data, personnel training and training equipment, U.S. Government and contractor engineering and logistics personnel services, U.S. Government Quality Assurance Teams, Mobile Training Teams, and other related elements of logistics support.
- (iv) Military Department: Army (JBB, Amd 2 and YUM)
- (v) Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: None
- (vi) Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:
See Annex attached.
- (vii) Date Report Delivered to Congress: 27 Aug 1998

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Taipei Economic and Cultural Representative Office (TECRO) in the United States - Dual Mount STINGER Missile Systems

The Taipei Economic and Cultural Representative Office (TECRO) in the United States has requested a possible sale of 61 Dual Mount STINGER Missile Systems consisting of: 61 Dual Mount STINGER (DMS) launchers (includes elevation assembly, tripod assembly, and sights) with coolant units, 61 STINGER RMP (-) captive flight trainers, 728 complete STINGER RMP (-) missile rounds (less battery coolant unit), 132 AN/VRC-91 export version SINCGAR radios, spare and repair parts, support equipment, Interrogator Friend or Foe interrogator sets, interrogator programmers, utility carrier trucks, aerial flight handling and launcher trainers, coolant units, gas bottles, publications and documentation data, personnel training and training equipment, U.S. Government and contractor engineering and logistics personnel services, U.S. Government Quality Assurance Teams, Mobile Training Teams, and other related elements of logistics support. The estimated cost is \$180 million.

This proposed sale is consistent with the United States law and policy as expressed in Public Law 96-8.

The recipient will use the STINGER missiles to maintain their air defense capability and will have no difficulty absorbing these additional weapon systems into its armed forces.

The proposed sale of this equipment and support will not affect the basic military balance in the region.

The prime contractor will be the Hughes Aircraft Company, Tucson, Arizona. One or more offset agreements may be related to this proposed sale.

Implementation of this proposed sale will require visits by up to ten U.S. Government personnel for two-week periods, twice a year, for three years for quality assurance purposes. There will be technical contractor representatives in Taiwan for one year. The number of U.S. Government personnel and contractor representatives required to support the training program will be determined as the program proceeds.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 98-54

Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act

Annex
Item No. vi

(vi) Sensitivity of Technology:

1. The Dual Mount STINGER missile system less reprogrammable microprocessor module and gripstock (STINGER RMP (-)), hardware, software and documentation contain sensitive technology and are classified Confidential. The guidance section of the missile and tracking head trainer contain highly sensitive technology and are classified Confidential.

2. Missile system hardware and fire unit components contain sensitive/critical technologies. STINGER critical technology is primarily in the area of design and production know-how and not end-items. This sensitive/critical technology is inherent in the hybrid microcircuit assemblies, microprocessors, magnetic and amorphous metals, purification, firmware, printed circuit boards, laser range finder, dual detector assembly, detector filters, automatic text and associated computer software, optical coatings, ultraviolet sensors, semi-conductor detectors, infrared band sensors, equipment operating instructions, warhead components seeker assembly and the Identification Friend or Foe (IFF) system with Mode 34 capabilities.

3. Information on vulnerability to electronic countermeasures and counter-countermeasures, system performance capabilities and effectiveness, and test data are classified up to Secret.

4. Loss of this hardware and/or data could permit development of information leading to the exploitation of countermeasures. Therefore, if a technologically capable adversary were to obtain these devices, the missile system could be compromised through reverse engineering techniques which could defeat the weapon systems effectiveness.

5. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification. Moreover, the benefits to be derived from this sale, as outlined in the Policy Justification, outweigh the potential damage that could result if the sensitive technology were revealed to unauthorized persons.

DEPARTMENT OF DEFENSE**Ballistic Missile Defense Organization; Preparation of a Theater Missile Defense Extended Test Range Final Supplemental Environmental Impact Statement—Eglin Gulf Test Range**

AGENCY: Ballistic Missile Defense Organization (BMDO).

ACTION: Notice of availability (NOA).

SUMMARY: This notifies the public that BMDO is issuing a Final Supplemental Environmental Impact Statement (FSEIS) for the Eglin Gulf Test Range (EGTR). The FSEIS assesses the potential impacts associated with developmental and operational flight testing of Theater Missile Defense (TMD) systems. The proposed action would allow for the development and testing of TMD systems to protect U.S. forces, friends, and allies around the world from attacks by ballistic missiles. No decision has been made concerning the EGTR proposal and cannot be made until at least 30 days after the NOA is published in the **Federal Register**. As the Executing Agent for the SEIS, the Air Force Development Test Center (AFDTC), Eglin Air Force Base (AFB), FL, managed the FSEIS for BMDO. The FSEIS analyzed additional missile launch and support locations, facility construction, launch preparation activities, missile flight tests, radar and optical tracking operations, and intercept tests in the EGTR portion of the Gulf of Mexico not analyzed in the *TMD Extended Test Range Final Environmental Impact Statement*, November 1994.

The Record of Decision on the *TMD Extended Test Range Final Environmental Impact Statement*, March 21, 1995, documented only the selection of U.S. Army Kwajalein Atoll, Republic of the Marshall Islands, and the White Sands Missile Range, NM, for TMD tests. However, additional interceptor and target missile launch options have been identified for the EGTR. These additional alternatives are within treaty and technology limitations. The EGTR alternatives would provide a more complete set of test scenarios than is possible at existing ranges, and would permit realistic threat ranges for testing of TMD interceptor systems. Copies of the *TMD Extended Test Range Final Environmental Impact Statement* are available at various locations within the interested communities. The exact locations can be provided by contacting the point of contact listed below.

The purpose of expanding the EGTR's missile defense testing capability is to

test TMD systems to validate their capability to intercept enemy missiles with the capability of ranges up to 1,100-kilometers (684 miles). Testing with both target and interceptor launch facilities located within the continental United States and its adjacent waters would provide a cost-effective, flexible, long-term means of meeting TMD test requirements.

Environmental issues analyzed in the FSEIS for the EGTR include: air quality; airspace control; biological resources (such as threatened or endangered species and wetlands); cultural resources; geology and soils; hazardous materials and waste; safety and health; land use; noise; socio-economic; transportation; utilities; visual and aesthetics; and water resources.

Lead Agency: Ballistic Missile Defense Organization.

Cooperating Agencies:

Department of the the Air Force
Department of the Army
Department of the Navy
Federal Aviation Administration
Department of Interior
U.S. Coast Guard

Proposed Action

The BMDO proposes to enhance the capability to conduct missile defense testing and training at the EGTR against targets simulating threat systems having the capability of ranges up to 1,100-kilometers (684 miles). Defensive missile intercepts would occur over the Gulf of Mexico within the EGTR.

Preferred Alternative

The preferred alternative includes three types of TMD activities:

- (a) Target launches from land at Eglin AFB and/or from aircraft above the Gulf of Mexico;
- (b) Interceptor (defensive missile) launches from Eglin AFB and/or ships; and
- (c) Intercept of the target missile by the interceptor over the Gulf of Mexico and within the EGTR.

The ground-launch locations evaluated at Eglin AFB are the Santa Rosa Island and Cape San Blas test locations. The air-launched locations evaluated include the airspace within the EGTR and other locations in the Gulf of Mexico within U.S. controlled airspace.

Other Alternatives

1. *Florida Keys Target Launches:* As an alternative to the air launch the Eglin AFB target launch sites, and ground-launch locations evaluated in the Florida Keys are Department of Defense controlled areas at Saddlebunch and Cudjoe Keys. These locations, along

with Boca Chica, Dredger, Sugarloaf, and Fleming Keys, are also evaluated to support missile tracking and sensor activities.

2. *Ship-based Target Launches:* In addition to the air launch and Eglin AFB target launch sites, targets launched from ships located within the EGTR and other locations in the Gulf of Mexico are evaluated in the FSEIS.

3. *Platform-based Interceptor Launches:* In addition to the Eglin AFB interceptor launch sites, interceptors launched from platforms located offshore from the Santa Rosa Island and Cape San Blas test locations and evaluated in the FSEIS.

4. *No Action:* In addition to the above alternatives, the No Action Alternative is considered for evaluation in the FSEIS.

Information/Comments

Information on the proposed action is available at the following internet address; <http://tw1.eglin.af.mil/46mtd/tmd.htm>. The point of contact for the FSEIS is: Ms. Linda Busch, 46 OG/OGM-TMD, 205 West D Ave., Suite 241, Eglin AFB, FL, 32542-6866. A Record of Decision on the EGTR SEIS alternatives could be made available no earlier than [30 days of publication].

Dated: September 4, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 98-24376 Filed 9-10-98; 8:45 am]

BILLING CODE 5000-04-M

DEPARTMENT OF DEFENSE**Office of the Secretary****Strategic Environmental Research and Development Program, Scientific Advisory Board**

ACTION: Notice.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), announcement is made of the following Committee meeting:

Date of Meeting: September 23, 1998 from 0830 to 1745, September 24, 1300 to 1745 and September 25, 1998 from 0800 to 1045.

Place: U.S. Army Engineer Waterways Experiment Station, Vicksburg, Mississippi.

Matters to be Considered: Research and Development proposals and continuing projects requesting Strategic Environmental Research and Development Program funds in excess of \$1M will be reviewed.

This meeting is open to the public. Any interested person may attend, appear before, or file statements with the Scientific Advisory Board at the time and in the manner permitted by the Board.

For Further Information Contact: Mrs. Amy Kelly, SERDP Program Office, 901 North Stuart Street, Suite 303, Arlington, VA or by telephone at (703) 696-2124.

Dated: September 4, 1998.

L.M. Bynum,

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

[FR Doc. 98-24378 Filed 9-10-98; 8:45 am]

BILLING CODE 5000-04-M

DEPARTMENT OF DEFENSE

Department of the Air Force

Intent to Grant an Exclusive Patent License

Pursuant to the provisions of Part 404 of Title 37, Code of Federal Regulations, which implements Public Law 96-517, the Department of the Air Force announces its intention to grant ITT Industries, ITT Night Vision Division an exclusive license under: United States Patent Application Serial No.08/945,369 filed in the names of Robert L. Crane, Byron P. Edmonds, Charles C. Lovett, and Walter E. Johnson on May 16, 1995, for a "System and Method for Enhanced Visualization of Subcutaneous Structures."

The license described above will be granted unless an objection thereto, together with a request for an opportunity to be heard, if desired, is received in writing by the addressee set forth below within sixty (60) days from the date of publication of this Notice. Information concerning the application may be obtained, on request, from the same addressee.

All communications concerning this Notice should be sent to: Mr. Randy Heald, Senior Intellectual Property Counsel, Secretary of the Air Force, Office of the General Counsel, SAF/GCQ, 1501 Wilson Blvd., Suite 802, Arlington, VA 22209-2403, Telephone No. (703) 696-9037.

Barbara A. Carmichael,

Alternate Air Force Federal Register Liaison Officer.

[FR Doc. 98-24433 Filed 9-10-98; 8:45 am]

BILLING CODE 3910-01-P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement/ Environmental Impact Report (DEIS/ EIR) for the San Timoteo Creek Flood Control Project, Reach 3B, in San Bernardino County, CA

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: San Timoteo Creek, drains a watershed of approximately 126 square miles of the San Bernardino Mountains and foothills in eastern Riverside and San Bernardino Counties. The San Timoteo Creek study area falls within several small communities including Redlands, Colton, Loma Linda, and the City of San Bernardino, California. The study area which includes the 100-year floodplain of San Timoteo Creek extends along San Timoteo Creek from a short distance downstream of Alessandro Road west to the confluence with the Santa Ana River, in the City of San Bernardino.

ADDRESSES: Commander, U.S. Army Corps of Engineers, Los Angeles District, Environmental Design Section, P.O. Box 532711, Los Angeles, CA 90053-2325.

FOR FURTHER INFORMATION CONTACT: Ms. Joy Jaiswal, Technical Manager, phone (213) 453-3871.

SUPPLEMENTARY INFORMATION:

1. Authorization

The study of potential flood control measures for San Timoteo Creek in San Bernardino County, California was initially authorized by Public Law 738, 74th Congress, June 22, 1936. Authorization of the recommended plan for the Santa Ana River Mainstem, including Santiago Creek and Oak Street Drain was the Water Resources Development Act of 1986, Congress determined that it was appropriate to include San Timoteo Creek in the Interim I (authorized) project. In 1988, Congress authorized a project for flood control along San Timoteo Creek as part of the Santa Ana River Mainstem Flood Control Project.

2. Background

Construction of 3.4 miles of San Timoteo Creek extending from the Santa Ana River to just upstream of Barton Road, designated as Reach 1, 2 and 3A have been completed. The improvements consisted of construction of a rectangular concrete-lined channel, for approximately the first 1.2 miles,

and trapezoidal channel for the next 2.2 miles. The public raised concerns for extending the concrete-lined channel construction upstream of Barton Road. Public concerns were about esthetics of the creek, wildlife movement, impacts to vegetation, recreation trail usage and groundwater recharge. The public desired to construct a natural looking channel as much as possible. The San Bernardino County Board of Supervisors requested the USACOE study and alternative to the authorized project for Reach 3B (proposed construction) that would incorporate the public's concerns.

3. Proposed Action

Construction of a flood control channel at San Timoteo Creek, Reach 3B upstream of Barton Road.

4. Alternatives

a. No Action: Construction of Authorized Plan:

(1) Construction of the trapezoidal concrete-lined channel to San Timoteo Canyon Road.

(2) Construction of eight sediment basins from that point to just below Alessandro Road to trap the sediment and prevent it from clogging the channel downstream.

b. Proposed/Recommended Modified Plan—Reach 3B:

(1) Construction of the concrete channel upstream to California Street.

(2) Construction of 11 sediment basins to a point 3,000 feet upstream of San Timoteo Canyon Road.

(3) The total length of the plan is 10,700 feet (6,300 feet shorter than the authorized project).

c. The USACOE and San Bernardino County, the local sponsor, will consider public concerns regarding design refinements, esthetics, cultural resources, recreational trail usage, and ground water recharge.

5. Scoping Process

a. Potential impacts associated with the proposed action will be evaluated. Resource categories that will be analyzed are: land use, physical environment, geology, biological, agricultural, air quality, water quality, groundwater, transportation/communications, hazardous waste, socioeconomic and safety.

b. Participation of affected Federal, State, and local resource agencies, Native American groups and concerned interest groups/individuals is encouraged in the scoping process. A Public Scoping Meeting will be held September 24, 1998. Time and location of the Public Scoping Meetings also will be announced by means of a letter,

public announcements, and news releases. Public participation will be especially important in the environmental analysis by providing assistance in defining the scope of analysis in the EIS/EIR; identifying significant environment issues and impact analysis in the EIS/EIR; and providing useful information such as published and unpublished data, personal knowledge of relevant issues, and recommending mitigative measures associated with the proposed action. Those wishing to provide information or data relevant to the environmental or social impacts that should be included or considered in the environmental analysis can furnish this information by writing to the points of contact indicated above or by attending applicable public scoping meetings. A mailing list will also be establishing so pertinent data may be distributed to interested agencies, interest groups and individuals.

6. Public Scoping Meeting

The scoping meeting is scheduled for September 24, 1998, at 7:00 PM, San Bernardino County Museum Hall of History, 2024 Orange Tree Lane Redlands, California, 92374.

Dated: September 3, 1998.

Robert L. Davis,

Colonel, Corps of Engineers, District Engineer.

[FR Doc. 98-24414 Filed 9-10-98; 8:45 am]

BILLING CODE 3710-KF-M

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability and Public Hearings for the Draft Environmental Impact Statement (DEIS) for Disposal and Reuse of Naval Air Station, Barbers Point (NASBP), HI

AGENCY: Department of the Navy, DOD.

ACTION: Announcement of public meeting.

SUMMARY: The Department of the Navy (Navy) and its cooperating agency, the Federal Aviation Administration, has prepared and filed with the Environmental Protection Agency the Draft Environmental Impact Statement (DEIS) for Disposal and Reuse of Naval Air Station, Barbers Point, HI (NASBP). Two public hearings will be held for the purpose of receiving oral and written comments on the DEIS. Federal, state and local agencies, and interested individuals are invited to be present or represented at the meetings.

DATES: Hearing dates are:

1. October 5, 1998, 7:00 p.m., Kapolei, HI
2. October 7, 1998, 7:00 p.m., Honolulu, HI

ADDRESSES: Hearing locations are:

1. Kapolei—James Campbell Building, Laulima Room, 1001 Kamokila Boulevard, Kapolei, HI
2. Honolulu—Washington Intermediate School, 1663 South King Street, Honolulu, HI

FOR FURTHER INFORMATION CONTACT: Mr. Fred Minato (Code 231PM), (808) 471-9338.

SUPPLEMENTARY INFORMATION: Pursuant to the Council on Environmental Quality regulations (40 CFR Parts 1500-1508) that implement the procedural provisions of the National Environmental Policy Act (NEPA), the Department of the Navy (Navy) and its cooperating agency, the Federal Aviation Administration, has prepared and filed with the U.S. Environmental Protection Agency the DEIS for Disposal and Reuse of NASBP. This notice announces the availability of the DEIS and the dates and locations of the public hearings.

The proposed action is the disposal of surplus Navy property for subsequent reuse and redevelopment, in accordance with the 1990 Defense Base Closure and Realignment Act, and the 1993 Base Closure and Realignment Commission recommendations. NASBP will be closed on July 2, 1999. Of the 3,722 acres (1,507 hectares) of land at NASBP, Navy is retaining about 1,130 acres (457.7 hectares) and approximately 492 acres (199 hectares) are being transferred to other federal agencies. The remaining 2,100 acres (850 hectares) of base closure property have been declared surplus and are the focus of this DEIS.

The DEIS evaluates four reuse alternatives, each emphasizing various types of development, e.g., residential, light industrial, recreational, and commercial. Three of the alternatives include a general aviation reliever airport. A fifth alternative, No Action, assumes the existing airport would not be used and, along with other surplus land (land not being retained by Navy or other federal agencies), would be retained by Navy in caretaker status. The plan approved by the Barbers Point Naval Air Station Redevelopment Commission, the State and Navy's preferred alternative, includes the following major elements: general aviation reliever airport for Honolulu International Airport, large areas for park and recreational uses, and areas for commercial/private recreation, light industrial, residential, and homeless

providers. No decision on the proposed action will be made until the NEPA process has been completed.

The DEIS analyzes potential environmental impacts to land use and airspace, visual resources, socioeconomics, cultural resources, traffic and circulation, air quality, noise, biological resources, water resources, utilities and services, public health and safety, and hazardous materials and waste. No significant environmental impacts are anticipated from the proposed action with the exception of infrequent and severe traffic conditions resulting from major events at special attractions (e.g., motor sports raceway complex) which may occur several times a year. Other potentially significant, but mitigable, environmental impacts include impacts to biological resources, cultural resources, and public safety.

A Notice of Intent to prepare the EIS was published in the Federal Register on March 26, 1997 and two public scoping meetings were held on April 16 and April 17, 1997. A Notice of Availability of the DEIS was published in the **Federal Register** on August 28, 1998.

The DEIS has been distributed to affected Federal, state, and local agencies, and interested parties. In addition, copies of the DEIS are available for review at Ewa Beach Public and School Library, and Hawaii State Main Library.

Two public hearings will be held to inform the public of the DEIS findings and to solicit and receive oral and written comments. The first hearing will be held at 7:00 p.m. on October 5, 1998, at the James Campbell Building, Laulima Room, 1001 Kamokila Boulevard, Kapolei. The second hearing will be held in the cafeteria of Washington Intermediate School, 1663 South King Street, Honolulu, at 7:00 p.m. on October 7, 1998. Federal, state, and local agencies, and interested individuals are invited to be present at the hearings. Oral comments will be heard and transcribed by a court recorder; written comments are also requested to ensure accuracy of the record. All comments, both oral and written, will become part of the official record. In the interest of available time, each speaker will be asked to limit oral comments to three minutes. Longer comments should be summarized at the public hearing and submitted in writing either at the hearing or mailed to Mr. Fred Minato (Code 231FM), Pacific Division, Naval Facilities Engineering Command, Pearl Harbor, Hawaii 96860-7300, facsimile (808) 474-5909. Written

comments are requested not later than October 12, 1998.

Dated: September 8, 1998.

Ralph W. Corey,

LCDR, JAGC, USN, Federal Register Liaison Officer.

[FR Doc. 98-24424 Filed 9-10-98; 8:45 am]

BILLING CODE 3810-FF-P

DEPARTMENT OF ENERGY

Civilian Radioactive Waste Management; Availability of Memoranda of Agreement for Disposal Services for Naval Spent Nuclear Fuel and Department of Energy-Owned Spent Nuclear Fuel and High-Level Radioactive Waste

AGENCY: Department of Energy.

ACTION: Notice of availability of Memoranda of Agreement between the Office of Civilian Radioactive Waste Management and the Naval Nuclear Propulsion Program and between the Office of Civilian Radioactive Waste Management and the Office of Environmental Management addressing acceptance, transportation, storage, and disposal of naval spent nuclear fuel and of Department of Energy-owned spent nuclear fuel and high-level radioactive waste.

SUMMARY: The Department of Energy (DOE), Office of Civilian Radioactive Waste Management (OCRWM), is providing public notice of the availability of two Memoranda of Agreement between OCRWM and the Naval Nuclear Propulsion Program (NNPP) and the DOE Office of Environmental Management (EM), respectively. These two agreements address the roles and responsibilities of OCRWM, NNPP, and EM concerning the acceptance, transportation, storage (if needed and available), and ultimate disposal of naval SNF managed by the NNPP, and of DOE SNF and HLW managed by EM. These agreements comply with the Nuclear Waste Policy Act, as amended (NWPA). In particular, section 302(b)(4), of the NWPA, makes the disposal of Federally-owned SNF and HLW in a repository constructed under the NWPA subject to the transfer of funds equivalent to fees that would be paid by civilian nuclear utilities for similar services.

FOR FURTHER INFORMATION CONTACT: Jeffrey R. Williams, Director, Systems Engineering and International Division, Office of Civilian Radioactive Waste Management, Department of Energy, Room 7F-085, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-9620.

SUPPLEMENTARY INFORMATION: DOE has previously committed to provide the MOAs for public information. Additionally, it is DOE's expectation that the MOAs may require revision from time to time to reflect changes in policy or to redefine responsibilities as the MOAs are implemented. In order to provide a cost-effective and timely means of notifying interested parties and the public if revisions to MOAs do occur, DOE intends to publish the MOAs, and any revisions thereto, on the Internet. The OCRWM Home Page will contain hyperlinks to electronic versions of the MOAs, a summary of any revisions that have taken place, the reasons for any revisions, and other information, as appropriate. The OCRWM Home Page universal resource locator (URL) is [HTTP://WWW.RW.DOE.GOV](http://WWW.RW.DOE.GOV). For those individuals without Internet access, please contact the person identified above for further information.

Issued in Washington, DC, on September 7, 1998.

Lake H. Barrett,

Acting Director, Office of Civilian Radioactive Waste Management.

[FR Doc. 98-24454 Filed 9-10-98; 8:45 am]

BILLING CODE 6450-01-M

DEPARTMENT OF ENERGY

Privacy Act of 1974; Amendment to an Existing System of Records

AGENCY: Department of Energy.

ACTION: Notice of intent to amend and clarify an existing Privacy Act System of Records and request for comments.

SUMMARY: In accordance with the Privacy Act (5 U.S.C. 552a(e)(11)), the Department of Energy (DOE) is issuing notice of our intent to revise and amend the system of records entitled "DOE-13, Payroll and Leave Records," including the modification and deletion of some existing routine uses and the establishment of new routine uses. The proposed routine disclosures are required by the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA, Pub. L. 104-193). The routine uses of this system will also be renumbered and, therefore, the listing will reflect all the routine uses established for the system after the deletion and addition of new routine uses. We invite public comment on this publication.

DATES: Written comments should be submitted on or before October 13, 1998.

ADDRESSES: Written comments should be directed to Abel Lopez, Acting

Director, Freedom of Information Act and Privacy Act Division, U.S. Department of Energy, HR-73, 1000 Independence Avenue, SW, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Abel Lopez, Acting Director, Freedom of Information Act and Privacy Act Division, HR-73, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-5955; Phil Pagnato, Director, Payroll Division, CR-55, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 29874, (301) 903-4934; or Susan Beard, Office of General Counsel, U. S. Department of Energy, GC-80, 1000 Independence Avenue, SW, Washington, DC 20485, (202) 586-8618.

SUPPLEMENTARY INFORMATION: Pursuant to the Privacy Act, 5 U.S.C. 552a, the DOE will revise routine use numbers 2, 3, and 9, which permit disclosure to the Internal Revenue Service, State and Local Governments, and Financial Institutions, respectively. Each of these routine uses describes to whom the records will be disclosed and the purpose of the disclosure. However, the routine uses have been clarified to further describe and define the purpose of the disclosure to the permitted entities. The revised routine uses are compatible with the purposes for which the Department of Energy collects the information.

This notice also will reflect the deletion of four routine uses. The routine uses to be deleted, as they currently appear in the pertinent system of records, are:

20. A physician or mental health professional of any individual submitting a request for access to the record under the Privacy Act of 1974 and DOE's Privacy Act regulations if, in accordance with the provisions of 5 U.S.C. 552a(f)(3) and applicable DOE regulations and in its sole judgement and good faith, DOE believes that disclosure of the medical and/or psychological information directly to the individual who is the subject of the record could have an adverse effect upon that individual;

22. Contractors, grantees, participants in cooperative agreements, collaborating researchers, or their employees, in performance of health studies or related health or environmental duties pursuant to their contracts, grants, and cooperating or collaborating research agreements may disclose a record to Federal, State and local health and medical agencies or authorities; to subcontractors—To determine a subject's vital status or cause of death;

to health care providers—To verify a diagnosis or cause of death; or to obtain current addresses for participants in health-related studies, surveys and surveillances. All recipients of such records are required to comply with the Privacy Act, to follow prescribed measures to protect personal privacy, and to disclose or use personally identifiable information only for the above described research purposes;

23. Members of DOE advisory committees, the Department of Health and Human Services Advisory Committee on Projects Related to Department of Energy Facilities, and to authorized employees of Federal, State, or local government or government-sponsored entities—To provide advice to the Department concerning health, safety, or environmental issues, as these uses are not in accordance with the purposes of this system; and

24. A record from this system of records may be disclosed to facilitate health hazard evaluations, epidemiological studies, or public health activities required by law performed by personnel, contractor personnel, grantees, and cooperative agreement holders of components of the Department of Health and Human Services, including the National Institute for Occupational Safety and Health and the national Center for Environmental Health, of the Centers for Disease Control and Prevention, and the Agency for Toxic Substances and Disease Registry pursuant to Memoranda of Understanding between the Department and the Department of Health and Human Services or its components.

It has been determined that these routine uses are not in accordance with the purposes for this system.

Pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1995 (Pub. L. 104-193), the DOE will establish new routine uses that will permit disclosure of data from "DOE-13 Payroll and Leave Records" to the Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services, for use in its Federal Parent Locator System (FPLS) and Federal Tax Offset System, DHHS/OCSE No. 09-90-0074. A description of the FPLS may be found at 62 FR 51663 (October 2, 1997).

The FPLS is a computerized network through which States may request location information from Federal and State agencies to find non-custodial parents and/or their employers for purposes of establishing paternity and securing support. On October 1, 1997, the FPLS was expanded to include the

National Directory of New Hires, a database containing information on employees commencing employment, quarterly wage data on private and public sector employees, and information on unemployment compensation benefits. On October 1, 1998, the FPLS will be expanded to include a Federal Case Registry. The Federal Case Registry will contain abstracts on all participants involved in child support enforcement cases. When the Federal Case Registry is instituted, its files will be matched on an ongoing basis against the files in the National Directory of New Hires to determine if an employee is a participant in a child support case anywhere in the country. If the FPLS identifies a person as being a participant in a State child support case, that State will be notified of the participant's current employer. State requests to the FPLS for location information also will continue to be processed after October 1, 1998. When individuals are hired by the DOE, the Department may disclose to the FPLS their names, social security numbers, home addresses, dates of birth, dates of hire, and information identifying DOE as the employer. The DOE also may disclose, within one month of the end of the quarterly reporting period, to FPLS the names, social security numbers, and quarterly earnings of each DOE employee.

In addition, names and social security numbers submitted by DOE to the FPLS will be disclosed by the Office of Child Support Enforcement to the Social Security Administration for verification to ensure that the social security number provided is correct. The data disclosed by DOE to the FPLS also will be disclosed by the Office of Child Support Enforcement to the Secretary of the Treasury for use in verifying claims for the advance payment of the earned income tax credit or to verify a claim of employment on a tax return.

The Department proposes to establish the routine uses in accordance with the Privacy Act (5 U.S.C. 552a(b)(3)). The Privacy Act permits the disclosure of information about individuals without their consent as a routine use where the information will be used for a purpose that is compatible with the purpose for which the information was originally collected. The Office of Management and Budget has indicated that a "compatible" use is a use which is necessary and proper. See OMB Guidelines, 51 FR 1892, 18985 (1986). Since the proposed uses of the data are required by Pub. L. 104-193, they are clearly necessary and proper uses, and therefore "compatible" uses which meet Privacy Act requirements.

The DOE will disclose information under the proposed routine uses only as required by Pub. L. 104-193 and as permitted by the Privacy Act.

Access to this system of records is limited to authorized personnel only. Access to magnetic tapes and disc files is controlled through established DOE computer center procedures (personnel screening and physical security). Paper records are maintained in locked cabinets and desks. Access to any record is on a need-to-know basis. The on-line database is protected by a password(s) known only to the system manager and those whose duties require access to the records.

This proposed amendment has no relationship to other branches of the Federal Government or to State and local governments. There has been no prior request for OMB clearance of information collection relating to this altered system of records.

The text is set forth below.

Issued in Washington, DC this 3rd day of September, 1998.

Thomas T. Tamura,

Acting Assistant Secretary for Human Resources and Administration.

DOE-13

SYSTEM NAME:

Payroll and Leave Records.

SYSTEM CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

U.S. Department of Energy,
Headquarters, 1000 Independence
Avenue, SW, Washington, DC 20585;
U.S. Department of Energy, Alaska
Power Administration, 2770
Sherwood Lane, Juneau, AK 99801-
8545;
U.S. Department of Energy,
Albuquerque Operations Office, PO
Box 5400, Albuquerque, NM 87185-
5400;
U.S. Department of Energy, Atlanta
Regional Support Office, 730
Peachtree, NE, Suite 876, Atlanta, GA
30308;
U.S. Department of Energy, Bartlesville
Project Office, 220 North Virginia
Avenue, Bartlesville, OK 74003;
U.S. Department of Energy, Boston
Regional Support Office, One
Congress Street, Room 1101, Boston,
MA 02114-2021;
U.S. Department of Energy, Bonneville
Power Administration, PO Box 3621,
Portland, OR 97208;
U.S. Department of Energy, Chicago
Operations Office, 9800 South Cass
Avenue, Argonne, IL 60439;

U.S. Department of Energy, Federal Energy Technology Center, PO Box 880, Morgantown, WV 26507-0880;

U.S. Department of Energy, Golden Field Office, 1617 Cole Boulevard, Golden, CO 80401;

U.S. Department of Energy, Idaho Operations Office, 785 DOE Place, Idaho Falls, ID 83401;

U.S. Department of Energy, Naval Petroleum and Oil Shale Reserves in Colorado, Utah, and Wyoming, 907 N. Poplar, Suite 150, Casper, WY 8260;

U.S. Department of Energy, Naval Petroleum Reserves in California, 28590 Highway 119, PO Box 11, Tupman, CA 93276;

U.S. Department of Energy, Nevada Operations Office, PO Box 98518, Las Vegas, NV 89193-8518;

U.S. Department of Energy, Oak Ridge Operations Office, PO Box 2001, Oak Ridge, TN 37831;

U.S. Department of Energy, Oakland Operations Office, 1301 Clay Street, Oakland, CA 94612-5208;

U.S. Department of Energy, Office of Scientific & Technical Information, PO Box 62, Oak Ridge, TN 37831;

U.S. Department of Energy, Ohio Field Office, 1 Mound Road, Miamisburg, OH 45342;

U.S. Department of Energy, Philadelphia Regional Support Office, 1880 John F. Kennedy Boulevard, Suite 501, Philadelphia, PA 19103-7483;

U.S. Department of Energy, Pittsburgh Energy Technology Center, 626 Cochran Mill Road, Pittsburgh, PA 15236-0940;

U.S. Department of Energy, Pittsburgh Naval Reactors Office, PO Box 109, West Mifflin, PA 15122-0109;

U.S. Department of Energy, Richland Operations Office, PO Box 550, Richland, WA 99352;

U.S. Department of Energy, Rocky Flats Field Office, PO Box 928, Golden, CO 80402-0928;

U.S. Department of Energy, Savannah River Operations Office, PO A, Aiken, SC 29801;

U.S. Department of Energy, Seattle Regional Support Office, 800 Fifth Avenue, Suite 3950, Seattle, WA 98104;

U.S. Department of Energy, Schenectady Naval Reactors Office, PO Box 1069, Schenectady, NY 12301;

U.S. Department of Energy, Southeastern Power Administration, Samuel Elbert Building, Elberton, GA 30635;

U.S. Department of Energy, Southwestern Power Administration, PO Box 1619, Tulsa, OK 74101;

U.S. Department of Energy, Strategic Petroleum Reserve Project Office, 900 Commerce Road East, New Orleans, LA 70123;

U.S. Department of Energy, Western Area Power Administration, PO Box 3402, Golden, CO 80401.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DOE personnel and consultants, including personnel and consultants of the Federal Energy Regulatory Commission.

CATEGORIES OF RECORDS IN THE SYSTEM:

Time and attendance records, earning records, payroll actions, deduction information requests, authorizations for overtime and night differential, and Office of Personnel Management retirement records.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7341); Executive Order 12091; Privacy Act of 1974, Pub. L. 93-579 (5 U.S.C. 552a); General Accounting Office Policy and Procedures Manual; Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193.

PURPOSE(S):

To maintain historical documentation on employee wages, deductions, retirement benefits, and leave.

ROUTINE USES MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

1. Treasury Department—To collect withheld taxes, process payroll payments and issue savings bonds.
2. Internal Revenue Service—To process Federal income tax payments and tax levies.
3. State and Local Governments -To process State and local income tax deductions and court ordered child support or alimony payments.
4. Office of Personnel Management—To establish and maintain retirement records and benefits.
5. Thrift Savings Board—To update Section 401K type records and benefits.
6. Social Security Administration—To establish Social Security records and benefits.
7. Department of Labor—To process workmen's compensation claims.
8. Department of Defense—To adjust military retirement.
9. Financial Institutions—To credit net check deposits, savings allotments, and discretionary allotments.
10. Employee unions—To credit accounts for employees with union dues deductions.
11. Health insurance carriers—To process insurance claims.
12. General Accounting Office—To verify accuracy and legality of disbursement.

13. Department of Veterans Affairs—To evaluate veteran's benefits to which the individual may be entitled.

14. States' departments of employment security—To determine entitlement to unemployment compensation or other State benefits.

15. Federal, State, local or foreign agencies—To investigate or prosecute violations or potential violations of law, whether civil, criminal, or regulatory in nature, and to enforce or implement statutes, rules, regulations or orders.

16. Federal, State or local agencies—To maintain civil, criminal, or other enforcement information relevant to hiring or retention of an employee, issuance of a security clearance, letting of a contract or issuance of a license, grant, or other benefit.

17. Office of Management and Budget—To review private relief legislation, as set forth in OMB Circular No. A-19, at any stage of the legislative coordination and clearance process.

18. DOE contractors in performance of their contracts and their officers and employees who have a need for the record—To perform their duties and subject to the same limitations applicable to DOE officers and employees under the Privacy Act.

19. A member of Congress submitting a request involving an individual when the individual is a constituent—To provide the information that pertains to a constituent that has been requested.

20. United States Enrichment Corporation and its contractors in performance of their contracts, and their officers and employees who have a need for the record in the performance of their duties, subject to the same limitations applicable to DOE officers and employees under the Privacy Act.

21. The Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services, Federal Parent Locator system (FPLS) and Federal Tax Offset System—To locate individuals and identify their income sources to establish paternity, establish and modify orders of support, and for enforcement action.

22. The Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services, Federal Parent Locator system (FPLS) and Federal Tax Offset System, for release to the Social Security Administration—To verify social security numbers in connection with the operation of the FPLS by the Office of Child Support Enforcement.

23. To the Office of Child Support Enforcement, Administration for Children and Families, Department of

Health and Human Services, Federal Parent Locator system (FPLS) and Federal Tax Offset System, for release to the Department of Treasury—To administer the Earned Income Tax Credit Program (Section 32, Internal Revenue Code of 1986) and verify a claim with respect to employment in a tax return.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records, on-line database, magnetic tape and disc, and microfiche.

RETRIEVABILITY:

By name, social security number, and payroll number.

SAFEGUARDS:

Access to magnetic tapes and disc files is controlled through established DOE computer center procedures (personnel screening and physical security). Paper records are maintained in locked cabinets and desks. Access to any record is on a need-to-know basis. The on-line database is protected by password(s) known only to the system manager and those whose duties require access to the records.

RETENTION AND DISPOSAL:

Retention and disposal of these records is covered by DOE 1324.5B.

SYSTEM MANAGER(S) AND ADDRESS:

Headquarters: U.S. Department of Energy, Office of Chief Financial Officer, CR-1, 1000 Independence Avenue, SW., Washington, DC 20585.

Field Offices: The managers and directors of field locations are the system managers for their respective portions of this system.

NOTIFICATION PROCEDURES:

a. Requests by an individual to determine if a system of records contains information about him/her should be directed to the Director, FOIA and Privacy Act Division, Department of Energy (Headquarters), or the Privacy Act Officer at the appropriate field location in accordance with DOE's Privacy Act regulations (10 CFR part 1008, 45 FR 61576, September 16, 1980).

b. Requests should include: Complete name, social security number, the location(s) of employment, and time period of employment.

RECORD ACCESS PROCEDURES:

Same as Notification procedures above. Records generally are kept at locations where work is performed. The Privacy Act Officer may require proper

identification, in accordance with DOE's Privacy Act regulations (10 CFR part 1008, 45 FR 61576, September 16, 1980).

CONTESTING RECORD PROCEDURES:

Same as Notification procedures above.

RECORD SOURCE CATEGORIES:

The subject individual, supervisors, timekeepers, official personnel records, and the Internal Revenue Service.

SYSTEM EXEMPT FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. 98-24455 Filed 9-10-98; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98-391-000]

Colorado Interstate Gas Company; Notice of Tariff Filing

September 4, 1998.

Take notice that on September 1, 1998, Colorado Interstate Gas Company (CIG), tendered for filing to become part of its FERC Gas Tariff, First Revised Volume No. 1, the tariff sheets listed in the Appendix A attached to the filing, to be effective October 5, 1998.

CIG states it is making this filing to initiate a new "Swing Service" which will establish a gas balance management tool for points of delivery where "No Notice" service is not available and where an Operational Balancing Agreement is not appropriate.

CIG further states this service will be available to the operator at such points of delivery, and CIG believes that end users who are directly connected to its system will be the primary users of the proposed service. CIG states it cannot offer additional service under its storage-based NNT Rate Schedule since its current NNT commitments exhaust all of its available storage deliverability/capacity.

CIG states it has entered into Operational Balancing Agreements at most points of receipt and interconnects with other interstate pipelines and intrastate pipelines, as well as other non-market sensitive delivery points. However, CIG states that remain certain points of delivery where Operational Balancing Agreements are not appropriate, because the variances at these locations are primarily the direct result of market swings rather than operational issues. By offering the new

"Swing Service" to the operators of these facilities at which CIG delivers gas, CIG hopes to provide these point operators with the ability to reduce the imbalance penalties and cash-out obligations that can arise as end-user markets swing up and down.

CIG states that copies of the filing have been mailed to all affected customers and state regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Section 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98-24398 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98-4464-000]

The Detroit Edison Company; Notice of Filing

September 4, 1998.

Take notice that on August 28, 1998, The Detroit Edison Company (Detroit Edison) tendered for filing Service Agreements (the Service Agreement) for Firm and Non-Firm Point-to-Point Transmission Service under the Open Access Transmission Tariff of Detroit Edison, FERC Electric Tariff No. 1, between Detroit Edison and Tractebel Energy Marketing dated as of July 7, 1998. The parties have not engaged in any transactions under the Service Agreements prior to thirty days to this filing.

Detroit Edison requests that the Service Agreements be made affective as rate schedules as of July 7, 1998.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888

First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions and protests should be filed on or before September 17, 1998. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98-24388 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98-4465-000]

The Detroit Edison Company; Notice of Filing

September 4, 1998.

Take notice that on August 28, 1998, the Detroit Edison Company (Detroit Edison), tendered for filing Service Agreements (the Service Agreements), for Firm and Non-Firm Point-to-Point Transmission Service under the Joint Open Access Transmission Tariff of Consumers Energy Company and Detroit Edison, FERC Electric Tariff No. 1, between Detroit Edison and Tractebel Energy Marketing dated as of July 7, 1998. The parties have not engaged in any transactions under the Service Agreements prior to thirty days to this filing.

Detroit Edison requests that the Service Agreements be made effective as of July 7, 1998.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions and protests should be filed on or before September 17, 1998. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the

Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98-24389 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98-390-000]

El Paso Natural Gas Company; Notice of Proposed Changes in Ferc Gas Tariff

September 4, 1998.

Take notice that on September 1, 1998, El Paso Natural Gas Company (El Paso) tendered for filing to become part of its FERC Gas Tariff, Second Revised Volume No. 1-A, the following tariff sheets, with an effective date of October 1, 1998:

Third Revised Sheet No. 118

First Revised Sheet No. 314

El Paso states that the tariff sheet is being filed to increase the Billing Determinant for Pemex Gas y Petroquimica Basica to 15,000 dth and to revise the related revenue crediting threshold.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98-24399 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98-4431-000]

Kentucky Utilities Company; Notice of Filing

September 4, 1998.

Take notice that on August 26, 1998, Kentucky Utilities Company (KU), tendered for filing Supplement No. 8 to the Kentucky Utilities and East Kentucky Power Cooperative Interconnection Agreement. This Supplement is under the filed and approved Schedule FERC No. 203.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions and protests should be filed on or before September 15, 1998. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98-24386 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER98-4432-000]

Kentucky Utilities Company; Notice of Filing

September 4, 1998.

Take notice that on August 26, 1998, Kentucky Utilities Company (KU) tendered for filing a Supplement No. 7, to the Kentucky Utilities and East Kentucky Power Cooperative Interconnection Agreement. This Supplement is under the filed and approved Schedule FERC No. 203.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice

and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions and protests should be filed on or before September 15, 1998. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98-24387 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98-222-001]

Kern River Gas Transmission Company; Notice of Refund Report

September 4, 1998.

Take notice that on August 31, 1998, Kern River Gas Transmission Company (Kern River) tendered for filing a report of Gas Research Institute (GRI) refunds made to its customers in compliance with the Commission's June 30 letter order in Docket No. RP98-222-001.

On August 13, 1998, Kern River states that it refunded to its customers the difference between the GRI surcharges collected from January 1997 through May 1998, and the amount that should have been collected using the correct surcharges.

Kern River states that a copy of this filing has been served upon its affected customers and interested state regulatory commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed on or before September 11, 1998. 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 proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98-24400 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM98-2-53-005]

K N Interstate Gas Transmission Co.; Notice of Tariff Filing

September 4, 1998.

Take notice that on September 1, 1998, K N Interstate Gas Transmission Co. [KNI] tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1-B, the following tariff sheet to be effective August 1, 1998:

Second Revised Original Sheet No. 24

KNI states that this tariff sheet is being filed in accordance with the Commission's order dated August 17, 1998, in Docket No. TM98-2-53-003.

KNI states that copies of the filing were served upon KNI's jurisdictional customers, interested public bodies and all parties to the proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. 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 proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98-24393 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP98-746-000]

K N Interstate Gas Transmission Co.; Notice of Request Under Blanket Authorization

September 4, 1998.

Take notice that on August 25, 1998, K N Interstate Gas Transmission Co. (KNI), P.O. Box 281304, Lakewood, Colorado 80228 filed in Docket No. CP98-746-000 a request pursuant to Sections 157.205 and 157.212 of the Commission's Regulations under the

Natural Gas Act (18 CFR 157.205, 157.212) for authorization to install and operate seven new delivery taps and appurtenant facilities in Nebraska, under KNI's blanket certificate issued in Docket No. CP83-140-000 and CP83-140-001 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

KNI states that the seven new delivery taps will be located in Buffalo, Dawson, Holt, Lincoln and Red Willow Counties, Nebraska. Four of the taps will be added as delivery points under an existing transportation agreement between KNI and K N Energy Inc. (KNE) and the remaining three taps will be added as delivery points under existing shipper transportation agreements with KNI. The proposed delivery points will be used by KNE and other shippers to facilitate the delivery of natural gas to end-use customers.

KNI states that the gas volumes delivered at these proposed delivery points will be within maximum transportation quantities set forth in KNI's transportation service agreement with shippers. The addition of the proposed delivery points is not prohibited by KNI's existing FERC Gas Tariff and will not have any adverse impact, on a daily or annual basis, upon KNI's existing customers.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98-24402 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket Nos. CP96-178-007 and CP97-238-007]

Maritimes & Northeast Pipeline, L.L.C.; Notice of Initial FERC Gas Tariff

September 4, 1998.

Take notice that on September 1, 1998, Maritimes & Northeast Pipeline, L.L.C. (Maritimes) filed to place into effect its FERC Gas Tariff, Original Volume No. 1, Cover Sheet and Original Sheet Nos. 1 through 500. Also take notice that on September 2, 1998, Maritimes filed a Motion for Extension of Time and Limited Waiver of Order Nos. 587.

Maritimes says that it proposes to place its complete FERC Gas Tariff, Original Volume No. 1 into effect on November 1, 1998, which is the certificated in-service date for the Maritimes Phase I facilities. The tariff will allow Maritimes to provide firm or interruptible services to those customers desiring such service as contemplated by the certificates of public convenience and necessity issued to Maritimes.¹

Maritimes says that complete copies of this filing are being mailed to potential customers and interested state commissions. However, due to the voluminous nature of actual tariff sheets, Maritimes says that copies of this filing without the actual tariff sheets are being mailed to all other parties on the Commission's Official Service Lists in the above referenced dockets. Maritimes says that copies of actual tariff sheets will be made available upon request and complete copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Any person desiring to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed by September 14, 1998, as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be

¹ July 31, 1997, Order, 80 FERC 61,136 (1997), September 24, 1997, Order, 80 FERC 61,346 (1997), and July 31, 1998, Order, 84 FERC 61,130 (1998).

taken, but will not serve to make protestants parties to the proceeding.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98-24401 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. RP98-392-000]

Mississippi River Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

September 4, 1998.

Take notice that on September 1, 1998, Mississippi River Transmission Corporation (MRT) tendered for filing as part of the General Terms and Conditions to FERC Gas Tariff, Third Revised Volume No. 1, the following revised tariff sheets:

First Revised Sheet No. 124
Third Revised Sheet No. 245

MRT proposes an effective date of October 1, 1998, and states that the purpose of this filing is to modify MRT's General Terms and Conditions to its Tariff to provide that volumes transported in excess of capacity entitlements in a rate zone are charged as authorized overrun quantities.

MRT states that a copy of this filing is being mailed to each of MRT's customers and to the state commissions of Arkansas, Illinois and Missouri.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98-24397 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. ER98-4466-000]

NGE Generation, Inc.; Notice of Filing

September 4, 1998.

Take notice that on August 28, 1998, NGE Generation, Inc. (NGE Generation), tendered for filing pursuant to Part 35 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 CFR 35, notice terminating certain transactions with Federal Energy Sales, Inc. (FES), in accordance with the terms of NGE Generation's Electric Power Sales Tariff, FERC Electric Rate Schedule, Original Volume No. 1, initially filed with the Commission in Docket No. ER97-2518-000 and restated on March 18, 1998 in Docket No. ER98-2234-000.

NGE Generation served a copy of the filing upon FES.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions and protests should be filed on or before September 17, 1998. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98-24390 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. RP98-393-000]

Northwest Pipeline Corporation; Notice of Petition for Grant of Limited Waiver of Tariff

September 4, 1998.

Take notice that on September 1, 1998, pursuant to Rule 207(a)(5) of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.207(a)(5), Northwest Pipeline Corporation (Northwest) tendered for filing a

Petition for Grant of Limited Waiver of Tariff.

Northwest seeks a waiver of the Commission's first-come, first-served policy as reflected in Section 1 of Northwest's Rate Schedule TI-1 and in the Priority Date provisions in Section 12.3 of the General Terms and Conditions of Northwest's FERC Gas Tariff, Third Revised Volume No. 1, in order to allow the receipt point priority dates established by Mock Energy Services, L.P. (Mock) under an interruptible transportation agreement No. 100779 dated February 10, 1988, as amended, to be retained by Mock's assignee, Coral Energy Resources, L.P. pursuant to an asset purchase agreement.

Northwest states that a copy of this filing has been served upon Northwest's jurisdictional customers and upon affected state regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed on or before September 11, 1998. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not served to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,
Acting Secretary.

[FR Doc. 98-24396 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OA97-411-002]

PacificCorp; Notice of Extension of Time

September 4, 1998.

On August 28, 1998, PacifiCorp filed a motion for an extension of time to make a compliance filing and revise its organizational charts and job descriptions posted on the OASIS as directed by the Commission's *Order on Standards of Conduct* issued July 31, 1998, in the above-docketed

proceeding.¹ In its motion, PacifiCorp states that it is making changes to its computer systems to further separate its wholesale merchant function from its transmission function, as required by the Order. PacifiCorp states that the changes to its KWH Accounting System will take approximately 90 days to implement. Further, PacifiCorp states that it is underdog organizational changes that will be finalized in the next 60 days that will affect the organizational charts posted on the OASIS.

Upon consideration, notice is hereby given that an extension of time within which PacifiCorp must: (1) make its compliance filing is granted to and including November 28, 1998; and (2) revise its organizational charts and job descriptions is granted to and including October 29, 1998.

Linwood A. Watson, Jr.,
Acting Secretary.

[FR Doc. 98-24391 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. GT98-90-000]

Texas Eastern Transmission Corporation; Notice of Compliance Report

September 4, 1998.

Take notice that on September 1, 1998, Texas Eastern Transmission Corporation (Texas Eastern) tendered for filing pursuant to Section 9.1 of the General Terms and Conditions of its FERC Gas Tariff, Sixth Revised Volume No. 1, its report of recalculated Operational Segment Capacity Entitlements to become effective November 1, 1998.

Texas Eastern states that the purpose of the filing is to make its report pursuant to Section 9.1 of the General Terms and Conditions of its FERC Gas Tariff, Sixth Revised Volume No. 1 of recalculated November 1, 1998 Operational Segment Capacity Entitlements, along with supporting documentation explaining the basis for changes.

Texas Eastern states that copies of the filing were served on all affected customers of Texas Eastern and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the

Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed on or before September 11, 1998. 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 proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,
Acting Secretary.

[FR Doc. 98-24394 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TM99-1-143-000]

TransColorado Gas Transmission Company; Notice of Proposed Changes in FERC Gas Tariff

September 4, 1998.

Take notice that on September 1, 1998, TransColorado Gas Transmission Company (TransColorado) tendered for filing to become part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets to become effective October 1, 1998:

Second Revised Sheet No. 20
Second Revised Sheet No. 200
First Revised Sheet No. 264
Original Sheet No. 265

TransColorado states that these tariff sheets propose an Annual Charge Adjustment (ACA) surcharge of \$0.0021 for its currently effective rates. The tariff sheets are proposed to become effective October 1, 1998.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. Copies

¹ Allegheny Public Service Company, et al., 84 FERC ¶ 61,131 (1998).

of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98-24392 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP98-394-000]

Transcontinental Gas Pipe Line Corporation; Notice of Proposed Changes in FERC Gas Tariff

September 4, 1998.

Take notice that on September 1, 1998, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing to become part of its FERC Gas Tariff, Third Revised Volume No. 1, certain revised tariff sheets listed on Appendix A attached to the filing, with an effective date of November 1, 1998.

Transco states that the purpose of the instant filing is to (1) implement new Rate Schedules WSS-Open Access (Washington Storage Service-Open Access) and WSS-Open Access-R (Released Washington Storage Service-Open Access) (2) modify the General Terms and Conditions to provide for storage transfers between Rate Schedules WSS-Open Access and ISS (3) modify Rate Schedule WSS to reflect outdated information regarding injected base gas requirements and the designed ratio of injected base gas requirements to top gas storage capacity (4) modify language in Rate Schedule ISS to enable that portion of the Washington Storage Field dedicated to Part 284 service to be utilized for ISS service upon authorization of the conversion and (5) revise the revenue sharing provision in Rate Schedule ISS to include Buyers under Rate Schedule WSS-Open Access.

Transco states that it is serving copies of the instant filing to its affected customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. 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 proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 98-24395 Filed 9-10-98; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-6159-8]

Agency Information Collection Activities: Proposed Collection; Comment Request; StarTrack Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit the following proposed Information Collection Request (ICR) to the Office of Management and Budget (OMB): StarTrack Program, EPA ICR Number 1825.01. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before November 10, 1998.

ADDRESSES: Marge Miranda, U.S. EPA Region 1, JFK Federal Building—Mailcode SPE, Boston, MA 02203. Interested persons may obtain a copy without charge by calling Marge Miranda at 617/565-1002. The ICR will be available on the StarTrack website at <http://www.epa.gov/region01/steward/startrack>.

FOR FURTHER INFORMATION CONTACT: Marge Miranda, 617/565-1002 or David W. Guest, Esq., 617/565-3348. Fax number: 617/565-4939

SUPPLEMENTARY INFORMATION:

Affected entities: Entities potentially affected by this action are those that choose to participate in the full-scale StarTrack Program.

Title: StarTrack Program.

Abstract: U.S. EPA's New England Region office (Boston, MA), in conjunction with participating states and, in some cases, local agencies, is developing a third-party certification system for environmental performance as part of its StarTrack Program. Participants in StarTrack will develop, demonstrate, and/or test compliance

tools and principles associated with third-party certification of environmental performance. The goal of the program is to expand the use of compliance and environmental management systems to improve protection of the environment, increase the public's understanding of a company's environmental performance, and further promote efficient use of public and private resources.

StarTrack is one of many reinvention initiatives within EPA. EPA's reinvention philosophy is focused on improving environmental results while allowing flexibility in how the improved results are achieved; sharing information and decision-making with all stakeholders; creating market place incentives for compliance with environmental requirements; and lessening the red-tape and paperwork burden of complying with environmental requirements.

Reinventing environmental protection means addressing the everyday inefficiencies and limitations associated with environmental regulations and managing for better environmental results. It includes designing and testing fundamentally new systems, such as those encouraged in StarTrack, and considering alternative approaches to address environmental challenges.

In each year of participation in StarTrack, a company agrees to audit its environmental compliance and management system and to prepare and publish a comprehensive environmental performance report. During every third year of participation, the company will have its compliance and management system audit results reviewed and certified by an independent third party. Follow-up certification may be required on a more frequent basis for facilities not meeting full certification requirements.

To participate, a company must have an established compliance auditing program and a demonstrated commitment to compliance, pollution prevention, and continuous improvement of environmental performance.

Applicants to the program must submit information addressing the selection factors (commitment to compliance, continuous improvement, and pollution prevention), using examples, quantitative data, and existing documentation, where applicable. An applicant may submit information such as a compliance audit protocol, auditors' qualifications, and a sample of previous audit findings and corrective action plans to support a claim to an established compliance

auditing program. The facility should have an acceptable compliance history including no open or recent major enforcement actions.

Upon acceptance to the program, the participant will sign a Letter of Commitment with the EPA Region, participating state regulatory agencies, and participating local regulatory agencies. Facilities renewing their status as a StarTrack company after their first year will not need to re-apply to the program, but will need to sign a Letter of Commitment for the new year of participation. The participant will be required to submit several reports documenting required StarTrack activities throughout the 12-month period of participation. It is ultimately the responsibility of the StarTrack facility to ensure that the following required documents are submitted to EPA in a timely fashion: audit workplans, reports and corrective action plans for all compliance and EMS audits; third party certifier reports and certifications; the facility improvement plan (in response to the certification report); and an annual environmental performance report.

Application to StarTrack is voluntary. Information submitted as part of the requirements for ongoing participation in the program (e.g., EMS and compliance audits, status reports, etc.) is mandatory to maintain StarTrack participatory status and to obtain the Program benefits.

EPA shall treat information claimed as confidential business information (CBI) in accordance with the requirements of 40 CFR part 2. If the participant fails to claim the information as confidential upon submission, it may be made available to the public without further notice. EPA cannot guarantee that information submitted pursuant to this agreement and claimed as confidential will be immune from disclosure to a requester under the Freedom of Information Act (FOIA). Participating state agencies will maintain CBI confidentiality to the extent allowed by relevant state law. Note that some state laws provide for a greater degree of access to and narrower protections for information considered confidential under federal law.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15.

The EPA would like to solicit comments to:

(i) evaluate whether the proposed collection of information is necessary

for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Burden Statement: It is estimated that approximately 50 facilities may voluntarily apply to StarTrack annually in Region 1, and as many as 250 if the program were to be expanded to other EPA Regions. EPA estimates that 35 facilities may satisfy the requirements for participation in the StarTrack Program. An estimated 36 hours per facility will be expended to provide EPA with data for application to StarTrack. This burden hour estimate translates to a cost of approximately \$1,127.88 per facility [\$31.33/hour times 36 hours] and a total cost to industry of approximately \$56,394 [\$1,127.88 per facility times 50 facilities].

During those years of participation when third-party certification is not required, facilities will expend a total of 156 hours preparing all documents and conducting all activities required under the program. This represents a cost of \$4,887.48 per facility [\$31.33/hour times 156 hours] and a total cost to industry of \$171,061.80 [\$4,887.48 per facility times 35 facilities]. Total capital and start-up costs may vary based on the degree to which participants already conduct the required activities at their facilities.

In those years requiring third party certification, facilities will expend an additional 67 hours for conducting all the associated activities. This represents an additional cost to industry of \$7,481.89 per facility [67 hours times \$111.67/hour] and a total cost to industry of \$261,866.15 [35 facilities times \$7,481.89]. (For 1998, program participants will commit for one year. Continued participation will be considered once all first year project tasks are completed and have been evaluated. Triennial third-party certification will be implemented, if appropriate, in the adoption of any agreement for continuing participation.)

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Dated: August 19, 1998.

Thomas D'Avanzo,

Acting Chief, Assistance and Pollution Prevention Office.

[FR Doc. 98-24775 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-5495-4]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared August 10, 1998 Through August 14, 1998 pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the OFFICE OF FEDERAL ACTIVITIES AT (202) 564-7167. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 10, 1998 (62 FR 17856).

Draft EISs

ERP No. D-AFS-L65293-00 Rating EC2, Upper Columbia River Basin Ecosystem Based Lands Management Plan, Implementation, Interior Columbia Basin Ecosystem Management Project, ID, MT, WY, NV and UT.

Summary: EPA expressed environmental concerns with these issues: (1) the lack of adequate provisions to identify and protect high quality waters and aquatic habitats, (2) the uncertainty with how impaired waters will be addressed, (3) the uncertainty with the nature of restoration and conservation efforts and their associated impacts, (4) the lack of

a clear protocol for determining how conflicts between competing objectives and needs will be resolved, (5) the implications of less than full budget for implementation. EPA suggests combining some of the features of Alternatives 7 and 6 with Alternative 4. EPA strongly supports ecosystem management principles on a broad scale to analyze resources issues that transcend jurisdictional boundaries.

ERP No. D-COE-E32078-00 Rating EO3, Savannah Harbor Section 203 Expansion Project, Channel Deepening, Harbor Improvements, Georgia Ports Authority, Federal Navigation Project, Chatham County, Ga and Jasper County, SC.

Summary: EPA concluded that the document does not contain adequate modeling and sediment chemistry information necessary to make a decision as to the biotic and water quality impacts. EPA also had environmental objections about the extent/duration of adverse impacts resulting from the magnitude of channel deepening and whether necessary mitigation for functional losses is practicable.

ERP No. D-FHW-D40143-MD Rating EC2, MD-331—Dover Bridge, Construction, Right-of-Way Grant, US Coast Guard Bridge Permit and COE Section 404 Permit, Easton, Talbot and Caroline County, MD.

Summary: EPA expressed environmental concerns regarding impacts to aquatic resources, including associated tidal marsh wetlands. EPA requested additional information on storm water run-off, bridge shading effects and wetland mitigation.

ERP No. D-FHW-L40207-WA Rating EC2, Interstate 90 (I-90) South Sammamish Plateau Access Road and Sunset Interchange Modifications, Construction, COE Section 404 Permit, Coastal Zone Management and NPDES Permits, King County, WA.

Summary: EPA expressed environmental concerns based on potential adverse environmental effects to waters of the United States from the project and undisclosed potential cumulative affects from planned activities in lands adjacent to the project site. More information is needed to clarify design specifications to ensure that proper stormwater management practices will be implemented to appropriately protect receiving-water quality.

ERP No. D-NOA-B91026-ME Rating EC1, Atlantic Herring (*Clupea harengus harengus*) Fishery Management Plan (FWP), Management Measures, Exclusive Ecosystem Zone (EEZ), Gulf of Maine, George Bank, ME.

Summary: EPA supports the actions proposed by NMFES; additional information was requested for enforcement of fishery management plan, and adulteration of scallop meat.

Final EISs

ERP No. F-COE-E32077-GA Brunswick Harbor Deepening Federal Navigation Project, Improvements, Brunswick, Glynn County, GA.

Summary: EPA continues to be concerned about the project's adverse impacts and mitigations, while a number of modifications/clarifications were made to the channel upgrade. Future interagency coordination will be necessary.

Other

ERP No. LD-COE-L36111-WA Rating EC2, Howard A. Hanson Dam (HHD) Additional Water Storage (AWS) Phase I Project, Construction and Operation, Green River Basin, Pierce and King Counties, WA.

Summary: EPA expressed environmental concerns on potential cumulative impacts of activities in adjacent lands, potential indirect effects on fish habitat and water quality, and discussion of a possibly restricted range of alternatives. EPA also identified the need for a clear statement of public disclosure of Phase I monitoring results before initiating Phase II of the project.

Dated: September 8, 1998.

William D. Dickerson,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 98-24493 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-U

ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-5495-3]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564-7167 OR (202) 564-7153.

Weekly receipt of Environmental Impact Statements

Filed August 31, 1998 Through September 4, 1998

Pursuant to 40 CFR 1506.9.

EIS No. 980341, Final EIS, FHW, FL, East-West Multimodal Corridor Transportation Improvements, Beginning at the Tamiami Campus of Florida International University (FIU) extending the length of FL 836, Port of Miami, Dade County, FL Due: August 28, 1998, Contact: Robert M. Callan (904) 681-7223.

The above EIS should have appeared in the 8-28-98 Notice of Availability in the FR. The 30 Day-Wait period is calculated from 8-28-98.

EIS No. 980342, Final EIS, FTA, FL, Adoption—East-West Multimodal Corridor Transportation Improvements, Begins Tamiami Campus of Florida International University (FIU) extends the length of FL 836, Port of Miami Dade County, FL, Due: September 28, 1998, Contact: Elizabeth Martin (404) 562-3509.

The US Department of Transportation (DOT), Federal Transit Administration is Adopting DOT, Federal Highway Administration's Final EIS filed with EPA on 9-21-98. The above Notice of Availability should have appeared in the 8-28-98 **Federal Register**. The 30-Day Wait Period is calculated from 8-28-98.

EIS No. 980343, Draft EIS, NPS, CA, Mojave National Preserve General Management Plan, Implementation, San Bernardino County, CA, Due: December 09, 1998, Contact: Alan Schmierer (415) 427-1441.

EIS No. 980344, Draft Supplement, NOA, Northeast Multispecies Fishery Management Plan, Updated Information concerning Overfishing of Red Hake and Silver Hake Fisheries, Northeast United States, Due: October 26, 1998, Contact: Kathi Rodrigues (202) 482-5158.

EIS No. 980345, Final EIS, NPS, WA, Lake Crescent Management Plan, Implementation, Olympic National Park, WA, Due: October 13, 1998, Contact: David Morris (360) 452-4501.

EIS No. 980346, Draft EIS, NPS, CA, NV, CA, NV, Death Valley National Park General Management Plan, Implementation, Mojave Desert, Inyo and San Bernardino Counties, CA and Nye and Esmeralda Counties, NV, Due: December 10, 1998, Contact: Alan Schmierer (415) 427-1441.

EIS No. 980347, Draft EIS, AFS, ID, Goose Creek Watershed Project, Harvesting Timber and Improve Watershed, Payette National Forest, New Meadows Ranger District, Adams County, ID, Due: October 27, 1998, Contact: Kimberly Brandel (208) 347-0300.

EIS No. 980348, Final EIS, FTA, NJ, Newark-Elizabeth Rail Link (NERL) Study Corridor, Transportation Improvements, Light Rail Transit (LRT), Essex and Union Counties, NJ, Due: October 13, 1998, Contact: Steven F. Faust (212) 264-8162.

EIS No. 980349, Draft Supplement, UMC, CA, Sewage Effluent Compliance Project, Updated and

Additional Information, Implementation, Lower Santa Margarita Basin, Marine Corps Base Camp Pendleton, San Diego County, CA, Due: October 26, 1998, Contact: Vickie Taylor (619) 532-3007.

EIS No. 980350, Final EIS, COE, CA, Hansen Dam Water Conservation and Supply Study, Flood Protection, Implementation, Los Angeles County, CA, Due: October 13, 1998, Contact: David Compas (213) 452-3850.

EIS No. 980351, Final Supplement, USA, TT, Theater Missile Defense (TMD) Extended Test Range (ETR) Project, Eglin Gulf Test Range to Conduct (TMD) Testing or Training Activities, Santa Rosa Island and Cape San Blas, FL, Due: October 13, 1998, Contact: Ms. Linda Busch (850) 882-6499.

EIS No. 980352, Draft EIS, IBR, CA, Contra Costa Water District Multi-Purpose Pipeline (MPP) Project, Construction and Operation of Raw Water Delivery System, Contra Costa Canal, COE Section 10 and 404 Permits, Contra Costa County, CA, Due: November 03, 1998, Contact: Christina Hartinger (916) 978-5051.

EIS No. 980353, Final EIS, USA, IN, Camp Atterbury Training Areas and Facilities Upgrading, Implementation, Bartholomew, Brown, Johnson, Marion and Shelby Counties, IN, Due: October 13, 1998, Contact: Chris William (703) 607-7985.

EIS No. 980354, Draft EIS, NPS, CA, Whiskeytown Unit General Management Plan, Implementation, Whiskeytown-Shasta-Trinity National Recreation Area, Shasta County, CA, Due: November 10, 1998, Contact: Dave A. Pugh (530) 241-6584.

EIS No. 980355, Draft EIS, AFS, ID, North Fork St. Joe River Project, Implementation, Idaho Panhandles National Forest, St. Joe Ranger District, Shoshone County, ID, Due: October 26, 1998, Contact: Lynette Myhre (208) 765-7223.

Dated: September 8, 1998.

William D. Dickerson,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 98-24494 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-U

ENVIRONMENTAL PROTECTION AGENCY

[FRL-6160-1]

National Drinking Water Advisory Council, Right-to-Know Working Group; Notice of Open Meeting

Under section 10(a)(2) of Public Law 92-423, "The Federal Advisory

Committee Act," notice is hereby given that a meeting of the Right-to-Know Working Group of the National Drinking Water Advisory Council established under the Safe Drinking Water Act, as amended (U.S.C. S300f *et. seq.*), will be held on September 24 (9:00 a.m.—5:00 p.m.) and September 25 (8:00 a.m.—2:00 p.m.) at the Washington Plaza Hotel, 10 Thomas Circle, NW, Washington, D.C. 20005. The meeting is open to the public, but due to past experience, seating will be limited.

The purpose of this meeting is to analyze the public information and public involvement provisions in the Safe Drinking Water Act as Amended in 1996, and to recommend products to the Advisory Council through which EPA, States, water suppliers, and others could inform stakeholders and the public about the provisions, and suggest ways to assure that the provisions achieve the intent of the 1996 Amendments. The working group is meeting to gather information, to analyze relevant issues and facts, and to draft recommendations for consideration by the Advisory Council. Statements from the public will be taken at this meeting as time allows.

For more information, please contact Marjorie Jones, Designated Federal Officer, Right-to-Know Working Group, U.S. EPA, Office of Ground Water and Drinking Water, Mail Code 4601, 401 M Street SW, Washington, D.C. 20460. The telephone number is 202/260-4152 and the e-mail address is jones.marjorie@epa.gov.

Dated: September 2, 1998.

Charlene E. Shaw,

Designated Federal Officer, National Drinking Water Advisory Council.

[FR Doc. 98-24474 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-6159-6]

Peer Review Meeting on the Hudson River PCBs Reassessment RI/FS Phase 2 Report Entitled "Preliminary Model Calibration Report (PMCR)"

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of a Scientific Peer Review meeting to review EPA's Preliminary Model Calibration Report (PMCR).

SUMMARY: Eastern Research Group, Inc. (ERG), a U.S. Environmental Protection Agency (EPA) contractor, has scheduled a scientific peer review meeting to review the "Preliminary Model

Calibration Report (PMCR)." This report is one of several reports that comprise the basis for EPA's reassessment of the PCB-contaminated portions of the upper Hudson River. This report includes data and information used to make projections of future concentrations of PCBs in water, sediment, and fish tissue as well as the rationale for selection of calibration data sets and projections for the Thompson Island Pool.

DATES: The scientific peer review meeting will be held on September 9 and 10, 1998, from 9:00 a.m. to approximately 5:00 p.m. each day. The public is invited to attend the scientific peer review meeting. There is no charge for attending the meeting; however, seating is limited so advance registration is suggested.

ADDRESSES: The scientific peer review meeting will be held at the Sheraton Saratoga Springs Hotel and Conference Center, 534 Broadway, Saratoga Springs, NY, 12866. To make hotel reservations, please call the hotel directly at (518) 584-4000. Reference the "PCBs Peer Review Meeting" to receive the group rate. The Sheraton Saratoga Springs Hotel and Conference Center is located off Exit 15 of I-87 (Adirondack Northway). If traveling North on I-87, turn left off Exit 15. At the fifth traffic light, turn left onto Rock Street. At the stop sign, turn right onto Maple Avenue. The Sheraton parking lot is on the right. If traveling South on I-87, turn right off Exit 15. At the fourth traffic light, turn left onto Rock Street. At the stop sign turn right onto Maple Avenue. The Sheraton parking lot is on the right. Members of the public wishing to attend the meeting may contact EPA's contractor, Eastern Research Group, Inc. (ERG), by calling the ERG meeting registration line at (781) 674-7374.

The document to be peer reviewed, entitled "Preliminary Model Calibration Report (PMCR)," may be obtained by contacting Damien Hughes, U.S. Environmental Protection Agency, Region II, Emergency and Remedial Response Division, 290 Broadway, 20th Floor, New York, NY, 10007-1866; telephone (212) 637-3957; fax (212) 637-4284. When ordering, please provide your name, mailing address, and the document title.

The PMCR also will be available for public inspection at the EPA Region II Library, 290 Broadway, 16th Floor, New York, NY, 10007-1866, between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday, except for federal holidays.

FOR FURTHER INFORMATION CONTACT: The U.S. Environmental Protection Agency (EPA) has contracted with Eastern

Research Group, Inc. (ERG) to manage and conduct the peer review. To attend the meeting contact ERG's registration line at (781) 674-7374, and reference the "PCBs Peer Review Meeting." A limited amount of time will be set aside for members of the public to present brief oral comments regarding the Preliminary Model Calibration Report (PMCR) to the peer review panel or for public record on each day of the meeting. Oral presentations will be limited to a maximum of 5 minutes, and the number of people giving oral comment may be limited by the time available. Opportunity for making oral comment will be provided on a first-come, first-served basis; therefore, the public is encouraged to register in advance to present oral comments by contacting ERG's registration line at (781) 674-7374.

For general questions about the overall Hudson River PCBs Reassessment, contact Ann Rychlenski, U.S. Environmental Protection Agency, Region II, Communications Division, 290 Broadway, New York, NY, 10007-1866, (212) 637-3672.

SUPPLEMENTARY INFORMATION: From about 1947 to 1977, approximately 1.1 million pounds of PCBs were discharged into the Hudson River from two General Electric (GE) Company capacitor manufacturing plants located in Fort Edward and Hudson Falls, New York. The U.S. Environmental Protection Agency (EPA) has classified PCBs as probable human carcinogens. In 1983, a 197-mile stretch of the Hudson River from Hudson Falls to the Battery in New York City was classified as a Superfund site. In 1984, EPA made an interim no-action decision for the contaminated upper Hudson River sediments.

In 1990, EPA began the reassessment of its no-action decision of PCB-contaminated sediments in the upper Hudson River. Because of the size and complexity of the site and the high degree of public interest associated with this project, EPA decided to conduct the reassessment in three phases, issuing reports to the public as work progressed. Phase 2, the largest in scope, was further broken down into six segments. EPA's eventual remedial decision for this site will depend on the information contained in all three phases of the project and in all associated reports, and how that information fits together as a whole. The reports consist of the following:

Phase 1 Report—This report compiled and analyzed existing data relevant to PCB contamination in the Hudson River. The report also included a

preliminary ecological risk assessment and a preliminary human health risk assessment. The Phase 1 Report was released in August 1991.

Phase 2 Report—The Phase 2 Report consists of seven separately issued reports:

- **Database Report**—The report is a guide to understanding the information contained in the database and where to find it. The database includes EPA's Phase 2 data from the New York State Department of Environmental Conservation (NYSDEC), General Electric (GE), the U.S. Geological Survey (USGS), and other sources. EPA's database is available to the public on CD-ROM. An explanation of the database is contained in the Database Report, but the report did not include any analyses or findings. The report was released in November 1995; the CD-ROM was released in March 1996. An update to the database is expected in July 1998.

- **Preliminary Model Calibration Report**—This report includes groundwork for projections of future concentrations of PCBs in water, sediment, and fish tissue; rationale for selection of calibration data sets; and projections for the Thompson Island Pool. The report provides interested parties with an opportunity to review and comment on the assumptions used in the models developed for the reassessment. The report was released in October 1996.

- **Data Evaluation and Interpretation Report**—This report contains geochemical analysis of data from water columns and high-resolution sediment coring investigations; evaluation of these data to determine relationships between parameters; and evaluation of PCB sources. This report, which complements the computer modeling, was released in February 1997.

- **Low Resolution Coring Report**—This report contains information that describes the technical approach for the Low Resolution Coring Program, field sampling procedures, and sample analysis. The report also interprets the results of the program, presents evidence on how the low-resolution coring results build on previously collected Phase 2 data, and examines PCB inventories in the area of study.

- **Baseline Modeling Report**—This report will provide projections of future concentrations of PCBs in water, sediment, and fish tissue without remediation; will include the interpretation of the low-resolution sediment coring data; and will provide interested parties an opportunity to review the baseline model projections

prior to their incorporation into the risk assessments.

- **Ecological Risk Assessment**—This report will include the evaluation and interpretation of the ecological field data, further the Phase I ecological risk assessment, and present the ecological risk to certain organisms associated with the site.

- **Human Health Risk Assessment**—This report will present the human health risks associated with the site. It includes cancer and non-cancer risks from consumption of fish and other exposure pathways from the upper Hudson River, will include the most current PCB toxicity values adopted by EPA in the risk calculation, and will qualitatively address endocrine disruption effects.

Phase 3 Report—The Phase 3 Report will consist of the Feasibility Study, a detailed analysis of remedial alternatives, the running of models for each remedial scenario, and a calculation of risk reduction for each scenario.

The above reassessment reports taken together, along with the public comment received on them, will assist EPA in formulating a Proposed Plan for the Site, in which the Agency will propose its preferred remedy for the Site.

Only the Preliminary Model Calibration Report (PMCR) and related supplemental documents will be the subject of the scientific peer review meeting to be held on September 9 and 10, 1998; the Phase 1 Report, the other Phase 2 Reports, and the Phase 3 Report will not be addressed.

Dated: September 1, 1998.

William J. Muszynski,

Deputy Regional Administrator, Region 2.

[FR Doc. 98-24478 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-U

ENVIRONMENTAL PROTECTION AGENCY

[OPP-00551; FRL-6027-7]

Initiation of Rodenticide Stakeholder Process and Availability of Zinc Phosphide and Rodenticide Cluster Reregistration Eligibility Decision Documents

AGENCY: Environmental Protection Agency (EPA).

ACTION: Initiation of rodenticide stakeholder process; Notice of availability of reregistration eligibility decision documents; Interest in State incident data.

SUMMARY: This notice announces the availability of and starts a 60-day public

comment period for the Reregistration Eligibility Decision (RED) documents for the active ingredients brodifacoum, bromadiolone, bromethalin, chlorophacinone, diphacinone and its sodium salt, and pival and its sodium salt (Rodenticide Cluster) and zinc phosphide. The REDs for these chemicals are the Agency's formal regulatory assessments of the health and environmental data base of the subject chemicals and present the Agency's determination regarding which pesticidal uses are eligible for reregistration. This notice also announces the rodenticide stakeholder meetings and Agency interest in obtaining State incident data involving non-target and secondary poisoning to wildlife from rodenticides.

DATES: Written comments on the RED decisions must be submitted by November 10, 1998. The stakeholder meeting(s) are expected to be held in

November or December, 1998. Anyone interested in serving on the stakeholder panel should notify the Agency of their interest by October 13, 1998.

ADDRESSES: Three copies of comments identified with the docket control number (OPP-00551) and the case number (noted below), should be submitted to: By mail: Public Information and Records Integrity Branch, Information Resources and Services Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, deliver comments to the docket on the first floor (Room 119), CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Comments and data may also be submitted electronically to: opp-docket@epamail.epa.gov. Follow the instructions under Unit III of this document. No Confidential Business Information (CBI) should be submitted through e-mail.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential will be included in the public docket by EPA without prior notice. The public docket is available for public inspection in Rm. 119 at the Virginia address given above, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Technical questions on the RED documents listed below should be directed to the appropriate point-of-contact:

Chemical Name	Case No	Point of Contact	Telephone No.	e-mail Address
Zinc phosphide	0026	Susan Jennings	703-308-7130	jennings.susan@epamail.epa.gov
Brodifacoum	2755	Dennis Deziel	703-308-8173	deziel.dennis@epamail.epa.gov
Bromadiolone	2760	Dennis Deziel	703-308-8173	deziel.dennis@epamail.epa.gov
Bromethalin	2765	Dennis Deziel	703-308-8173	deziel.dennis@epamail.epa.gov
Chlorophacinone	2100	Dennis Deziel	703-308-8173	deziel.dennis@epamail.epa.gov
Diphacinone and its sodium salts.	2205	Dennis Deziel	703-308-8173	deziel.dennis@epamail.epa.gov
Pival and its sodium salts ..	2810	Dennis Deziel	703-308-8173	deziel.dennis@epamail.epa.gov

For further information regarding the rodenticide stakeholder meeting contact either Susan Jennings or Dennis Deziel at the phone numbers listed above. For further information regarding the review of State incident data contact Dennis Deziel.

To request a copy of any of the above listed RED documents, or a specific RED Fact Sheet, contact the OPP Pesticide Docket, Public Information and Records Integrity Branch, first floor (Room 119), at the address given above or call (703) 305-5805.

SUPPLEMENTARY INFORMATION:

I. Electronic Availability

Electronic copies of this document and the final PR Notice also are available from the EPA Home page at the **Federal Register**—Environmental Documents entry for this document under “Laws and Regulations” (<http://www.epa.gov/fedrgstr/>).

Electronic copies of the REDs and RED fact sheets can also be downloaded from the Pesticide Reregistration Eligibility Decisions (REDs) home page at <http://www.epa.gov/REDs>.

II. Reregistration Decision

The Agency has issued RED documents for the pesticidal active ingredients listed in the SUMMARY. Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended in 1988, EPA is conducting an accelerated reregistration program to reevaluate existing pesticides to make sure they meet current scientific and regulatory standards. The data base to support the reregistration of each of the chemicals, except for pival and its sodium salts, is substantially complete. Due to a lack of data, pival and its sodium salts are ineligible for reregistration.

All registrants of products containing one or more of the active ingredients have been sent the appropriate RED documents and must respond to labeling requirements and product specific data requirements (if applicable) within 8 months of receipt. Products containing other active ingredients will not be reregistered until those other active ingredients are determined to be eligible for reregistration.

The reregistration program is being conducted under congressionally

mandated timeframes, and EPA recognizes both the need to make timely reregistration decisions and to involve the public. Therefore, EPA is issuing these REDs as final documents with a 60-day comment period. Although the 60-day public comment period does not affect the registrants' response due date, it is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the RED. All comments will be carefully considered by the Agency.

III. National Rodenticide Stakeholder Meeting(s)

The Agency is concerned about accidental poisonings of young children by rodenticide products. Data collected by the American Association of Poison Control Centers (AAPCC) for 1995 showed approximately 15,000 exposures to children younger than 6 years. Of the total number of human exposures to rodenticides in 1995, almost 6,500 were significant enough to result in treatment at a health care facility.

During the RED process, the Agency investigated several regulatory measures that could mitigate these risks, but

wanted to ensure that any adopted measures were consistent with public health values and priorities. Therefore, the Agency is initiating a rodenticide stakeholder process to develop a risk mitigation strategy to protect young children from rodenticide products while preserving the public health benefits of these products. The stakeholder process will consist of one or more meetings that will be open to the public. A core group of individuals or representatives from organizations will serve on a panel to discuss and analyze several mitigation proposals, ultimately concluding with recommendations to the Agency on how to further mitigate risks to young children from rodenticide poisonings. Panel members will represent a broad cross-section of the public and will be expected to attend all of the stakeholder meetings.

The first of the stakeholder meetings is expected to be held sometime in November or December 1998, in Washington, DC. The Agency is hopeful that 2-3 separate full-day panel meetings will be sufficient to resolve these issues, however, it recognizes that several more meetings may be warranted. EPA will announce the dates and times of the meetings in a subsequent **Federal Register** notice. The stakeholder process will also discuss issues that may pertain to other rodenticide products, such as those which contain warafin, red squill, difethialone, cholecalciferol/Vitamin D-3, difethialone, and possibly registrations of new rodenticide active ingredients. Anyone interested in these products may also attend. The Agency welcomes proposals for mitigation techniques and invites anyone who might be interested in serving on the panel to please contact Susan Jennings or Dennis Deziel at the addresses or phone numbers under FOR FURTHER INFORMATION CONTACT within 30 days of the date of this notice.

IV. Reviewing Wildlife Incident Data

The Agency recently became aware of incident data suggesting that there may be a potential problem involving accidental non-target and secondary exposures to wildlife from the rodenticides subject to this notice of availability. At this time, the Agency is reviewing available data; no final conclusions have been reached. After a complete review, if a problem or pattern is detected, the Agency may impose additional restrictions on the use of any rodenticide products involved. The Agency is directed by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to coordinate its actions

with states. In this vein, the Agency will be reviewing, and would be interested in receiving, State wildlife incident data for all rodenticides to better understand the extent of this potential problem.

V. Public Record and Electronic Submissions

The official record for this notice, as well as the public version, has been established for this notice under docket control number (OPP-00551) (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The official record is located at the Virginia address in "ADDRESSES" at the beginning of this document.

Electronic comments can be sent directly to EPA at:

opp-docket@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment and data will also be accepted on disks in Wordperfect 5.1/6.1 file formats or ASCII file format. All comments and data in electronic form must be identified by the docket control number (OPP-00551). Electronic comments on this notice may be filed online at many Federal Depository Libraries.

List of Subjects

Environmental protection.

Dated: September 3, 1998.

Jack E. Housenger,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 98-24337 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-F

ENVIRONMENTAL PROTECTION AGENCY

[FRL-6159-7]

Ulah Battery Lead Reclaiming Site; Notice of Proposed Settlement

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed settlement.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to settle claims with Sears, Roebuck and Co., pursuant to a Cost Recovery Agreement

for reimbursement of \$20,000 of costs under section 122(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9622(h). These costs related to removal actions taken by EPA at the Ulah Battery Lead Reclaiming Site, located in Asheboro, Randolph County, North Carolina. Sears, Roebuck and Co., has agreed to pay \$20,000.00 of the \$120,616.88 spent by EPA, for past response costs that the United States incurred and paid with regard to the Site. The United States retains all right to pursue any other potentially responsible parties (PRPs) for all unreimbursed costs related to the removal actions at the Site.

Pursuant to section 122(i) of CERCLA, 42 U.S.C. 9622(i), EPA will consider public comments on the proposed settlement for thirty (30) days. EPA may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate. Copies of the proposed settlement are available from: Ms. Paula V. Bachelor, Waste Management Division, U.S. EPA, Region 4, 61 Forsyth Street, Atlanta, Georgia 30303-3104, 404/562-8887.

Written comments may be submitted to Ms. Bachelor within thirty (30) calendar days of the date of publication.

Dated: August 21, 1998.

Franklin E. Hill,

Chief, Program Services Branch, Waste Management Division.

[FR Doc. 98-24477 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-6158-9]

National Pollutant Discharge Elimination System (NPDES) General Permits for Discharges From Concentrated Animal Feeding Operations (CAFOs)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of reopening of the public comment period for proposed NPDES general permits.

SUMMARY: Notice is hereby given that Region 6 of the U.S. Environmental Protection Agency (EPA) intends to reopen, during a specified period of time, the comment period for the proposed reissuance of the EPA Region 6 National Pollutant Discharge Elimination System (NPDES) general

permits for concentrated animal feeding operations (CAFOs) in New Mexico, Oklahoma, and Texas and all Indian Country Lands within these States.

DATES: EPA Region 6 will be accepting additional comments on the proposed CAFO general permits until October 12, 1998.

ADDRESSES: Comments and suggestions should be mailed to Ms. Wilma Turner (6WQ-CA), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733.

FOR FURTHER INFORMATION CONTACT: For further information on the proposed permits or to request a complete copy of the entire fact sheet and the draft permits, please contact Ms. Wilma Turner at the above address or by telephone at (214) 665-7516. The draft permits may be obtained from the following website address: www.epa.gov/region6/6wq/npdes/genpermt.htm

SUPPLEMENTARY INFORMATION: Region 6 of the EPA publicly announced on June 26, 1998, in the **Federal Register** (see 63 FR 34874) the proposed reissuance of the EPA Region 6, National Pollutant Discharge Elimination System (NPDES) general permits for concentrated animal feeding operations (CAFOs) in New Mexico (Permit Nos. NMG800000 and NMG810000); Oklahoma (Permit Nos. OKG800000 and OKG810000); and Texas (Permit Nos. TXG800000 and TXG810000) and all Indian Country Lands within these States. EPA requested the general public to submit written comments on the proposed permits to EPA Region 6 during the public comment period ending on August 25, 1998. However, EPA has received numerous requests both during public hearings on the proposed permits and by mail to extend the August 25, 1998, deadline for commenting on the proposed permits. After considering these comments, EPA has decided to extend the comment period from August 25, 1998, to October 12, 1998. Therefore, the comment period for these general permits has been reopened and EPA Region 6 will be accepting additional comments on the proposed CAFO general permits until October 12, 1998.

The public may comment on any aspects of the proposed permits. However, EPA is particularly requesting comments on the following issues:

1. Should the general permit coverage be limited to some maximum number of animal units? If so, what should this maximum number be?

2. Should the 303(d) list be used to establish stream segments impaired due to nutrients? If not, what specific criteria should be utilized?

3. Should all nutrient-impaired watersheds be included in the impaired watershed permit or only those specifically identified as related to CAFO activities?

4. The applicability of the proposed permits to pollutants from poultry operations that spread litter (manure) to land in a non-agronomic manner.

5. The definition of agricultural (agronomic) uses of manure based upon nitrogen and phosphorus application rates.

6. The appropriate rates of manure application in impaired and nonimpaired watersheds when the manure is applied at rates that exceed agronomic rates.

William B. Hathaway,

Director, Water Quality Protection Division, Region 6.

[FR Doc. 98-24505 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL MARITIME COMMISSION

Ocean Freight Forwarder License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission applications for licenses as ocean freight forwarders pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718 and 46 CFR 510).

Persons knowing of any reason why any of the following applicants should not receive a license are requested to contact the Office of Freight Forwarders, Federal Maritime Commission, Washington, DC 20573: Export Container Lines, Inc., 601 Dune Drive, Avalon, NJ 08202, Officer: Belinda E. Richardson.

Dated: September 4, 1998.

Joseph C. Polking,

Secretary.

[FR Doc. 98-24374 Filed 9-10-98; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than September 28, 1998.

A. Federal Reserve Bank of Minneapolis (JoAnne F. Lewellen, Assistant Vice President) 90 Hennepin Avenue, P.O. Box 291, Minneapolis, Minnesota 55480-0291:

1. *Herbert A. Lund and Ralph H. Peterson as trustees for the Herbert A. Lund Revocable Trust*, Albert Lea, Minnesota; to acquire voting shares of Lake Bank Shares, Inc., Albert Lea, Minnesota, and thereby indirectly acquire voting shares of Security Bank Minnesota, Albert Lea, Minnesota, and First State Bank of Emmons, Emmons, Minnesota.

Board of Governors of the Federal Reserve System, September 8, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 98-24491 Filed 9-10-98; 8:45 am]

BILLING CODE 6210-01-F

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act. Unless otherwise noted, nonbanking

activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 8, 1998.

A. Federal Reserve Bank of Minneapolis (JoAnne F. Lewellen, Assistant Vice President) 90 Hennepin Avenue, P.O. Box 291, Minneapolis, Minnesota 55480-0291:

1. *Lake Bank Shares, Inc., Employee Stock Ownership Plan*, Albert Lea, Minnesota; to become a bank holding company by acquiring 96 percent of the voting shares of Lake Bank Shares, Inc., Albert Lea, Minnesota, and thereby indirectly acquire Security Bank Minnesota, Albert Lea, Minnesota, and First State Bank of Emmons, Emmons, Minnesota.

Board of Governors of the Federal Reserve System, September 8, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 98-24490 Filed 9-10-98; 8:45 am]

BILLING CODE 6210-01-F

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 10:00 a.m., Wednesday, September 16, 1998.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED: 1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees. 2. Any matters carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Lynn S. Fox, Assistant to the Board; 202-452-3204.

SUPPLEMENTARY INFORMATION: You may call 202-452-3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at <http://www.bog.frb.fed.us> for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: September 9, 1998.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 98-24546 Filed 9-9-98; 11:00 am]

BILLING CODE 6210-01-M

GENERAL SERVICES ADMINISTRATION

Electronic Posting System

AGENCY: General Services Administration.

ACTION: Notice of electronic posting of business opportunities and solicitations.

SUMMARY: GSA is implementing a single, agency-wide electronic system for soliciting quotations, bids, and proposals. The Electronic Posting System (EPS) will replace existing GSA systems with duplicate functionality. This system will reduce the costs and improve the efficiency of the acquisition process.

The EPS is a World Wide Web-based application that provides an interface with the Commerce Business Daily Net for creating synopses and permits uploading of solicitation files. The EPS also provides vendors access to agency business opportunities and allows them to register to receive e-mail notification of opportunities in their area of interest.

Beginning October 1, 1998, the General Services Administration (GSA) will issue written solicitations in electronic format through our Electronic Posting System (EPS). These solicitations will be available on the Internet at: <http://eps.arnet.gov>. The same site contains information describing the EPS and how to register to receive automatic notices of acquisitions.

GSA will provide paper copies of solicitations (and attachments) only when we do not anticipate adequate competition for an acquisition if the solicitation is only made available electronically; when documents are not available electronically; or when release of drawings, exhibits or other attachments must be controlled to ensure adequate security. The related synopsis will explain if the solicitation (and its attachments) is available only electronically.

FOR FURTHER INFORMATION CONTACT: Gloria Sochon, GSA Acquisition Policy Division, (202) 208-6726 or gloria.sochon@gsa.gov.

Dated: September 3, 1998.

Ida M. Ustad,

Deputy Associate Administrator for Acquisition Policy.

[FR Doc. 98-24410 Filed 9-10-98; 8:45 am]

BILLING CODE 6820-61-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 93N-0253]

Mark Perkal; Grant of Special Termination; Final Order Terminating Debarment

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (the act) granting special termination of the debarment of Mark Perkal, Israel. FDA bases this order on a finding that Dr. Perkal provided substantial assistance in the investigations or prosecutions of offenses relating to a matter under FDA's jurisdiction and that special termination of Dr. Perkal's debarment serves the interest of justice and does not threaten the integrity of the drug approval process.

EFFECTIVE DATE: SEPTEMBER 11, 1998.

ADDRESSES: Comments should reference Docket No. 93N-0253 and be sent to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Leanne Cusumano, Center for Drug Evaluation and Research (HFD-7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-594-2041.

SUPPLEMENTARY INFORMATION:

In a **Federal Register** notice dated November 29, 1993 (58 FR 62676), Mark Perkal, the former Executive Vice President and Chief Scientific Officer of PharmaKinetics Laboratories, Inc., was permanently debarred from providing services in any capacity to a person with an approved or pending drug product application (21 U.S.C. 335a(c)(1)(B) and (c)(2)(A)(ii) and 21 U.S.C. 321(dd)). The debarment was based on FDA's finding that Dr. Perkal was convicted of a felony under Federal law for conduct relating to the development or approval of any drug product, or otherwise relating to the regulation of a drug product (21 U.S.C. 335a(a)(2)). On April 14, 1995, Dr. Perkal applied for special termination of debarment under section 306(d)(4) of the act (21 U.S.C. 335a(d)(4)), as amended by the Generic Drug Enforcement Act (GDEA).

Under section 306(d)(4)(C) and (d)(4)(D) of the act, FDA may limit the period of debarment of a permanently

debarred individual if the agency finds that: (1) The debarred individual has provided substantial assistance in the investigation or prosecution of offenses described in subsections (a) or (b) of section 306 of the act or relating to a matter under FDA's jurisdiction; (2) termination of the debarment serves the interest of justice; and (3) termination of the debarment does not threaten the integrity of the drug approval process. Special termination of debarment is discretionary with FDA.

FDA considers a determination by the Department of Justice concerning the substantial assistance of a debarred individual conclusive in most cases. Dr. Perkal cooperated with the Department of Justice investigations and prosecutions of others, as substantiated by the testimony of the Assistant U.S. Attorney at Dr. Perkal's sentencing. Accordingly, FDA finds that Dr. Perkal provided substantial assistance as required by section 306(d)(4)(C) of the act.

The additional requisite showings that termination of debarment serves the interest of justice and poses no threat to the integrity of the drug approval process are difficult standards to satisfy. In determining whether these have been met, the agency weighs the significance of all favorable and unfavorable factors in light of the remedial, public health-related purposes underlying debarment. Termination of debarment will not be granted unless, weighing all favorable and unfavorable information, there is a high level of assurance that the conduct that formed the basis for the debarment has not recurred and will not recur, and that the individual will not otherwise pose a threat to the integrity of the drug approval process.

The evidence presented to FDA in support of termination shows that Dr. Perkal was convicted for a first offense; that he has no prior or subsequent convictions for conduct described under the GDEA and has committed no other wrongful acts affecting the drug approval process; and that his character and scientific ability are highly regarded by his professional peers. The evidence presented supports the conclusion that the conduct upon which Dr. Perkal's debarment was based is unlikely to recur. For these reasons, the agency finds that termination of Dr. Perkal's debarment serves the interest of justice and will not pose a threat to the integrity of the drug approval process.

Under section 306(d)(4)(D) of the act, the period of debarment of an individual who qualifies for special termination may be limited to less than permanent but to no less than 1 year. Dr. Perkal's period of debarment has lasted

more than 1 year. Accordingly, the Deputy Commissioner for Operations, under section 306(d)(4) of the act and under authority delegated to him (21 CFR 5.20), finds that Mark Perkal's application for special termination of debarment should be granted, and that the period of debarment should terminate immediately, thereby allowing him to provide services in any capacity to a person with an approved or pending drug product application. The Deputy Commissioner for Operations further finds that because the agency is granting Dr. Perkal's application, an informal hearing under section 306(d)(4)(C) of the act is unnecessary.

As a result of the foregoing findings, Dr. Mark Perkal's debarment is terminated effective September 11, 1998 (21 U.S.C. 335a(d)(4)(C) and (d)(4)(D)).

Dated: September 2, 1998.

Michael A. Friedman,

Deputy Commissioner for Operations.

[FR Doc. 98-24375 Filed 9-10-98; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[Document Identifier: HCFA-R-0050 and HCFA-1515/1572]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Health Care Financing Administration, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Extension of a currently

approved collection; *Title of Information Collection:* Medical Records Review Under PPS and Supporting Regulations in 42 CFR 412.40-412.52; *Form No.:* HCFA-R-0050 (OMB# 0938-0359); *Use:* Peer Review Organizations (PRO) are authorized to conduct medical review activities under the Prospective Payment System (PPS). In order to conduct the medical review activities we depend upon hospitals to make available medical records. PROs ensure that admissions are medically necessary, provided in the appropriate setting, and that they meet acceptable standards of quality.; *Frequency:* When records are reviewed; *Affected Public:* Business or other for profit; *Number of Respondents:* 6,412; *Total Annual Responses:* 746,681; *Total Annual Hours:* 27,096.

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Home Health Agency Survey and Deficiencies Report, Home Health Functional Assessment Instrument and Supporting Regulations in 42 CFR Part 484-1-484.52; *Form No.:* HCFA-1515/1572 (OMB#0938-0355); *Use:* In order to participate in the Medicare program as a Home Health Agency (HHA) provider, the HHA must meet Federal Standards. These forms are used to record information about patients' health and provider compliance with requirements.; *Frequency:* Annually; *Affected Public:* Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 9,942; *Total Annual Responses:* 19,884; *Total Annual Hours:* 19,884.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access HCFA's Web Site address at <http://www.hcfa.gov/regs/prdact95.htm>, or E-mail your request, including your address, phone number, OMB number, and HCFA document identifier, to Paperwork@hcfa.gov, or call the Reports Clearance Office on (410) 786-1326. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the HCFA Paperwork Clearance Officer designated at the following address: HCFA, Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards, Attention: Louis Blank, Room N2-14-26, 7500 Security Boulevard, Baltimore, Maryland 21244-1850

Dated: September 2, 1998.

John P. Burke III,

HCFA Reports Clearance Officer, HCFA Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards.

[FR Doc. 98-24436 Filed 9-10-98; 8:45 am]

BILLING CODE 4120-03-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[HCFA-2029-PN]

RIN 0938-A169

Medicare and Medicaid Programs; Recognition of the Community Health Accreditation Program, Inc. (CHAP) and Joint Commission for Accreditation of Healthcare Organizations (JCAHO) for Hospices

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Proposed notice.

SUMMARY: This notice announces the receipt of applications from CHAP and JCAHO for recognition as national accreditation programs for hospices that wish to participate in the Medicare or Medicaid programs. The Social Security Act requires that the Secretary publish a notice identifying the national accreditation body making the request, describing the nature of the request, and providing a 30-day public comment period.

DATES: Written comments will be considered if we receive them at the appropriate address, as provided below, no later than 5 p.m. on or before October 13, 1998.

ADDRESSES: Mail written comments (one original and three copies) to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: HCFA-2029-PN, 7500 Security Boulevard, Baltimore, Maryland 21244-1850.

If you prefer, you may deliver your written comments (one original and three copies) to one of the following addresses:

Room 309-G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5-09-26, 7500 Security Boulevard, Baltimore, Maryland 21244-1850.

Because of staffing and resource limitations, we cannot accept audio, visual, or facsimile (FAX) copies of comments. In commenting, please refer to file code HCFA-2029-PN. Comments

received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in room 309G of the Department's offices at 200 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (Phone: (202) 690-7890). **FOR FURTHER INFORMATION CONTACT:** Joan C. Berry, (410) 786-7233.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Medicare program, eligible beneficiaries may receive covered services in a hospice provided certain requirements are met. The regulations specifying the Medicare conditions of participation for hospice care are located in 42 CFR part 418. These conditions implement section 1861(dd) of the Social Security Act (the Act), which specifies services covered as hospice care and the conditions that a hospice program must meet in order to participate in the Medicare program. Other relevant sections of the Act are sections 1812(a)(4) and (d) which specify eligibility requirements for the individual and the benefit periods; section 1813(a)(4) which specifies coinsurance amounts; sections 1814(a)(7) and 1814 (i)(1)(A) which contain conditions and limitation on coverage of, and payment for, hospice care; and sections 1862(a)(1), (6), (9) which establish limits on hospice coverage.

Regulations concerning provider agreements are at 42 CFR part 489 and those pertaining to the activities relating to the survey and certification of facilities are at 42 CFR part 488. Our regulations at 42 CFR part 418 specify the conditions that a hospice must meet in order to participate in the Medicare program, the scope of covered services, and the conditions for Medicare payment for facility services.

Generally, in order to enter into an agreement, a hospice must first be certified by a State survey agency as complying with the conditions or standards set forth in part 418 of our regulations. Then, the hospice is subject to regular surveys by a State survey agency to determine whether it continues to meet these requirements. There is an alternative, however, to surveys by State agencies.

Section 1865(b)(1) of the Act permits "accredited" hospices to be exempt from routine surveys by State survey agencies to determine compliance with Medicare conditions of participation. Section 1865(b)(1) of the Act provides that if the Secretary finds that

accreditation of a provider entity by a national accreditation body demonstrates that all applicable conditions are met or exceeded, the Secretary "deems" those requirements to be met by the hospice. Our regulations concerning approval of accrediting organizations are set forth at §§ 488.6 and 488.8. To date, we have not recognized any organization as an accreditation organization for hospices.

II. Approval of Deeming Organizations

Section 1865(b)(2) of the Act further requires that the Secretary's findings concerning review and approval of national accrediting organizations consider, among other factors, the applying accreditation organization's requirements for accreditation, its survey procedures, its ability to provide adequate resources for conducting required surveys and ability to supply information for use in enforcement activities, its monitoring procedures for provider entities found out of compliance with the conditions or requirements, and its ability to provide the Secretary with necessary data for validation.

Section 1865(b)(3)(A) of the Act requires that the Secretary publish, within 60 days of the receipt of an organization's complete application, a notice identifying the national accreditation body making the request, describing the nature of the request, and providing at least a 30-day public comment period. Subsequently, the Secretary has 210 days from the receipt of the request to publish a finding of approval or denial of the application.

The purpose of this notice is to notify the public of the request of CHAP and of JCAHO for approval of their requests that the Secretary find that their separate accreditation programs for hospice care meet or exceed the Medicare conditions. This notice also solicits public comment on the ability of each body's requirements to meet or exceed the Medicare conditions of participation.

III. Evaluation of Deeming Request

On July 6, 1998, CHAP and JCAHO submitted all the necessary information concerning their request to be approved as deeming organizations for hospices to permit us to make a determination. Under section 1865(b)(2) of the Act and our regulations at § 488.8 ("Federal review of accreditation organizations") our review and evaluation of a national accreditation organization will be conducted in accordance with, but not necessarily limited to, the following factors:

- The equivalency of CHAP's and JCAHO's requirements for a hospice to our comparable hospice requirements.

- CHAP's and JCAHO's survey processes, to determine the following:

- The composition of the survey team, surveyor qualifications, and CHAP's and JCAHO's ability to provide continuing surveyor training.

- The comparability of their processes to those of State agencies, including survey frequency, and their ability to investigate and respond appropriately to complaints against accredited facilities.

- Their procedures for monitoring providers or suppliers found by CHAP or JCAHO to be out of compliance with program requirements. (These procedures are used only when CHAP or JCAHO identifies noncompliance. If noncompliance is identified through validation reviews, the survey agency monitors corrections as specified at § 488.7(b)(3).)

- Their ability to report deficiencies to the surveyed facilities and respond to the facility's plan of correction in a timely manner.

- The ability of CHAP and JCAHO to provide us with electronic data in ASCII comparable code and any reports necessary for effective validation and assessment of their survey processes.

- The adequacy of CHAP's and JCAHO's staff and other resources, and their financial viability.

- CHAP's and JCAHO's ability to provide adequate funding for performing required surveys.

- CHAP's and JCAHO's policies with respect to whether surveys are announced or unannounced.

CHAP's and JCAHO's agreement to provide us with a copy of the most current accreditation survey together with any other information related to the survey as we may require (including corrective action plans).

IV. Notice Upon Completion of Evaluation

Upon completion of our evaluation, including evaluation of comments received as a result of this notice, we will publish a notice in the **Federal Register** announcing the result of our evaluation.

(Authority: Sec. 1865(b)(3)(A) of the Social Security Act (42 U.S.C. 1395bb(b)(3)(A)). (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance)

Dated: August 19, 1998.

Nancy-Ann Min DeParle,

Administrator, Health Care Financing Administration.

[FR Doc. 98-24555 Filed 9-10-98; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[HCFA-1097-N]

RIN 0938-AJ19

Medicare Program; September 28, 1998, Meeting of the Practicing Physicians Advisory Council

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notice of meeting.

SUMMARY: In accordance with section 10(a) of the Federal Advisory Committee Act, this notice announces a meeting of the Practicing Physicians Advisory Council. This meeting is open to the public.

DATES: The meeting is scheduled for September 28, 1998, from 8:30 a.m. until 5 p.m., E.S.T.

ADDRESSES: The meeting will be held in the Auditorium, 1st Floor, Health Care Financing Administration Building, 7500 Security Boulevard, Baltimore, Maryland 21244.

FOR FURTHER INFORMATION CONTACT: Aron Primack, MD, MA, FACP, Executive Director, Practicing Physicians Advisory Council, Room 435-H, Hubert H. Humphrey Building, 200 Independence Avenue, S.W., Washington, DC 20201, (202) 690-7874.

SUPPLEMENTARY INFORMATION: The Secretary of the Department of Health and Human Services (the Secretary) is mandated by section 1868 of the Social Security Act to appoint a Practicing Physicians Advisory Council (the Council) based on nominations submitted by medical organizations representing physicians. The Council meets quarterly to discuss certain proposed changes in regulations and carrier manual instructions related to physicians' services, as identified by the Secretary. To the extent feasible and consistent with statutory deadlines, the consultation must occur before publication of the proposed changes. The Council submits an annual report on its recommendations to the Secretary and the Administrator of the Health Care Financing Administration not later than December 31 of each year.

The Council consists of 15 physicians, each of whom has submitted at least 250

claims for physicians' services under Medicare or Medicaid in the previous year. Members of the Council include both participating and nonparticipating physicians, and physicians practicing in rural and underserved urban areas. At least 11 members must be doctors of medicine or osteopathy authorized to practice medicine and surgery by the States in which they practice. Members have been invited to serve for overlapping 4-year terms. In accordance with section 14 of the Federal Advisory Committee Act, terms of more than 2 years are contingent upon the renewal of the Council by appropriate action before the end of the 2-year term.

The Council held its first meeting on May 11, 1992.

The current members are: Jerold M. Aronson, M.D.; Richard Bronfman, D.P.M.; Wayne R. Carlsen, D.O.; Gary C. Dennis, M.D.; Mary T. Herald, M.D.; Ardis Hoven, M.D.; Sandra Hullett, M.D.; Jerilynn S. Kaibel, D.C.; Marie G. Kuffner, M.D.; Marc Lowe, M.D.; Derrick K. Latos, M.D.; Sandra B. Reed, M.D.; Susan Schooley, M.D.; Maisie Tam, M.D.; and Kenneth M. Viste, Jr., M.D. The chairperson is Kenneth M. Viste, Jr., M.D. The vice chairperson is Marie G. Kuffner, M.D.

Council members will receive updates on documentation guidelines, Y2K, and coverage procedure. The agenda will provide for discussion and comment on the following topic(s)—

- Advanced Beneficiary Notices;
- PRO 6th Scope of Work; and
- Regulatory Workload for Physicians.

Individuals or organizations that wish to make 5-minute oral presentations on the agenda issues should contact the Executive Director by 12 noon, September 18, 1998, to be scheduled. The number of oral presentations may be limited by the time available. A written copy of the oral remarks should be submitted to the Executive Director no later than 12 noon, September 23, 1998. Anyone who is not scheduled to speak may submit written comments to the Executive Director by 12:00 noon, September 23, 1998. The meeting is open to the public, but attendance is limited to the space available.

(Section 1868 of the Social Security Act (42 U.S.C. 1395ee) and section 10(a) of Public Law 92-463 (5 U.S.C. App. 2, section 10(a)); 45 CFR Part 11.)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: September 4, 1998.

Nancy-Ann Min DeParle,

Administrator, Health Care Financing Administration.

[FR Doc. 98-24506 Filed 9-10-98; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request

SUMMARY: Under the provisions of Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995*, the National Institutes of Health (NIH), Office of the Director (OD), Office of Extramural Research (OER), Office of Policy for Extramural Research Administration (OPERA) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on May 5, 1998, pages 24813-24814 and allowed 60-days for public comments. No public comments were received. The purpose of this notice is to allow an additional 30-days for public comments. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection

Title: Responsibility of Applicants for Promoting Objectivity in Research for which Public Health Service (PHS) Funding is Sought: 42 CFR Part 50 Subpart F and Responsible Prospective Contractors: 45 CFR Part 94. **Type of Information Collection Request:** Extension of a currently approved collection, OMB No. 0925-0417, expiration date 09/30/98. **Need and Use of Information Collection:** This is a request for OMB approval for the information collection and recordkeeping requirements contained in the final rule 42 CFR Part 50 Subpart F and Responsible Prospective Contractors: 45 CFR Part 94. The purpose of the regulations is to promote objectivity in research by requiring institutions to establish standards which ensure that there is no reasonable expectation that the design, conduct, or reporting of research will be biased by a conflicting financial interest of an investigator.

Frequency of Response: On occasion. **Affected Public:** Individuals or households; Business or other for-profit; Not-for-profit institutions; and State, Local or Tribal Government. **Type of Respondents:** Any public or private entity or organization. The annual reporting burden is as follows: **Estimated Number of Respondents:** 57,235; **Estimated Number of Responses per Respondent:** 10; **Average Burden Hours Per Responder:** 20; **Estimated Total Annual Burden Hours Requested:** 171,110. The annualized cost to respondents is estimated at: \$5,068,850. There are no Capital Costs, Operating Costs and/or Maintenance Costs to report.

Request for Comments

Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points. (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, D.C. 20503, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Thomas F. McCormack, Assistant Grant's Policy Officer, Office of Extramural Research, Office of Policy for Extramural Research Administration, 6701 Rockledge Drive, Bethesda, MD 20892, or call non-toll-free number (301) 435-0935 or E-mail your request, including your address, to: TM102d@NIH.gov

Comments Due Date

Comments regarding this information collection are best assured of having

their full effect if received on or before October 13, 1998.

Dated: September 4, 1998.

Diana Jaeger,

Acting Director, Office of Policy for Extramural Research Administration.

[FR Doc. 98-24369 Filed 9-10-98; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes of Health Clinical Center (NIHCC): Opportunity for Cooperative Research and Development Agreement (CRADA) in the Fields of Magnetic Resonance Imaging, Magnetic Resonance Spectroscopy, Molecular Imaging, Image Processing, and Surgery Under Image Guidance

AGENCY: Radiology Department, NIHCC, NIH, DHHS.

ACTION: Notice of CRADA Opportunity.

SUMMARY: The Radiology Department of the National Institutes of Health Clinical Center (NIHCC), seeks Cooperative Research and Development Agreements (CRADAs) with one or more medical equipment manufacturers to collaborate on research projects designed to develop improved technologies for radiological diagnosis and treatment. The term of the CRADA will be up to four (4) years.

DATES: Interested parties should submit a brief statement indicating: (i) area(s) of proposed research collaboration and (ii) interest in submitting a formal proposal. Statements of interest should be submitted to NIHCC in writing no later than December 10, 1998. Parties will then have an additional thirty (30) days in which to submit a formal proposal.

ADDRESSES: Inquiries and proposals regarding this opportunity should be addressed to Steve Galen, Technology Development Coordinator, National Institutes of Health, Warren Grant Magnuson Clinical Center, 6011 Executive Boulevard, suite 559B, Rockville, MD 20852. Phone: (301) 594-4509, FAX (301) 402-2143.

SUPPLEMENTARY INFORMATION: A CRADA is the anticipated joint agreement to be entered into by NIHCC pursuant to the Federal Technology Transfer Act of 1986 as amended by the National Technology Transfer Act (Pub.L. 104-113 (Mar. 7, 1996)) and by Executive Order 12591 of April 10, 1987.

The CRADA objective is the rapid publication of research findings and the timely commercialization of improved diagnostic and treatment strategies in

the fields of Magnetic Resonance Imaging, Magnetic Resonance Spectroscopy, Molecular Imaging, Image Processing, and Surgery Under Image Guidance. Particular emphasis is placed on discoveries that enhance clinical research.

Under a CRADA, the NIHCC can offer selected collaborators access to facilities, staff, materials, and expertise. The collaborator may contribute facilities, staff, materials, expertise and funding to the collaboration. The NIHCC cannot contribute funding. The CRADA collaborator may elect an option to an exclusive or non-exclusive license to Government intellectual property rights arising under the CRADA and may qualify as a co-inventor of new technology developed under the CRADA.

CRADA proposals will be evaluated under the following criteria:

- Corporate research and development competencies.
- Demonstrated abilities to productively collaborate in research programs.
- The nature of resources to be contributed to the collaboration.
- Key staff expertise, qualifications and relevant experience.
- Willingness to assign technical staff to on-site collaborative efforts.
- Ability to effectively commercialize new discoveries.

Dated: August 26, 1998.

Kathleen Sybert,

Acting Director, Technology Development and Commercialization Branch, National Institutes of Health.

[FR Doc. 98-24370 Filed 9-10-98; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by agencies of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852-3804; telephone: 301/496-7057; fax: 301/402-0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

LIF And Related Cytokines That Operate Through The gp130 Receptor Pathway As A Means To Enhancing Embryo Implantation In Mammals And As An Alternative To Using Estrogen

CL Stewart, T Shatzer, T Sullivan, JR Chen, L Hernandez (NCI)

DDHS Reference No. E-166-98/0 filed 06 Jul 98

Licensing Contact: Dennis Penn, 301/496-7056 ext. 211

The present invention is directed to the use of Leukemia Inhibitory Factor (LIF), or certain other cytokines as a means for enhancing successful embryo implantation. This discovery may lead to increased success rates in normal embryonic development in human and non-human embryos following in vitro fertilization. The present invention, tested in LIF deficient mice, confirms that single injections of LIF lead to implantation and the embryo's normal development to birth. LIF may be useful as a replacement for estrogen in inducing embryo implantation. The invention indicates that LIF can substitute for estrogen in animal models, in regulating the receptibility of the uterus to the implanting embryo, and results in a significant increase in successful implantation. This technology has both human and veterinary applications.

Protection Of Neural Cells From Catecholamine-Induced Apoptosis By Macrophage Migration Inhibitory Factor (MIF)

G Wistow (NEI)

DDHS Reference No. E-028-98/0 filed 28 Jul 98

Licensing Contact: Stephen Finley, 301/496-7735 ext. 215

Macrophage Migration Inhibitory Factor (MIF) was shown to have neuroprotective properties with important implications for conditions such as Parkinson's Disease (PD). MIF is widely distributed in mammalian tissues. However, in vivo studies show that while the levels of MIF expression significantly decrease with age in most tissues, including lens, liver and kidney,

it is maintained at high levels in neural tissues, brain and retina. This suggests the possibility of an important role for MIF in aging neural tissues. It was also shown that MIF has catalytic enzyme activity towards the toxic quinones dopaminechrome (DNC), epinephrinechrome (EC) and norepinephrine (NEC) which arises by oxidation of the catecholamine neurotransmitters dopamine, epinephrine and norepinephrine. These catecholamines induce cell death by apoptosis in cultured neural cells and other cell types. It was shown that in cell culture, MIF can block this catecholamine-induced cell death. Death of catecholaminergic neurons is an important feature of PD in human brain. This suggests a physiological and/or therapeutic role for MIF in protection of neural and other cells from apoptosis induced by toxic quinones. Decreased levels of MIF in the aging brain may be a risk factor for PD and similar neurodegenerative disorders. MIF may also be involved in the synthesis of neuromelanin, which is prominent in the aging human substantia nigra, since the quinones DNC, EC and NEC are known neuromelanin precursors.

A surprising additional property of MIF was also observed. Lens epithelial cell cultures differentiated into neuronlike cells, containing neuronal cell markers, axons, and processes, upon the constitutive expression of endogenous recombinant MIF. Thus, in addition to its neuroprotective properties, MIF has potential to contribute to culture methods for neural cells that may be useful in transplantation.

G-Protein Coupled Receptor Antagonists

N Tarasova, SJ Michejda (NCI)

Serial No. 60/076,105 filed 27 Feb 98

Licensing Contact: Carol Salata, 301/496-7735 ext. 232

This invention is a potentially broadly applicable method of disrupting the functioning of G-protein coupled receptors (GPCR). GPCRs are a large family of receptors involved in the regulation of physiological activities. GPCRs have seven transmembrane regions, i.e. they cross the cell membrane seven times. The inventors have found that if a peptide consisting of one of the transmembrane regions of a GPCR with an added charged amino acid on the extracellular side, is brought into contact with a cell having the same GPCR, the functioning of the GPCR is disrupted. It is thought that the added peptide interferes with the correct assembly of the GPCR. Cells containing

the CXCR4 receptor, a co-receptor with CD4 for the entry of certain strains of HIV-1 into T-cells, are much less receptive to infection by HIV in the presence of a particular transmembrane peptide from the CXCR4 receptor. Therefore, this method of disrupting the functioning of particular GPCRs could be used to treat diseases which are mediated by functioning GPCRs, such as HIV.

Inhibition of HGF/SF Cleavage/Activation by Suramin and Other Related Small Molecules

C Webb, ME Jeffers, G Czerwinski, CJ Michejda,

GF Vande Woude (NCI)

Serial No. 60/075,994 filed 26 Feb 98

Licensing Contact: Jaconda Wagner, 301/496-7735 ext. 284

HGF/SF, which is the ligand for the tyrosine kinase receptor encoded by the c-Met proto-oncogene, is involved in tumor establishment, progression and metastasis. HGF/SF is synthesized as a 90 kDa single chain precursor polypeptide (pro-HGF/SF) which is devoid of biological activity. The critical step in HGF/SF activation is proteolytic cleavage generating an β heterodimer in which an β chain of 60 kDa and a β chain of 32-36 kDa are bound to one another by a disulfide bridge. The cleavage/activation of pro-HGF/SF represents the initial stage of HGF/SF-met activation and provides a possible point for interference by potential inhibitors.

This invention is based on the discovery that suramin and related polysulfonated compounds inhibit cleavage of pro-HGF/SF. The invention provides an efficient assay for identifying inhibitors of HGF/SF activation. The invention also describes suramin-like compounds that can be used to inhibit HGF/SF activation, thereby inhibiting tumor growth and metastasis. These compounds are less toxic than comparable molecules.

Vaccines For Blocking Transmission of Plasmodium vivax

DC Kaslow, T Tsuboi, M. Torii (NIAID)

Serial No. 60/067,596 filed 05 Dec 97

Licensing Contact: Carol Salata, 301/496-7735 ext. 232

This invention relates to novel methods and compositions for blocking transmission of *Plasmodium vivax* which cause malaria. In particular, Pvs25 and Pvs28 polypeptides, variants and fusion proteins thereof, are disclosed which, when administered to a susceptible organism, induce an immune response against a 25 kD and

28 kD protein, respectively, on the surface of *Plasmodium vivax* zygotes and ookinetes. This immune response in the susceptible organism can block transmission of malaria.

Stromal Cell Derived Factor-1 (SDF-1) And Method of Use For Diagnostic And Prognostic Indicator Or AIDS Pathogenesis

C. Winkler, S O' Brien (NCI)

Serial No. 60.063,832 filed 30 Oct 97

Licensing Contact: Carol Salata, 301/496-7735 ext. 232

Stromal cell derived factor-1 (SDF-1) is the principal ligand for CXCR4 (a 7-transmembrane G/coupled receptor) which, with CD4, provides an entry port for T-tropic HIV-1, a variety that frequently develops in AIDS patients just prior to T-lymphocyte depletion. This invention is based on the discovery of a correlation between the presence of a mutation at one nucleotide position of the 3'untranslated region of the SDF1 gene and delayed progression to AIDS and death due to HIV infection. Based on this discovery, it is the object of the present invention to provide diagnostic and therapeutic approaches to treating HIV infection by diagnosing the mutation and down regulating the CXCR4 receptor with native or synthetic SDF-1.

Recominant Adenoviral Targeting Vector

SE Spence, JR Keller, JS Smith (NCI)

Serial No. 60/061,587 filed 10 Oct 97

Licensing Contact: Elaine Gese, 301/496-7056 ext. 282

The current invention embodies recombinant adenoviral vectors for use in targeted gene transfer. The method by which these vectors are generated involves no molecular modifications to the adenovirus genome, and allows for the production of vectors targeted specifically to virtually any cell line of choice. Specifically, the vectors are generated by directly linking biotin to the capsid of adenovirus particles. The particles are then treated with streptavidin and subsequently incubated with a biotinylated targeting moiety which is capable of recognizing a specific marker which is expressed on the surface of selected cells.

The resulting adenoviral vectors would appear to be of value for use in gene transfer, and can be targeted to virtually any cell type of interest via incubation with a specific targeting moiety.

To date, the inventors have demonstrated that these vectors can be specifically directed to target and infect

hematopoietic cell lines which display the c-kit receptor, and are capable of achieving high levels of expression in these cell lines. Also, these vectors can be specifically directed to cell surface markers such as CD34, CD 44 and others through antibodies directly attached to the biotinylated adenoviral vectors. Such gene transfer may represent a potential means by which various diseases, including immunodeficiency diseases, blood cell disorders, AIDS, and various cancers, could be treated. Therefore, the current invention appears to represent a novel gene therapy approach upon which the development of specific therapies against a broad range of diseases may be based.

Recombinant Proteins of a Pakistani Strain of Hepatitis E and Their Use in Diagnostic Methods and Vaccines

SA Tsarev, SU Emerson, RH Purcell (NIAID)

Serial No. 08/809,523 filed 28 Jun 97; PCT filed

Licensing Contact: Carol Salata, 301/496-7735, ext. 232

A strain of hepatitis E virus from Pakistan (SAR-55) implicated in an epidemic of enterically transmitted non-A, non-B hepatitis, now called hepatitis E, is disclosed. The invention relates to the expression of the whole structural region of SAR-55, designated open reading frame 2 (ORF-2), in a eukaryotic expression system. The expressed protein is capable of forming HEV virus-like particles which can serve as an antigen in diagnostic immunoassays and as an immunogen or vaccine to protect against infection by hepatitis E.

Chimeric Gag Pseudovirions

GJ Tobin, MA Gonda (NCI)

Serial No. 08/857,385 filed 15 May 97

Licensing Contact: J. Peter Kim, 301/496-7056 ext. 264

The human immunodeficiency virus (HIV) is the causative agent of acquired immunodeficiency syndrome (AIDS). The HIV virion basically consists of a viral core and envelope. The core consists predominantly of gag- and pol-encoded proteins and the viral RNA. Expression of recombinant Gag precursor proteins can lead to assembly and budding of virus-like particles (pseudovirions). The production of Gag-based pseudovirions in mammalian and insect cell systems using recombinant virus vectors provides a novel technology for engineering recombinant protein-based particulate vaccines for HIV and other viruses. The incorporation of additional viral or cellular, peptides and polypeptides may be advantageous in vaccine

preparations, since they may contain antigenic epitopes that may play a role in inducing protection from infection or disease.

The subject invention provides chimeric nucleic acids comprising a retroviral gag sequence, a target nucleic acid sequence derived from a nucleic acid encoding a fusion partner, and a frame shift site. Expression of the chimeric gene cassette results in packaging the fusion partner into the Gag pseudovirion. Suitable fusion partners can be derived from any protein of interest which has a biological activity or which elicits a cellular or humoral immune response.

Method For Measuring Mechanical Properties of the Collagen Network in Cartilage

PJ Bassler, A Maroudas (NICHD)

Serial No. 60/038,005 filed 14 Feb 97; PCT/US98/02727 filed 17 Mar 98

Licensing Contact: John Fahner-Vihtelic, 301/496-7735 ext. 270

The present application describes a methodology for assessing the mechanical integrity of extracellular matrices such as cartilage. Specifically, the invention teaches how to characterize the mechanical integrity of the collagen network as well as the swelling properties of the proteoglycans trapped within it. This is done by performing an osmotic stress titration experiment on a tissue specimen, and interpreting the results using a simple mathematical model. This invention provides the necessary experimental and theoretical tools to understand functional consequences of: (1) endogenous changes in cartilage structure that occur normally due to growth or aging; (2) exogenous changes in cartilage structure due to the addition of biochemical agents or caused by genetic manipulations; and (3) inherent differences between cartilage specimens that are obtained from different joints within the same subject or from different subjects. These methods can also be applied to characterize the mechanical integrity of tissue cultured or "tissue engineered" cartilage.

Vectors for Delivering Viral and Oncogenic Inhibitors

SM Rybak, A Cara, GL Gusella, DL Newton (NCI)

Serial No. 60/022,052 filed 22 Jul 96; PCT/US97/12637 filed 17 Jul 97

Licensing Contact: Carol Salata, 301/496-7735, ext. 232

The invention concerns cell transduction vectors which are capable of inhibiting viral replication in cells

transduced with these vectors, and which also are capable of inhibiting the growth of cancer cells. Specifically, these expressions vectors produce protective genes which interfere with viral replication. These genes are tightly regulated by HIV-1 Tat and Rev proteins, which if produced after infection can induce expression of the protective genes. The vectors contain either a single gene (delta-gag), or a combination of two different genes (delta-gag and RNase) which interfere with HIV-1 replication at different stages of the HIV-1 life cycle. Following transduction of target cells, the mRNA for the protective genes is incorporated into the newly budding virion along with the viral genomic mRNA. Following infection of neighboring cells, the mRNA for the protective gene can be reverse transcribed and integrated into these cells, thereby increasing the proportion of cells containing the protective gene.

In providing protection against viral replication, the vectors embodied in this invention could be used in gene therapy against HIV and against other viral diseases. In addition, the vectors could be used for introducing specific genes into neoplastic cells and thereby be effective in treating cancer and other diseases.

Anti-Viral Pharmaceutical Compositions Containing 1,2-Dithiane Compounds and Methods of Using Thereof

WG Rice, R Schultz, D Baker, LE Henderson (NCI)

Serial No. 60/021,665 filed 05 July 96; PCT/US97/10870 filed 03 Jul 97

Licensing Contact: J. Peter Kim, 301/496-7056 ext. 264

Certain highly conserved structures, known as retroviral-type CCHC zinc fingers, are found in the nucleocapsid proteins of all retroviruses, including HIV-1 and HIV-2. It is known that these zinc finger structures perform essential functions in viral infection and replication.

The subject invention provides for pharmaceutical compositions comprising dithiane dioxide compounds which are useful as antiviral agents and are particularly effective at inhibiting the replication of retroviruses and for treating retroviral pathologies. The 1,2-dithiane compounds target the zinc fingers of the nucleocapsid protein. These compositions represent potential agents for prevention and treatment of HIV and of other retroviral diseases. The subject invention also embodies methods for the administration of these

compositions, a kit containing these compositions, and methods for the inactivation of contaminating retrovirus in samples of potentially infected body fluids.

Dated: September 3, 1998.

Jack Spiegel,

Director, Division of Technology Development and Transfer, Office of Technology Transfer.
[FR Doc. 98-24368 Filed 9-10-98; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Neurological Disorders and Stroke, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke October 4-6, 1998.

Date: October 4-6, 1998.

Closed: October 4, 1998, 7:00 PM to 10:00 PM.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Building 31, Conference Room 6C9, 31 Center Drive, Bethesda, MD 20892.

Open: October 5, 1998, 8:00 AM to 4:30 PM.

Agenda: To discuss program planning and program accomplishments.

Place: National Institutes of Health, Building 31, Conference Room 6C9, 31 Center Drive, Bethesda, MD 20892.

Closed: October 5, 1998, 4:30 PM to 5:45 PM.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Building 31, Conference Room 6C9, 31 Center Drive, Bethesda, MD 20892.

Closed: October 6, 1998, 8:30 AM to adjournment.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Building 31, Conference Room 6C9, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Story C. Landis, PhD, Director, Division of Intramural Activities, NINDS, National Institutes of Health, Building 36, Room 5A05, Bethesda, MD 20892, 301-435-2232.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: September 3, 1998.

Anna Snouffer,

Acting Committee Management Officer, NIH.

[FR Doc. 98-24365 Filed 9-10-98; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Working Group on Public Participation in NIH Activities; Notice of Meeting

The Office of the Director (OD), National Institutes of Health (NIH), announces a meeting on public participation in NIH activities. The meeting is scheduled for September 23, 1998, from 9:00 a.m. until 4:00 p.m., Conference Room 10, Building 31C, Sixth Floor, 9000 Rockville Pike, Bethesda, Maryland. At the meeting, individual public participants invited by the NIH will discuss future activities and responsibilities of the proposed NIH Director's Council of Public Representatives, and the NIH Offices of Public Liaison. The NIH is the lead Federal agency that provides major support for medical research leading to the improvement of the nation's health. The NIH Director's Council of Public Representatives will serve as a forum for discussing issues and concerns and exchanging viewpoints that are important to NIH policies, programs, and research priorities. The NIH Offices of Public Liaison are expected to strengthen collaboration between the NIH and the public.

Establishment of the Director's Council of Public Representatives and the Offices of Public Liaison were recommendations from the National Academy of Sciences Institute of Medicine's report—*Scientific Opportunities and Public Needs: Improving Priority Setting and Public Input at the National Institutes of Health*. The full text of the report is available on-line at the following site of the Institute of Medicine, National Academy of Sciences: <http://www.nap.edu/readingroom/books/nih/>. Future activities will follow from the NIH's Office of Public Liaison and the Director's Council of Public Representatives.

The entire meeting is open to the public; however, seating is limited and will be on a first-come, first-served basis. There will be an overflow room available to listen to and view the proceedings of the meeting. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the contact person listed below in advance of the meeting.

Individual public participants invited by the NIH will be asked to express their views on matters related to the following:

Director's Council of Public Representatives

- What should be the responsibilities and activities of the Director's Council of Public Representatives?
- What is the role of this Director's Council of Public Representatives as compared to the role of other NIH Advisory Councils?
- Describe some activities that could be undertaken by the Director's Council of Public Representatives to encourage and improve public participation in NIH programs.
- What processes, mechanisms, and criteria should be used for identifying appropriate candidates to serve on the Director's Council of Public Representatives?

The NIH Offices of Public Liaison

- What should be the responsibilities and activities of the NIH Offices of Public Liaison?
- Should all of the Institute-level Offices of Public Liaison perform the same activities?
- How should the activities of the OD Office of Public Liaison differ from those of the Institute-level Offices of Public Liaison?
- How should NIH make the existence of the Offices of Public Liaison known and to whom?

- How should the Offices of Public Liaison reach out to draw the public into NIH activities?

- What programs and activities should the Offices of Public Liaison consider that have been particularly successful in providing public viewpoints to the NIH?

Additional Questions

- What should be the relationship between the Offices of Public Liaison and the Director's Council of Public Representatives?
- What programs from other research agencies or organizations could serve as models for either the Director's Council of Public Representatives or the Offices of Public Liaison in involving the public more effectively in NIH activities?
- What do various segments of the public need and want to know about the NIH's activities, research, and operations that could be imparted through the Director's Council of Public Representatives or the Offices of Public Liaison?
- How can the Director's Council of Public Representatives and/or the Offices of Public Liaison help in conveying this information to those segments of the public?
- Identify activities to disseminate information about and from the Offices of Public Liaison and the Director's Council of Public Representatives to the appropriate public audiences.

Discussion of these questions will help NIH in identifying people to serve on the Director's Council of Public Representatives and will be used by the Director's Council of Public Representatives and the Offices of Public Liaison to identify activities and frame the issues for discussion at future public meetings.

Public comments and requests for additional information should be mailed to Ms. Anne Thomas, Associate Director for Communications, National Institutes of Health, Building 1, Room 344, Bethesda, MD 20892.

Dated: September 2, 1998.

Anne Thomas,

Associate Director for Communications, NIH.

[FR Doc. 98-24463 Filed 9-10-98; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. Appendix 2), 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 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: Microbiological and Immunological Sciences Special Emphasis Panel

Date: September 9, 1998.

Time: 11:00 AM to 12:30 PM.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: William C. Branche, PHD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4182, MSC 7808, Bethesda, MD 20892, (301) 435-1148.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine, 93.306; 93.333, Clinical Research, 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: September 3, 1998.

Anna Snouffer,

Program Analyst, NIH/CMO.

[FR Doc. 98-24366 Filed 9-10-98; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4341-N-26]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Mark Johnston, room 7256, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410; telephone (202) 708-1226; TTY

number for the hearing- and speech-impaired (202) 708-2465 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1-800-927-7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Steward B. McKinney Homeless Assistant Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1998 Court Order in *National Coalition for the Homeless v. Veterans Administration*, No. 88-2503-OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Brian Rooney, Division of Property Management, Program Support Center, HHS, room 5B-41, 5600 Fishers Lane, Rockville, MD 20857; (301) 443-2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if

subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1-800-927-7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: ENERGY: Ms. Marsha Penhaker, Department of Energy, Facilities Planning and Acquisition Branch, FM-20, Room 6H-058, Washington, DC 20585; (202) 586-0426; GSA: Mr. Brian K. Polly, Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th and F Streets, NW, Washington, DC 20405; (202) 501-2059; INTERIOR: Ms. Lola D. Kane, Department of the Interior, 1849 C Street, NW, Mail Stop 5512-MIB, Washington, DC 20240; (202) 208-4080; NAVY: Mr. Charles C. Cocks, Department of the Navy, Director, Real Estate Policy Division, Naval Facilities Engineering Command, Code 241A, 200 Stovall Street, Alexandria, VA 22332-2300; (703) 325-7342; VA: Mr. George L. Swarcman, Director, Land Management Service, 184A, Department of Veterans Affairs, 811 Vermont Avenue, NW, Room 414, Lafayette Bldg., Washington, DC 20420; (202) 565-5941; (These are not toll-free numbers).

Note: Property Number 879630011 (Bldg. 439), Galveston, Texas was published in error on 8/28/98.

Dated: September 3, 1998.

Fred Karnas, Jr.,

Deputy Assistant Secretary for Economic Development.

TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM FEDERAL REGISTER REPORT FOR 09/11/98

Suitable/Available Properties

Buildings (by State)

California

Visitor Motel—Upper Kaweah
Sequoia National Park
Three Rivers CA 93271—
Landholding Agency: Interior
Property Number: 619720007
Status: Unutilized

Comment: 39,403 sq. ft., wood, 2-story, needs repair, presence of asbestos/lead paint, off-site use only

Illinois

Bldg. 207

Argonne National Laboratory
Argonne
Co: DuPage IL 60439—
Landholding Agency: Energy
Property Number: 419830005
Status: Excess

Comment: consist of 54 ind. wheel-less trailer chassis bolted together to form 6 clusters, off-site use only

Indiana

Bldg. 105, VAMC

East 38th Street
Marion
Co: Grant IN 46952—
Landholding Agency: VA
Property Number: 979230006
Status: Excess

Comment: 310 sq. ft., 1 story stone structure, no sanitary or heating facilities, Natl Register of Historic Places

Bldg. 140, VAMC

East 38th Street
Marion
Co: Grant IN 46952—
Landholding Agency: VA
Property Number: 979230007
Status: Excess

Comment: 60 sq. ft., concrete block bldg., most recent use—trash house

Bldg. 7

VA Northern Indiana Health Care System
Marion Campus, 1700 East 38th Street
Marion
Co: Grant IN 46953—
Landholding Agency: VA
Property Number: 979810001
Status: Underutilized

Comment: 16,864 sq. ft., presence of asbestos, most recent use—psychiatric ward, National Register of Historic Places

Bldg. 10

VA Northern Indiana Health Care System
Marion Campus, 1700 East 38th Street
Marion
Co: Grant IN 46953—
Landholding Agency: VA
Property Number: 979810002
Status: Underutilized

Comment: 16,361 sq. ft., presence of asbestos, most recent use—psychiatric ward, National Register of Historic Places

Bldg. 11

VA Northern Indiana Health Care System
Marion Campus, 1700 East 38th Street
Marion
Co: Grant IN 46953—
Landholding Agency: VA
Property Number: 979810003
Status: Underutilized

Comment: 16,361 sq. ft., presence of asbestos, most recent use—psychiatric ward, National Register of Historic Places

Bldg. 18

VA Northern Indiana Health Care System
Marion Campus, 1700 East 38th Street
Marion
Co: Grant IN 46953—
Landholding Agency: VA
Property Number: 979810004
Status: Underutilized

Comment: 13,802 sq. ft., presence of asbestos, most recent use—psychiatric ward, National Register of Historic Places

Bldg. 25

VA Northern Indiana Health Care System
Marion Campus, 1700 East 38th Street
Marion
Co: Grant IN 46953—
Landholding Agency: VA
Property Number: 979810005
Status: Unutilized

Comment: 32,892 sq. ft., presence of asbestos, most recent use—psychiatric ward, National Register of Historic Places

Maryland

Former Physioc Property

NPS Tract 402-29
Jugtown
Co: Washington MD 21713—
Landholding Agency: Interior
Property Number: 619820005
Status: Excess

Comment: 227 sq. ft. stone cabin, off-site use only

Massachusetts

Roberts—Tract #15-2352

Pearsall Drive
Truro
Co: Barnstable MA 02666—
Landholding Agency: Interior
Property Number: 619820012
Status: Unutilized

Comment: 830 sq. ft., needs rehab, presence of lead paint, most recent use—residence, off-site use only

Mississippi

Quarters #196
Dancy District, Natchez Tract
Mantee
Co: Webster MS 39751—
Landholding Agency: Interior
Property Number: 619820008
Status: Excess

Comment: 1200 sq. ft., needs rehab, off-site use only

New Jersey

Former Tyberg Residence
National Park Service
Wallpack
Co: Sussex NJ 07881—
Landholding Agency: Interior
Property Number: 619720053
Status: Unutilized

Comment: most recent use—housing, off-site use only

New Mexico

Gran Quivira Visitor Station
Gran Quivira Ruins, SR55
Mountainair
Co: Torrance NM 87036—
Landholding Agency: Interior
Property Number: 619820003
Status: Unutilized

Comment: 1121 sq. ft., stone, presence of asbestos, off-site use only

Pennsylvania

Former Florio House
National Park Service
Bushkill
Co: Monroe PA 18324—
Landholding Agency: Interior
Property Number: 619720050
Status: Unutilized

Comment: 936 sq. ft. frame, most recent use—housing, off-site use only

Former Hardtla House

Raymondskill
Milford
Co: Pike PA
Landholding Agency: Interior
Property Number: 619720051
Status: Unutilized

Comment: 1527 sq. ft. frame, 2-story, needs repair, most recent use—housing, off-site use only

Former Hickman House

National Park Service
Bushkill
Co: Monroe PA 18324—
Landholding Agency: Interior
Property Number: 619720052
Status: Unutilized

Comment: approx. 1604 sq. ft. frame, 2-story, most recent use—housing, off-site use only

Bldg. 25—VA Medical Center
Delafield Road
Pittsburgh

Co: Allegheny PA 15215—
Landholding Agency: VA
Property Number: 979210001
Status: Unutilized
Comment: 133 sq. ft., one story brick guard house, needs rehab

Bldg. 3, VAMC

1700 South Lincoln Avenue
Lebanon
Co: Lebanon PA 17042—
Landholding Agency: VA
Property Number: 979230012
Status: Underutilized

Comment: portion of bldg. (3850 and 4360 sq. ft.), most recent use—storage, second floor—lacks elevator access

Virginia

Nichols Property
Rt. 2, Box 554
Galax
Co: Grayson VA 24333—
Landholding Agency: Interior
Property Number: 619640009
Status: Unutilized

Comment: 1520 sq. ft. residence, off-site use only

Golding Property

Rt. 2, Box 555
Galax
Co: Grayson VA 24333—
Landholding Agency: Interior

Property Number: 619640010
 Status: Unutilized
 Comment: 2224 sq. ft. residence, needs repair, barn, rental cottage, shed, off-site use only

Former Mayhew Property
 NPS Tract 475-27
 Catawba
 Co: Botetourt VA 24070-
 Landholding Agency: Interior
 Property Number: 619820004
 Status: Excess
 Comment: 936 sq. ft. cabin, off-site use only

West Virginia
 Emit Jennings House
 New River Gorge National River
 Huffman Drive
 McCreery
 Co: Raleigh WV 25934-
 Landholding Agency: Interior
 Property Number: 619740002
 Status: Excess
 Comment: 1400 sq. ft. concrete block, needs rehab, off-site use only

Webb House
 New River Gorge National River
 Rt. 41 North
 McCreery
 Co: Raleigh WV 25934-
 Landholding Agency: Interior
 Property Number: 619740003
 Status: Excess
 Comment: 288 sq. ft. dwelling, off-site use only

Gilliam House
 New River Gorge National River
 Rt. 41 North
 McCreery
 Co: Raleigh WV 25934-
 Landholding Agency: Interior
 Property Number: 619740004
 Status: Excess
 Comment: 448 sq. ft. dwelling, off-site use only

Wisconsin
 Bldg. 8
 VA Medical Center
 County Highway E
 Tomah
 Co: Monroe WI 54660-
 Landholding Agency: VA
 Property Number: 979010056
 Status: Underutilized
 Comment: 2200 sq. ft., 2 story wood frame, possible asbestos, potential utilities, structural deficiencies, needs rehab.

Land (by State)
 Alabama
 VA Medical Center
 VAMC
 Tuskegee
 Co: Macon AL 36083-
 Landholding Agency: VA
 Property Number: 979010053
 Status: Underutilized
 Comment: 40 acres, buffer to VA Medical Center, potential utilities, undeveloped.

California
 Land
 4150 Clement Street
 San Francisco
 Co: San Francisco CA 94121-

Landholding Agency: VA
 Property Number: 979240001
 Status: Underutilized
 Comment: 4 acres; landslide area.

Iowa
 40.66 acres
 VA Medical Center
 1515 West Pleasant St.
 Knoxville
 Co: Marion IA 50138-
 Landholding Agency: VA
 Property Number: 979740002
 Status: Unutilized
 Comment: golf course, easement requirements

Maryland
 VA Medical Center
 9500 North Point Road
 Fort Howard
 Co: Baltimore MD 21052-
 Landholding Agency: VA
 Property Number: 979010020
 Status: Underutilized
 Comment: Approx. 10 acres, wetland and periodically floods, most recent use—dump site for leaves.

Texas
 Land
 Olin E. Teague Veterans Center
 1901 South 1st Street
 Temple
 Co: Bell TX 76504-
 Landholding Agency: VA
 Property Number: 979010079
 Status: Underutilized
 Comment: 13 acres, portion formerly landfill, portion near flammable materials, railroad crosses property, potential utilities.

Wisconsin
 VA Medical Center
 County Highway E
 Tomah
 Co: Monroe WI 54660-
 Landholding Agency: VA
 Property Number: 979010054
 Status: Underutilized
 Comment: 12.4 acres, serves as buffer between center and private property, no utilities.

Suitable/Unavailable Properties
Buildings (by State)
 Florida
 Bldg. 37, VAMC
 10,000 Bay Pines Blvd.
 Bay Pines
 Co: Pinellas FL 33504-
 Landholding Agency: VA
 Property Number: 979230010
 Status: Underutilized
 Comment: Third floor of a concrete frame bldg. (13,900 sq. ft.), presence of asbestos, listed on Natl Register of Historic Places, access restrictions.

Indiana
 Bldg. 24, VAMC
 East 38th Street
 Marion
 Co: Grant IN 46952-
 Landholding Agency: VA
 Property Number: 979230005
 Status: Underutilized

Comment: 4135 sq. ft. 2-story wood structure, needs minor rehab, no sanitary or heating facilities, presence of asbestos, Natl Register of Historic Places

Bldg. 122
 VA Northern Indiana Health Care System
 Marion Campus, 1700 East 38th Street
 Marion
 Co: Grant IN 46953-
 Landholding Agency: VA
 Property Number: 979810006
 Status: Unutilized
 Comment: 37,135 sq. ft., presence of asbestos, most recent use—former dietetics bldg., National Register of Historic Places

Washington
 Tract No. 18242
 10328 Highway 2
 Coulee
 Co: Grant WA 99115-
 Landholding Agency: 619810012
 Status: Unutilized
 Comment: gas station on 8.2 acres, site clean-up required

Wyoming
 Bldg. 13
 Medical Center
 N.W. of town at the end of Fort Road
 Sheridan
 Co: Sheridan WY 82801-
 Landholding Agency: VA
 Property Number: 979110001
 Status: Unutilized
 Comment: 3613 sq. ft., 3 story wood frame masonry veneered, potential utilities, possible asbestos, needs rehab.

Bldg. 79
 Medical Center
 N.W. of town at the end of Fort Road
 Sheridan
 Co: Sheridan WY 82801-
 Landholding Agency: VA
 Property Number: 979110003
 Status: Unutilized
 Comment: 45 sq. ft., 1 story brick and tile frame, limited utilities, most recent use—reservoir house, use for storage purposes.

Land (by State)
 Arizona
 0.23 acre
 Ron Burke II/West of 124th Street
 Scottsdale
 Co: Maricopa AZ 85259-
 Landholding Agency: Interior
 Property Number: 619740001
 Status: Excess
 Comment: narrow strip
 6.478 acres
 Salt Gila Aqueduct, Ironwood Road
 Apache Junction
 Co: Pinal AZ 85220-
 Landholding Agency: Interior
 Property Number: 619820009
 Status: Unutilized
 Comment: most recent use—aqueduct maintenance, no utilities

Illinois
 VA Medical Center
 3001 Green Bay Road
 North Chicago
 Co: Lake IL 60064-
 Landholding Agency: VA

Property Number: 979010082
 Status: Underutilized
 Comment: 2.5 acres, currently being used as a construction staging area for the next 6–8 years, potential utilities.

Iowa

38 acres
 VA Medical Center
 1515 West Pleasant St.
 Knoxville
 Co: Marion IA 50138–
 Landholding Agency: VA
 Property Number: 979740001
 Status: Unutilized
 Comment: golf course

Michigan

VA Medical Center
 5500 Armstrong Road
 Battle Creek
 Co: Calhoun MI 49016–
 Landholding Agency: VA
 Property Number: 979010015
 Status: Underutilized
 Comment: 20 acres, used as exercise trails and storage areas, potential utilities.

New York

VA Medical Center
 Fort Hill Avenue
 Canandaigua
 Co: Ontario NY 14424–
 Landholding Agency: VA
 Property Number: 979010017
 Status: Underutilized
 Comment: 27.5 acres, used for school ballfield and parking, existing utilities easements, portion leased.

Pennsylvania

VA Medical Center
 New Castle Road
 Butler
 Co: Butler PA 16001–
 Landholding Agency: VA
 Property Number: 979010016
 Status: Underutilized
 Comment: Approx. 9.29 acres, used for patient recreation, potential utilities.

Land No. 645

VA Medical Center
 Highland Drive
 Pittsburgh
 Co: Allegheny PA 15206–
 Location: Between Campania and Wiltsie Streets.
 Landholding Agency: VA
 Property Number: 979010080
 Status: Unutilized
 Comment: 90.3 acres, heavily wooded, property includes dump area and numerous site storm drain outfalls.

Land—34.16 acres

VA Medical Center
 1400 Black Horse Hill Road
 Coatesville
 Co: Chester PA 19320–
 Landholding Agency: VA
 Property Number: 979340001
 Status: Underutilized
 Comment: 34.16 acres, open field, most recent use—recreation/buffer

Tennessee

44 acres
 VA Medical Center

3400 Lebanon Road.
 Murfreesboro
 Co: Rutherford TN 37129–
 Landholding Agency: VA
 Property Number: 979740003
 Status: Underutilized
 Comment: intermittent use, partially landlocked, flooding

Washington

Tract No. 102812b
 West Sagemoor Road
 Co: Franklin WA 99352–
 Landholding Agency: Interior
 Property Number: 619810003
 Status: Excess
 Comment: 31.05 acres, most recent use—recreation

Tract No. 113206b
 Gertler Rd/Haverland-Koontz Rd
 Co: Franklin WA 99330–
 Landholding Agency: Interior
 Property Number: 619810004
 Status: Excess
 Comment: 24.49 acres, most recent use—recreation/vacant

Tract No. 123134
 Smith Canyon Rd.
 Co: Franklin WA 99330–
 Landholding Agency: Interior
 Property Number: 61981005
 Status: Excess
 Comment: 46.63 acres, most recent use—recreation/vacant

Tract No. 143230
 Highway 395
 Co: Franklin WA 99326–
 Landholding Agency: Interior
 Property Number: 619810006
 Status: Excess
 Comment: 217.89 acres

Tract No. 162315
 Highway 243
 Co: Grant WA 99321–
 Landholding Agency: Interior
 Property Number: 619810007
 Status: Excess
 Comment: 455.49 acres, most recent use—recreation, includes roads, powerlines, sewer disposal pond, gravel pits

Tract No. 172328
 Highways 243, 26
 Co: Grant WA 98950–
 Landholding Agency: Interior
 Property Number: 619810008
 Status: Excess
 Comment: 599.38 acres, most recent use—recreation, waste water easement

Tract No. 212616
 Grandview Park
 Co: Grant WA 98823–
 Landholding Agency: Interior
 Property Number: 619810010
 Status: Excess
 Comment: 0.27 acres, part of city park

Tract No. 18243
 Westshore Drive
 Moses Lake
 Co: Grant WA 98837–
 Landholding Agency: Interior
 Property Number: 619810011
 Status: Unutilized
 Comment: 0.20 acres, sand blown depression

Suitable/To Be Excessed*Buildings (by State)*

Washington
 Quarters No. 1204
 604 S. Maple
 Warden
 Co: Grant WA 98857–
 Landholding Agency: Interior
 Property Number: 619330001
 Status: Excess
 Comment: 850 sq. ft., one story frame residence, asbestos siding

Quarters No. 1208
 608 S. Maple
 Warden
 Co: Grant WA 98857–
 Landholding Agency: Interior
 Property Number: 619330002
 Status: Excess
 Comment: 709 sq. ft., one story frame residence, asbestos siding

Quarters No. 1301
 3 SE and N Warden Road
 Warden
 Co: Grant WA 98857–
 Landholding Agency: Interior
 Property Number: 619330003
 Status: Excess
 Comment: 709 sq. ft., one story frame residence on 4.9 acres, asbestos siding

*Land (by State)***Minnesota**

Land around Bldg. 240–249,253
 VA Medical Center
 Fort Snelling
 St. Paul
 Co: Hennepin MN 55111–
 Landholding Agency: VA
 Property Number: 979010007
 Status: Unutilized
 Comment: 3.76 acres, potential utilities.

Unsuitable Properties*Buildings (by State)*

Alabama
 Bldg. 7
 VA Medical Center
 Tuskegee
 Co: Macon AL 36083–
 Landholding Agency: VA
 Property Number: 979730001
 Status: Underutilized
 Reason: Secured Area

Bldg. 8
 VA Medical Center
 Tuskegee
 Co: Macon AL 36083–
 Landholding Agency: VA
 Property Number: 979730002
 Status: Underutilized
 Reason: Secured Area

Arizona
 Inn Cabin #9
 North Rim Grand Canyon
 Grand Canyon
 Co: Coconino AZ 86023–
 Landholding Agency: Interior
 Property Number: 619530013
 Status: Unutilized
 Reason: Extensive deterioration

California
 Castle Area Shops
 Sequoia National Park
 Three Rivers CA 93271–
 Landholding Agency: Interior
 Property Number: 619720004
 Status: Unutilized
 Reason: Extensive deterioration

Giant Forest Village
 Sequoia National Park
 Three Rivers CA 93271–
 Landholding Agency: Interior
 Property Number: 619720006
 Status: Unutilized
 Reason: Extensive deterioration

Cabins 90–92, 100V–146
 Sequoia National Park
 Three Rivers CA 93271–
 Landholding Agency: Interior
 Property Number: 619720008
 Status: Unutilized
 Reason: Extensive deterioration

Lower Kaweah 514–549, 594
 Sequoia National Park
 Three Rivers CA 93271–
 Landholding Agency: Interior
 Property Number: 619720009
 Status: Unutilized
 Reason: Extensive deterioration

Lower Kaweah Cabins—various
 Sequoia National Park
 Three Rivers CA 93271–
 Landholding Agency: Interior
 Property Number: 619720010
 Status: Unutilized
 Reason: Extensive deterioration

Bldg. 331
 Pinnacles National Monument
 Paicines
 Co: San Benito CA 95043–
 Landholding Agency: Interior
 Property Number: 619720046
 Status: Unutilized
 Reason: Extensive deterioration

15 Buildings, Davison Ranch
 Orick
 Co: Humboldt CA 95555–
 Landholding Agency: Interior
 Property Number: 619720047
 Status: Unutilized
 Reason: Extensive deterioration

Bldg. 5500
 Wolf Creek Outdoor School Lodge
 Orick
 Co: Humboldt CA 95555–
 Landholding Agency: Interior
 Property Number: 619720048
 Status: Unutilized
 Reason: Extensive deterioration

02–120 Liz White Residence
 Wilson Creek
 Klamath
 Co: Del Norte CA 95531–
 Landholding Agency: Interior
 Property Number: 619820002
 Status: Unutilized
 Reason: Extensive deterioration

Brandy Creek Residence #608
 Whiskeytown
 Co: Shasta CA 96095–
 Landholding Agency: Interior
 Property Number: 619820006
 Status: Excess
 Reason: Extensive deterioration

Indiana
 Bldg. 21, VA Medical Center
 East 38th Street
 Marion
 Co: Grant IN 46952–
 Landholding Agency: VA
 Property Number: 979230001
 Status: Excess
 Reason: Extensive deterioration

Bldg. 22, VA Medical Center
 East 38th Street
 Marion
 Co: Grant IN 46952–
 Landholding Agency: VA
 Property Number: 979230002
 Status: Excess
 Reason: Extensive deterioration

Bldg. 62, VA Medical Center
 East 38th Street
 Marion
 Co: Grant IN 46952–
 Landholding Agency: VA
 Property Number: 979230003
 Status: Excess
 Reason: Extensive deterioration

Massachusetts
 Cook House
 North Great Road
 Lincoln
 Co: Middlesex MA 01773–
 Landholding Agency: Interior
 Property Number: 619810001
 Status: Excess
 Reason: Extensive deterioration

Giurleo House
 North Great Road
 Lincoln
 Co: Middlesex MA 01773–
 Landholding Agency: Interior
 Property Number: 619810002
 Status: Excess
 Reason: Extensive deterioration

Jozwicki House
 Minute Man National Historical Park
 Lincoln
 Co: Middlesex MA 01773–
 Landholding Agency: Interior
 Property Number: 619820010
 Status: Unutilized
 Reason: Extensive deterioration

Smith House
 Minute Man National Historical Park
 Lincoln
 Co: Middlesex MA 01773–
 Landholding Agency: Interior
 Property Number: 619820011
 Status: Unutilized
 Reason: Extensive deterioration

Mississippi
 Bldg. 6, Boiler Plant
 Biloxi VA Medical Center
 Biloxi
 Co: Harrison MS 39531–
 Landholding Agency: VA
 Property Number: 979410001
 Status: Unutilized
 Reason: Floodway

Bldg. 67
 Biloxi VA Medical Center
 Biloxi
 Co: Harrison MS 39531–
 Landholding Agency: VA
 Property Number: 979410008
 Status: Unutilized
 Reason: Extensive deterioration

Bldg. 68
 Biloxi VA Medical Center
 Biloxi
 Co: Harrison MS 39531–
 Landholding Agency: VA
 Property Number: 979410009
 Status: Unutilized
 Reason: Extensive deterioration

Montana
 Barn/Garage
 316 N. 26th Street
 Billings
 Co: Yellowstone MT
 Landholding Agency: Interior
 Property Number: 619520022
 Status: Excess
 Reason: Extensive deterioration

New Jersey
 Bldg. 188
 Naval Air Engineering Station
 Lakehurst
 Co: Ocean NJ 08733–5000
 Landholding Agency: Navy
 Property Number: 779830065
 Status: Unutilized
 Reason: Extensive deterioration

New York
 Bldg. 144, VAEC
 Linden Blvd. and 179th St
 St. Albans
 Co: Queens NY 11425–
 Landholding Agency: VA
 Property Number: 979210004
 Status: Unutilized
 Reason: Extensive deterioration

Bldg. 143, VAEC
 Linden Blvd. and 179th St.
 St. Albans
 Co: Queens NY 11425–
 Landholding Agency: VA
 Property Number: 979210005
 Status: Unutilized
 Reason: Extensive deterioration

Bldgs. 142/146, VAEC
 Linden Blvd. and 179th St.
 St. Albans
 Co: Queens NY 11425–
 Landholding Agency: VA
 Property Number: 979210006
 Status: Unutilized
 Reason: Extensive deterioration

Bldg. 72, VAEC
 St. Albans
 Co: Queens NY 11425–
 Landholding Agency: VA
 Property Number: 979720001
 Status: Unutilized
 Reason: Extensive deterioration

Bldg. 73, VAEC
 St. Albans
 Co: Queens NY 11425–
 Landholding Agency: VA
 Property Number: 979720002
 Status: Unutilized
 Reason: Extensive deterioration

Bldg. 94, VAEC
 St. Albans
 Co: Queens NY 11425–
 Landholding Agency: VA
 Property Number: 979720003
 Status: Unutilized

Reason: Extensive deterioration
 Bldg. 158, VAEC
 St. Albans
 Co: Queens NY 11425-
 Landholding Agency: VA
 Property Number: 979720004
 Status: Unutilized
 Reason: Extensive deterioration
 North Carolina
 Storage Bldg.
 Great Smoky Mountains Natl Park
 Cherokee
 Co: Swain NC 28719-
 Landholding Agency: Interior
 Property Number: 619820007
 Status: Unutilized
 Reason: Extensive deterioration
 Bldg. 9
 VA Medical Center
 1100 Tunnel Road
 Asheville
 Co: Buncombe NC 28805-
 Landholding Agency: VA
 Property Number: 979010008
 Status: Unutilized
 Reason: Extensive deterioration
 Ohio
 Bldgs. 25A-25H
 Fernald Environmental Management Project
 Fernald
 Co: Hamilton OH 45013-
 Landholding Agency: Energy
 Property Number: 419830004
 Status: Excess
 Reason: Within 2000 ft. of flammable or
 explosive material Secured Area
 Oregon
 Troutdale Materials Lab
 Troutdale
 Co: Multnomah OR 97060-9501
 Landholding Agency: GSA
 Property Number: 549830009
 Status: Surplus
 Reason: Within 2000 ft. of flammable or
 explosive material
 GSA Number: 9-D-OR-729
 Bldg. 0210
 500 Nevada Street
 Klamath Falls
 Co: Klamath OR 97601-
 Landholding Agency: Interior
 Property Number: 619540002
 Status: Unutilized
 Reason: Extensive deterioration
 Bldg. 0211
 500 Nevada Street
 Klamath Falls
 Co: Klamath OR 97601-
 Landholding Agency: Interior
 Property Number: 619540003
 Status: Unutilized
 Reason: Extensive deterioration
 Bldg. 0213
 500 Nevada Street
 Klamath Falls
 Co: Klamath OR 97601-
 Landholding Agency: Interior
 Property Number: 619540004
 Status: Unutilized
 Reason: Extensive deterioration
 Bldg. 0214
 500 Nevada Street
 Klamath Falls
 Co: Klamath OR 97601-
 Landholding Agency: Interior
 Property Number: 619540005
 Status: Unutilized
 Reason: Extensive deterioration
 Bldg. 0510
 Wilson Dam Residence
 Klamath Falls
 Co: Klamath OR 97601-
 Landholding Agency: Interior
 Property Number: 619540006
 Status: Unutilized
 Reason: Extensive deterioration
 Pennsylvania
 Former Ebert House
 Johnny Bee Rd.
 Dingmans
 Co: Pike PA 18328-
 Landholding Agency: Interior
 Property Number: 619720049
 Status: Unutilized
 Reason: Extensive deterioration
 Weiland Prop.—Sound Studio
 Gettysburg
 Co: Adams PA 17325-
 Landholding Agency: Interior
 Property Number: 619810013
 Status: Excess
 Reason: Extensive deterioration
 Puerto Rico
 Bldg. 433
 Naval Station Roosevelt Roads
 Ceiba PR 00735-
 Landholding Agency: Navy
 Property Number: 779830066
 Status: Unutilized
 Reason: Extensive deterioration
 Bldg. 434
 Naval Station Roosevelt Roads
 Ceiba PR 00735-
 Landholding Agency: Navy
 Property Number: 779830067
 Status: Unutilized
 Reason: Extensive deterioration
 Bldg. 464
 Naval Station Roosevelt Roads
 Ceiba PR 00735-
 Landholding Agency: Navy
 Property Number: 779830068
 Status: Unutilized
 Reason: Extensive deterioration
 Bldg. 762
 Naval Station Roosevelt Roads
 Ceiba PR 00735-
 Landholding Agency: Navy
 Property Number: 779830069
 Status: Unutilized
 Reason: Extensive deterioration
 Bldg. 763
 Naval Station Roosevelt Roads
 Ceiba PR 00735-
 Landholding Agency: Navy
 Property Number: 779830070
 Status: Unutilized
 Reason: Extensive deterioration
 Bldg. 1927
 Naval Station Roosevelt Roads
 Ceiba PR 00735-
 Landholding Agency: Navy
 Property Number: 779830071
 Status: Unutilized
 Reason: Extensive deterioration
 Bldg. 175
 Naval Station Roosevelt Roads
 Ceiba PR 00735-
 Landholding Agency: Navy
 Property Number: 779830072
 Status: Unutilized
 Reason: Extensive deterioration
 Former No. 2091
 Naval Station Roosevelt Roads
 Ceiba PR 00735-
 Landholding Agency: Navy
 Property Number: 779830073
 Status: Unutilized
 Reason: Extensive deterioration
 Bldg. 261/1692
 Naval Station Roosevelt Roads
 Ceiba PR 00735-
 Landholding Agency: Navy
 Property Number: 779830074
 Status: Unutilized
 Reason: Extensive deterioration
 B-38
 Naval Station Roosevelt Roads
 Ceiba PR 00735-
 Landholding Agency: Navy
 Property Number: 779830075
 Status: Unutilized
 Reason: Extensive deterioration
 Texas
 Bldg. 24
 Olin E. Teague Veterans Center
 1901 South 1st Street
 Temple
 Co: Bell TX 76504-
 Landholding Agency: VA
 Property Number: 979010050
 Status: Unutilized
 Reason: Other
 Comment: Friable asbestos.
 Bldg. 25
 Olin E. Teague Veterans Center
 1901 South 1st Street
 Temple
 Co: Bell TX 76504-
 Landholding Agency: VA
 Property Number: 979010051
 Status: Unutilized
 Reason: Other
 Comment: Friable asbestos.
 Bldg. 26
 Olin E. Teague Veterans Center
 1901 South 1st Street
 Temple
 Co: Bell TX 76504-
 Landholding Agency: VA
 Property Number: 979010052
 Status: Unutilized
 Reason: Other
 Comment: Friable asbestos.
 Washington
 Bldgs. 1158, 1159
 Ross Lake Nat'l Recreation Area
 Co: Whatcom WA
 Landholding Agency: Interior
 Property Number: 619820001
 Status: Unutilized
 Reason: Extensive deterioration
 Bldgs. 35, 36
 Naval Radio Station T Jim Creek
 Arlington
 Co: Snohomish WA 98223-
 Landholding Agency: Navy
 Property Number: 779830076
 Status: Unutilized
 Reason: Extensive deterioration

West Virginia
Jarrell House
New River Gorg National River
Meadow Creek
Co: Summers WV 25977-
Landholding Agency: Interior
Property Number: 619740005
Status: Excess
Reason: Extensive deterioration

Blackburn Houses
New River Gorg National River
Meadow Creek
Co: Summers WV 25977-
Landholding Agency: Interior
Property Number: 619740006
Status: Excess
Reason: Extensive deterioration

Adkins House
New River Gorg National River
Claypool Hollow
Co: Summers WV 25977-
Landholding Agency: Interior
Property Number: 619740007
Status: Excess
Reason: Extensive deterioration

Wyoming
Bldg. 95
Medical Center
N.W. of town at the end of Fort Road
Sheridan
Co: Sheridan WY 82801-
Landholding Agency: VA
Property Number: 979110004
Status: Unutilized
Reason: Other
Comment: Sewage digester for disposal plant

Bldg. 96
Medical Center
N.W. of town at the end of Fort Road
Sheridan
Co: Sheridan WY 82801-
Landholding Agency: VA
Property Number: 979110005
Status: Unutilized
Reason: Other
Comment: Pump house for sewage disposal plant

Structure 99
Medical Center
N.W. of town at the end of Fort Road
Sheridan
Co: Sheridan WY 82801-
Landholding Agency: VA
Property Number: 979110006
Status: Unutilized
Reason: Other
Comment: Mechanical screen for sewage disposal plant

Structure 100
Medical Center
N.W. of town at the end of Fort Road
Sheridan
Co: Sheridan WY 82801-
Landholding Agency: VA
Property Number: 979110007
Status: Unutilized
Reason: Other
Comment: Dosing tank for sewage disposal plant

Structure 101
Medical Center
N.W. of town at the end of Fort Road
Sheridan
Co: Sheridan WY 82801-

Landholding Agency: VA
Property Number: 979110008
Status: Unutilized
Reason: Other
Comment: Chlorination chamber for sewage disposal plant

Bldg. 97
Medical Center
Sheridan
Co: Sheridan WY 82801-
Landholding Agency: VA
Property Number: 979410011
Status: Unutilized
Reason: Other
Comment: Sewage disposal plant

Structure 98
Medical Center
Sheridan
Co: Sheridan WY 82801-
Landholding Agency: VA
Property Number: 979410012
Status: Unutilized
Reason: Other
Comment: Sludge bed/sewage disposal plant

Land (by State)

Arizona
Santa Fe Pacific Pipelines
Avenue 7E North from Hwy. 95
Yuma
Co: Yuma AZ 85364-
Landholding Agency: Interior
Property Number: 619420003
Status: Unutilized
Reason: Secured Area
Case No. 95-019—Surplus Land
Dale Anderson (Farnsworth)
Mesa
Co: Maricopa AZ 85220-
Landholding Agency: Interior
Property Number: 619610001
Status: Excess
Reason: Other
Comment: Inaccessible

ARCO Surplus Land
20-foot Strip, 53rd Ave.
Phoenix
Co: Maricopa AZ 85043-
Landholding Agency: Interior
Property Number: 619620001
Status: Unutilized
Reason: Within 2000 ft. of flammable or explosive material
Secured Area
58 acres
VA Medical Center
500 Highway 89 North
Prescott
Co: Yavapai AZ 86313-
Landholding Agency: VA
Property Number: 970630001
Status: Unutilized
Reason: Floodway

29 acres
VA Medical Center
500 Highway 89 North
Prescott
Co: Yavapai AZ 86313-
Landholding Agency: VA
Property Number: 970630002
Status: Unutilized
Reason: Floodway

California
DVA Medical Center
4951 Arroyo Road

Livermore
Co: Alameda CA 94550-
Landholding Agency: VA
Property Number: 979010023
Status: Unutilized
Reason: Other
Comment: 750,000 gallon water reservoir.

Florida
Wildlife Sanctuary, VAMC
10,000 Bay Pines Blvd.
Bay Pines
Co: Pinellas FL 33504-
Landholding Agency: VA
Property Number: 979230004
Status: Underutilized
Reason: Other
Comment: Inaccessible

Idaho
Zamzow Sidewalk Sale
0.5 acres
Boise
Co: Ada ID 83705-
Landholding Agency: Interior
Property Number: 619630001
Status: Unutilized
Reason: Within 2000 ft. of flammable or explosive material

Minnesota
VAMC
VA Medical Center
4801 8th Street No. St. Cloud
Co: Stearns MN 56303-
Landholding Agency: VA
Property Number: 979010049
Status: Underutilized
Reason: Within 2000 ft. of flammable or explosive material
3.85 acres (Area #2)
VA Medical Center
4801 8th Street No. St. Cloud
Co: Stearns MN 56303-
Landholding Agency: VA
Property Number: 979740004
Status: Unutilized
Reason: Other
Comment: landlocked
7.48 acres (Area #1)
VA Medical Center
4801 8th Street No. St. Cloud
Co: Stearns MN 56303-
Landholding Agency: VA
Property Number: 979740005
Status: Underutilized
Reason: Secured Area

New York
Tract 1
VA Medical Center
Bath
Co: Steuben NY 14810-
Location: Exit 38 off New York State Route 17.
Landholding Agency: VA
Property Number: 979010011
Status: Unutilized
Reason: Secured Area

Tract 2
VA Medical Center
Bath
Co: Steuben NY 14810-
Location: Exit 38 off New York State Route 17.
Landholding Agency: VA
Property Number: 979010012

Status: Underutilized
Reason: Secured Area
Tract 3
VA Medical Center
Bath
Co: Steuben NY 14810-
Location: Exit 38 off New York State Route
17.
Landholding Agency: VA
Property Number: 979010013
Status: Underutilized
Reason: Secured Area
Tract 4
VA Medical Center
Bath
Co: Steuben NY 14810-
Location: Exit 38 off New York State Route
17.
Landholding Agency: VA
Property Number: 979010014
Status: Unutilized
Reason: Secured Area
Oregon
Portion/Oregon Landfill
3 acres
Ontario
Co: Malheur OR 97914-
Landholding Agency: Interior
Property Number: 619630002
Status: Unutilized
Reason: Other
Comment: landlocked
Puerto Rico
119.3 acres
Culebra Island PR 00775-
Landholding Agency: Interior
Property Number: 619210001
Status: Excess
Reason: Floodway
Washington
Tract No. 092902
Pasco
Co: Franklin WA 99301-
Landholding Agency: Interior
Property Number: 619740008
Status: Excess
Reason: Within airport runway clear zone
Tract No. 092912
Pasco
Co: Franklin WA 99301-
Landholding Agency: Interior
Property Number: 619740009
Status: Excess
Reason: Within airport runway clear zone
Tract No. 093022
Co: Franklin WA 99301-
Landholding Agency: Interior
Property Number: 619740010
Status: Excess
Reason: Other
Comment: no public access
Tract No. 103026
Co: Franklin WA 99301-
Landholding Agency: Interior
Property Number: 619740011
Status: Excess
Reason: Other
Comment: no public access
Tract No. 103032
Co: Franklin WA 99301-
Landholding Agency: Interior
Property Number: 619740012
Status: Excess

Reason: Other
Comment: no public access
Tract No. 132816
Co: Franklin WA 99330-
Landholding Agency: Interior
Property Number: 619740013
Status: Excess
Reason: Other
Comment: no public access
Tract No. 132929
Co: Franklin WA 99330-
Landholding Agency: Interior
Property Number: 619740014
Status: Excess
Reason: Other
Comment: no public access
Tract No. 142517
Co: Grant WA 99349-
Landholding Agency: Interior
Property Number: 619740015
Status: Excess
Reason: Other
Comment: no public access
Tract No. 172314
Co: Grant WA 98950-
Landholding Agency: Interior
Property Number: 619740016
Status: Excess
Reason: Other
Comment: no public access
Tract No. 172433
Co: Grant WA 99321-
Landholding Agency: Interior
Property Number: 619740017
Status: Excess
Reason: Other
Comment: no public access
Tract No. 172833
Co: Grant WA 99357-
Landholding Agency: Interior
Property Number: 619740018
Status: Excess
Reason: Other
Comment: no public access
Tract No. 182620
Co: Grant WA 98824-
Landholding Agency: Interior
Property Number: 619740019
Status: Excess
Reason: Other
Comment: no public access
Tract No. 192328
Co: Grant WA 98848-
Landholding Agency: Interior
Property Number: 619740020
Status: Excess
Reason: Other
Comment: no public access
Tract No. 192332
Co: Grant WA 98848-
Landholding Agency: Interior
Property Number: 619740021
Status: Excess
Reason: Other
Comment: no public access
Tract No. 192520
Co: Grant WA 98837-
Landholding Agency: Interior
Property Number: 619740022
Status: Excess
Reason: Other
Comment: no public access
Tract No. 192524
Co: Grant WA 98837-

Landholding Agency: Interior
Property Number: 619740023
Status: Excess
Reason: Other
Comment: no public access
Tract No. 192620b
Co: Grant WA 98837-
Landholding Agency: Interior
Property Number: 619740024
Status: Excess
Reason: Other
Comment: no public access
Tract No. 192909
Co: Grant WA 98837-
Landholding Agency: Interior
Property Number: 619740025
Status: Excess
Reason: Other
Comment: no public access
Tract No. 202436
Co: Grant WA 98848-
Landholding Agency: Interior
Property Number: 619740026
Status: Excess
Reason: Other
Comment: no public access
Tract No. 202529b
Co: Grant WA 98823-
Landholding Agency: Interior
Property Number: 619740027
Status: Excess
Reason: Other
Comment: no public access
Tract No. 202530
Co: Grant WA 98823-
Landholding Agency: Interior
Property Number: 619740028
Status: Excess
Reason: Other
Comment: no public access
Tract No. 202635
Co: Grant WA 98823-
Landholding Agency: Interior
Property Number: 619740029
Status: Excess
Reason: Other
Comment: no public access
Tract No. 212808
Co: Grant WA 98837-
Landholding Agency: Interior
Property Number: 619740030
Status: Excess
Reason: Other
Comment: no public access

[FR Doc. 98-24152 Filed 9-10-98; 8:45 am]

BILLING CODE 4210-29-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Receipt of Applications for Permit

The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, *as amended* (16 U.S.C. 1531, *et seq.*):

PRT-001950

Applicant: St. Louis Zoological Park, St. Louis, MO

The applicant requests a permit to export six captive born Black and White Ruffed Lemurs (*Varecia variegata variegata*) to Madagascar for the purpose of enhancement of the survival of the species through re-introduction into the wild.

PRT-783054

Applicant: Working Wildlife, Frazier Park, CA

The applicant requests a permit to import and re-export captive-born Bengal tiger (*Panthera tigris tigris*) and leopards (*Panthera pardus*) progeny of the animals currently held by the applicant and any animals acquired in the United States by the applicant to/from worldwide locations to enhance the survival of the species through conservation education. This notification covers activities d by the applicant over a three year period.

PRT-002385

Applicant: International Center for Gibbon Studies, Santa Clara, CA

The applicant requests a permit to import one female capped gibbon (*Hylobates pileatus*) from Zoo Melaka, Malaysia for the purpose of enhancement to the propagation of the species and scientific research.

PRT-823896

Applicant: Jane Goodall Institute, St. Paul, MN

The applicant request amendment of their current permit which allows for the import of chimpanzee (*Pan troglodytes schweinfurthii*) hair samples from Gombe National Park, Tanzania to include the import of salvaged chimpanzee tissue sample for the purpose of scientific research.

PRT-001397

Applicant: International Animal Exchange, Inc., Ferndale, MI

The applicant requests a permit to re-import two captive-bred tigers (*Panthera tigris*) from Parc Safari, Hemmingford, Quebec, Canada for the purpose of enhancement of the species through conservation education. These tigers are being returned to the United States and were originally exported to Canada in 1994.

PRT-843937

Applicant: International Animal Exchange, Inc., Ferndale, MI

The applicant requests a permit to re-export two captive-bred tigers (*Panthera tigris*) to Safari Park Qin Huang Dao, Qinhuangdao, China for the purpose of enhancement of the species through

conservation education and captive propagation.

PRT-843423

Applicant: International Animal Exchange, Inc., Ferndale, MI

The applicant requests a permit to export four captive-bred tigers (*Panthera tigris*) to Safari Park Qin Huang Dao, Qinhuangdao, China for the purpose of enhancement of the species through conservation education and captive propagation.

PRT-002594

Applicant: Paul Serrano, Phoenix, AZ

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

PRT-002601

Applicant: James Adams, Fruitport, MI

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

PRT-002600

Applicant: Christopher K. Fannin, Ashland, KY

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

PRT-002596

Applicant: David Daniel Boren, Norman, OK

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

PRT-002602

Applicant: Vincent E. Cucci, Evansville, IN

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

PRT-002606

Applicant: John Edward Stepan, Burnet, TX

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

PRT-002609

Applicant: Richard B. Nilsen, FT. Lauderdale, FL

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

PRT-002612

Applicant: Bill Brewster, Batesville, TX

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Written data or comments should be submitted to the Director, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203 and must be received by the Director within 30 days of the date of this publication.

The public is invited to comment on the following application for a permit to conduct certain activities with marine mammals. The application was submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) and the regulations governing marine mammals (50 CFR part 18).

PRT-829754

Applicant: The Northeastern Nevada Museum, Elko, NV

Permit Type: Import for Public Display.

Name and Number of Animals: Polar bear (*Ursus maritimus*), 1.

Summary of Activity to be

Authorized: The applicant requests a permit to import a polar bear that was sport hunted from the Lancaster Sound population, Canada and donated to the Northeastern Nevada Museum for the purpose of public display.

Source of Marine Mammals: Sport-hunted polar bear donated to the museum as described above.

Period of Activity: Up to 5 years from issuance date of permit, if issued.

PRT-001991

Applicant: Oregon Coast Aquarium,
Newport, OR

Permit Type: Take for Public Display.

Name and Number of Animals:
Northern sea otter (*Enhydra lutris*
lutris), 1.

Summary of Activity to be

Authorized: The applicant requests a permit for public display of a non-releasable orphaned Northern sea otter pup.

Source of Marine Mammals: The sea otter pup was rescued by the Alaska Sealife Center, Seward, AK acting on behalf of the U.S. Fish and Wildlife Service.

Period of Activity: Up to 5 years from issuance date of permit, if issued.

Concurrent with the publication of this notice in the **Federal Register**, the Office of Management Authority is forwarding copies of this application to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

PRT-843727

Applicant: Nathan P. Newbern, Ft. Worth, TX

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport-hunted prior to April 30, 1994 from the Lancaster Sound polar bear population, Northwest Territories, Canada for personal use.

PRT-002446

Applicant: Ricardo E. Longoria W, Laredo, TX

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport-hunted from the McClintock Channel polar bear population, Northwest Territories, Canada for personal use.

Written data or comments, requests for copies of the complete application, or requests for a public hearing on this application should be sent to the U.S. Fish and Wildlife Service, Office of Management Authority, 4401 N. Fairfax Drive, Room 700, Arlington, Virginia 22203, telephone 703/358-2104 or fax 703/358-2281 and must be received within 30 days of the date of publication of this notice. Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

Documents and other information submitted with these applications are available for review, *subject to the requirements of the Privacy Act and Freedom of Information Act*, by any

party who submits a written request for a copy of such documents to the above address within 30 days of the date of publication of this notice.

Dated: September 4, 1998.

MaryEllen Amtower,

Acting Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 98-24385 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-55-U

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of a Technical/ Agency Draft Recovery Plan for *Cordia Bellonis* for Review and Comment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability and public comment period.

SUMMARY: The Fish and Wildlife Service announces the availability for public review of the technical/agency draft recovery plan for *Cordia bellonis*.

Cordia bellonis is a shrub species endemic to the island of Puerto Rico. It is currently restricted to three public forests: Maricao, Susúa, and Río Abajo. *Cordia bellonis* has been found in serpentine soils at Maricao and Susúa at road edges, river margins, and on steep slopes. In the Río Abajo Forest, the species was found either on sunny banks along dirt roads growing in thickets of vegetation or in open saddles between limestone hills. The species is threatened by habitat loss, some forest management practices and restricted distribution. The Service solicits review and comment from the public on this draft plan.

DATES: Comments on the draft recovery plan must be received on or before November 10, 1998 to receive consideration by the Service.

ADDRESSES: Persons wishing to review the draft recovery plan may obtain a copy by contacting the Field Supervisor, Boquerón Field Office, P.O. Box 491, Boquerón, Puerto Rico 00622 (Telephone 787/851-7297). Comments and materials received are available on request for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Ms. Marelisa Rivera at the address and telephone shown above.

SUPPLEMENTARY INFORMATION:

Background

Restoring an endangered or threatened animal or plant to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of the U.S. Fish and Wildlife Service's endangered species program. To help guide the recovery effort, The Service is working to prepare recovery plans for most of the listed species native to the United States. Recovery plans describe actions considered necessary for conservation of the species, establish criteria for the recovery levels for downlisting or delisting them, and estimate time and cost for implementing the recovery measures needed.

The Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*) requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act, as amended 1988, requires that public notice and opportunity for public review and comment be provided during recovery plan development. The Service will consider all information presented during a public comment period prior to approval of each new or revised Recovery Plan. The Service and other Federal agencies will also take these comments into account in the course of implementing approved recovery plans.

This Technical/Agency draft is for *Cordia bellonis*, a shrub species endemic to Puerto Rico. *Cordia bellonis* has approximately 64 individuals (less than 30% of the original population) in three localities of the Subtropical Wet, Subtropical Moist, and Subtropical Lower Montane Forests of northern and central Puerto Rico (Maricao, Susa, and Río Abajo Commonwealth Forests). The species is threatened by habitat loss, some forest management practices and restricted distribution.

Public Comments Solicited

The Service solicits written comments on the recovery plan described. All comments received by the date specified above will be considered prior to approval of the plan.

Authority

The authority for this section is Section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: August 17, 1998.

James P. Oland,
Field Supervisor.

[FR Doc. 98-24443 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****Availability of a Habitat Conservation Plan and Receipt of an Application for an Incidental Take Permit for the Bluffs Project, Alameda County, California**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and receipt of application.

SUMMARY: This notice advises the public that the Greenbriar Land Company and the East County Investors (Applicants) have applied to the Fish and Wildlife Service for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The proposed permit would authorize the incidental take of the San Joaquin kit fox (*Vulpes macrotis mutica*), federally listed as endangered, and modification of its habitat during construction of a planned unit development in Alameda County, California. The permit would also authorize incidental take of the California tiger salamander (*Ambystoma californiense*), a Federal candidate species, effective upon its listing under the Act. The permit would be in effect for 2 years.

The Service announces the receipt of the Applicants' incidental take permit application and the availability of an Environmental Assessment and the proposed Bluffs Habitat Conservation Plan (Plan), which accompanies the incidental take permit application, for public comment. The Plan fully describes the proposed project and the measures the Applicants would undertake to minimize and mitigate project impacts to the San Joaquin kit fox and the California tiger salamander. This notice is provided pursuant to section 10(a) of the Endangered Species Act and National Environmental Policy Act regulations (40 CFR 1506.6). All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

DATES: Written comments on the permit application and Plan should be received on or before October 13, 1998.

ADDRESSES: Comments regarding the permit application, Environmental Assessment or the Plan should be addressed to the Field Supervisor, Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 3310 El Camino Avenue, Suite 130, Sacramento, California 95821-6340. Written comments may be sent by facsimile to (916) 979-2723. Individuals wishing

copies of the application, the Environmental Assessment and the Plan for review should immediately contact the above office. Documents also will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Ms. Lori Rinek or Mr. William Lehman, Sacramento Fish and Wildlife Office, telephone (916) 979-2129.

SUPPLEMENTARY INFORMATION: Section 9 of the Act and Federal regulation prohibit the "take" of a species listed as endangered or threatened, respectively (take is defined under the Act, in part, as to kill, harm, or harass). However, the Service, under limited circumstances, may issue permits to authorize "incidental take" of listed species (defined by the Act as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). Regulations governing permits for threatened species are promulgated in 50 CFR 17.32; regulations governing permits for endangered species are promulgated in 50 CFR 17.22.

Background

The Applicants propose to construct a Planned Unit Development consisting of 51 single-family residential units and associated public streets and infrastructure on the Bluffs project site. The planned development will cover approximately 22.8 acres, with the remaining 9.5 acres of the property set aside as open space. Residential lot sizes will range from 0.23 to 0.53 an acre, with a maximum density of 2 units per acre. Grading of lots and streets will conform approximately to the existing topography, with the exception that the knoll at the northeastern end of the site will be substantially lowered. The open space areas on the site will consist of an earthquake fault structure exclusion zone that traverses the site from northwest to southeast, a series of sediment detention basins, and 0.36 acre of seasonal wetlands with associated 50-foot minimum setbacks at the western end of the site. Four of the detention basins will be located within the structure exclusion zone. Two additional detention basins will be constructed at the western end of the property and will be separated from the existing wetlands and setbacks by a berm approximately 4 feet tall. Appropriate native vegetation, including indigenous shrubs and native grass seed mixture, will be planted on the banks of the detention basins. The Bluffs project site covers approximately 32.28 contiguous acres within the City of Livermore. The site is located at the

northeastern end of the Livermore Valley in eastern Alameda County, California, approximately one mile north of Interstate 580. The property borders open grassland to the north, Laughlin Road opposite Frick Lake to the east, grassland adjacent to a new residential development to the south, and grassland and alkali wetlands to the west. The site is comprised mainly of a gently sloping alluvial plain at the base of the Altamont Hills.

In 1993 and 1994, the proposed project area was surveyed for potential habitat for rare, threatened, or endangered species and other biological features that could be affected by the project. Only one federally listed species, the endangered San Joaquin kit fox, has the potential to occur on the project site and to be incidentally taken during the proposed project. The project site may also provide foraging or estivation habitat for the California tiger salamander, a Federal candidate species. To mitigate for impacts that may result from incidental take of the San Joaquin kit fox and the California tiger salamander, the Greenbriar Land Company purchased 60 credits (60 acres) from the Livermore Equity Group Conservation Bank, a mitigation bank approved by the California Department of Fish and Game. To further minimize take of the San Joaquin kit fox and California tiger salamander, the Applicants will ensure the following: (1) that a qualified biologist is present to monitor the project site during and after the initial grading period; (2) that temporary fencing will be installed to ensure that construction personnel remain out of the open space area; (3) that construction equipment disturbance will be minimized; and (4) that construction personnel receive worker awareness training.

The Environmental Assessment considers the environmental consequences of three alternatives. Alternative one, the No Action Alternative, the Service would not issue an incidental take permit. The Bluffs project would not be implemented, and no incidental take of the listed species would occur. In addition, the mitigation credits would be transferred, therefore no habitat would be preserved from compensation activities for the proposed project.

Under Alternative two, the Reduced Density Alternative, the development footprint of the Bluffs project would be reduced, thereby reducing the loss of annual grassland. The amount of offsite mitigation would be less than that provided for the project as proposed.

Alternative three, the Proposed Action, consists of the issuance of an

incidental take permit, and implementation of the Habitat Conservation Plan. The purchase of 60 acres of habitat management lands and other conservation measures would result in greater habitat value for the San Joaquin kit fox and the California tiger salamander than currently exists on the project site.

This notice is provided pursuant to section 10(a) of the Endangered Species Act and the National Environmental Policy Act of 1969 regulations (40 CFR 1506.6). The Service will evaluate the application, associated documents, and comments submitted thereon to determine whether the application meets the requirements of the National Environmental Policy Act regulations and section 10(a) of the Endangered Species Act. If it is determined that those requirements are met, a permit will be issued for the incidental take of the San Joaquin kit fox during the Applicants' planned development project. The permit would also authorize incidental take of the California tiger salamander effective upon its listing under the Act. The final permit decision will be made no sooner than 30 days from the date of this notice.

Dated: September 4, 1998.

Michael J. Spear,

Manager, California/Nevada Operations Office, Fish and Wildlife Service, Region 1, Sacramento, California.

[FR Doc. 98-24408 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO-350-4210-01]

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

AGENCY: Bureau of Land Management Interior.

ACTION: Notice and request for comments.

In accordance with the Paperwork Reduction Act of 1995, the Bureau of Land Management (BLM) announces its intention to request approval from the Office of Management and Budget (OMB) to collect information, suggestions, and opinions, of individuals who visit the Wild Horse and Burro Internet Adoption Web Site. On June 24, 1998, BLM published a notice in the **Federal Register** (63 FR 33472) requesting comment on this proposed collection. The comment

period closed on August 25, 1998. No comments were received from the public in response to that notice. Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the BLM clearance officer at the telephone number listed below. OMB is required to respond to this request within 60 days but may respond after 30 days. For maximum consideration, your comments and suggestions on the requirement should be made directly to the Office of Management and Budget, Interior Department Desk Officer (1004-NEW), Office of Information and Regulatory Affairs, Washington, D.C. 20503, telephone (202) 395-7340. Please provide a copy of your comments to the Bureau Clearance Officer (WO-630), 1849 C St., N.W., Mail Stop 401 LS, Washington, D.C. 20240.

Nature of Comments

We specifically request your comments on the following:

1. Whether the collection of information is necessary to BLM's proper functioning, including whether the information will have practical utility;
2. The accuracy of BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
3. The quality, utility, and clarity of the information to be collected; and
4. How to minimize the burden of collecting the information on those who are to respond, including the use of appropriate electronic, mechanical, or other forms of information technology.

Title: Wild Horse and Burro Internet Adoption Customer Comment Card.

OMB Approval Number: None.

Abstract: BLM will use the information, suggestions, and opinions given by commenters on the Internet adoption web site to improve the management of the web site and of the Internet adoption program. These data will determine whether BLM continues to use Internet adoptions as a means of disposing of healthy, excess wild horses and burros living on public lands.

Frequency: Once, per adoption.

Description of Respondents:

Respondents are those individuals who have access to computers with modems and internet access and who visit the Wild Horse and Burro Internet Adoption Web Site during the period of the adoption. Estimated completion time, 3 minutes per response.

Annual Responses: 600.

Annual Burden Hours: 30.

Collection Clearance Officer: Carole Smith, (202) 452-0367.

Dated: August 26, 1998.

Carole J. Smith,

Bureau of Land Management, Information Clearance Officer.

[FR Doc. 98-24441 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-84-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA-060-1430-01; CACA 7195]

Termination of Classification of Public Land for Small Tract Classification Number 368, and Opening Order; California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This notice terminates, in its entirety, the following classification, which classified public land for disposition pursuant to the Small Tract Act of June 1, 1938: CACA 7195—Small Tract Classification Number 368. The Small Tract Act of June 1, 1938 was repealed by the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701), which contained provisions providing broad authority that replaced the repealed act. Of the 75 acres described under the above described classification, 35 acres have been conveyed out of public ownership pursuant to the Small Tract Act of June 1, 1938. The mineral estates of those conveyed lands were reserved to the United States. Until appropriate rules and regulations are issued by the Secretary of the Interior, the reserved minerals on the conveyed lands will not be subject to location under the U.S. mining laws. A total of 40 acres still remain in public ownership. Those lands will be opened to the operation of the public land laws including the mining laws, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. All of the lands have been and remain open to the operation of the mineral leasing laws. The termination is necessary to facilitate the completion of a pending land exchange.

EFFECTIVE DATE: The termination of the classification is effective on September 11, 1998. The public land will be opened to entry at 10 a.m. on October 13, 1998.

FOR FURTHER INFORMATION CONTACT: Duane Marti, BLM California State Office (CA-931.4), 2135 Butano Drive, Sacramento, California 95825-0451; telephone number 916-978-4675.

SUPPLEMENTARY INFORMATION:**1. CACA 7195—Small Tract Act Classification Number 368**

T. 14 N., R. 9 E., San Bernardino Meridian
Sec. 30, W $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$,
NW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, and
SE $\frac{1}{4}$ NE $\frac{1}{4}$.

The area described contains 75 acres in San Bernardino County.

On May 15, 1953, 80 acres of public land were classified as suitable for lease and sale for home and business site purposes only under the Act of June 1, 1938, as amended (43 U.S.C. 682a-e). The classification decision was published in the **Federal Register** on May 21, 1953 (18 FR 2932). On February 15, 1954, 5 acres of land were revoked from the classification. The revocation decision was published in the **Federal Register** on February 26, 1954 (19 FR 1097). After the partial revocation, 75 acres of public land (as described above) remained classified under the original decision. The land was segregated from all appropriation under the public land laws, including mineral location under the general mining laws. The land has been and will remain open to the mineral leasing laws.

Of the 75 acres classified, 35 acres have been conveyed out of public ownership, with 40 acres remaining in public ownership. The mineral estates of those conveyed lands were reserved to the United States.

2. Pursuant to the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1701 *et seq.*), and the regulations contained in 43 CFR 2091.7-1(b)(2), Small Tract Act Classification Number 368 is hereby terminated in its entirety. The classification no longer serves a needed purpose as to the land described above.

3. Until appropriate rules and regulations are issued by the Secretary of the Interior, the reserved minerals on the 35 acres of conveyed lands will not be subject to location under the U.S. mining laws.

4. At 10 a.m. on October 13, 1998, the 40 acres of public lands will be opened to the operation of the public land laws generally, subject to valid existing rights, the provision of existing withdrawals, other segregations of record, and the requirement of applicable law. All valid applications received at or prior to 10 a.m. on October 13, 1998 shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

5. At 10 a.m. on October 13, 1998, the 40 acres of public lands will be opened to location and entry under the United States mining laws, subject to valid existing rights, the provisions of existing

withdrawals, other segregations of record, and the requirements of applicable law.

Appropriation of any of the lands described in this notice under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38 (1994), shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determination in local courts.

Dated: September 3, 1998.

David McInay,

Chief, Branch of Lands.

[FR Doc. 98-24437 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-40-p

DEPARTMENT OF THE INTERIOR**Bureau of Land Management**

[COC-59828; CO-935-98-1430-00]

Colorado: Initial Classification of Public Lands for State Indemnity Selection

AGENCY: Bureau of Land Management, Interior

ACTION: Notice of initial classification of public lands for state indemnity classification.

SUMMARY: The Bureau of Land Management is issuing a notice of initial classification of certain public lands located in Fremont, Park, Routt Counties, Colorado, as suitable for state indemnity selection by the State of Colorado. The proposed classification decision was published in the **Federal Register**, and no comments were received. The lands are therefore being classified as proposed.

DATES: Comments should be received on or before October 13, 1998.

ADDRESSES: Comments should be submitted to the Secretary of the Interior, through the Bureau of Land Management, AD 350, 1000 L Street, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Andrew J. Senti, BLM, Colorado State Office, 303-239-1713.

SUPPLEMENTARY INFORMATION: Pursuant to Title 43 Code of Federal Regulations, Subpart 2400 and Section 7 of the Act of June 28, 1934; and the provisions granted to the State of Colorado by the Act of March 3, 1875 (18 Stat. 474), the

public lands described below are hereby classified for State Indemnity Selection. The State of Colorado has filed application to acquire the described lands in lieu of certain school lands that were encumbered by other rights or reservations before the State's title could attach. This application was assigned serial number Colorado 59828.

The notice of proposed classification of these lands was published in the **Federal Register** on February 12, 1997, Volume 62, Number 29, pages 6554, 6555, and was widely publicized. No comments were received. The lands are being classified as proposed.

The lands included in this classification are in Fremont, Park, and Routt Counties, Colorado and are described as follows:

Sixth Principal Meridian, Colorado

T. 17 S., R. 68 W.,

Sec. 11, SE $\frac{1}{4}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$;

Sec. 15, S $\frac{1}{2}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ and
NW $\frac{1}{4}$ SE $\frac{1}{4}$;

Sec. 21, NW $\frac{1}{4}$ SE $\frac{1}{4}$;

Sec. 22, NW $\frac{1}{4}$ NW $\frac{1}{4}$;

Sec. 27, SW $\frac{1}{4}$;

Sec. 28, NE $\frac{1}{4}$ SE $\frac{1}{4}$;

Sec. 34, W $\frac{1}{2}$ and SE $\frac{1}{4}$;

T. 18 S., R. 68 W.,

Sec. 3 lots 3, 4, 5, 6, 7, S $\frac{1}{2}$ NW $\frac{1}{4}$ and
NW $\frac{1}{4}$ SW $\frac{1}{4}$;

Sec. 4, NE $\frac{1}{4}$ SE $\frac{1}{4}$;

Sec. 10, N $\frac{1}{2}$ NW $\frac{1}{4}$;

T. 11 S., R. 75 W.,

Sec. 5, lots 1, 2, 3, 4, S $\frac{1}{2}$ NE $\frac{1}{4}$ and
SE $\frac{1}{4}$ SE $\frac{1}{4}$;

Sec. 6, lots 1, 2, 3, 4, 5, S $\frac{1}{2}$ NE $\frac{1}{4}$ and
SE $\frac{1}{4}$ NW $\frac{1}{4}$;

T. 7 N., R. 88 W.,

Sec. 5, SE $\frac{1}{4}$ SE $\frac{1}{4}$

Sec. 8, N $\frac{1}{2}$ NE $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$.

The areas described aggregate 2,237.06 acres.

This classification decision is based on the disposal criteria set forth in Title 43 Code of Federal Regulations, Part 2400. Transfer of the lands to the State will help fulfill the federal government's common school land grant to the state, which constitutes a public purpose use of the land. Lands found to be valuable for a public purpose use will be considered chiefly valuable for public purposes (43 CFR 2430.2b).

Certain of the lands in sections 27, 28 and 34, T. 17 S., R. 68 W., and sections 3 and 10, T. 18 S., R. 68 W., and the land in T. 7 N., R. 78 W., are in grazing use authorizations. If these lands are clearlisted, this grazing use will be terminated at the time title to the land is transferred to the State.

Threatened and endangered species and cultural resources evaluations have been performed and approved for the lands in this classification. Neither threatened and endangered species nor cultural resources were found on the

lands. A study made of each area indicates little potential for mineral exploration. There are no active mining claims recorded with the Bureau of Land Management for these lands, nor was any evidence of mining activity found on the land. An issued oil and gas lease on the lands in T. 11 S., R. 75 W., will remain in effect. A right-of-way on sections 3 and 10, T. 18 S., R. 68 W., will transfer with the land to the State.

If and when the selection is approved and certified to the State, the clearlist will contain the following reservations to the United States:

1. A right-of-way thereon for ditches and canals constructed by the authority of the United States, Act of August 30, 1890, 26 Stat. 391 (codified at 43 U.S.C. 945).

2. All the oil and gas in the described lands in T. 11 S., R. 75 W., and T. 7 N., R. 88 W. so clearlisted; and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914, 38 Stat. 509, as supplemented (codified at 30 U.S.C. 121-124).

The clearlist will also be subject to those rights for reservoir and ditch purposes as have been granted to Beaver Water and Irrigation Company, its successors or assigns, by right-of-way Pueblo 07902 under the Act of March 3, 1891, as amended (formerly 43 U.S.C. 946-949).

The public lands classified by this notice are shown on maps on file and available for inspection in the Colorado State Office of the Bureau of Land Management.

For a period of 30 days from the date of publication in the **Federal Register**, this classification shall be subject to exercise of administrative review and modification by the Secretary of the Interior as provided for in 43 CFR 2461.3 and 2462.3. Interested parties may submit comments to the Secretary of the Interior, through the Bureau of Land Management, Assistant Director, Minerals Realty & Resource Protection, AD-350, 1000 L Street, Washington, D.C. 20240.

Dated: August 28, 1998.

Jenny L. Saunders,

Realty Officer.

[FR Doc. 98-24431 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-JB-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Applications for Recordable Disclaimers of Interest; Colorado

[C0-935-5420-CO20; COC-61867, COC-39277]

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed issuance of recordable disclaimers of interest.

SUMMARY: The United States of America, pursuant to the provisions of Section 315 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1745), proposes to disclaim all interest in nine patented mining claims in Pitkin County, Colorado, and two patented parcels totaling 20 acres in Montrose County.

DATES: Comments or objections should be received on or before December 10, 1998.

ADDRESSES: Comments or objections should be sent to the Colorado State Director, BLM, 2850 Youngfield Street, Lakewood, Colorado 80215-7093.

FOR FURTHER INFORMATION CONTACT: Andrew J. Senti, BLM Colorado State Office, 303-239-3713.

SUPPLEMENTARY INFORMATION: A deed dated April 21, 1941, from Amos, M.E., and William Bourquin, purported to convey to the United States of America, by donation, the surface only of the following mining claims in Pitkin County: the Baltimore claim in Mineral Survey (M.S.) 3337; the Climax, Idlewilde, Howard Russell, Picnic, and Wilmington claims, constituting all of M.S. 4338; the Robert Lincoln claim in M.S. 6844; the Hayden claim in M.S. 6803; and the Jewell claim in M.S. 4786; all of which are lode claims in section 6, T. 11 S., R. 84 W., and/or section 1, T. 11 S., R. 85 W., of the Sixth Principal Meridian, Colorado, within the White River National Forest. Title to these patented mining claims was not accepted by the United States. However, the deed has created a cloud on the title to the claims, which have since been the subject of numerous conveyances among private landowners.

The two parcels in Montrose County, described as the E¹/₂NE¹/₄NE¹/₄NW¹/₄, N¹/₂NW¹/₄NW¹/₄NE¹/₄, and the SE¹/₄SW¹/₄NE¹/₄ of section 31, T. 49 N., R. 8 W., New Mexico Principal Meridian, Colorado, are affected by a scrivener's error in a patent dated July 25, 1925. The statute of limitations within which to correct the error has long since passed, and full title has therefore vested in the patentee and

successors in interest. The present landowner has requested issuance of a recordable disclaimer of interest to further substantiate an unclouded title to his property.

The Bureau of Land Management has determined that the United States has no claim to or interest in the lands in either situation described above and that issuance of the proposed recordable disclaimers of interest will help to remove a cloud on title on the respective claims and lands.

Authority: 43 CFR Part 1864.

Dated: August 28, 1998.

Jenny L. Saunders,

Realty Officer.

[FR Doc. 98-24432 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-JB-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID-020-1430-01-IDI-32122]

Amendment of the Monument Resource Management Plan and Notice of Realty Action: Sale of Public Land in Minidoka County, ID

AGENCY: Bureau of Land Management, Interior.

ACTION: Amendment of the Monument Resource Management Plan and Sale of Public Land in Minidoka County, Idaho.

NOTICE: Notice is hereby given that the Bureau of Land Management has amended the Monument Resource Management Plan to change the land use plan designation of Lots 1 and 2 (34.89 acres) of Section 25, Township 8 South, Range 24 East from the current Management Area (retention) designation to an Adjustment Area (disposal) designation. Notice is also hereby given that the amendment allows only for the sale of lot 2 (2.87 acres) of Section 25, Township 8 South, Range 24 East, at this time.

SUMMARY: The following described public land has been examined and through the public supported land use planning process has been determined to be suitable for disposal by direct sale pursuant to Section 203 of the Federal Land Policy and Management Act of 1976, as amended. The land will not be offered for sale until at least 60 days after the date of publication of this notice in the **Federal Register**.

Boise Meridian, Idaho

T. 8 S., R. 24 E.

Sec. 25: Lot 2.

Comprising 2.87 acres of public land, more or less.

The patent, when issued, will contain a reservation to the United States for ditches and canals and will be subject to existing rights-of-way for a buried telephone cable, a power line, and a county road. Lot 1 of Section 25, Township 8 South, Range 24 East (32.02 acres) will remain in public ownership until such time as it is no longer needed as a sheep trail rest area.

DATES: Upon publication of this notice in the **Federal Register**, the land described above will be segregated from appropriation under the public land laws, including the mining laws, except the sale provisions of the Federal Land Policy and Management Act. The segregative effect will end upon issuance of patent or 270 days from the date of publication, whichever occurs first.

PLANNING PROTEST: Any party that participated in the plan amendment and is adversely affected by the amendment may protest this action only as it affects issues submitted for the record during the planning process. Any protest must be filed within 30 days of the publication of this notice and sent to the following address: Director, Bureau of Land Management, Attention: Ms. Brenda Williams, Protests Coordinator, WO-210/LS-1075, Department of the Interior, Washington D.C. 20240. The Overnight Mail address is: Director, Bureau of Land Management, Attention: Ms. Brenda Williams, Protests Coordinator, (WO-210), 1620 L Street, N.W., Rm. 1075, Washington, D.C. 20036 [Phone: 202-452-5110]. To expedite consideration, in addition to the original sent by mail or overnight mail, a copy of the protest may be sent by FAX to 202-452-5112 or E-mail to bhudgens@wo.blm.gov. The protest shall contain:

1. The mailing address, telephone number, and interest of the person filing the protest.
2. A statement of the issue or issues being protested.
3. A statement of the part or parts of the amendment being protested.
4. A copy of all documents addressing the issue or issues that were submitted during the planning process by the protesting party or an indication of the date the issues were discussed for the record.
5. A concise statement explaining why the decision is believed to be wrong.

DIRECT SALE COMMENTS: For a period of 45 days from the date of publication of this notice in the **Federal Register**, interested parties may submit comments on this notice to the District Manager, Bureau of Land Management, 1405

Hollipark Drive, Idaho Falls, ID, 83401-2100. Objections will be reviewed by the State Director who may sustain, vacate, or modify this realty action. In the absence of any planning protests or objections regarding the land sale, this realty action will become the final determination of the Department of the Interior and the planning amendment will be in effect.

FOR FURTHER INFORMATION CONTACT: Contact Karl Simonson, Realty Specialist, at the Burley Field Office, 15 East 200 South, Burley, ID 83318 or telephone (208)677-6640.

Dated: August 28, 1998.

Tom Dyer,

Snake River Area Manager.

[FR Doc. 98-24446 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-GG-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA-160-1220-00]

Recreation Regulations Temporarily in Effect on Public Land Adjacent to the North Fork of the Kaweah River

AGENCY: Bureau of Land Management (BLM).

ACTION: Regulations addressing recreational use of BLM land along the North Fork of the Kaweah River under the management of the BLM are established.

SUMMARY: To protect natural resources, prevent wildfires, maintain public health and sanitation, and address occupancy and recreational use of BLM land along the North Fork of the Kaweah River the below regulations are established. These regulations are applicable to BLM land in Township 16 South, Range 28 East, Section 13, 23, 24 and 26, MDM under the management of the BLM, Bakersfield Field Office, California.

RULE: Effective September 1, 1998 and pursuant to 43 CFR 8365.1-6 (Supplementary Rules) the following regulations are in effect on BLM land within Township 16 South, Range 28 East, Sections 13, 23, 24, 26 and 34, MDM under the management of the BLM, Bakersfield Field Office.

1. Camping, parking of vehicles, occupancy or placing private property on BLM land within 500 feet of the North Fork of the Kaweah River or within 200 feet of the North Fork Drive is prohibited between the hours of 10:00 PM to 5:00 AM. However, the Authorized Officer and authorized representatives of the BLM may grant

organized groups use of the area consistent with the regulations listed below.

2. Only portable stoves using gas, jellied petroleum or pressurized liquid fuel or charcoal grills may be used for cooking. Used charcoal may not be dumped or discarded onto the ground or into the river. Campfires, warming or cooking fires using wood, vegetation or any other substance, except as described above, are prohibited. Building, maintaining, attending or using any fire other than the above described stove or grill is prohibited. Any emergency fire restriction established by the authorized officer or any government agency of proper jurisdiction will supersede the above upon appropriate signature or required publication.

3. All papers, plastic and paper bags or wrappers must be controlled to prevent their being blown away from the immediate control of their owner. All garbage or food residue such as egg shells, peelings, pits or other waste must be placed in an appropriate container pending proper disposal. Picnic sites must be kept free of refuse. All refuse must be placed into an appropriate container or litter bag pending proper disposal. Refuse means trash, garbage, rubbish, waste papers, empty bottles or cans, debris, litter, oil, solvents, liquid waste, diapers or other items of personal hygiene, or any other discarded materials.

4. The spilling, placing, pumping or other discharge of contaminants, pollutants or other wastes, including human waste, on the ground or into the Kaweah River is prohibited. Used diapers must be placed into an appropriate receptacle as soon as practical and may not be stored or placed within 40 feet of the North Fork of the Kaweah River.

5. The consumption or possession of alcoholic beverages is prohibited on the above defined BLM land. This does not apply to unopened containers in vehicles traveling through BLM land on roads maintained by Tulare County or the State of California.

SUPPLEMENTARY INFORMATION: These regulations have been effected to curtail the considerable accumulation of refuse and waste on public land adjacent to the North Fork of the Kaweah River. The area receives considerable recreational use in limited accessible locations. Public health and safety, sanitation and the pollution of water resources are of concern.

Nothing herein is intended in any way restrict or prevent access to or use of private property within the designated area. Public officers or

employees in the performance of their official duties are exempt from these regulations. These regulations do not apply to roads maintained by Tulare County or the State of California. These regulations are not intended to and will not be enforced to hinder or curtail any valid existing right, permit, or authorization. Access and use by owners or legitimate occupants of adjacent private property is permitted at all times.

Authority to create this supplementary rule is contained in 43 CFR 8365.1-6. These regulations affect only public lands within Township 16 South, Range 28 East, Sections 13, 23, 24, 26 and 34, Mount Diablo Base and Meridian. This is in conformance with the May 1997 Caliente Resource Management Plan.

Any violations of the prohibitions of this supplementary rule shall be punished by a fine or not more than \$1,000 or imprisonment of not more than 12 months as noted in 43 CFR 8365.0-7.

DATES: This rule will be in effect September 1, 1998 and will expire upon completion of a special recreation management plan applicable to the Kaweah River area.

FOR FURTHER INFORMATION CONTACT: John Hervey at (805) 391-6121 or at the BLM, Bakersfield field Office, 3801 Pegasus Drive, Bakersfield, CA 93308.

Dated: August 31, 1998.

Ron Fellows,

Field Office Manager.

[FR Doc. 98-24440 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-40-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO-076-1220-00]

Recreation Management; Recreation Visitor Use Restrictions for Ruby Canyon/Black Ridge; Colorado

AGENCY: Bureau of Land Management, Department of Interior.

ACTION: Notice of travel management and recreation visitor use restrictions.

SUMMARY: This order, issued under the authority of 43 CFR 8341.1 and 8342.1 and 43 CFR 8364.1(d), implements recreation and travel related management actions as identified in the Ruby Canyon Black Ridge Integrated Resource Management Plan signed in March of 1998 by the Colorado State Director and the Grand Junction Resource Area Manager. The identified public lands are in Colorado, Mesa

County, under the management jurisdiction of the Bureau of Land Management, Grand Junction Resource Area, Grand Junction District (T 10 S, R 103 & 104 W.; and T.1 N., R 2 & 3 W., Ute Dm). The area is bounded by the Colorado National Monument and highway 340 on the east, the Colorado/Utah state line on the west, private land and M.8 road (old highway 6&50) on the north, and private land in Glade Park north of the Little Dolores River and BS road. The restrictions and travel management direction consist of:

1. Expand the areas where motorized and non-motorized travel is allowed on designated routes only (no cross country travel) to include the area between I-70 and M.8 road, the area north of the Colorado River between Salt Creek and Loma and the area south of I.3 road and north and east of the Black Ridge Canyons Wilderness Study Area boundary in Kodels, Flume, and Devils Canyons (Devils and Kodels Canyons to be managed for non-motorized use only, Flume Canyon for hiking and equestrian use only).

2. The Upper Bench and Lower Bench roads on Black Ridge will be the primary access routes to the Rattlesnake Arches and will be managed as follows:

—The Upper Bench Road will be opened to all motorized vehicles from April 15 to August 15 only.

—The Lower Bench Road will be opened to all motorized vehicles from August 15 to February 15 only.

—The spur road off of the Lower Bench Road to the Black Ridge Communication Site will be closed year round to all motorized vehicle use (located in T.11 S., R 102 W., SW¹/₄, Sec. 25).

—Both routes will be closed to motorized vehicles from February 15 to April 15 and will be open year round to hikers, mountain bikers and horseback riders.

—Both roads may be closed at any time to prevent resource damage.

3. Overnight camping in the Rabbit Valley Special Recreation Management Area will be limited to no more than 7 consecutive nights within a 30 day period.

4. The number of commercial float outfitters allowed to operate on the Colorado River, Lomo to Westwater stretch will be limited to existing levels (34).

5. Motorized and mechanized access to the river bottom via the east and west Horsethief Benches is prohibited.

6. Overnight camping is prohibited on the bench below and the mesa top above the Rattlesnake Arches.

7. The size of the groups travelling to the Rattlesnake Arches will be limited to no more than 12 people.

8. Overnight parking is prohibited on either side of the cherry stem road to the Rattlesnake Arches and at the Rattlesnake Arches Trailhead.

9. The size of the groups hiking in the lower one and one-half miles of Knowles, Mee, and Rattlesnake Canyons in the Black Ridge Canyons Wilderness Study Area will be limited to no more than 25 people.

10. Portions of the river shoreline may be closed to recreational use on a seasonal or other temporary basis to minimize disruption of bald eagles, peregrine falcons, and other sensitive species.

11. To maintain its suitability for nesting bald eagles, overnight camping will be prohibited on Chow Doggone Island.

12. For the purpose of enhancing public safety, recreational target shooting will be prohibited on BLM lands southwest of Fruita, Colorado. The area closed to target shooting is approximately 2900 acres and is bounded on the north by the Colorado River (includes Skippers Island), the Black Ridge Canyons Wilderness Study Area boundary on the west, the Colorado National Monument on the south, and the boundary between BLM and private lands on the east. For this closure order, shooting is defined as discharge of any weapon for the purpose of recreational target shooting. Bow & arrows, pellet guns and BB guns are included in this definition.

EFFECTIVE DATES: The restrictions shall be in effect year round beginning September 15, 1998 and shall remain in effect until rescinded or modified by the Authorized Officer.

SUPPLEMENTARY INFORMATION: BLM administers approximately 118,700 acres in the Black Ridge/Ruby Canyon planning area. This area has become increasingly popular for river floating, hiking, mountain biking, horseback riding and OHV use due to its close proximity to Fruita and Grand Junction. Public lands in this area contain important fragile resource values along with providing a variety of recreational opportunities. Changes in the current travel and recreation restrictions in the Black Ridge area are needed to protect desirable recreational opportunities and benefits as well protect erosive soils, wildlife habitat, cultural resources, important scenic values, wilderness values and semi-primitive motorized and non-motorized settings. Growing recreational use in the area is expected to continue, and these travel

management and recreation use restrictions are needed to prevent conflicts between users and unacceptable impacts on resource values, while continuing to provide a variety of recreational opportunities.

Notice of these regulations will be posted on-the-ground at the entrance to the Black Ridge Road network, at the beginning of the cherry stemm road to the arches, at the Rattlesnake Arches, Devils Canyon and Pollock Bench Trailheads, at the Loma Boat Launch, at the main staging area in Rabbit Valley, and at the Grand Junction Resource Area office.

Persons who may be exempted from the restrictions include: (a) Any federal, state, or local officers engaged in fire, emergency and law enforcement activities; (b) BLM employees engaged on official duties; (c) other persons authorized to operate motorized vehicles within the restricted areas.

PENALTIES: Violations of this restriction order are punishable by fines not to exceed \$100,000 and/or imprisonment not to exceed 12 months.

FOR FURTHER INFORMATION CONTACT: Catherine Robertson, Area Manager, Grand Junction Resource Area, 2815 H Road Grand Junction, Colorado 81506; (303) 244-3000. Mark Morse, District Manager, Grand Junction District, 2815 H Road, Grand Junction, Colorado 81506; (970) 244-3000.

Rich Arcand,

Grand Junction Acting District Manager.

[FR Doc. 98-24439 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-JB-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID-957-1430-00]

Idaho: Filing of Plats of Survey; Idaho

The plat of the following described land was officially filed in the Idaho State Office, Bureau of Land Management, Boise, Idaho, effective 9:00 a.m., August 31, 1998.

The plat representing the dependent resurvey of portions of the south and east boundaries and portions of the subdivisional lines, and the subdivision of sections 25, 26, 35, and 36, the survey of certain lots, and certain metes-and-bounds surveys in T. 4 S., R. 19 E., Boise Meridian, Idaho, Group 985, was accepted August 31, 1998. This survey was executed to meet certain administrative needs of the Bureau of Land Management.

All inquiries concerning the surveys of the above described land must be sent

to the Chief, Cadastral Survey, Idaho State Office, Bureau of Land Management, 1387 South Vinnell Way, Boise, Idaho, 83709-1657.

Dated: August 31, 1998.

Duane E. Olsen,

Chief Cadastral Surveyor for Idaho.

[FR Doc. 98-24429 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-GG-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID-957-1150-00]

Idaho: Filing of Plats of Survey; Idaho

The plats of the following described land was officially filed in the Idaho State Office, Bureau of Land Management, Boise, Idaho, effective 9:00 a.m., August 31, 1998. The plat representing the dependent resurvey of a portion of the subdivisional lines, and the subdivision of section 4, and the survey of lots 8 and 12 in section 4 and lot 5 in section 5, T. 17 N., R. 24 E., Boise Meridian, Idaho, Group 988, was accepted August 31, 1998. This survey was executed to meet certain administrative needs of the bureau of Land Management. The plat representing the dependent resurvey of portions of the Fourth Standard Parallel North, the south boundary of the Lemhi Indian Reservation, and subdivisioned lines, and the subdivision of certain sections, T. 18 N., R. 24 E., Boise Meridian, Idaho, Group 988, was accepted August 31, 1998. This survey was executed to meet certain administrative needs of the Bureau of Land Management. All inquiries concerning the survey of the above described land must be sent to the Chief, Cadastral Survey, Idaho State Office, Bureau of Land Management, 1387 South Vinnell Way, Boise, Idaho, 83709-1657.

Dated: August 31, 1998.

Duane E. Olsen,

Chief Cadastral Surveyor for Idaho.

[FR Doc. 98-24430 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-GG-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID-957-1030-00]

Idaho: Filing of Plats of Survey; Idaho

The field notes of the following described land were officially filed in the Idaho State Office, Bureau of Land

Management, Boise, Idaho, effective 9:00 a.m., September 4, 1998.

The field notes representing the remonumentation of certain original corners in Tps. 18 and 19 N., R. 22 E., Boise Meridian, Idaho, Group 1000, were accepted September 4, 1998. This remonumentation was executed to meet certain administrative needs of the Bureau of Land Management.

The field notes representing the remonumentation of certain original corners in T. 24 N., R. 3 E., Boise Meridian, Idaho, Group 1000, were accepted September 4, 1998. This remonumentation was executed to meet certain administrative needs of the Bureau of Land Management.

All inquiries concerning the survey of the above described land must be sent to the Chief, Cadastral Survey, Idaho State Office, Bureau of Land Management, 1387 South Vinnell Way, Boise, Idaho, 83709-1657.

Dated: September 4, 1998.

Duane E. Olsen,

Chief Cadastral Surveyor for Idaho.

[FR Doc. 98-24438 Filed 9-10-98; 8:45 am]

BILLING CODE 4310-GG-M

DEPARTMENT OF JUSTICE

Auto Theft and Recovery; Request for Comments

AGENCY: Department of Justice.

ACTION: Notice.

SUMMARY: The Anti Car Theft Act of 1992 ("ACTA"), as amended, requires the Secretary of the Department of Transportation to expand the scope of its existing automobile parts marketing program to include certain unmarked passenger motor vehicles—*unless* the Attorney General finds that such a program would not substantially inhibit chop shop operations and motor vehicle thefts. In accordance with the requirement of section 306 of ACTA, the Attorney General is required to make this finding based, in part, on information developed after notice and an opportunity for a public hearing. Therefore, the United States Department of Justice is publishing this notice seeking public comment on the issue of whether or not parts marking substantially inhibits chop shop operations and motor vehicle thefts.

DATES: All comments must be received no later than November 10, 1998.

ADDRESSES: All comments should be submitted to Thomas Eldridge, U.S. Department of Justice, Room 2213, 950 Pennsylvania Avenue, N.W., Washington, DC 20530.

FOR FURTHER INFORMATION CONTACT:

Thomas Eldridge, U.S. Department of Justice, Room 2213, Washington D.C. 20530 (202) 307-3966.

SUPPLEMENTARY INFORMATION: The Motor Vehicle Theft Law Enforcement Act of 1984 (the "1984 Act") required the Secretary of the Department of Transportation ("DOT") to issue a rule requiring the marking of certain major parts of high-theft passenger automobile lines. DOT implemented the 1984 Act by issuing the Federal Motor Vehicle Theft Prevention Standard, as codified at 49 CFR Part 541.

The purpose of the Federal Motor Vehicle Theft Prevention Standard was to reduce the incidence of motor vehicle theft by facilitating the tracing and recovery of parts from stolen vehicles. The standard seeks to facilitate such tracing by requiring that vehicle identification numbers ("VINs"), VIN derivative numbers, or other symbols be placed on major motor vehicle parts. At this time, each vehicle in a high-theft line must have its major parts and major replacement parts marked unless the line is exempted from parts marking pursuant to 49 CFR part 543.

The Anti Car theft Act of 1992 ("ACTA") expanded the coverage of the Federal Motor Vehicle Theft Prevention Standard to include high theft lines of multipurpose passenger vehicles or light duty trucks rated less than 6,000 pounds gross vehicle weight. ACTA also required DOT to prescribe a vehicle theft standard to cover not more than 50 percent of passenger motor vehicles (except light duty trucks) not designated as high theft lines. DOT was required to prescribe such conforming vehicle theft standards by October 25, 1994. In addition, ACTA required the Secretary of DOT to apply the Federal Motor Vehicle Theft Prevention Standard to all remaining lines of passenger motor vehicles (except light duty trucks) within three years after prescribing the vehicle theft standard—*unless* the Attorney General found that applying the standard would not substantially inhibit chop shop operations and motor vehicle thefts.

The Attorney General is required to make this finding based, in part, on information developed after notice and an opportunity for a public hearing. Therefore, the Department of Justice now seeks public comment on whether or not applying the Federal Motor Vehicle Theft Prevention Standard to the remaining lines of passenger motor vehicles (except light duty trucks) substantially inhibits chop shop operations and motor vehicle thefts.

The Attorney General also is required to consider and include in a record

submitted to the Secretary of DOT additional costs, effectiveness, competition, and available alternative factors concerning the expansion of the Federal Motor Vehicle Theft Prevention Standard. The Department of Justice will consider studies conducted by the Department and DOT, as well as any comments solicited by this notice, in reaching its finding. The Department of Justice also will consider comments previously submitted to DOT in response to a June 26, 1997 **Federal Register** Notice (62 FR 34494) requesting comments on a DOT preliminary report entitled "Auto Theft and Recovery; Preliminary Report on the Effects of the Anti Car Theft Act of 1992 and the Motor Vehicle Theft Law Enforcement Act of 1984." Parties who submitted comments to DOT in response to that request do not need to submit similar comments to the Department of Justice.

In order to develop the required information for its finding, the Department of Justice awarded a grant, through a competitive process, to a contractor to evaluate the impact of the auto parts marking regulations on automobile thefts. As part of this grant, the contractor surveyed auto theft investigators from local and state law enforcement agencies. This survey, titled "Opinions of 47 Auto Theft Investigators Regarding Automobile Component Parts Anti-Theft Labels," was prepared and submitted to the Department of Justice for consideration on December 30, 1996. The following outlines the findings contained in the survey:

(1) The survey was administered by telephone to a sample of investigators from 47 jurisdictions, including 31 of the 32 largest cities in the country (plus Miami), six smaller jurisdictions, and nine state agencies.

(2) Nearly three-quarters of the 40 big city and state auto theft investigators contacted reported that anti-theft labels are useful in helping to identify and arrest chop shop owners and individuals who steal or traffic in stolen vehicles and parts.

(3) Nearly two-thirds of investigators reported that labels also aid in the successful prosecution of chop shop operators and other automobile and parts thieves.

(4) Investigators reported that the most serious obstacle to making more effective use of the labels is that they are easily removed and, once removed, it is impossible to prove that the parts are stolen because the owner cannot be traced.

(5) Investigators were about evenly divided regarding whether anti-theft

labels deter professionals or amateurs from stealing or stripping cars.

(6) All but one investigator felt that parts marking legislation should be extended to all automobile lines and to all types of noncommercial vehicles, especially pickup trucks.

(7) Investigators suggested that parts marking might be more effective if: (i) auto theft investigators and patrol officers were trained more systematically and frequently in how to investigate label removal and tampering; (ii) legislation in every state made tampering with or removing labels a felony; and (iii) manufacturers were required to stamp VINs on the component parts rather than using removable labels.

(8) Respondents also recommended providing investigators access to ultraviolet lights with which to detect counterfeit labels or the "footprints" that most anti-theft labels are designed to leave if removed.

The Department of Justice plans to consider this survey prior to making and providing its required finding to DOT. Persons interested in obtaining a copy of the survey should call the National Criminal Justice Reference Service at 1-(800) 851-3420 and request Document No. NCJ 171693.

Pursuant to the grant awarded by the Department of Justice, the contractor also is preparing a report based on a cross-sectional time series analysis of national auto theft data, including FBI reported automobile thefts, R.J. Polk, Inc.'s data on car registrations, supplemented by Census statistics, FBI Uniform Crime Reports, and the National Household Victimization Survey. This report currently is being revised to incorporate new information provided by DOT and should be completed no later than the end of 1998. The Department of Justice plans to consider this report prior to making and providing its required finding to DOT.

In addition to the report being prepared on behalf of the Department of Justice, DOT also conducted studies addressing the effectiveness of parts marking which the Department of Justice will consider as part of the record for its findings. In 1991, the National Highway Traffic Safety Administration presented a report to Congress assessing the auto theft problem in the United States and evaluating parts marking. Although evidence of the effectiveness of parts marking could not be obtained through statistical analysis of theft and recovery rates at that time, DOT nevertheless found wide support in 1991 for parts marking in the law enforcement community. Investigators believed that

parts marking provided them with a valuable tool for detecting, apprehending, and prosecuting thieves. After considering the analyses, surveys and public comments obtained during the preparation of the 1991 report, DOT recommended that the Federal Motor Vehicle Theft Prevention Standard be continued with minor changes.

In addition, on June 26, 1997, DOT sought information concerning the Federal Motor Vehicle Theft Prevention Standard in a **Federal Register** Notice (62 FR 34494) requesting comments on a DOT preliminary report entitled "Auto Theft and Recovery; Preliminary Report on the Effects of the Anti Car Theft Act of 1992 and the Motor Vehicle Theft Law Enforcement Act of 1984." Persons interested in obtaining a copy of this report should contact the Docket Section, Room 5111, NASSIF Building, 400 Seventh Street, SW, Washington, DC 20590, and refer to Docket Number 97-042; Notice 1.

According to DOT's June 26, 1997 notice, analyses of the effectiveness of parts marking in "high theft" passenger car lines suggested that parts marking has benefits in reducing theft rates, and at times in increasing recovery rates. DOT stated that these benefits seem to exceed the cost of parts marking. DOT also found that the greatest impact of parts marking appears to occur with chop shops and "professional" auto thieves. While more vehicles stolen for export are being recovered according to DOT, the number recovered was too small to say that parts marking has helped reduce thefts for export or recovery of these vehicles. (62 FR 34496).

Given that parts marking appears to be effective in currently marked passenger car lines, DOT believed that there was no reason to doubt that it also could have benefits for other passenger vehicles. DOT further stated that it appears that parts marking and other provisions of the 1984 Act and ACTA have given the law enforcement community tools they can use to deter thefts, trace stolen vehicles and parts, and apprehend and convict thieves. (62 FR 34496-97).

The Department of Justice plans to utilize these reports and studies, as well as any comments solicited by this notice or the DOT notice, as the record for the finding it will make to the Secretary of DOT pursuant to 49 U.S.C. 33103(c).

Comments Sought

The Department of Justice seeks public comment on whether or not applying the Federal Motor Vehicle Theft Prevention Standard to the remaining lines of passenger motor

vehicles (except light duty trucks) substantially inhibits chop shop operations and motor vehicle thefts. In this regard, the Department of Justice also seeks comments concerning additional costs, effectiveness, competition, and available alternative factors associated with the expansion of the Federal Motor Vehicle Theft Prevention Standard to the remaining lines of passenger motor vehicles (except light duty trucks).

All comments received before the close of business on the comment closing date will be considered. To the extent possible, comments filed after the closing date also will be considered.

Authority: 49 U.S.C. 33103.

Dated: August 25, 1998.

James K. Robinson,

Assistant Attorney General.

[FR Doc. 98-24434 Filed 9-10-98; 8:45 am]

BILLING CODE 4410-14-M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response Compensation and Liability Act

In accordance with Departmental policy, 28 CFR § 50.7, and Section 122 of CERCLA, 42 U.S.C. 9622, notice is hereby given that on July 31, 1998, a proposed Consent Decree in *United States v. Crestwood Development et al.*, Civ. Action No. 98-73313 was lodged with the United States District Court for the Eastern District of Michigan. This Consent Decree represents a settlement of claims of the United States against: (1) Crestwood Development Company, (2) Ford Motor Company; (3) Indian Head Industries, Inc. (f.k.a Detroit Gasket & Manufacturing Company); (4) John Denski; (5) Minnesota Mining & Manufacturing Company; (6) Purolator Products Company; (7) Stanley Denski; (8) TBG Services, Inc.; (9) TPI Petroleum, Inc. (f.k.a. J. Austin Oil); (10) Woolf Aircraft Products; (11) Charter Township of Canton; (12) City of Allen Park; (13) City of Garden City; (14) City of Inkster; (15) City of Livonia; (16) City of Plymouth; (17) City of Romulus; (18) City of Wayne; (19) City of Westland; and (20) County of Wayne (collectively "Settling Defendants"), for reimbursement of response costs in connection with the Nankin Township Superfund Site ("Site") pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 et seq.

Under this settlement with the United States, Settling Defendants, will pay \$1,573,551.76, plus interest, in

reimbursement of response costs incurred by the United States at the Site. In addition, Performing Settling Defendants (Minnesota Mining and Manufacturing Company, the County of Wayne and Crestwood Development) will submit a Remedial Action Plan ("RAP") to the Michigan Department of Environmental Quality ("MDEQ") by February 1, 1999. Upon approval of the RAP by MDEQ, the Performing Settling Defendants will implement the work outlined in the RAP by the dates specified in the RAP.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General of the Environmental and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States v. Crestwood Development, et al.*, D.J. Ref. 90-11-2-1291.

The proposed Consent Decree may be examined at the Office of the United States Attorney, Eastern District of Michigan, Southern Division, 211 West Fort Street, Suite 2300, Detroit, MI 48226, at the Region 5 Office of the Environmental Protection Agency, 77 West Jackson Street, Chicago, Illinois 60604-3590, and at the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005, (202) 624-0892. A copy of the proposed Consent Decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005. In requesting a copy of the Consent Decree, please enclose a check payable to the Consent Decree Library in the amount of \$9 (25 cents per page reproduction cost) for a copy of the Consent Decree.

Joel Gross,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 98-24447 Filed 9-10-98; 8:45 am]

BILLING CODE 4410-15-M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States v. Joel G. Freeman, et al.*, Case No. 96 Civ. 2354 (CLB), was lodged on August 31, 1998, in the United States

District Court for the Southern District of New York.

The Consent Decree resolves the United States' claim, pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9607, for response costs incurred by EPA at the Freeman Industries Superfund Site (the "Site"), located in the Town of Tuckahoe, Westchester County, New York. The Consent Decree also resolves the United States' claim, pursuant to Section 3008 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6928, for injunctive relief to stop the storage of hazardous waste at the Site without a permit.

Under the Consent Decree, the United States will receive \$400,000 in reimbursement of response costs. In addition, the Consent Decree provides for the Defendants to finance and perform the clean up of hazardous waste remaining on the Site.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States v. Joel G. Freeman, et al.*, DOJ Ref. #90-11-2-1082.

The proposed Consent Decree may be examined at the Office of the United States Attorney in New York City; the Region II Office of the Environmental Protection Agency, 290 Broadway, New York, New York; and at the Consent Decree Library, 1120 G Street, NW., 3rd Floor, Washington, DC 20005, (202) 624-0892. A copy of the proposed Consent Decree may be obtained in person or by mail from the Consent Decree Library. In requesting a copy please refer to the referenced case and enclose a check made payable to the Consent Decree Library in the amount of \$8.00 (25 cents per page reproduction costs).

Walker B. Smith,

Deputy Section Chief,

Environmental Enforcement Section,

Environment and Natural Resources Division,
U.S. Department of Justice.

[FR Doc. 98-24448 Filed 9-10-98; 8:45 am]

BILLING CODE 4410-15-M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Clean Water Act

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed Final Consent Decree in *United States v. William J. Hall, et al.*, Civil No. 2:97-0169-12 (D.S.C.), was lodged with the United States District Court for the District of South Carolina on July 20, 1998. The proposed Decree concerns alleged violations of sanctions 301(a) and 404 of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1344, resulting from Defendants' unauthorized excavation, mechanized land-clearing and filling activities in approximately 30.7 acres of wetlands. The violations occurred primarily in connection with Defendants' construction of a private, dirt airstrip for personal use and a hanger/equipment storage facility in palustrine-forested wetlands near the Town of Ravenel, in Charleston County, South Carolina.

The proposed Final Consent Decree would require the payment of a \$120,000 civil penalty and implementation of a Corps-approved restoration and mitigation plan. The plan would provide for the restoration, enhancement and preservation of all the impacted wetlands except for approximately 6.0 acres near the hanger building. Additional acreage would be preserved in mitigation for the unrestored area.

The U.S. Department of Justice will receive written comments relating to the proposed Consent Decree for a period of thirty (30) days from the date of publication of this notice. Comments should be addressed to R. Emery Clark, Assistant United States Attorney, District of South Carolina, 1441 Main Street, Suite 500, Columbia, SC 29201, and should refer to *United States v. William J. Hall, et al.*, Civil No. 2:97-0169-12 (D.S.C.).

The proposed Final Consent Decree may be examined at the Clerk's Office, United States District Court for the District of South Carolina, Charleston Division, Hollings Judicial Center, Meeting and Broad Streets, Charleston, South Carolina 29401.

Letitia J. Grishaw,

Chief, Environmental Defense Section,

Environment and Natural Resources Division,
United States Department of Justice.

[FR Doc. 98-24449 Filed 9-10-98; 8:45 am]

BILLING CODE 4410-15-M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

In accordance with 28 CFR 50.7 and Section 122 of the Comprehensive Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9622, the Department of Justice gives notice that a proposed consent decree in *United States v. Harold Shane, et al.*, Civil No. 90-0102-C (S.D. Ohio), was lodged with the United States District Court for the Southern District of Ohio on August 28, 1998, pertaining to the Arcanum Iron & Metal Superfund Site (the "Site"), Arcanum, Twin Township, Darke County, Ohio. The proposed consent decree would resolve the United States' civil claims against four third-party and fourth-party defendants named in this action.

Under the proposed consent decree, three settling defendants, alleged generators who were not named in the original United States' 1990 cost recovery complaint, will be obligated to perform and finance a \$5.8 million remedy at the Site, pay up to \$150,000 in U.S. EPA's future response costs, and reimburse the Superfund for \$201,832 of the United States' past costs of approximately \$3 million. In addition, a fourth de minimis settling defendant, also an alleged generator not named in the United States' complaint, will be obligated to pay \$53,842 to the Superfund in reimbursement of the United States' past costs at the Site.

The Arcanum Iron & Metal Site is a 4.5 acre parcel of land that operated as a battery salvaging and reprocessing facility from approximately 1964 to 1982. Site activities resulted in contamination of soil, surface waters, structures and sediments with high levels of lead and other hazardous substances. In addition, large volumes of contaminated plastic and rubber battery casing chips accumulated at the Site. The Site will be remediated under the proposed consent decree. The remedy to be implemented by the three settling defendants consists of the following actions: (1) Demolition and decontamination of on-Site structures; (2) Excavation and treatment of approximately 44,000 cubic yards of lead-contaminated soil and 4,000 cubic yards of battery casing chips; (3) Excavation and treatment of contaminated sediment on-Site; (4) Backfilling of excavated areas with clean soil and revegetation; and (5) Extensive groundwater monitoring.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resource Division, United States Department of Justice, Washington, DC 20530, and should refer to *United States v. Harold Shane et al.*, Civil No. 90-0102-C (S.D. Ohio), and DOJ Reference No. 90-11-3-504. Commenters may request an opportunity for a public meeting in the affected area, in accordance with Section 7003(d) of RCRA, 42 U.S.C. § 6973(d).

The proposed consent decree may be examined at: (1) the Office of the United States Attorney for the Southern District of Ohio, Federal Building, Room 602, 200 W. Second St., Dayton, Ohio 45400 (937-225-2910); (2) the United States Environmental Protection Agency (Region 5), 77 West Jackson Boulevard, Chicago, Illinois 60604-3590 (contact Richard Murawski (312-886-6721)); and (3) the U.S. Department of Justice, Environment and Natural Resources Division Consent Decree Library, 1120 G Street, NW, 4th Floor, Washington, DC 20005 (202-624-0892). A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, NW, 4th Floor, Washington, DC 20005. In requesting a copy, please refer to the referenced case and DOJ Reference Number and enclose a check in the amount of \$26.75 for the consent decree only (107 pages at 25 cents per page reproduction costs), or \$72.25 for the consent decree and all appendices (289 pages), made payable to the Consent Decree Library.

Walker B. Smith,

Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 98-24435 Filed 9-10-98; 8:45 am]

BILLING CODE 4410-15-M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-34,553; TA-W-34,553A]

Carleton Woolen Mills, Gardiner and Winthrop, ME; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for

Worker Adjustment Assistance on July 22, 1998, applicable to workers of Carleton Woolen Mills located in Gardiner, Maine. The notice was published in the **Federal Register** on August 7, 1998 (63 FR 42434).

At the request of petitioners, the Department reviewed the certification for workers of the subject firm. New information submitted to the Department shows that worker separations have occurred at the Winthrop, Maine plant of the subject firm. The workers are engaged in employment related to the production of woolen fabric.

The intent of the Department's certification is to provide coverage to all workers of the subject firm adversely affected by increased imports of woolen fabric. Therefore, the Department is amending the certification to expand coverage to workers of Carleton Woolen Mills, Winthrop, Maine.

The amended notice applicable to TA-W-34, 553 is hereby issued as follows:

All workers of Carleton Woolen Mills, Gardiner, Maine (TA-W-34,553) and Winthrop, Maine (TA-W-34,553A), who became totally or partially separated from employment on or after May 6, 1997 through July 22, 2000, are eligible to apply for worker adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, D.C. this 1st day of September 1998.

Grant D. Beale,

Acting Director, Office of Trade Adjustment Assistance.

[FR Doc. 98-24484 Filed 9-10-98; 8:45 am]

BILLING CODE 4510-30-M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-33,943; TA-W-33,943A]

Carolyn of Virginia, Inc.; Bristol, VA; Paulette Robes, Division of Lipson Brothers, Inc., New York, NY; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 USC 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on October 31, 1998, applicable to workers of Carolyn of Virginia Inc. located in Bristol, Virginia. The notice was published in the **Federal Register** on December 12, 1997 (62 FR 65097).

At the request of the company, the Department reviewed the certification

for workers of the subject firm. New information provided by the company shows that the Paulette Robes, a division of Lipson Brothers, Inc. in New York, New York, distributed the garments produced by Carolyn of Virginia Inc., which is a subsidiary of Paulette. All workers of Paulette Robes were separated from employment as a result of the Carolyn of Virginia plant closure.

The intent of the Department's certification is to provide coverage to all workers of the subject firm adversely affected by increased imports of ladies' robes. Therefore, the Department is amending the certification to expand coverage to workers of Paulette Robes, a division of Lipson Brothers, Inc. in New York, New York.

The amended notice applicable to TA-W-33,943 is hereby issued as follows:

All workers of Carolyn of Virginia Inc., Bristol, Virginia (TA-W-33,943) and Paulette Robes, Division of Lipson Brothers, Inc., New York, New York (TA-W-33,943A), who became totally or partially separated from employment on or after September 15, 1996 through October 31, 1999, are eligible to apply for worker adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, DC this 31st day of August 1998.

Grant D. Beale,

Acting Director, Office of Trade Adjustment Assistance.

[FR Doc. 98-24483 Filed 9-10-98; 8:45 am]

BILLING CODE 4510-30-M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-34,067]

Duracell North Atlantic Group, A/K/A GP Lithium Batteries, Waterbury, CT; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 USC 2273) the Department of Labor issued a Notice of Certification Regarding Eligibility to Apply for Worker Adjustment Assistance on February 2, 1998, applicable to workers of Duracell North Atlantic Group located in Waterbury, Connecticut. The notice was published in the **Federal Register** on March 16, 1998 (63 FR 12831).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers produce rechargeable batteries packs. The findings show that on February 6, 1998, the subject firm was

purchased by Gold Peak, also known as GP Batteries (USA). GP Lithium Batteries in Waterbury has announced that the plant is closing September 30, 1998. Some of the workers separated from employment at the Waterbury plant will have had their wages reported under the unemployment insurance (UI) tax account for GP Lithium Batteries.

The intent of the Department's certification is to include all workers of the Waterbury, Connecticut plant adversely affected by increased imports. Accordingly, the Department is amending the certification to reflect that Duracell North Atlantic Group is under the new ownership of GP Lithium Batteries.

The amended notice applicable to TA-W-34,067 is hereby issued as follows:

All workers of Duracell North Atlantic Group, also known as GP Lithium Batteries, Waterbury, Connecticut engaged in employment related to the production of rechargeable battery packs who became totally or partially separated from employment on or after November 21, 1996 through February 2, 2000, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, DC this 31st day of August 1998.

Grant D. Beale,

Acting Director, Office of Trade Adjustment Assistance.

[FR Doc. 98-24481 Filed 9-10-98; 8:45 am]

BILLING CODE 4510-30-M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-34,487; et al.]

Halmode Apparel, Incorporated; et al.; Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 USC 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on June 24, 1998 applicable to all workers of Halmode Apparel, Incorporated in New Castle, Virginia. The notice was published in the **Federal Register** on July 31, 1998 (63 FR 40935).

At the request of the company, the Department reviewed the certification for workers of the subject firm. New information from the company shows that worker separations will occur at the subject firms' Covington and Roanoke, Virginia production facilities when they close in October, 1998. The workers are

engaged in employment related to the production of maternity dresses and nurses uniforms.

Accordingly, the Department is amending the certification to cover workers at Halmode Apparel, Incorporated, Covington and Roanoke, Virginia.

The intent of the Department's certification is to include all workers of Halmode Apparel, Incorporated adversely affected by increased imports.

The amended notice applicable to TA-W-34,487 is hereby issued as follows:

All workers of Halmode Apparel, Incorporated, New Castle, Virginia (TA-W-34,487), Covington, Virginia (TA-W-34,487B) and Roanoke, Virginia (TA-W-34,487C) who became totally or partially separated from employment on or after April 9, 1997 through June 24, 2000 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, D.C. this 31st day of August, 1998.

Grant D. Beale,

Acting Director, Office of Trade Adjustment Assistance.

[FR Doc. 98-24482 Filed 9-10-98; 8:45 am]

BILLING CODE 4510-30-M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-34,685]

Siebe Automotive North America, Knoxville, TN; Notice of Revised Determination on Reopening

On July 30, 1998, the Department issued a Negative Determination Regarding Eligibility to apply for worker adjustment assistance, applicable to workers and former workers of Siebe Automotive North America in Knoxville, Tennessee. The notice will be published shortly in the **Federal Register**.

By letter of August 11, 1998, the company requested administrative reconsideration regarding the Department's denial. New information provided by the subject firm and confirmed by the sole customer shows that the customer is using a different vendor who is manufacturing like or directly competitive articles in Canada and importing the finished product into the U.S.

Workers at the subject firm are engaged in employment related to the production of emission gas recirculating valves. The workers are not separately identifiable by product line.

Sales, production and employment at the Knoxville, Tennessee facility

declined during the relevant time period.

Conclusion

After careful review of the additional facts obtained on reopening, I conclude that increased imports of articles like or directly competitive with emission gas recirculating valves, contributed importantly to the decline in sales or production and to the total or partial separation of workers of Siebe Automotive North America in Knoxville, Tennessee. In accordance with the provisions of the Act, I make the following certification:

All workers of Siebe Automotive North America in Knoxville, Tennessee, who became totally or partially separated from employment on or after June 12, 1997 are eligible to apply for worker adjustment assistance under Section 223 of the Trade Act of 1974.

Signed in Washington, D.C. this 27th day of August 1998.

Grant D. Beale,

Acting Director, Office of Trade Adjustment Assistance.

[FR Doc. 98-24479 Filed 9-10-98; 8:45 am]

BILLING CODE 4510-30-M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-34,655]

Tri Americas, Incorporated, A/K/A Try America, Incorporated, El Paso, TX; Notice of Revised Determination on Reopening

On August 25, 1998, the Department, on its own motion, reopened its investigation for workers and former workers of the subject firm.

The initial investigation resulted in a negative determination issued on July 27, 1998, because the "contributed importantly" test of the Group Eligibility Requirements of the Trade Act was not met for workers at the subject firm. The workers produced men's high-end denim pants. The notice was published in the **Federal Register** on August 7, 1998 (63 FR 42433).

New information presented during a NAFTA-TAA petition investigation (NAFTA-2524) for the workers of the subject firm included a customer survey conducted by the Department for the time period relevant to the investigation. The survey results show that a major declining customer of the subject firm increased import purchases of jeans while decreasing purchases from the subject firm from 1996 to 1997

and in January–June 1998 compared to January–June 1997.

Conclusion

After careful consideration of the new facts obtained on reopening, it is concluded that increased imports of articles like or directly competitive with jeans produced by the subject firm contributed importantly to the decline in sales and to the total or partial separation of workers of the subject firm. In accordance with the provisions of the Trade Act of 1974, I make the following revised determination:

All workers of Tri Americas, Incorporated, also known as Try America, Incorporated, El Paso, Texas who became totally or partially separated from employment on or after May 27, 1997, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, D.C. this 28th day of August 1998.

Grant D. Beale,

Acting Director, Office of Trade Adjustment Assistance.

[FR Doc. 98–24480 Filed 9–10–98; 8:45 am]

BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment Standards Administration; Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act.

The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW, Room S–3014, Washington, DC 20210.

Modifications to General Wage Determination Decisions

The number of decisions listed in the Government Printing Office document entitled "General Wage Determinations

Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

Massachusetts

MA980001 (Feb. 13, 1998)
MA980002 (Feb. 13, 1998)
MA980003 (Feb. 13, 1998)
MA980007 (Feb. 13, 1998)
MA980013 (Feb. 13, 1998)
MA980017 (Feb. 13, 1998)
MA980018 (Feb. 13, 1998)
MA980019 (Feb. 13, 1998)
MA980020 (Feb. 13, 1998)
MA980021 (Feb. 13, 1998)

New Jersey

NJ980002 (Feb. 13, 1998)

Rhode Island

RI980001 (Feb. 13, 1998)
RI980002 (Feb. 13, 1998)
RI980006 (Feb. 13, 1998)

Volume II

Maryland

MD980021 (Feb. 13, 1998)

Pennsylvania

PA980001 (Feb. 13, 1998)
PA980002 (Feb. 13, 1998)
PA980003 (Feb. 13, 1998)
PA980004 (Feb. 13, 1998)
PA980007 (Feb. 13, 1998)
PA980009 (Feb. 13, 1998)
PA980011 (Feb. 13, 1998)
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PA980027 (Feb. 13, 1998)
PA980029 (Feb. 13, 1998)
PA980035 (Feb. 13, 1998)
PA980038 (Feb. 13, 1998)
PA980042 (Feb. 13, 1998)
PA980052 (Feb. 13, 1998)
PA980054 (Feb. 13, 1998)
PA980060 (Feb. 13, 1998)
PA980063 (Feb. 13, 1998)

Virginia

VA980008 (Feb. 13, 1998)
VA980025 (Feb. 13, 1998)
VA980053 (Feb. 13, 1998)

Volume III

Florida

FL980001 (Feb. 13, 1998)
FL980009 (Feb. 13, 1998)
FL980017 (Feb. 13, 1998)
FL980032 (Feb. 13, 1998)
FL980096 (Feb. 13, 1998)

Volume IV

Illinois

IL980058 (Feb. 13, 1998)

Michigan

MI980076 (Feb. 13, 1998)

Volume V

Arkansas

AR980003 (Feb. 13, 1998)

Kansas

KS980006 (Feb. 13, 1998)
KS980007 (Feb. 13, 1998)
KS980008 (Feb. 13, 1998)

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 KS980035 (Feb. 13, 1998)

Missouri

MO980001 (Feb. 13, 1998)
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 MO980070 (Feb. 13, 1998)
 MO980071 (Feb. 13, 1998)
 MO980072 (Feb. 13, 1998)

Texas

TX980014 (Feb. 13, 1998)

Volume VI

Colorado

CO980001 (Feb. 13, 1998)
 CO980002 (Feb. 13, 1998)
 CO980004 (Feb. 13, 1998)
 CO980005 (Feb. 13, 1998)
 CO980006 (Feb. 13, 1998)
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 CO980018 (Feb. 13, 1998)
 CO980020 (Feb. 13, 1998)
 CO980021 (Feb. 13, 1998)
 CO980023 (Feb. 13, 1998)
 CO980025 (Feb. 13, 1998)

Washington

WA980002 (Feb. 13, 1998)
 WA980004 (Feb. 13, 1998)
 WA980005 (Feb. 13, 1998)
 WA980010 (Feb. 13, 1998)

Wyoming

WY980023 (Feb. 13, 1998)

Volume VII

California

CA980009 (Feb. 13, 1998)

Nevada

NV980001 (Feb. 13, 1998)
 NV980003 (Feb. 13, 1998)
 NV980005 (Feb. 13, 1998)
 NV980007 (Feb. 13, 1998)
 NV980009 (Feb. 13, 1998)

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon and Related Acts." This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

The general wage determinations issued under the Davis-Bacon and related Acts are available electronically by subscription to the FedWorld Bulletin Board System of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1-800-363-2068.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512-1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the seven separate volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates are distributed to subscribers.

Signed at Washington, DC This 3rd day of September 1998.

Carl J. Poleskey,

Chief, Branch of Construction Wage Determinations.

[FR Doc. 98-24269 Filed 9-10-98; 8:45 am]

BILLING CODE 4510-27-M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification

The following parties have filed petitions to modify the application of mandatory safety standards under section 101(c) of the Federal Mine Safety and Health Act of 1977.

1. Clinchfield Coal Co.

[Docket No. M-98-74-C]

Clinchfield Coal Company, PO Box 4000, Lebanon, Virginia 24266 has filed a petition to modify the application of 30 CFR 75-1710-1(a) (canopies or cabs; self-propelled diesel-powered and electric face equipment; installation requirements) to its Cherokee Mine (I.D. No. 44-06846) located in Dickenson County, Virginia. The petitioner proposes to operate Joy 21SC center-driven shuttle cars, S&S 488 scoops, Long Airdox 482 scoops, and Fletcher Roof Ranger bolting machines in mining heights less than 46 inches. The petitioner asserts that application of the standard would result in a diminution of safety to miners.

2. The Kedco, Inc.

[Docket No. M-98-75-C]

The Kedco, Inc., PO Box 232, Justice, West Virginia 24857 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its No. 2 Mine (I.D. No. 46-08019) located in Mingo County, West Virginia. The petitioner proposes to replace a padlock on battery plug connectors with a threaded ring and a spring loaded device on mobile battery-powered machines to prevent the plug connector from accidentally disengaging while under load. The petitioner asserts that application of the standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

3. Manna Coal Corporation

[Docket No. M-98-76-C]

Manna Coal Corporation, PO Box 1210, Richlands, Virginia 24641 has filed a petition to modify the application of 30 CFR 75.1710-1 (canopies and cabs; self-propelled diesel-powered and electric face equipment; installation requirements) to its Mine No. 1 (I.D. No. 44-04248) located in Buchanan County, Virginia. The petitioner requests a modification of the standard to allow self-propelled

electric face equipment to be operated without cabs or canopies in mining heights less than 48 inches. The petitioner asserts that application of the standard would result in a diminution of safety to the miners.

4. Leeco, Inc.

[Docket No. M-98-77-C]

Leeco, Inc., 1374 Highway 192 East, London, Kentucky 40741-3123 has filed a petition to modify the application of 30 CFR 75.1710-1 (canopies and cabs; self-propelled diesel-powered electric face equipment; installation requirements) to its Mine No. 68 (I.D. No. 15-17497) located in Perry County, Kentucky. The petitioner proposes to operate self-propelled diesel-powered and electric face equipment without cabs or canopies. The petitioner asserts that application of the standard would result in a diminution of safety to the miners.

5. Webster County Coal Corp.

[Docket No. M-98-78-C]

Webster County Coal Corp., 2668 State Route 120 East, Providence, Kentucky 42450 has filed a petition to modify the application of 30 CFR 75.901(a) (protection of low-and medium-voltage three-phase circuits used underground) to its Dotiki Mine (I.D. No. 15-02132) located in Webster County, Kentucky. The petitioner requests a modification of the standard to allow an alternative method for the diesel powered generator system. The petitioner proposes to have the neutral of the wye configured alternator in series between it and the frame of the generator unit with a 480-volt rated resistor that would limit phase-to-frame fault current to 0.5 continuous ampere; to have the neutral of the secondary side of the wye configured 480/995-volt step-up transformer in series between it and the frame of the generator with a 995-volt rated resistor that would limit phase-to-frame fault current to 0.5 continuous ampere; to have the 480-volt rated output of the generator equipped with a sensitive ground fault relay set to cause the circuit breaker(s) to trip and shut down the diesel engine when a phase-to-frame fault of 120 milliamperes occurs; to have a No. 1/0 A.W.G. or larger external ground conductor solidly connected between the frame(s) of the diesel generator and the mining equipment being powered; to have a type SHD-GC power cable from the generator to the equipment with a minimum of 2,000-volt rating, and an MSHA accepted flame-resistant outer jacket; to have shielded cable with strain relief extended between the

generator and the piece of equipment being powered; and to perform a functional test of the ground fault and ground wire monitor systems prior to moving each piece of equipment and upon starting the diesel generator. The petitioner states that the generator system would not be operated until MSHA has inspected the equipment and determined compliance; that all circuits breaker settings would be adjusted to provide short-circuit protection and would not exceed the maximum allowable instantaneous setting specified in 30 CFR 75.601-1; and that all qualified persons would receive specific "hands on" training on proper testing procedures prior to using the diesel generator system; and that the testing procedures would be incorporated in the Part 48 training plans and annual refresher training. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

6. Mississippi Potash, Inc.

[Docket No. M-98-05-M]

Mississippi Potash, Inc., PO Box 101, Carlsbad, New Mexico 88220 has filed a petition to modify the application of 30 CFR 57.11050 (escapeways and refuges) to its Mississippi Potash West Mine (I.D. No. 29-00175) located in Eddy County, New Mexico. The petitioner proposes to use a refuge chamber located 400 feet from the shaft as one of its escapeways in the event of a hoist outage. The petitioner states that the 18,700 cubic foot refuge chamber would be used by a limited number of underground maintenance and production employees to accomplish dead work; that these employees would be working with a normal mantrip hoist operation; and that the refuge chamber would accommodate 45 employees and would be used as an alternate escapeway. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

7. Colorado Yule Marble Company

[Docket No. M-98-06-M]

Colorado Yule Marble Company, 2800 Midland Avenue, #102, Glenwood, Colorado 81601 has filed a petition to modify the application of 30 CFR 49.2(f) (availability of mine rescue teams) to its Yule Quarry (I.D. No. 05-04438) located in Gunnison County, Colorado. The petitioner requests a modification of the standard to allow the use of the San Juan Mine Rescue Co-operative rescue team of Ridgeway located 2 to 3 hours

ground travel time from the mine while their rescue team (Roaring Fork Mine Rescue Co-operative) is being established. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

Request for Comments

Persons interested in these petitions are encouraged to submit comments via e-mail to "comments@msha.gov", or on a computer disk along with an original hard copy to the Office of Standards, Regulations, and Variances, Mine Safety and Health Administration, 4015 Wilson Boulevard, Room 627, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before October 13, 1998. Copies of these petitions are available for inspection at that address.

Dated: September 1, 1998.

Patricia W. Silvey,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 98-24382 Filed 9-10-98; 8:45 am]

BILLING CODE 4510-43-P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Geosciences, Committee of Visitors; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Geosciences (1755).

Date and Time: September 30—October 2, 1998, 8:00 am to 6:00 pm each day.

Place: Room 365, National Science Foundation, 4301 Wilson Blvd., Arlington, VA.

Type of Meeting: Part-Open (see Agenda, below).

Contact Person: Dr. Michael R. Reeve, Section Head, Ocean Sciences Division, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. Telephone (703) 306-1580.

Purpose of Meeting: To carry out Committee of Visitors (COV) review, including program evaluation, GRPA assessments, and to access privileged materials.

Agenda

Closed: September 30 and October 1, 8:00 am to 6:00 pm, and October 2 from 8:00 am to 12:00 noon—To review the merit review processes covering funding decisions made during the immediately preceding three fiscal years of the Ocean Sciences Research Section program.

Open: October 2, 1:00 pm to 6:00 pm.—To assess the results of NSF program investments in the Division. This should involve a discussion and review of results focused on NSF and grantee outputs and related outcomes achieved or realized during the preceding three fiscal years. These results may be based on NSF grants or other investments made in earlier years.

Reason for Closing: During the closed session, the Committee will be reviewing proposals that include privileged intellectual property and personal information that could harm individuals if they were disclosed. If discussions were open to the public, these matters that are exempt under 5 U.S.C. 552b(c) (4) and (6) of the Government in the Sunshine Act would be improperly disclosed.

Dated: September 8, 1998.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 98-24427 Filed 9-10-98; 8:45 am]

BILLING CODE 7555-01-M

NATIONAL SKILL STANDARDS BOARD

Notice of Open Meeting

AGENCY: National Skill Standards Board.

ACTION: Notice of open meeting.

SUMMARY: The National Skill Standards Board was established by an Act of Congress, the National Skill Standards Act, Title V, Pub. L. 103-227. The 27-member National Skill Standards Board serves as a catalyst for the development and implementation of a national system of voluntary skill standards and certification through voluntary partnerships. These partnerships will have the full and balanced participation of business, industry, labor, education and other key groups.

TIME AND PLACE: The meeting will be held from 8:30 a.m. to approximately 12:00 p.m. on Tuesday, September 29, 1998, in the Grand Ballroom I Room of the DoubleTree Hotel Seattle Airport located at 18740 International Boulevard, Seattle, WA.

AGENDA: The agenda for the Board Meeting will include: an update on the Board's Strategic Plan; reports from the Board's committees; presentations from the Voluntary Partnerships—Manufacturing, Installation and Repair (Manufacturing Skill Standards Council) and Retail Trade, Wholesale Trade, Real Estate & Personal Services (Sales and Services); and reports from Convening Groups representing the following industry clusters: Business & Administrative Services; Construction; Education and Training; Finance & Training; Restaurants, Lodging, Hospitality & Tourism, and Amusement

& Recreation; and Telecommunications, Computers, Arts & Entertainment, and Information.

PUBLIC PARTICIPATION: The meeting is open to the public. Seating is limited and will be available on a first-come, first-served basis. (Seats will be reserved for the media.) If special accommodations are needed contact Pat Warfield at (202) 254-8628 extension 24.

FOR FURTHER INFORMATION CONTACT: Tracy Marshall, Director of Operations at (202) 254-8628 extension 13.

Signed in Washington, DC, this 4th day of September, 1998.

Edie West,

Executive Director, National Skill Standards Board.

[FR Doc. 98-24485 Filed 9-10-98; 8:45 am]

BILLING CODE 4510-23-M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-317 and 50-318]

Baltimore Gas and Electric Company; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of Baltimore Gas and Electric Company (the licensee) to withdraw its July 26, 1996, application for proposed amendment to Facility Operating License Nos. DPR-53 and DPR-69 for the Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, located in Lusby, Maryland.

The proposed amendment would have revised the operating licenses to allow the repair of defected steam generator tubes by electrosleaving.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on August 14, 1996 (61 FR 42276). However, by letter dated August 20, 1998, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated July 26, 1996, and the licensee's letter dated August 20, 1998, which withdrew the application for license amendment. The above documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Calvert County Library, Prince Frederick, Maryland 20678.

Dated at Rockville, Maryland, this 3rd day of September 1998.

For the Nuclear Regulatory Commission.

Alexander W. Dromerick,

Senior Project Manager, Project Directorate I-1, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 98-24459 Filed 9-10-98; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-003]

Consolidated Edison Company; Indian Point Nuclear Generating Station Unit; Notice of Public Meeting

The NRC will conduct a public meeting at Cortlandt Town Hall, 1 Heady Street, Cortlandt Manor, New York, on October 7, 1998, to discuss plans developed by Consolidated Edison Company (Con Edison) to decommission the Indian Point Nuclear Generating Station Unit 1. The Indian Point Station, located in Buchanan, New York, includes the permanently shutdown Unit 1 and two operating units, Units 2 and Unit 3. Unit 2 is operated by Consolidated Edison Company, and Unit 3 by New York Power Authority. The meeting is scheduled for 7:00-9:30 p.m., and will be chaired by New York State Assemblywoman Sondra Galef. The public meeting is being held pursuant to the NRC's regulations in 10 CFR 50.82(a)(4) regarding the requirements for the submission of a post-shutdown decommissioning activities report (PSDAR) by the licensee following permanent cessation of operation and the holding of a public meeting by the NRC on the PSDAR. Con Edison submitted a decommissioning plan, which was approved by the NRC in January 1996, prior to the rule change promulgated at 31 **Federal Register** 39301 (July 29, 1996), requiring a PSDAR. Decommissioning plans approved prior to the revision are considered to meet the requirement for a PSDAR and are subject to the revised regulations, including the requirement for a public meeting. The meeting will include a short presentation by the NRC staff on the decommissioning process and NRC programs for monitoring decommissioning activities with attention being given to the licensee's decommissioning plans. There will be a presentation by Consolidated Edison Company on planned decommissioning activities, and there will be an opportunity for members of the public to ask questions of NRC staff and Con Edison representatives and make comments on the planned activities. The meeting will be transcribed.

Con Edison's decommissioning plan provides a short discussion of the plant history, a description of the unit's radiological conditions, and a description and schedule of planned decommissioning activities. This decommissioning plan and the NRC's safety evaluation associated with the plan is available for public inspection at the White Plains Public Library, 100 Martie Avenue, White Plains, NY 10601. For more information contact John L. Minns, Non-Power Reactors and Decommissioning Project Directorate, Division of Reactor Program Management, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone 301-415-3166.

Dated at Rockville, Maryland, this 3rd day of September 1998.

For The Nuclear Regulatory Commission.

Seymour H. Weiss,

Director, Non-Power Reactors and Decommissioning Project Directorate, Division of Reactor Program Management, Office of Nuclear Regulatory Regulation.
[FR Doc. 98-24462 Filed 9-10-98; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-309]

Maine Yankee Atomic Power Company, Maine Yankee Atomic Power Station; Exemption

I

Maine Yankee Atomic Power Company (MYAPCo or the licensee) is the holder of Facility Operating License No. DPR-36, which authorizes possession of Maine Yankee Atomic Power Station (Maine Yankee). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC or the Commission) now or hereafter in effect. The facility is a pressurized-water reactor (PWR) located on the licensee's site in Lincoln County, Maine. On August 7, 1997, the licensee submitted written certifications to the Commission that it had decided to permanently cease operations at Maine Yankee and that all fuel had been permanently removed from the reactor. In accordance with 10 CFR 50.82(a)(2), upon docketing of the certifications contained in the letter of August 7, 1997, the facility operating license no longer authorizes MYAPCo to operate the reactor or to place fuel in the reactor vessel.

II

Section 50.54(q) of Title 10 of the Code of Federal Regulations (10 CFR 50.54(q)) requires power reactor licensees to follow and maintain in effect emergency plans that meet the standards of 10 CFR 50.47(b) and the requirements of Appendix E to 10 CFR Part 50.

Pursuant to 10 CFR 50.12(a), the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of the regulations that are (1) authorized by law, will not present an undue risk to public health and safety, and are consistent with the common defense and security and (2) present special circumstances. Special circumstances exist when application of the regulation in the particular circumstance would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule (10 CFR 50.12(a)(2)(ii)). The underlying purpose of Section 50.54(q) is to ensure licensees follow and maintain in effect emergency plans that provide reasonable assurance that adequate protective measures can and will be taken in the event of an emergency at a nuclear reactor. Sections 50.47(b) and (c) outline the planning standards and size of Emergency Planning Zones, respectively, that are to be considered in emergency plans and Appendix E to 10 CFR Part 50 identifies the information that must be included in emergency plans.

III

By letter dated November 6, 1997, the licensee requested exemptions from certain requirements of 10 CFR 50.54(q), 10 CFR 50.47(b) and (c), and Appendix E to Part 50; the licensee also made available a draft copy of the Maine Yankee Defueled Emergency Plan (DEP) to assist the staff in its review of the exemption request. The exemptions would allow Maine Yankee to discontinue certain aspects of offsite planning and reduce the scope of onsite emergency planning. The licensee stated that the remaining requirements of 10 CFR 50.54(q), 10 CFR 50.47(b) and (c), and Appendix E to Part 50 will be addressed in the DEP. The licensee plans to implement the DEP without NRC review and approval. Under the provisions of § 50.54(q), when a change to an emergency plan is made, the staff evaluates that change against the bases for commitments made in the plan to determine whether there is a decrease in effectiveness. It is not a decrease in effectiveness if the reduction in the commitment is commensurate with a

reduction in the bases for that commitment. In this instance, the staff has determined that there has been a reduction in the bases that require offsite emergency planning. The revised DEP will be reviewed by the NRC after implementation. By letter dated March 25, 1998, the licensee submitted the Emergency Action Levels that it proposes to use with the Defueled Emergency Plan. By letter dated June 29, 1998, the licensee submitted additional information that revised the exemption request. By letters dated January 20, May 15, and June 18, 1998, MYAPCo submitted the results of an assessment of the Maine Yankee spent fuel heatup in the absence of water in the spent fuel pool. By letters dated July 9 and August 5, 1998, the licensee provided the results of radiological analyses applicable to Maine Yankee in the permanently shutdown condition.

The licensee stated that special circumstances are present at Maine Yankee because (1) application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule, (2) compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or are significantly in excess of those incurred by others in similar circumstances, and (3) there is a material circumstance present, that was not considered when the regulation was adopted, for which it would be in the public interest to grant an exemption.

With the plant in a permanently shutdown and defueled condition, the applicable design-basis accidents are limited to a fuel handling incident, spent fuel cask drop, and radioactive liquid waste system leak and failure. The calculated maximum offsite dose from these postulated releases is less than the U.S. Environmental Protection Agency (EPA) Protective Action Guides (PAGs). The licensee also estimated that, by March 1998, a beyond-design-basis event, involving fuel damage (caused by a loss of spent fuel pool water and a subsequent overheating of the stored fuel) and the release of radioactive materials sufficient to exceed EPA PAGs at the site boundary is not credible.

Revision 14 to the Maine Yankee Defueled Safety Analysis Report (DSAR) includes revised analyses of postulated accidents at Maine Yankee in its permanently shutdown status. Chapter 5 of the DSAR describes the radiological consequences of accidents that could release radioactive materials and the consequences of a spent fuel pool

draindown event. The staff reviewed the licensee's analyses, as modified in licensee submittals dated July 9 and August 5, 1998, to determine whether the radiological impact of these events would require an offsite emergency plan.

Decontamination of systems during decommissioning and dismantlement operations will generate significant quantities of radioactive waste in the form of contaminated demineralizer resins. The licensee has postulated a bounding accident for the release of radioactivity: the dropping of a highly loaded spent resin liner within the low-level-waste storage building (LLWSB), resulting in the liner failure and a release of a fraction of its radioactive materials in an airborne cloud. The analysis indicates that an individual at the exclusion area boundary (EAB) could receive up to 0.11 rem total effective dose equivalent (TEDE) from this event.

The licensee stated that this event was considered to have higher offsite consequences than the mishandling of resin during resin liner filling and dewatering operations since these activities are performed in containment. Hold-up and confinement of radioactive materials in a containment that is isolated would significantly decrease the potential for offsite release. In addition, the licensee committed in the DSAR to establish administrative controls to ensure that calculated offsite doses from potential decommissioning accidents do not exceed those calculated for a spent resin cask drop accident.

The licensee did not postulate a fire concurrent with the resin mishandling event owing to the low flammability of the resin itself and the absence of flammable material in the LLWSB. However, the analysis did assume that 1.0 percent of the radioactivity in the liner became airborne during the event. This assumption is the same fraction of material expected to be released by a fire, and is consistent with the release fractions listed in Schedule C to 10 CFR 30.72 for mixed fission and corrosion products. The calculational methods and assumptions used in this analysis are acceptable to the staff.

Wet storage of spent fuel possesses inherently large safety margins because of the simplicity and robustness of the spent fuel pool design. The design basis includes the ability to withstand an earthquake and to retain sufficient water to adequately cool and shield the stored spent fuel. Specifically, in the DSAR, the licensee states that the spent fuel pool structure is designed to Seismic Class I requirements and is capable of

performing its intended safety function under the licensee's design-basis hypothetical earthquake with a 0.1-g peak ground acceleration. The pool has 6-foot reinforced-concrete walls and floor with a 1/4-inch steel liner. To add to the robustness of the design, the pool is founded on bedrock and is embedded 12.5 feet below grade level, which is at the 20 foot, 1 inch elevation. Since the analyses used in designing the capability of structures, systems, and components (SSCs) to perform their safety function under a hypothetical earthquake have significant margin in them, it is expected that an SSC built to withstand the hypothetical design-basis earthquake actually will be able to withstand a larger earthquake. Thus, the loss of coolant from the Maine Yankee spent fuel pool, which partially or completely uncovers the fuel, is a beyond-design-basis event with a very low probability of occurrence.

In a letter dated May 15, 1998, the licensee submitted analyses for a complete loss of inventory and several partial loss-of-inventory events within the spent fuel pool. That analysis showed that a partial draindown was more severe than a complete draindown for the licensee's plant. For this case, only 5.5 feet of the active fuel is covered by water. The licensee calculated that it would take 30 hours for the cladding to heat up to 827 °C. However, the staff reviewed the calculations and determined that the bounding scenario would be one with the active fuel totally uncovered and water blocking the assembly lower inlet so that no natural circulation flowpath exists. The staff calculated that, for this case, as of August 1, 1998, it would take approximately 10 hours for the hottest location in the highest power assembly to reach 900 °C. The heatup time was calculated assuming an adiabatic heatup of a fuel rod and using conservative decay heat assumptions. An adiabatic heatup is defined as one in which all heat generated is retained in the system, with no heat loss to the surroundings. This definition corresponds to a physical situation in which the spent fuel pool water is lost, no cooling mechanism is available, and the fuel is surrounded by a perfect insulator. The staff considers that this scenario would be bounding for any loss-of-inventory scenario since any other scenario would have some heat removal from the assembly and a longer heatup time. Consequently, the staff determined that, in view of the low likelihood of the bounding scenario, and the time elapsed since the shutdown of the facility, there would be sufficient time for mitigative

actions and, if necessary, offsite protective measures to be initiated after a postulated loss of water and before a postulated release of radioactivity resulting from spent fuel overheating.

In the event that spent fuel pool water inventory is lost more gradually through the method discussed above or through some other means, such as a siphon or liner leak, plant personnel have various methods for detecting the loss of inventory. The staff reviewed these methods, which include indicators to alert and assist in identifying any loss of coolant inventory. The design includes a low coolant level indicator and an area radiation monitor, both of which alarm in the control room. Although not credited for accident mitigation, these alarms provide methods to alert the operators to a loss-of-inventory event. In the DSAR, the licensee also states that there are several sources of makeup water to the spent fuel pool. Among these sources are the normal sources of makeup water from the refueling water storage tank, demineralizer water from the primary water storage tank, emergency sources from the fire water system, and potable water from the town of Wiscasset water supply system. On the basis of indicators and alarms available to plant personnel and the availability of makeup sources to restore a gradual loss of coolant, the staff finds it reasonable to expect that fuel uncover as a result of a gradual loss of coolant scenario is highly unlikely.

Although the event is unlikely, the licensee evaluated the dose consequences of both partial and complete spent fuel pool draindown. Water and the concrete pool structure provide radiation shielding on the sides of the pool. However, water alone accounts for most of the shielding above the spent fuel. A loss of shielding above the fuel could increase the radiation levels at the exclusion area boundary (EAB) due to the scattering of gamma rays streaming up out of the pool. The licensee postulated a partial pool draindown event resulting from a break in the pool cooling system piping, concurrent with a failure of the associated anti-siphon device. The licensee assumed that additional pool water was lost through pool boiling for the following four days before effective corrective actions could be taken to reestablish adequate pool water level. The licensee calculated that the dose rate was 0.00076 rem per hour at the EAB. In addition the licensee calculated the postulated offsite dose rates in the event of a complete draindown of the spent fuel pool (a beyond-design-basis event). Assuming only one year of

radioactive decay and a site boundary distance of 610 meters, the complete shutdown resulted in a postulated dose rate of 0.01 rem per hour. The licensee's calculated dose rate indicates it would take 4.1 days for this event to exceed the EPA early-phase PAG of 1 rem.

The staff concludes that the licensee's request for an exemption from certain requirements of 10 CFR 50.54(q), 10 CFR 50.47(b) and (c), and Appendix E to Part 50 is acceptable in view of the greatly reduced offsite radiological consequences associated with the current plant status. The staff finds that the postulated dose to the general public from any reasonably conceivable accident would not exceed EPA PAGs and, for the bounding accident, the length of time available gives confidence that offsite measures for the public could be taken without preplanning. The staff finds acceptable the licensee's commitment in the DSAR to establish administrative controls to ensure that calculated offsite doses from potential decommissioning accidents do not exceed those determined for a spent resin cask drop accident. Therefore, the staff concludes that the requirement that emergency plans meet all of the standards of 10 CFR 50.47(b) and all of the requirements of Appendix E to Part 50 is not now warranted at Maine Yankee and an exemption from the requirements for offsite emergency planning is acceptable.

IV

The NRC staff has completed its review of the licensee's request for an exemption from the requirements of 10 CFR 50.47(c)(2) and from the requirements of 10 CFR 50.54(q), that emergency plans must meet all of the standards of 10 CFR 50.47(b) and all the requirements of Appendix E to 10 CFR part 50. The standards of 10 CFR 50.47(b) and the requirements of Appendix E to 10 CFR part 50 that remain in effect are listed in Attachment II to the licensee's letter dated June 29, 1998. On the basis of its review, the NRC staff finds that the postulated dose to the general public from any reasonably conceivable accident would not exceed EPA PAGs and, for the bounding accident, the length of time available provides confidence that offsite measures for the public could be taken without preplanning. The analyses submitted by the licensee are consistent with the commitment made in its DSAR, which stated that any decommissioning activities will be analyzed and administrative controls will be established to ensure that the calculated offsite doses do not exceed those determined for the spent resin

cask drop accident. The staff finds the exemption from two requirements, 10 CFR 50.47(b)(9) and 10 CFR 50 Appendix E.IV.A.4, acceptable on the basis of the licensee's commitment to continue to maintain capabilities for dose assessment and personnel equivalent to those described in section 7.0 of the draft Defueled Emergency Plan provided in Attachment III to the licensee's letter dated November 6, 1997. The information developed from the capability would be used to determine whether offsite measures for the general public would be appropriate. Maine Yankee will continue to maintain an onsite emergency preparedness organization capable of responding to the consequences of radiological events still possible at the site. Thus, the underlying purpose of the regulations will not be adversely affected by eliminating offsite emergency planning activities or reducing the scope of onsite emergency planning.

For the foregoing reasons, the Commission has determined that, pursuant to 10 CFR 50.12, elimination of offsite emergency planning activities will not present an undue risk to public health and safety and is consistent with common defense and security. Further, special circumstances are present as stated in 10 CFR 50.12(a)(ii). Pursuant to 10 CFR 51.32, the Commission has determined that this exemption will not have a significant effect on the quality of the human environment (63 FR 43968, August 17, 1998).

This exemption is effective upon issuance.

Dated at Rockville, Maryland this 3rd day of September 1998.

For the Nuclear Regulatory Commission.

Samuel J. Collins,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 98-24461 Filed 9-10-98; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-280 and 50-281]

In the Matter of Virginia Electric and Power Company Surry Power Station, Unit Nos. 1 and 2; Exemption

The Virginia Electric and Power Company (VEPCO, the licensee) is the holder of Facility Operating License Nos. DPR-32 and DPR-37, which authorize operation of the Surry Power Station (SPS), Unit Nos. 1 and 2. The licenses provide, among other things, that the licensee is subject to all rules,

regulations, and orders of the Nuclear Regulatory Commission (the Commission) now or hereafter in effect.

The facility consists of two pressurized-water reactors at the licensee's site located in Surry County, Virginia.

II

Title 10 of the *Code of Federal Regulations* (10 CFR), Section 20.1703, "Use of individual respiratory protection equipment" requires in subsection (a)(1) that "* * * the licensee shall use only respiratory protection equipment that is tested and certified or had certification extended by the National Institute for Occupational Safety and Health/Mine Safety and Health Administration (NIOSH/MSHA)." Further, 10 CFR 20.1703(c) requires that "the licensee shall use as emergency devices only respiratory protection equipment that has been specifically certified or had certification extended for emergency use by NIOSH/MSHA," and 10 CFR Part 20, Appendix A, Protection Factors for Respirators, Footnote d.2 (d), states that "* * * the protection factors apply for atmosphere-supplying respirators only when supplied with adequate respirable air. Respirable air shall be provided of the quality and quantity required in accordance with NIOSH/MSHA certification (described in 30 CFR part 11). Oxygen and air shall not be used in the same apparatus." By letter dated March 3, 1998, as supplemented May 5, 1998, the licensee requested an exemption from certain requirements of 10 CFR 20.1703(a)(1), 10 CFR 20.1703(c) and 10 CFR Part 20, Appendix A, Footnote d.2 (d).

Pursuant to 10 CFR 20.2301, the Commission may, upon application by a licensee or upon its own initiative, grant an exemption from the requirements of the regulations in Part 20 if it determines that the exemption is authorized by law and would not result in undue hazard to life or property.

III

The SPS 1&2 containments are designed to be maintained at subatmospheric pressure during power operations. The containment pressure can range from 9.0 to 11.0 pounds per square inch absolute (psia). This containment environment could potentially impact personnel safety due to reduced pressure and resulting oxygen deficiency. Such environment requires the use of a Self-Contained Breathing Apparatus (SCBA) with enriched oxygen breathing gas. The licensee initially purchased Mine Safety Appliances, Inc. (MSA) Model 401

open-circuit, dual-purpose, pressure-demand SCBAs constructed of brass components which were originally intended for use with compressed air. The licensee qualified the Model 401 cylinders for use with 35% oxygen/65% nitrogen following the recommendations of the Compressed Gas Association's Pamphlet C-10, Recommended Procedures for Changes of Gas Service for Compressed Gas Cylinders, which established procedures to utilize these devices with an enriched oxygen mixture. The licensee is currently using these SCBAs with 35% oxygen/65% nitrogen instead of compressed air. The MSA Model 401 SCBA has received the NIOSH/MSHA certification for use with compressed air, but has not been tested for 35% enriched oxygen applications. Using these SCBAs without the NIOSH/MSHA certification covering such applications requires an exemption from 10 CFR 20.1703(a)(1), 10 CFR 20.1703(c) and 10 CFR Part 20, Appendix A, Protection Factors for Respirators, Footnote d.2.(d).

IV

Pursuant to 10 CFR 20.1703(a)(2), SCBAs that have not been tested or certified or for which certification has not been extended by NIOSH/MSHA require a demonstration by testing or reliable test information that the material and performance characteristics of the equipment are capable of providing the proposed degree of protection under anticipated conditions of use. VEPCO contracted with National Aeronautic and Space Administration's (NASA) White Sand Test Facility (WSTF) and Lawrence Livermore National Laboratory (LLNL) to conduct applicable oxygen compatibility testing. WSTF evaluated the compatibility of the MSA Custom 4500 SCBA (testing of the model "MSA Custom 4500" envelops the lower pressure applications of models "MSA Ultralite" and "Model 401") with an oxygen-enriched breathing gas mixture. Based on these evaluations, the licensee concluded that compatibility exists provided (1) all hydrocarbon contamination is removed, (2) the SCBAs are maintained so as to preclude the introduction of hydrocarbon contamination, and (3) the temperature of the system does not exceed 135° F when the regulator is first activated. LLNL also concluded that an MSA Custom 4500, equipped with the interchangeable silicone facepiece, meets the National Fire Protection Association Flame and Heat Test requirements whether operated with 35% oxygen/65% nitrogen breathing gas mixture or with compressed air.

The licensee has indicated that the above conditions are met as follows: (1) the MSA repair guidance which is followed stipulates that no hydrocarbon-based compounds are to be used within the pressure boundary during maintenance, (2) the SCBAs are stored and repaired in clean, dry locations free of chemical contamination, (3) containment average temperature, required by Technical Specification, is less than or equal to 125°F at SPS 1&2, and (4) under VEPCO procedural guidance, SCBAs using 35% oxygen/65% nitrogen breathing gas mixture are equipped with a silicone facepiece. VEPCO has also stated that it has over 20 years of actual safe operating experience using SCBAs with 35% oxygen/65% nitrogen mixture with no incidents of oxygen-induced failure or equipment maintenance problems associated with the enriched oxygen operation.

The combination of the existing NIOSH/MSHA certification of the SCBAs (with compressed air), the testing of the SCBA with the enriched oxygen-nitrogen mixture conducted for VEPCO by NASA and LLNL, and VEPCO's safe use history constitutes an adequate basis for granting the requested exemption to permit the use of MSA SCBAs Model 401, Custom 4500 and Ultralite with 35% oxygen-65% nitrogen breathing air mixture in the sub-atmospheric containments of SPS, Units 1 and 2.

V

Accordingly, the Commission has determined that, pursuant to 10 CFR 20.2301, the requested exemption is authorized by law, and will not result in undue hazard to life or property. Therefore, the Commission hereby grants the requested exemption from the requirements of 10 CFR 20.1703(a)(1), 10 CFR 20.1703(c) and 10 CFR Part 20, Appendix A, Footnote d.2.(d), for Surry Power Station, Unit 1 and Unit 2, provided VEPCO uses SCBAs identified and meeting the formal testing outlined above and follows the above described conditions.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (63 FR 45097).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 3rd day of September 1998.

For the Nuclear Regulatory Commission.

Samuel J. Collins,

Director, Office of Nuclear Reactor Regulation.

[FR Doc. 98-24460 Filed 9-10-98; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Use of PRA in Plant-Specific Reactor Regulatory Activities: Final Regulatory Guide and Standard Review Plan Section; Availability

The Nuclear Regulatory Commission has issued three new guides in its Regulatory Guide Series, along with two conforming sections of the Standard Review Plan. The guides are Regulatory Guide 1.175, "An Approach for Plant-Specific, Risk-Informed, Decisionmaking: Inservice Testing"; Regulatory Guide 1.176, "An Approach for Plant-Specific, Risk-Informed Decisionmaking: Graded Quality Assurance"; and Regulatory Guide 1.177, "An Approach for Plant-Specific, Risk-Informed Decisionmaking: Technical Specifications." The revised sections of NUREG-0800, "Standard Review Plan," are Chapter 3.9.7, "Standard Review Plan for Risk-Informed Decisionmaking: Inservice Testing," and Chapter 16.1, "Standard Review Plan for Risk-Informed Decisionmaking: Technical Specifications." Together with Regulatory Guide 1.174, "An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis," and the accompanying Chapter 19 of the Standard Review Plan, "Use of Probabilistic Risk Assessment in Plant-Specific, Risk-Informed Decisionmaking: General Guidance," these documents provide the basic framework for an acceptable approach for use by power reactor licensees in preparing proposals for plant-specific changes to their licensing bases using risk information as a partial basis.

Comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time. Written comments may be submitted to the Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

Single copies of regulatory guides, both active and draft, may be obtained free of charge by writing the Reproduction and Distribution Services Section, OClO, USNRC, Washington, DC

20555-0001; or by fax to (301) 415-2289; or by email to GRW1@NRC.GOV. The SRP sections of NUREG-0800 may be purchased from the U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20402-9328 (telephone (202) 512-2249). Active guides may be purchased from the National Technical Information Service on a standing order basis. Details on this service may be obtained by writing NTIS, 5285 Port Royal Road, Springfield, VA 22161. NTIS also sells single copies of NUREG-series documents. Copies of regulatory guides and the Standard Review Plan sections are available for inspection or copying for a fee from the NRC Public Document Room at 2120 L Street NW., Washington, DC; the PDR's mailing address is Mail Stop LL-6, Washington, DC 20555; telephone (202) 634-3273; fax (202) 634-3343. Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

Background

On August 16, 1995, the Commission published in the **Federal Register** a final policy statement on the Use of Probabilistic Risk Assessment Methods in Nuclear Regulatory Activities (60 FR 42622). The policy statement included the following policy regarding expanded NRC use of PRA:

- The use of PRA technology should be increased in all regulatory matters to the extent supported by the state of the art in PRA methods and data and in a manner that complements the NRC's deterministic approach and supports the NRC's traditional defense-in-depth philosophy.

- PRA and associated analyses (e.g., sensitivity studies, uncertainty analyses, and importance measures) should be used in regulatory matters, where practical within the bounds of the state of the art, to reduce unnecessary conservatism associated with current regulatory requirements, regulatory guides, license commitments, and staff practices. Where appropriate, PRA should be used to support proposals for additional regulatory requirements in accordance with 10 CFR 50.109 (Backfit Rule). Appropriate procedures for including PRA in the process for changing regulatory requirements should be developed and followed. It is, of course, understood that the intent of this policy is that existing rules and regulations shall be complied with unless these rules and regulations are revised.

- PRA evaluations in support of regulatory decisions should be as realistic as practicable and appropriate

supporting data should be publicly available for review.

- The Commission's safety goals for nuclear power plants and subsidiary numerical objectives are to be used with appropriate consideration of uncertainties in making regulatory judgments on the need for proposing and backfitting new generic requirements on nuclear power plant licensees.

It was the Commission's intent that implementation of this policy statement would improve the regulatory process in three areas:

1. Enhancement of safety decisionmaking by the use of PRA insights,
2. More efficient use of agency resources, and
3. Reduction in unnecessary burdens on licensees.

In parallel with the development of Commission policy on uses of risk assessment methods, the NRC developed an agency-wide implementation plan for application of probabilistic risk assessment insights within the regulatory process (SECY-95-079). This implementation plan included tasks to develop the series of regulatory guides that is the subject of this notice. In June 1997, the regulatory guides and SRP sections were issued in draft for public comment. A discussion of the comments received and their disposition, as well as SECY-95-079, may be obtained from the NRC Public Document Room at 2120 L Street NW., Washington, DC; the PDR's mailing address is Mail Stop LL-6, Washington, DC 20555; telephone (202) 634-3273; fax (202) 634-3343. (5 U.S.C. 552(a))

Dated at Rockville, Maryland, this 28th day of August 1998.

For the Nuclear Regulatory Commission.

Margaret V. Federline,

Deputy Director, Office of Nuclear Regulatory Research.

[FR Doc. 98-24458 Filed 9-10-98; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Notice of Issuance of Final Design Approval and Final Safety Evaluation Report: Westinghouse Electric Company AP600 Standard Design

The U.S. Nuclear Regulatory Commission has issued a final design approval (FDA) to Westinghouse Electric Company for the AP600 standard design pursuant to 10 CFR Part 52, Appendix O. This FDA allows the AP600 standard design to be referenced in an application for a construction

permit or operating license under 10 CFR Part 50, or an application for a combined license under 10 CFR Part 52. In addition, the Commission has issued the Final Safety Evaluation Report (FSER) that supports issuance of the FDA.

Issuance of this FDA signifies completion of the technical review phase of the application for certification of the AP600 design under Subpart B of 10 CFR Part 52. The NRC staff performed its technical review of the AP600 Standard Safety Analysis Report, Probabilistic Risk Assessment, and Tier 1 Material in accordance with the standards for review of design certification applications set forth in 10 CFR 52.48 that were applicable and technically relevant to the AP600 design or were modified by the exemptions identified in Section 1.6 of the NRC's FSER (NUREG-1512).

On the basis of its evaluation and independent analyses, as described in the FSER, the NRC staff concludes that Westinghouse's application for design certification meets the applicable portions of 10 CFR 52.47 and the review standards set forth above. In addition, the AP600 design is ready for the rulemaking phase, subject to satisfactory completion of the Enclosure 2 AP600 design control document (DCD). Therefore, the NRC staff and Advisory Committee on Reactor Safeguards will utilize the AP600 DCD and will rely on it in the rulemaking phase of the design certification review process pursuant to 10 CFR 52.51.

A copy of the AP600 FSER and FDA have been placed in the NRC's Public Document Room, the Gelman Building, 2120 L Street, NW, Washington, DC 20037, for review and copying by interested persons.

Dated at Rockville, Maryland, this 3rd day of September 1998.

For the Nuclear Regulatory Commission.

Theodore R. Quay,

Director, Standardization Project Directorate, Division of Reactor Program Management, Office of Nuclear Reactor Regulation.

[FR Doc. 98-24457 Filed 9-10-98; 8:45 am]

BILLING CODE 7590-01-P

PANAMA CANAL COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Panama Canal Commission

ACTION: Notice

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 109 Stat. 163), the Panama Canal Commission hereby gives notice it

has forwarded to the Office of Management and Budget (OMB) for review and clearance a Paperwork Reduction Act Submission (OMB 83-I) for an extension of a currently approved collection of information entitled "Procurement-Related Forms and Contract Clauses," OMB No. 3207-0007. In accordance with sec. 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Commission published a notice in the **Federal Register** [63 FR 33419, June 18, 1998] requesting comment on this proposed collection. The comment period ended August 17, 1998. The Commission received no comments in response to that notice.

DATES: Written comments on this proposed action regarding the collection of information must be submitted by October 13, 1998.

ADDRESSES: Address all comments concerning this notice to Edward H. Clarke, Desk Officer for Panama Canal Commission, Office of Information and Regulatory Affairs, Room 10202, New Executive Building, Office of Management and Budget, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Ruth Huff, Office of the Secretary, Panama Canal Commission, 202-634-6441.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. Collection of information is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c). Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995 requires Federal agencies to provide a notice in the **Federal Register** stating the agency has made such submission and setting forth the following information:

Title: Procurement-Related Forms and Contract Clauses.

Type of Request: Extension of a currently approved collection.

Abstract: The information requested is authorized by the Panama Canal Commission Acquisition Regulation, codified at 48 Code of Federal Regulations Chapter 35. The information is needed to procure supplies, services, and construction required by the Panama Canal Commission for the operation and maintenance of the Panama Canal.

On September 15, 1982, the Panama Canal Commission submitted to OMB a request for approval of the forms used by the Commission in connection with the procurement of supplies, services, and construction required by the Panama Canal Commission for the

operation and maintenance of the Panama Canal. OMB approved this collection for use through September 30, 1985, and assigned it OMB No. 3207-0007. On August 30, 1985, the Commission requested extension of the expiration date of the collection of information designated Procurement-Related Forms through September 30, 1988. Prior to the expiration, the Commission requested another extension and received approval through December 1992. On October 7, 1992, the Commission submitted to OMB for approval the collection "Procurement-Related Forms and Contract Clauses." OMB approved the collection through October 31, 1995. On July 12, 1995, the Commission submitted a request for revision of this collection and received approval through August 31, 1998. The forms are used to furnish the information required by solicitation provisions or contract clauses.

Total Annual Reporting Burden

Hours: 19,853.

Frequency of Response: On occasion.

Estimated Number of Respondents: 69,092.

Estimated Total Hours per Response: 30 minutes.

Affected Public: Business or other for-profit.

Jacinto Wong,

Chief Information Officer, Senior Official for Information Resources Management.

[FR Doc. 98-24428 Filed 9-10-98; 8:45 am]

BILLING CODE 3640-04-P

POSTAL SERVICE

Notice of Visit to Facilities

AGENCY: Postal Rate Commission.

ACTION: Notice of visit.

SUMMARY: Arrangements have been made for members of the Commission and certain advisory staff members to tour operations and discuss postal issues with the following organizations in the Minneapolis, Minnesota area: Scovill Press; Deluxe Corporation; Northwest Airlines; MacKay Envelope; Fingerhut Corporation; Gage Lettershop; the Billy Graham Evangelistic Association. Additionally, the Commission will tour the Postmark America store operated by the Postal Service. Information obtained during the visit will assist Commissioners and staff in the execution of their duties.

DATES: The visit has been scheduled for September 14-16, 1998.

FOR FURTHER INFORMATION CONTACT:

Stephen L. Sharfman, General Counsel, Postal Rate Commission, Suite 300,

1333 H Street, NW., Washington, DC 20268-0001, (202) 789-6820.

Dated: September 8, 1998.

Margaret P. Crenshaw,
Secretary.

[FR Doc. 98-24486 Filed 9-10-98; 8:45 am]

BILLING CODE 7710-FW-M

SECURITIES AND EXCHANGE COMMISSION

[File No. 1-13986]

Issuer Delisting; Notice of Application To Withdraw From Listing and Registration; (Bogen Communications International, Inc., Common Stock, \$.001 Par Value; Redeemable Warrants to Purchase One Share of Common Stock)

September 4, 1998.

Bogen Communications International, Inc. ("Company") has filed an application with the Securities and Exchange Commission ("Commission"), pursuant to Section 12(d) of the Securities Exchange Act of 1934 ("Act") and Rule 12d2-(d) promulgated thereunder, to withdraw the above specified securities ("Securities") from listing and registration on the American Stock Exchange, Inc. ("Amex" or "Exchange").

The reasons cited in the application for withdrawing the Securities from listing and registration include the following:

The Company's Common Stock began trading on the National Market System of the Nasdaq Stock Market, Inc. ("Nasdaq NMS") at the opening of business on August 5, 1998, and concurrently therewith, the Securities were suspended from trading on the Amex.¹ The Company seeks to withdraw the Securities from listing on the Amex because it believes that there will be increased liquidity by listing the Securities on the Nasdaq NMS.

The Company has complied with Rule 18 of the Amex by providing the Amex with a certified copy of the Unanimous Written Consent of the Executive Committee on the Board of Directors of the Company authorizing the withdrawal of its Securities from listing on the Amex.

The Exchange has informed the Company that it has no objection to the

¹ The Company's Securities, Common Stock and Warrants, are listed on the Nasdaq. Telephone conversation between Thomas R. Weinberger, McDermott, Will & Emery, and Terri L. Evans, Attorney, Division of Market Regulation, Commission, on August 27, 1998.

withdrawal of the Company's Securities from listing on the Amex.

This application relates solely to the withdrawal from listing of the Company's Securities from Amex and has no effect upon the continued listing of the Company's Securities on the Nasdaq NMS.

By reason of Section 12(g) of the Act, as amended, and the rules and regulations of the Commission promulgated thereunder, the Company shall continue to be obligated to file reports under Section 13 of the Act.

Any interested person may, on or before September 28, 1998, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, facts bearing upon whether the application has been made in accordance with the rules of the Exchange and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,
Secretary.

[FR Doc. 98-24426 Filed 9-10-98; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[File No. 1-13437]

Issuer Delisting; Notice of Application To Withdraw From Listing and Registration; (The Source Information Management Company, Common Stock, \$0.01 Par Value)

September 4, 1998.

The Source Information Management Company ("Company") has filed an application with the Securities and Exchange Commission ("Commission"), pursuant to Section 12(d) of the Securities Exchange Act of 1934 ("Act") and Rule 12d2-2(d) promulgated thereunder, to withdraw the above specified security ("Security") from listing and registration on the Boston Stock Exchange, Inc. ("BSE" or "Exchange").

The reasons cited in the application for withdrawing the Security from listing and registration include the following:

The Company's Security was included on the National Market System

of the Nasdaq Stock Market, Inc. ("Nasdaq NMS") at the opening of business on June 12, 1998. As a result, the Company considered the increased likelihood of market inefficiencies, the administrative inconvenience and associated costs of satisfying the requirements of more than one exchange or market, and the requirement of the Nasdaq NMS that the Company take all steps necessary to withdraw its Security from listing on the Exchange, in making the decision to withdraw its Security from listing and registration on the BSE.

The Company has complied with the rules of the Exchange by filing a certified copy of the resolution adopted by the Company's Board of Directors authorizing the withdrawal of its Security from listing and registration on the Exchange and by setting forth in detail to the Exchange the reasons for such proposed withdrawal, and the facts in support thereof.

By letter dated June 8, 1998, the Exchange informed the Company that it would not object to the withdrawal of the Company's Security from listing and registration on the BSE.

The withdrawal from listing of the Company's Security from the BSE shall have no effect upon the continued listing of the Security on the Nasdaq.

By reason of Section 12(g) of the Act and the rules thereunder, the Company shall continue to be obligated to file reports under Section 13 of the Act with the Commission and the Nasdaq.

Any interested person may, on or before September 28, 1998, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, facts bearing upon whether the application has been made in accordance with the rules of the Exchange and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,
Secretary.

[FR Doc. 98-24425 Filed 9-10-98; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-40395; File No. SR-PCX-98-32]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Granting Approval to Proposed Rule Change Relating to Listing and Maintenance Fees for Nasdaq Listings

September 3, 1998.

I. Introduction

On July 14, 1998,¹ the Pacific Exchange, Inc. ("PCX" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")² and Rule 19b-4 thereunder,³ a proposed rule change to modify its listing and maintenance fees for certain issues dually listed on the PCX and the Nasdaq Stock Market, Inc. ("Nasdaq").

The proposed rule change was published for comment in the **Federal Register** on July 29, 1998, as amended.⁴ No comments were received on the proposal. This order approves the proposal.

II. Description of the Proposal

Currently, common stock that is listed on both the PCX and either the New York Stock Exchange ("NYSE") or American Stock Exchange ("AMEX") is considered dually listed for the purposes of determining the amount of original listing fees and maintenance fees. In the proposed rule change, the Exchange proposed to add Nasdaq National Market ("NNM") issues to the list of dually listed issues, thereby reducing the original listing fee for NNM issues to \$10,000.00 from \$20,000.00. Annual maintenance fees for any one NNM issue were also proposed to be reduced from \$2000.00 to \$1000.00. Fees for Nasdaq Small Cap Market issues remain the same.

In addition to modifying original listing fees and maintenance fees, the Exchange proposed to reduce the frequency of listing maintenance

¹ The proposed rule change was originally filed on June 19, 1998 pursuant to Section 19(b)(3)(A)(ii) of the Act. Amendment No. 1 converted the proposed rule change to a filing pursuant to Section 19(b)(2) of the Act because the proposal changed fees that apply to issuers. Letter from Robert Pacileo, Staff Attorney, Regulatory Policy, PCX to Kelly McCormick, Attorney, Office of Market Supervision, Division of Market Regulation, Commission, dated July 10, 1998.

² 15 U.S.C. 78s(b)(1).

³ 17 CFR 240.19b-4.

⁴ Securities Exchange Act Release No. 40249 (July 22, 1998), 63 FR 40577.

reviews for NNM issues; the reviews will be done on an annual basis along with other dually listed issues and rather than a quarterly basis as required for exclusive issues.⁵

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁶ In particular, the Commission believes the proposal is consistent with the requirements of Section 6(b)(4) of the Act⁷ because it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among members, issuers and other persons using its facilities. The proposal fairly allocates fees among issuers, NYSE, AMEX and NNM. The proposal provides issuers that list on both the PCX and NNM with the lower fees and lighter maintenance schedule as are currently provided to NYSE and AMEX issues. The Commission believes such reduced fees are appropriate and reasonable because the costs incident to maintaining exclusive issues are greater than costs incident to maintaining dually listed issues. The Exchange's costs incident to dually listed issues are lower because it requires only one maintenance review annually, rather than the quarterly reviews required for exclusive issues.

In addition, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.⁸ The Commission believes the proposal fosters cooperation and coordination between persons engaged with regulating securities transactions. The PCX reduced its own review process on NNM issues based in part on the review process of Nasdaq. According to the PCX, Nasdaq is a primary listing association and bears the primary obligation to ensure that its issuers meet appropriate listing standards. The Commission also believes that the proposal is not designed to permit unfair discrimination between issuers because the Exchange listing maintenance reviews for dually listed NYSE, AMEX and NNM issues are all on an annual basis.

⁵ The PCX Policy and Procedures Manual Section 903.01 provides for annual listing maintenance reviews for dually listed issues.

⁶ In reviewing this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁷ 15 U.S.C. 78f(b)(4).

⁸ 15 U.S.C. 78f(b)(5).

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁹ that the proposed rule change (SR-PCX-98-32) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98-24372 Filed 9-10-98; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-40397; File No. SR-PCX-98-19]

Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Approving Proposed Rule Change Relating to Capital Requirements and Guaranteed Participation of Lead Market Makers

September 3, 1998.

I. Introduction

On April 16, 1998, the Pacific Exchange, Inc. ("PCX" or "Exchange"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4² thereunder, filed with the Securities and Exchange Commission ("Commission"), a proposed rule change to amend PCX Rule 6.82 concerning Lead Market Makers. The Exchange filed Amendment No. 1 to the proposed rule change with the Commission on June 4, 1998.³

The proposed rule change was published for comment in the **Federal Register** on June 15, 1998.⁴ No comments were received on the proposal. This order approves the proposal.

II. Description of the Proposal

PCX Rule 6.82 sets forth the basic rules and procedures applicable to Lead Market Makers ("LMMs") and the PCX's LMM Program.⁵ PCX seeks to amend

⁹ 15 U.S.C. 78s(b)(2).

¹⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 clarified the text of the proposed rule change. See letter from Michael D. Pierson, Senior Attorney, to Heidi Pilpel, Special Counsel, Division of Market Regulation, SEC (June 4, 1998).

⁴ See Securities Exchange Act Release No. 40070 (June 4, 1998), 63 FR 32691.

⁵ The LMM Program is governed by PCX Rules 6.82 and 6.83, which rules apply strictly to options trading. The PCX's LMM Program was granted permanent approval on September 22, 1997. See Securities Exchange Act Release No. 39111, 62 FR 51710 (October 2, 1997).

PCX Rule 6.82 by modifying the capital requirements for LMMs on the exchange and clarifying the procedures applicable to LMM's guaranteed participation. The text of the proposed rule change is available at the offices of the Commission and the Exchange.

A. LLM Capital

PCX Rule 6.82(c)(11) currently provides that each LMM on the Exchange must maintain a cash or liquid asset position in the amount of \$100,000 or in an amount sufficient to assume a position of twenty trading units of the security underlying the option the LMM has been allocated, whichever amount is greater. The term "trading unit" means, in the case of stocks, 100 shares.⁶ Therefore, LMMs are currently required to maintain a cash or liquid asset position in the amount of \$100,000 or in an amount sufficient to assume a position of 2000 shares of stock in each option issue allocated to the LMM.

The proposed rule change would eliminate the current LMM capital requirement and replace it with another one providing that each LMM must maintain a cash or liquid asset position of at least \$350,000, plus \$25,000 for each issue over eight issues that have been allocated to the LMM.⁷ Under the proposal, PCX Rule 6.82(c)(11) will continue to provide that in the event that two or more LMMs are associated with each other and deal for the same LMM account, the LMM capital requirement will apply to such LMMs collectively, rather than to each LMM individually.⁸

The Exchange believes that the current LMM capital requirement, which generally fluctuates as the price of the underlying stock fluctuates, is unduly complicated and difficult to calculate, both for the exchange and for individual LMMs.⁹ Additionally, the Exchange believes that all of its LMMs should have cash or liquid asset positions of at least \$350,000 and that the current minimum amount of \$100,000 is insufficient.

B. Guaranteed Participation

PCX Rule 6.82(d)(2) currently provides that LMMS are guaranteed 50% participation in transactions

⁶ See PCX Rule 5.3(a).

⁷ Like the current rule, the proposed rule would not apply to issues traded by an LMM in connection with the Exchange's LMM Book Pilot Program, as provided in PCX Rule 6.82(h).

⁸ Cf. CBOE Rule 8.80, Interp. and Policy .02.

⁹ In that regard, the Exchange noted in its filing that the Commission's net capital rule also establishes fixed dollar amounts applicable to broker-dealers.

occurring on their disseminated bids or offers in their allocated issues. The rule also provides, however, that an LMM's guaranteed participation may be reduced from 50% to 40% in a multiply-traded issue, and maybe reduced from 50% to 25% in a non-multiply traded issue, if trading in the issue rises to certain levels (and other events occur).

The applicable trading volume requirement, for both multiply-traded and non-multiply traded issues, is an average daily trading volume of 3,000 contracts at the Exchange for three consecutive months. The Exchange believes that the current formulation of this provision is ambiguous and proposes to clarify it by replacing the words "for three consecutive months" with the words "during any three-calendar-month period (measured on a 'rolling' three-calendar-month basis)." ¹⁰

For multiply-traded issues, PCX Rule 6.82(d)(2)(A) also requires that the Exchange's share of multi-exchange customer trading volume drop below a certain level before an LMM's guaranteed participation will be reduced. The proposal clarifies that the applicable customer trading volume levels are to be determined on a monthly basis. ¹¹

The Exchange is also proposing to adopt Rule 6.82(d)(2)(C) to specify the circumstances under which an LMM may return to receiving a guaranteed 50% participation after having had it reduced to 40% or to 25%. Specifically, the proposal states that "[i]f the Options Allocation Committee has reduced an LMM's guaranteed participation in an issue pursuant to subsections (A) or (B) * * * and average daily trading volume in an issue falls below 3,000 contracts at the Exchange during any three-calendar-month period (measured on a 'rolling' three-calendar-month basis), the Options Allocation Committee will evaluate the LMM's performance in that issue and, based on that evaluation, may raise the LMM's guaranteed participation in that issue from 40% to 50% (in a multiply-traded issue) or from 25% to 50% (in a non-multiply traded issue)." The proposal codifies the

¹⁰ Thus, for example, if trading volume in an issue reached an average of 2,000 contracts per day in the first month, 4,000 per day in the second month, and 4,000 per day in the third month, the condition would have been met under the proposed formulation, but not under the current formulation.

¹¹ The proposal states that in the case of an issue traded by two options exchanges, the Exchange's monthly share of the total multi-exchange customer trading volume must drop from above 70% to below 70%. In the case of an issue traded by three or more options exchanges, the Exchange's monthly share of the total multi-exchange customer trading volume must drop from above 45% to below 45%.

Exchange's existing policy on when an LMM's guaranteed participation may return to 50%.

III. Discussion

For the reasons discussed below, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and with the provisions of Section 6(b) ¹² of the Act, in general, and furthers the objectives of Section 6(b)(5), ¹³ in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest.

A. LMM Capital

The proposed new capital requirement provides that each LMM must maintain a cash or liquid asset position of at least \$350,000, plus \$25,000 for each issue over eight issues that have been allocated to the LMM. The proposal increases the minimum capital requirement for a substantial majority of the LMMs currently subject to PCX Rule 6.82.

The Commission finds that the proposed new capital requirement is reasonably designed to assure that LMMs are capable of making deep, liquid, and competitive markets. For LMMs whose minimum capital requirement is increased, the rule change will ensure not only their greater financial stability, but also will enhance their ability to fill large customer orders and compete vigorously with other exchanges in multiply-traded issues. With respect to LMMs whose minimum capital requirement is either decreased or unchanged, the Commission finds, based on the representations of the Exchange, that there are sufficient safeguards (in addition to the proposed minimum capital requirement) to assure that such LMMs are adequately capitalized. ¹⁴

Moreover, the Commission believes that the proposed minimum capital

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ See letter from Michael D. Pierson, Senior Attorney, Pacific Exchange Inc., to Heidi Pilpel Special Counsel, Division of Market Regulation, SEC (August 31, 1998), representing, among other things that (i) as a business matter, the proposed capital requirement will assure that LMMs are capable of making deep, liquid and competitive markets; (ii) PCX Rule 6.36 requires each LMM to have a letter of guarantee from a clearing firm providing that the clearing firm accepts financial responsibility for all Exchange transactions made by the LMM, and (iii) it is the practice by the Exchange to evaluate the performance of each LMM every six months to identify any LMMs who may be trading too many issues to provide deep, liquid, and competitive markets.

requirement is reasonable related to the capital requirement for LMMs that are participating in the Book Pilot Program which the Commission recently approved. ¹⁵ Like the capital requirement for participants in the Book Pilot Program, the amount of capital an LMM is required to maintain in excess of the \$350,000 minimum will be determined base don the number of issues an LMM trades rather than on the constantly fluctuating price of the stock underlying an allocated issue. This method of determining the minimum capital required has the advantages of simplifying the capital calculations and preventing stock splits from significant reducing LMM capital requirements. ¹⁶

B. Guaranteed Participation

The proposal amends PCX Rule 6.82(d)(2) to clarify the circumstances in which the Exchange may modify an LMM's guaranteed participation. Currently, an LMM's guaranteed participation may be reduced from 50% to 40% in a multiply-traded issue, and may be reduced from 50% to 25% in a non-multiply traded issue, if average daily trading volume in the issue reaches 2,000 contracts at the Exchange for "three consecutive months" (and other events occur). The proposal replaces the words "for three consecutive months" with the words "during any three-calendar-month period (measured on a 'rolling' three-calendar-month basis)" to clarify that the average daily trading volume requirement of 3,000 contracts is determined on an aggregate basis, and that 3,000 contracts need not be the average daily trading volume for every month in the applicable three-calendar-month period. ¹⁷

For multiply-traded issues, PCX Rule 6.82(d)(2)(A) also requires that the Exchange's share of multi-exchange customer trading volume drop below a certain level before an LMM's guaranteed participation will be reduced. The proposal clarifies that the applicable customer trading volume

¹⁵ LMMs participating in the Book Pilot Program (who are responsible for the operation of the public limit order book and the resolution of trading errors committed in the course of operating the Book) are required to have minimum capital of \$500,000, plus \$25,000 for each issue over 5 issues included in the Book Pilot Program. The Commission recently approved this capital requirement. See Securities Exchange Act Release 39875 (April 15, 1998), 63 FR 19994 (April 22, 1998).

¹⁶ See letter from Michael D. Pierson, Senior Attorney, Pacific Exchange Inc., to Heidi Pilpel Special Counsel, Division of Market Regulation, SEC (August 31, 1998), offering additional justifications for the proposed rule change.

¹⁷ See footnote 10 *supra*.

levels are to be determined on a monthly basis.¹⁸

Additionally, the proposal codifies the Exchange's existing policy on when an LMM's guaranteed participation may return to 50% after having been reduced. The proposal provides that the Options Allocation Committee may in its discretion return an LMM to receiving a guaranteed 50% participation, after having had it reduced to 40% or 25%, if average daily trading volume in an issue falls below 3,000 contracts at the Exchange during any three-calendar-month period (measured on a 'rolling' three-calendar-month basis).

The Commission finds that the proposed rule changes relating to guaranteed participation are appropriate in that they reduce ambiguity and provide LMMs and the marketplace with clearer notice as to how an LMM's guaranteed participation will be determined.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act¹⁹ that the proposed rule change (SR-PCX-98-19) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁰

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 98-24373 Filed 9-10-98; 8:45 am]
BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-40400; File No. SR-Phlx-98-36]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to an Increase in Position and Exercise Limits for Standardized Equity Options

September 3, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 14, 1998, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and

III below, which Items have been prepared by the 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 Substance of the Proposed Rule Change

The Phlx proposes to amend Exchange Rule 1001, Position Limits, to increase position and exercise limits³ for standardized equity options to three times their current levels. Corresponding changes are also being made to the equity option hedge exemption contained in Commentary .07 to Rule 1001.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Phlx is proposing to increase the position and exercise limits for equity options traded on the Exchange to three times their current levels. Currently, Phlx Rule 1001 subjects equity options to one of the five different position limits depending on the trading volume and outstanding shares of the underlying security. Rule 1002 establishes corresponding exercises limits.⁴ The limits are: 4,500; 7,500;

³ Position limits impose a ceiling on the number of option contracts in each class on the same side of the market relating to the same underlying security that can be held or written by an investor or group of investors acting in concert.

Exercise limits prohibit an investor or group of investors acting in concert from exercising more than a specified number of puts or calls in a particular class within five consecutive business days.

⁴ Rule 1002 states ". . . no member or member organization shall exercise, for any account in which such member or member organization has an interest or for the account of any partner, officer, director or employee thereof or for the account of any customer, a long position in any option contract of a class of options dealt in on the Exchange (or, respecting an option not dealt in on the Exchange,

10,500; 20,000; and 25,000 contracts on the same side of the market. Under the proposed changes the new limits will be: 13,500; 22,500; 31,500; 60,000; and 75,000 contracts. Corresponding changes are also being proposed to the equity option hedge exemption contained in Commentary .07 of Rule 1001 so that the example in the Commentary reflects the proposed position and exercise limits. The Exchange believes sophisticated surveillance techniques at options exchanges adequately protect the integrity of the markets for the options that will be subject to these increased position and exercise limits.

Manipulation

The Phlx believes that position and exercise limits, at their current levels, no longer serve their stated purpose. The Commission has stated that:

Since the inception of standardized options trading, the options exchanges have had rules imposing limits on the aggregate number of options contracts that a member or customer could hold or exercise. These rules are intended to prevent the establishment of options positions that can be used or might create incentives to manipulate or disrupt the underlying market so as to benefit the options position. In particular, position and exercise limits are designed to minimize the potential for mini-manipulations and for corners or squeezes of the underlying market.⁵

At this time in 1998, noting the twenty-fifth anniversary of listed options trading, the Exchange believes that the existing surveillance procedures and reporting requirements at options exchanges and clearing firms that have been developed over the years are able to properly identify unusual and illegal trading activity. In addition, routine oversight inspections of Phlx's regulatory programs by the commission have not uncovered any material inconsistencies or shortcomings in the manner in which the Exchange's market surveillance reviews position limits.

another exchange if the member or member organization is not a member of that exchange) if as a result thereof such member or member organization, or partner, officer, director or employee thereof or customer, acting alone or in concert with others, directly or indirectly, has or will have exercised within any five (5) consecutive business days aggregate long positions in that class (put or call) as set forth in the position limit in Rule 1001, in the case of options on a stock, on a foreign currency or cross rate currency options, or stock index warrants; without regard to the exchange on which the options were purchased. Whether option or warrant positions should be aggregated under this rule shall be determined in the manner described in the Commentary to Exchange Rule 1001. Index option position and exercise limits are governed by Rules 1001A and 1002A."

⁵ Exchange Act Release No. 39489 (December 24, 1997), 63 FR 276 (January 5, 1998).

¹⁸ See footnote 11 *supra*.

¹⁹ 15 U.S.C. 78s(b)(2).

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

These procedures entail a daily monitoring of market movements automated to identify unusual activity in both the options and underlying stock. Further, the significant increases in unhedged options capital charges resulting from the September 1997 adoption of risk-based haircuts and the Exchange margin requirements applicable to these products under Exchange rules serves as a more effective protection than position limits.⁶

Further, large stock holdings must be disclosed to the Commission by way of Schedules 13D or 13G.⁷ Options positions are part of any reportable positions and cannot be legally hidden. In addition, Exchange Rule 1003—which requires members to file reports with the Exchange for any customer who held aggregate long or short positions of 200 or more option contracts of a put class and call class on the same side of the market covering the same underlying security—will remind unchanged and an important part of the Exchange's surveillance efforts.

Position and Exercise Limits Restrict Legitimate Options Use

Equity option position limits prevent large customers such as mutual funds and pension funds from using options to gain meaningful exposure to individual stocks, resulting in lost liquidity in both the options market and the stock market. Equity option position limits also act as a barrier to the use of options by corporations wishing to implement options strategies with their own stock. For example, existing equity option position limits could restrict the number of put options that could be sold under a corporate buyback program.⁸

Financial Requirements

The Exchange believes that financial requirements imposed by the Exchange and by the Commission adequately address concerns that a member or its customer could try to maintain an inordinately large unhedged position in an equity option. Current margin, and risk-based haircut methodologies serve to limit the size of positions maintained by any one account by increasing the margin and/or capital that a member must maintain for a large position held by itself or by its customer. It should also be noted that the Exchange has the

authority under Rule 722(d)(1), (d)(4) and (i)(8) to impose a higher margin requirement upon a member or member organization when the Exchange determines a higher requirement is warranted. In addition, the Commission's net capital rule, Rule 15c3-1, imposes a capital charge on members to the extent of any margin deficiency resulting from the higher margin requirement.

Past Increases Have Had No Adverse Consequences

Equity option position limits have been gradually expanded from 1,000 contracts in 1973 to the current level of 25,000 contracts for the largest and most active stocks. In 1998, the Commission approved the elimination of position and exercise limits in FLEX equity options under a two-year pilot program.⁹ To date, the Exchange does not believe that there have been adverse effects on the market as a result of the past increases in the limits for equity options or the elimination of position and exercise limits for FLEX equity options.

Changes Will Allow Options Exchanges To Compete More Fairly With OTC Markets

The Commission has stated that "limits must not be established at levels that are so low as to discourage participation in the options market by institutions and other investors with substantial hedging needs or to prevent specialists and market-makers from adequately meeting their obligations to maintain a fair and orderly market."¹⁰ However, in today's market, equity option position limits place listed options at a competitive disadvantage to over-the-counter ("OTC") derivatives. OTC dealers can execute options trades through overseas subsidiaries not subject to National Association of Securities Dealers ("NASD") regulation, and therefore not subject to position limits. As a result, the largest trades can go unobserved and unmonitored for regulatory and oversight purposes. Member firms continue to express concern to options Exchanges that position limits are an impediment to their business and that they have no choice but to move their business to off-shore markets where position limits are not an issue.

In addition, the Commission has recently approved the NASD's proposed rule change to raise position limits for

conventional equity options (*i.e.*, those options not issued, or subject to issuance by The Options Clearing Corporation) to three times their current levels and three times the levels established by current Exchange rules for standardized options.¹¹ Because conventional options often have nearly the identical terms as standardized, exchange-traded options, the Exchange believes the position limits for standardized options should be at least as high as those for conventional options. This is critical for listed options to compete with a growing OTC market, thus promoting fair competition. The proposed rule change should help to attract business back to the Exchange where the trades will be subject to reporting requirements and surveillance. In releases respecting FLEX equity option's, which have no position limits, the Commission noted that the elimination of position limits will allow the listed options markets to better compete with the OTC market.¹²

It should also be noted that individual stocks are not subject to position limits. Investors can theoretically hold 100% of a company's shares outstanding as long as they file the appropriate Schedule 13D or 13G. The Exchange believes the increase in the position and exercise limits will better enable the Exchange to compete against the OTC markets and is an appropriate and responsible increase given the nature of the Exchange's surveillance.

2. Statutory Basis

The Exchange represents that the proposed rule change is consistent with Section 6(b)¹³ of the Act, in general, and Section 6(b)(5) of the Act,¹⁴ 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, to protect investors and the public interest and is not designed to permit unfair discrimination between customer, issuers, brokers, or dealers.

¹¹ The NASD's position limit filing established position and exercise limits for conventional equity options identical to those being proposed by Phlx in this filing. See Exchange Act Release No. 40087 (June 12, 1998), 63 FR 33746 (June 19, 1998) (SR-NASD-98-23).

¹² See, e.g., Exchange Act Release No. 39549 (January 14, 1998), 63 FR 3601 (January 23, 1998) (SR-Phlx-96-38).

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(5).

⁶ See Exchange Act Release No. 38248 (February 6, 1997), 62 FR 6474 (February 12, 1997) (adopting Risk-Based Haircuts) and Phlx rule 722.

⁷ Exchange Act Rule 13d-1.

⁸ The Commission notes that issuers would, of course, need to comply with all applicable provisions of the federal securities laws in conducting their share repurchase programs.

⁹ See Exchange Act Release No. 39549 (January 14, 1998) (SR-Phlx-96-38).

¹⁰ See H.R. Rep. No. IFC-3 96th Cong., 1st Sess. At 189-91 (Comm. Print 1978).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organizations 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

Within 35 days of the publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. 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 inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-Phlx-98-36 and should be submitted by October 2, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98-24371 Filed 9-10-98; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF STATE

[Public Notice 2884]

Privacy Act of 1974; Altered System of Records

Notice is hereby given that the Department of State proposes to alter an existing system of records, STATE-36, pursuant to the provisions of the Privacy Act of 1974, as amended (5 U.S.C. (r)), and the Office of Management and Budget Circular No. A-130, Appendix I. The Department's report was filed with the Office of Management and Budget on August 24, 1998.

It is proposed that the current system will retain the name "Security Records." It is also proposed that due to the expanded scope of the current system, the system description will include revisions and/or additions to each section. These changes to the existing system description are proposed in order to reflect more accurately the Bureau of Diplomatic Security's record-keeping system, and a reorganization of activities and operations. Also, certain relevant records will be removed from "Security Access Control Records, STATE-55" and will become part of STATE-36. STATE-55 will be deleted in the near future.

Any persons interested in commenting on the altered system of records may do so by submitting comments in writing to Kenneth F. Rossman; Acting Chief; Programs and Policies Division; Office of IRM Programs and Services; Room 1239; Department of State; 2201 C Street, NW; Washington, DC 20520-1512. This system of records will be effective 40 days from the date of publication, unless we receive comments that will result in a contrary determination.

The altered system description, "Security Records, STATE-36" will read as set forth below.

Dated: August 24, 1998.

Patrick F. Kennedy,

Assistant Secretary for the Bureau of Administration.

STATE-36

SYSTEM NAME:

Security Records.

SECURITY CLASSIFICATION:

Unclassified and classified.

SYSTEM LOCATION:

Department of State, Bureau of Diplomatic Security, State Annex 1, 2401 E Street NW, Washington, DC 20037; State Annex 7, 7943-50 Cluny Court, Springfield, VA 22153; State Annex 10, 2121 Virginia Avenue NW, Washington, DC 20522; State Annex-11, 2216 Gallows Road, Dunn Loring, VA 22027; and overseas at some U.S. embassies, U.S. consulates general and U.S. consulates.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Present and former employees of the Department of State including Diplomatic Security Special Agents; applicants for Department employment who have been or are presently being investigated for security clearance; contractors working for the Department; interns and detailees to the Department; individuals requiring access to the official Department of State premises who have undergone or are undergoing security clearance; some passport and visa applicants concerning matters of adjudication; individuals involved in matters of passport and visa fraud; individuals involved in unauthorized access to classified information; prospective alien spouses of American personnel of the Department of State; individuals or groups whose activities have a potential bearing on the security of Departmental or Foreign Service operations, including those involved in criminal or terrorist activity. Others files include individuals issued security violations or infractions; litigants in civil suits and criminal prosecutions of interest to the Bureau of Diplomatic Security; individuals who have Department building passes; unformed security officers; individuals named in congressional inquiries to the Bureau of Diplomatic Security; individuals subject to investigations conducted abroad on behalf of other Federal agencies; individuals whose activities other agencies believe may have a bearing on U.S. foreign policy interests.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

- (a) 5 U.S.C. 301, (Management of Executive Agencies);
- (b) 5 U.S.C. 7311 (Suitability, Security, and Conduct);
- (c) 5 U.S.C. 7531-33 (Adverse Actions, Suspension and Removal, and Effect on Other Statutes);
- (d) 8 U.S.C. 1104 (Aliens and Nationality—passport and visa fraud investigations);
- (e) 18 U.S.C. 111 (Crimes and Criminal Procedures) (Assaulting, resisting, or impeding certain officers or employees);

¹⁵ CFR 200.30-(a)(12).

(f) 18 U.S.C. 112 (Protection of foreign officials, official guests, and internationally protected persons);

(g) 18 U.S.C. 201 (Bribery of public officials and witnesses);

(h) 18 U.S.C. 202 (Bribery, Graft, and Conflicts of Interest-Definitions);

(i) 18 U.S.C. 1114 (Protection of officers and employees of the U.S.);

(j) 18 U.S.C. 1116 (Murder or manslaughter of foreign officials, official guests, or internationally protected persons);

(k) 18 U.S.C. 1117 (Conspiracy to murder);

(l) 18 U.S.C. 1541-1546 (Issuance without authority, false statement in application and use of passport, forgery or false use of passport, misuse of passport, safe conduct violation, fraud and misuse of visas, permits, and other documents);

(m) 22 U.S.C. 211a (Foreign Relations and Intercourse) (Authority to grant, issue, and verify passports);

(n) 22 U.S.C. 842, 846, 911—(Duties of Officers and Employees and Foreign Service Officers) (Repealed, but applicable to past records);

(o) 22 U.S.C. 2454 (Administration)

(p) 22 U.S.C. 2651a (Organization of the Department of State);

(q) 22 U.S.C. 2658 (Rules and regulations; promulgation by Secretary; delegation of authority—applicable to past records);

(r) 22 U.S.C. 2267 Empowered security officers of the Department of State and Foreign Service to make arrests without warrant) (Repealed, but applicable to past records);

(s) 22 U.S.C. 2709 (Special Agents);

(t) 22 U.S.C. 2712 (Authority to control certain terrorism-related services);

(u) 22 U.S.C. 3921 (Management of service);

(v) 22 U.S.C. 4802, 4804(3)(D)—(Diplomatic Security) (generally) and (Responsibilities of Assistant Secretary for Diplomatic Security) (generally) (Repealed, but applicable to past records);

(w) 22 U.S.C. 4831-4835 (Accountability review, accountability review board, procedures, findings and recommendations by a board, relation to other proceedings);

(x) 44 U.S.C. 3101 (Federal Records Act of 1950, Sec. 506(a) as amended—applicable to past records);

(y) Executive Order 10450 (Security requirements for government employment);

(z) Executive Order 12107, Title 5 (Relating to the Civil Service Commission and Labor-Management in the Federal Service);

(aa) Executive Order 12958 and its predecessor orders (National security information);

(bb) Executive Order 12968 (Access to classified information);

(cc) 22 CFR Subchapter M (International Traffic in Arms—applicable to past records);

(dd) 40 U.S.C. Chapter 10 (Federal Property and Administrative Services Act (1949));

(ee) 31 U.S.C. (Tax Code);

(ff) Pub. L. 99-399, 8/27/86; (Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended);

(gg) Pub. L. 99-529, 10/24/86 (Special Foreign Assistance Act of 1986, concerns Haiti—applicable to past records);

(hh) Pub. L. 100-124, Section 155a (concerns special security program for Department employees responsible for security at certain posts—applicable to past records);

(ii) Pub. L. 100-202, 12/22/87 (Appropriations for Departments of Commerce, Justice, and State—applicable to past records);

(jj) Pub. L. 100-461, 10/1/88 (Foreign Operations, Export Financing, and Related Programs Appropriations Act);

(kk) Pub. L. 102-138, 10/28/91 (Foreign Relations Authorization Act, Fiscal Years 1992 and 1993)—applicable to past records.

CATEGORIES OF RECORDS IN THE SYSTEM:

Investigatory material relating to any category of individual described above, including case files containing items such as applications for passports and employment, photographs, fingerprints, birth certificates, credit checks, intelligence reports, security evaluations and clearances, other agency reports and informant reports; legal case pleadings and files; evidence materials collected during investigations; security violation files; training reports; weapons assignment data base; availability for special protective assignments; intelligence reports; counterintelligence material; counterterrorism material; internal Departmental memoranda; internal personnel, fiscal, and other administrative documents.

Additionally, security files contain information needed to provide protective services for the Secretary of State and visiting foreign dignitaries; and to protect the Department's official facilities. There are also information copies of investigations of individuals conducted abroad on behalf of other Federal agencies.

Finally, security files contain documents and reports furnished to the Department by other agencies concerning individuals whose activities

the other agencies believe may have a bearing on U.S. foreign policy interests.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The information in the Security Records is used by:

(a) Appropriate committees of the Congress in furtherance of their respective oversight functions;

(b) Department of Treasury; U.S. Office of Personnel Management; Agency for International Development; U.S. Information Agency; Department of Commerce; Peace Corps; Arms Control and Disarmament Agency; U.S. Secret Service; Immigration and Naturalization Service; Department of Defense; Central Intelligence Agency; Department of Justice; Federal Bureau of Investigation; National Security Agency; Drug Enforcement Administration; and other Federal agencies inquiring pursuant to law or Executive Order in order to make a determination of general suitability for employment or retention in employment, to grant a contract or issue a license, grant, or security clearance;

(c) Any Federal, state, municipal, or foreign law enforcement agency for law enforcement purposes: threat alerts and analyses, protective intelligence and counterintelligence information as needed by appropriate agencies of the Federal government, states, municipalities, or foreign governments;

(d) Any other agency or Department of the Federal government pursuant to statutory intelligence responsibilities or other lawful purposes;

(e) Any other agency or Department of the Executive Branch having oversight or review authority with regard to its investigative responsibilities;

(f) A federal, state, local, or foreign agency or other public authority that investigates, prosecutes or assists in investigation, prosecution or violation of criminal law; enforces, implements or assists in enforcement or implementation of statute, rule, regulation or order;

(g) A federal, state, local or foreign agency or other public authority or professional organization maintaining civil, criminal, and other relevant enforcement or pertinent records such as current licenses; information may be given to a customer reporting agency: (a) In order to obtain information, relevant enforcement records or other pertinent records such as current licenses or (b) to obtain information relevant to an agency investigation, a decision concerning the hiring or retention of an employee or other personnel action, the issuance of a security clearance or the initiation of administrative, civil, or criminal action;

(h) Officials of the Department of other government agencies in the letting of a contract, issuance of a license, grant or other benefit, and the establishment of a claim;

(i) Any private or public source, witness, or subject from which information is requested in the course of a legitimate agency investigation or other inquiry to the extent necessary to identify an individual; to inform a source, witness or subject of the nature and purpose of the investigation or other inquiry; and to identify the information requested;

(j) An attorney or other designated representative of any source, witness or subject described in paragraph (i) only to the extent that the information would be provided to that category of individual itself in the course of an investigation or other inquiry;

(k) By a Federal agency following a response to its subpoena or to a prosecution request that such record be released for the purpose of its introduction to a grand jury.

Also see "Routine Uses" of Prefatory Statement published in the **Federal Register**.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Hard copy, microfilm, microfiche, tape recordings, electronic media and photographs.

RETRIEVABILITY:

The system is accessed by individual name, personal identifier or case number; but the files may be grouped for the convenience of the user by type, country code, group name, subject, contract number, weapons serial number, or building pass number.

SAFEGUARDS:

All employees of the Department of State have undergone a thorough personnel security background investigation. Access to the Department of State building and its annexes is controlled by security guards, and admission is limited to those individuals possessing a valid identification card or individuals under proper escort. Access to Annex 10 also has security access controls (code entrances) and/or security alarm systems. All records containing personal information are maintained in secured file cabinets or in restricted areas, access to which is limited to authorized personnel. Access to computerized files is password-protected and under the direct supervision of the system manager. The system manager has the

capability of printing audit trails of access from the computer media, thereby permitting regular *ad hoc* monitoring of computer usage.

RETENTION AND DISPOSAL:

Retention of those records varies depending upon the specific kind of record involved. The records are retired or destroyed in accordance with published schedules of the Department of State and as approved by the National Archives and Records Administration. More specific information may be obtained by writing to the Director, Office of IRM Programs and Services (A/RPS/IPS), Room 1239, Department of State, 2201 C Street, NW, Washington, DC 20520-1512.

SYSTEM MANAGERS AND ADDRESS:

Principal Deputy Assistant Secretary for Diplomatic Security and Director for the Diplomatic Security Service; Department of State; SA-10; 8th Floor; 2121 Virginia Avenue, NW; Washington, DC 20522-1003.

NOTIFICATION PROCEDURE:

Individuals who have reason to believe that the Bureau of Diplomatic Security may have security/investigative records pertaining to themselves should write to the Director; Office of IRM Programs and Services; Room 1239; Department of State; 2201 C Street, NW; Washington, DC 20520-1512. The individual must specify that he/she wishes the Security Records to be checked. At a minimum, the individual must include: Name; date and place of birth; current mailing address and zip code; signature; and a brief description of the circumstances which may have caused the creation of the record.

RECORD ACCESS AND AMENDMENT PROCEDURES:

Individuals who wish to gain access to or amend records pertaining to themselves should write to the Director; Office of IRM Programs and Services (address above).

RECORD SOURCE CATEGORIES:

These records contain information obtained from the individual; persons having knowledge of the individual; persons having knowledge of incidents or other matters of investigative interest to the Department; other U.S. law enforcement agencies and court systems; pertinent records of other Federal, state, or local agencies or foreign governments; pertinent records of private firms or organizations; the intelligence community; and other public sources. The records also contain information obtained from interviews, review of records, and other authorized investigative techniques.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

Records originated by another agency when that agency has determined that the record is exempt under 5 U.S.C. 552a(j). Also, records contained within this system of records are exempted from 5 U.S.C. 552a(c)(3) and (4), (d), (e)(1), (2), (3), and (e)(4)(G), (H), and (I), and (f) to the extent they meet the criteria of section (j)(2) of the Act. See 22 CFR 171.32.

[FR Doc. 98-24381 Filed 9-10-98; 8:45 am]

BILLING CODE 4710-05-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aviation Rulemaking Advisory Committee; Transport Airplane and Engine Issues—New Tasks

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of new task assignments for the Aviation Rulemaking Advisory Committee (ARAC).

SUMMARY: Notice is given of new tasks assigned to and accepted by the Aviation Rulemaking Advisory Committee (ARAC). This notice informs the public of the activities of ARAC.

FOR FURTHER INFORMATION CONTACT: Stewart R. Miller, Transport Standards Staff (ANM-110), Federal Aviation Administration, 1601 Lind Avenue, SW., Renton, WA 98055-4056; phone (425) 227-1255; fax (425) 227-1320.

SUPPLEMENTARY INFORMATION:

Background

The FAA has established an Aviation Rulemaking Advisory Committee to provide advice and recommendations to the FAA Administrator, through the Associate Administrator for Regulation and Certification, on the full range of the FAA's rulemaking activities with respect to aviation-related issues. This includes obtaining advice and recommendations on the FAA's commitment to harmonize its Federal Aviation Regulations (FAR) and practices with its trading partners in Europe and Canada.

One area ARAC deals with is Transport Airplane and Engine Issues. These issues involve the airworthiness standards for transport category airplanes and engines in 14 CFR parts 25, 33, and 35 and parallel provisions in 14 CFR parts 121 and 135.

The Tasks

This notice is to inform the public that the FAA has asked ARAC to

provide advice and recommendation on the following harmonization tasks:

Task 1: Electrical Generating and Distribution System Requirements

Phase I—The following differences between Part 25 and JAR 25 and their associated guidance material have been identified as having a potentially significant impact on airplane design and cost.

1. FAR/JAR 25.1351(b)—FAR 25.1351(b) defines minimum requirements for generating system power sources, distribution busses and cables, and associated control, regulation and protection devices. JAR 25.1351(b), with its related ACJ 25.1351(b)(5), adds accessibility requirements for means to disconnect power sources from the electrical system.

2. FAR/JAR 25.1351(c)—FAR 25.1351(c) defines minimum requirements for connecting external power to the airplane electrical power system. JAR 25.1351(c) introduces additional parameters for external power protection.

3. FAR/JAR 25.1351(d)—FAR 25.1351(d) defines minimum requirements for a standby power system that can enable safe operation in VFR conditions for a period of not less than five minutes to enable engine relight. JAR 25.1351(d), with its related ACJs, requires provision for a high integrity standby power system with a duration for time limited systems compatible with JAR-OPS and ICAO Annex 8. These ACJs also provide Interpretive Material for non-time limited standby power sources and specifies services that must remain powered following loss of normal electrical power.

For each of the above tasks the working group is to review airworthiness, safety, cost, and other relevant factors related to the specified differences, and reach consensus on harmonized Part 25/JAR 25 regulations and guidance material.

The FAA expects ARAC to submit its recommendation(s) from Phase I by July 31, 2001.

Phase II—The following additional differences between Part 25 and JAR 25 and their associated guidance material have been identified as having a lesser impact on airplane design and cost:

4. FAR/JAR 25.1353(a) & 25.1431(d)—JAR 25.1353(a) provides an additional sentence for consideration of the effects of interference on systems with associated interpretive material. JAR 25.1431(d) has additional requirements on the survivability of essential electronic equipment during electrical

power transients. Such paragraph does not exist in the FAR's. Neither FAA advisory nor JAA guidance material currently is available. This guidance material needs to be generated.

5. FAR/JAR 25.1353(c)(5)—JAR 25.1353(c)(5) is different to FAR 25.1353(c)(5) in that it requires any Nickel-Cadmium battery (receiving a direct charge from the aircraft electrical system) to be subjected to this requirement. Past experience has shown that damage has been caused to structure (from defective batteries and their installations) from batteries irrespective of whether utilized for engine or APU starting or not.

6. FAR/JAR 25.1353(c)(6)—See also item 5 above. In addition, interpretive material is provided in JAR's concerning maintenance check intervals for over temperature sensing devices.

7. FAR/JAR 25.1353(d)—JAR 25.1353(d) contains additional paragraphs for electrical cables. Note: Paragraph 1 of ACJ to JAR 25.1301(b) in effect duplicates JAR 25.1353(d)(2) and could be deleted after harmonization of FAR/JAR 25.1353(d).

8. FAR/JAR 25.1355(c)—JAR 25.1355(c) introduces interpretive material concerning segregation of electrical feeders to minimize the possibility of cascade or multiple failures. The ACJ to JAR 25.1355(c) should be reviewed in conjunction with current ACJ No. 6 to JAR 25.1309 with a view to combining the two ACJs and forming new interpretive material to FAR/JAR 25.1355(c).

9. FAR/JAR 25X1360—Precautions against injury. This JAR requirement and corresponding ACJ was created following reported injuries to service and maintenance personnel.

10. JAR 25X1362—Electrical supplies for emergency conditions. This JAR requirement and corresponding ACJ was created to ensure that electrical supplies are maintained to emergency services (such as fuel and hydraulic shut-off valves) so that these may be closed after the main power sources have been switched off by the Flight Crew.

11. FAR/JAR 25.1363—JAR 25.1363 requires tests to be performed under specific criteria with (ACJ) additional means of compliance.

12. Tasks coming from the System Design and Analysis Harmonization Working Group (SD&A HWG): Harmonize and update 25.1310 (previous 25.1309(e) and (f)) as proposed by the SD&A HWG. Consider also JAA specific AMJ 25.1309(b) on heated domestic appliances and electric overheat protection equipment design/failures considerations.

For each of the above tasks the working group is to review the current standards of the FAR and JAR requirements concerning electrical generating and distribution system requirements and any associated advisory material, to review also any relevant service experience and consider the increased reliance of aircraft and systems dependent on electrical power and distribution systems. In the light of this review, recommend changes to harmonize the above FAR and JAR requirements and develop related advisory material as necessary.

The FAA expects ARAC to submit its recommendation(s) from Phase II by July 31, 2003.

Task 2: Electrical Bonding and Protection Against Lightning and Static Electricity

JAA regulations include JAR 25X899 and ACJ 25x899 or consideration of electrical bonding and protection against lightning and static electricity. FAA regulations do not include this requirement. This initiative will consider the material contained in the JAR and ACJ, revise this information (as appropriate), develop new FAA requirements, revise JAA requirements as applicable, including regulations and advisory material, to achieve a harmonized result. Part 23, 27, 29 and 33 requirements will be reviewed to assure consistency in requirements and modified as applicable. The use of the phrase "as applicable" provides the responsible working group with the prerogative to recommend changes to any or all identified FAR's, JAR's, or none. Suitable representative from industry and regulatory authorities is necessary to accomplish this assignment.

The FAA expects ARAC to submit its recommendation by March 31, 2001.

The FAA requests that ARAC draft appropriate regulatory documents with supporting economic and other required analyses, and any other related guidance material or collateral documents to support its recommendations. If the resulting recommendation is one or more notices of proposed rulemaking (NPRM) published by the FAA, the FAA may ask ARAC to recommend disposition of any substantive comments the FAA receives.

ARAC Acceptance of Tasks

ARAC has accepted the tasks and has chosen to establish a new Electrical systems Harmonization Working Group. The working group will serve as staff to ARAC to assist ARAC in the analysis of the assigned task. Working group

recommendations must be reviewed and approved by ARAC. If ARAC accepts the working group's recommendations, it forwards them to the FAA as ARAC recommendations.

Working Group Activity

The Electrical Systems Harmonization Working Group is expected to comply with the procedures adopted by ARAC. As part of the procedures, the working group is expected to:

1. Recommend a work plan for completion of the tasks, including the rationale supporting such a plan, for consideration at the meeting of ARAC to consider transport airplane and engine issues held following publication of this notice.

2. Give a detailed conceptual presentation of the proposed recommendations, prior to proceeding with the work stated in item 3 below.

3. Draft appropriate regulatory documents with supporting economic and other required analyses, and/or any other related guidance material or collateral documents the working group determines to be appropriate; or, if new or revised requirements or compliance methods are not recommended, a draft report stating the rationale for not making such recommendations. If the resulting recommendation is one or more notices of proposed rulemaking (NPRM) published by the FAA, the FAA may ask ARAC to recommend disposition of any substantive comments the FAA receives.

4. Provide a status report at each meeting of ARAC held to consider transport airplane and engine issues.

Participation in the Working Group

The Electrical Systems Harmonization Working Group will be composed of technical experts having an interest in the assigned tasks. A working group member need not be a representative of a member of the full committee.

An individual who has expertise in the subject matter and wishes to become a member of the working group should write to the person listed under the caption **FOR FURTHER INFORMATION CONTACT** expressing that desire, describing his or her interest in the tasks, and stating the expertise he or she would bring to the working group. All requests to participate must be received no later than October 12, 1998. The requests will be reviewed by the assistant chair and the assistant executive director, and the individuals will be advised whether or not the request can be accommodated.

Individuals chosen for membership on the working group will be expected to represent their aviation community

segment and participate actively in the working group (e.g., attend all meetings, provide written comments when requested to do so, etc.). They also will be expected to devote the resources necessary to ensure the ability of the working group to meet any assigned deadline(s). Members are expected to keep their management chain advised of working group activities and decisions to ensure that the agreed technical solutions do not conflict with their sponsoring organization's position when the subject being negotiated is presented to ARAC for a vote.

Once the working group has begun deliberations, members will not be added or substituted without the approval of the assistant chair, the assistant executive director, and the working group chair.

The Secretary of Transportation has determined that the formation and use of ARAC are necessary and in the public interest in connection with the performance of duties imposed on the FAA by law.

Meetings of ARAC will be open to the public. Meetings of the Electrical Systems Harmonization Working Group will not be open to the public, except to the extent that individuals with an interest and expertise are selected to participate. No public announcement of working group meetings will be made.

Issued in Washington, DC, on September 4, 1998.

Joseph A. Hawkins,

Executive Director, Aviation Rulemaking Advisory Committee.

[FR Doc. 98-24419 Filed 9-10-98; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Ketchikan International Airport, Ketchikan, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Ketchikan International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L.

101-508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before October 13, 1998.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Ronnie V. Simpson, Manager; Alaskan Region Airports Division, Federal Aviation Administration; 222 West 7th, Box 14; Anchorage, AK 99513.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Don Chenhall, Airport Manager, at the following address: Ketchikan International Airport, 1000 Airport Terminal Building, Ketchikan, Alaska 99901.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Ketchikan International Airport under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Debbie Roth, Programming Specialist, Alaskan Region Airports Division, Planning and Programming Branch, AAL-611A, 222 W 7th, Box 14, Anchorage, AK, 99513-7587, (907) 271-5443. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application (#98-01-C-00-KTN) to impose and use the revenue from a PFC at Ketchikan International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101-508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On August 27, 1998, the FAA determined that the application to impose and use the revenue from a PFC submitted by Ketchikan Gateway Borough was substantially complete within the requirements of section 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than November 27, 1998.

The following is a brief overview of the impose and use application.

Application number: 98-01-C-00-KTN.

Level of the proposed PFC: \$3.00.

Proposed charge effective date: February 1, 1999.

Proposed charge expiration date: February 1, 2018.

Total estimated PFC revenue: \$6,419,400.

Brief description Impose and Use Projects: Terminal Building Improvements, Acquire Replacement Airport Ferry.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: None.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** located at the FAA, Alaskan Region Airports Division, Anchorage, Alaska.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Ketchikan International Airport.

Issued in Anchorage, Alaska on September 1, 1998.

David S. Stelling,

Acting Manager, Airports Division, Alaskan Region.

[FR Doc. 98-24418 Filed 9-10-98; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Travis and Williamson Counties, TX

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Intent.

SUMMARY: The FHWA is issuing this notice to advise the public that the scope (project limits) of the environmental impact statement (EIS) for the proposed State Highway 45 project in Travis and Williamson Counties, Texas, will be revised. This notice amends the NOI for proposed State Highway 45 that was published in the **Federal Register** on October 31, 1997.

FOR FURTHER INFORMATION CONTACT: Walter C. Waidelich, District Engineer, Federal Highway Administration, Room 850, Federal Building, 300 East 8th Street, Austin, Texas 78701, (512) 916-5988. Stacey Benningfield, Environmental Manager, Texas Turnpike Authority Division, Texas Department of Transportation, 125 E. 11th Street, Austin, Texas 78701-2483, (512) 936-0983.

SUPPLEMENTARY INFORMATION: As initially planned SH 45 was to extend from FM 685 north of Pflugerville, Texas, westerly to a terminus at U.S. Highway 183 (a distance of approximately 22.5 kilometers or 14 miles) with a 1.1 kilometer (0.7 mile) transition to existing Ranch-to-Market Road 620.

Based on preliminary traffic and engineering analyses, it was determined that the western project terminus and 1.1 kilometer (0.7 mile) transitional

area, as originally proposed, would not provide for efficient dissipation of traffic demand and would, in fact, contribute to congestion on US 183, Anderson Mill Road and RM 620. To provide for efficient traffic movement in the western portion of the project area, it is necessary to extend the western project limit to Anderson Mill Road (Ranch-to-Market Road 2769). West of Anderson Mill Road the proposed facility will be transitioned back to existing RM 620. The environmental impact statement for proposed State Highway 45 will address the entire 26.1 kilometer (16.2 miles) length of the revised limits of State Highway 45 including the transitional area west of Anderson Mill Road.

Since publication of the original NOI in October 1997, the proposed SH 45 project has been identified as a turnpike project candidate. Accordingly, the Texas Department of Transportation has assigned project development responsibility to its Turnpike Authority Division (TTA). The proposed project is now being developed by the FHWA in cooperation with the TTA.

As currently envisioned, between Anderson Mill Road in southwest Williamson County and proposed State Highway 130 in northeast Travis County, the proposed facility will be initially constructed and operated as a controlled access toll road. Frontage roads will be provided in some areas, but will not be continuous throughout the length of the proposed project. Between Anderson Mill Road and proposed State Highway 130 the ultimate facility design is anticipated to be a six-lane controlled access freeway with frontage roads.

From State Highway 130 to FM 685, the eastern project terminus, the proposed facility will be a non-toll 4-lane divided highway.

In conjunction with preparation of the EIS for State Highway 45 and selection of a preferred alternative, the TTA will conduct a toll feasibility study to evaluate the viability of developing the selected alternative as a toll road (except in the area east of proposed State Highway 130) and financing it, in whole or in part, through the issuance of revenue bonds. The toll road designation will not influence the selection of a preferred alternative. Proposed alternatives, including alternative alignments, will be evaluated for how well they meet the established purpose and need for the proposed project. Any impacts owing to the toll road designation will be discussed in the environmental impact statement.

On October 7, 1998, the TTA will conduct a public meeting to discuss the

proposed State Highway 45 project. The purpose of the public meeting will be to receive comments on the proposed project. During the public meeting, particular emphasis will be placed upon the portion of the proposed facility to be located within the expanded project limits. The meeting will be held at Noel Grisham Middle School, 10805 School House Lane, Austin, Texas 78750. From 6:00 to 7:00 p.m., displays showing the preliminary alternatives corridors will be available for review. During this time, TTA staff will be available to answer questions. At 7:00 p.m. there will be a formal project presentation followed by a public comment period. All interested citizens are invited to attend this meeting.

A public hearing will be held after publication of the Draft EIS. Public notice will be given of the time and place of the hearing. The Draft EIS will be available for public and agency review and comment prior to the public hearing.

To ensure that the full range of issues related to this proposed action are addressed, and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning the proposed action and the EIS should be directed to the FHWA or TTA at the addresses provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

Walter C. Waidelich,

District Engineer, Austin, Texas.

[FR Doc. 98-24445 Filed 9-10-98; 8:45 am]

BILLING CODE 4910-22-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Petition for Exemption From the Vehicle Theft Prevention Standard; Ford

AGENCY: National Highway Traffic Safety Administration (NHTSA) Department of Transportation (DOT).

ACTION: Grant of petition for exemption.

SUMMARY: This notice grants in full the petition of Ford Motor Company (Ford) for an exemption of a high-theft line, the Ford Mustang, from the parts-marking requirements of the Federal Motor Vehicle Theft Prevention Standard. This petition is granted because the agency has determined that the antitheft device

to be placed on the line as standard equipment is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the Theft Prevention Standard.

DATES: The exemption granted by this notice is effective beginning with model year (MY) 1999.

FOR FURTHER INFORMATION CONTACT: Ms. Rosalind Proctor, Office of Planning and Consumer Programs, NHTSA, 400 Seventh Street, SW, Washington DC 20590. Ms. Proctor's telephone number is (202) 366-0846. Her fax number is (202) 493-2739.

SUPPLEMENTARY INFORMATION: In a petition dated January 21, 1998, Ford requested an exemption from the parts marking requirements of the Theft Prevention Standard (49 CFR Part 541) for the Crown Victoria and Grand Marquis vehicle lines beginning in MY 1999. Ford also requested that the agency also consider its petition for its Taurus and Sable vehicle lines beginning in MY 2000 which will also be equipped with the same standard equipment anti-theft system as Ford proposes for installation on its Crown Victoria and Grand Marquis vehicle lines for the 1999 model year.

However, Section 543.5(a) specifically states that "For each of model years 1997 through 2000, a manufacturer may petition NHTSA to grant an exemption for one additional line of its passenger motor vehicles from the requirements of Part 541 of this chapter." Therefore, the agency advised Ford that the company must decide which of the two lines it would request to petition for exemption from the parts-marking requirements for MYs 1999 and 2000 respectively. Subsequently by letter dated May 4, 1998, Ford chose to withdraw its original petition for exemption for the MY 1999 Crown Victoria and Grand Marquis lines, and the MY 2000 Taurus and Sable vehicle lines. In Ford's May 4 withdrawal letter, it also requested an exemption from the parts-marking requirements for its Mustang vehicle line beginning with MY 1999.

Accordingly, May 4, 1998, is the date on which the statutory 120-day period for processing Ford's petition began. The petition is pursuant to 49 CFR Part 543, Exemption From Vehicle Theft Prevention Standard, based on the installation of an anti-theft device as standard equipment for the entire line.

Ford's submittal is considered a complete petition, as required by 49 CFR Part 543.7, in that it met the general requirements contained in § 543.5 and the specific content requirements of § 543.6.

In its petition, Ford provided a detailed description and diagram of the identity, design, and location of the components of the anti-theft device for the new line. Ford will install its anti-theft device, the SecuriLock Passive Anti-Theft Electronic Engine Immobilizer System (SecuriLock) as standard equipment on the MY 1999 Ford Mustang.

In order to ensure the reliability and durability of the device, Ford conducted tests, based on its own specified standards. Ford provided a detailed list of the tests conducted and stated its belief that the device is reliable and durable since it complied with Ford's specified requirements for each test. The environmental and functional tests conducted were for thermal shock, high temperature exposure, low-temperature exposure, powered/thermal cycle, temperature/humidity cycling, constant humidity, end-of-line, random vibration, tri-temperature parametric, bench drop, transmit current, lead/lock strength/integrity, output frequency, resistance to solvents, output field strength, dust, and electromagnetic compatibility.

The Ford SecuriLock is a transponder-based electronic immobilizer system. The device is activated when the driver/operator turns off the engine by using the properly coded ignition key. When the ignition key is turned to the start position, the transponder (located in the head of the key) transmits a code to the powertrain's electronic control module. The vehicle's engine can only be started if the transponder code matches the code previously programmed into the powertrain's electronic control module. If the code does not match, the engine will be disabled. Ford stated that there are seventy-two quadrillion different codes and each transponder is hard-coded with a unique code at the time of manufacture. Additionally, Ford stated that the communication between the SecuriLock control function and the powertrain's electronic control module are encrypted.

Ford stated that its SecuriLock system incorporates a theft indicator using a light-emitting diode (LED) that provides information to the driver/operator as to the "set" and "unset" condition of the device. When the ignition is initially turned to the "ON" position, a 3-second continuous LED indicates the proper "unset" state of the device. When the ignition is turned to "OFF", a flashing LED indicates the "set" state of the device and provides visual information that the vehicle is protected by the SecuriLock system. Ford states that the integration of the setting/unsetting device (transponder) into the ignition

key prevents any inadvertent activation of the device.

Ford believes that it would be very difficult for a thief to defeat this type of electronic immobilizer system. Ford believes that its new device is reliable and durable because it does not have any moving parts, nor does it require a separate battery in the key. If the correct code is not transmitted to the electronic control module (accomplished only by having the correct key), there is no way to mechanically override the system and start the vehicle. Furthermore, Ford stated that drive-away thefts are virtually eliminated with SecuriLock's sophisticated design and operation of the electronic engine immobilizer system which makes conventional theft methods (i.e., hot-wiring or attacking the ignition-lock cylinder) ineffective. Ford reemphasized that any attempt to slam-pull the ignition-lock cylinder will have no effect on a thief's ability to start the vehicle.

Ford's SecuriLock anti-theft device was voluntarily installed on all Mustang GT and Cobra models as standard equipment in MY 1996. Ford notes that in comparing the National Crime Information Center's (NCIC) CY 1995-1996 theft data for MY 1995 Mustang GT and Cobra vehicles without an immobilizer device installed with MY 1996 data for Mustang GT and Cobra vehicles with an immobilizer device installed, approximately a 75% reduction in theft is shown. Additionally, Ford stated that its SecuriLock device has been installed on the entire Mustang vehicle line as standard equipment since MY 1997.

As part of its submission, Ford also provided a Highway Loss Data Institute (HLDI)'s theft loss bulletin, Vol. 15, No. 1, September 1997, which evaluated 1996 Ford Mustang and Taurus models fitted with the SecuriLock device and corresponding 1995 models without the SecuriLock device. The results as reported by HLDI indicated a reduction in overall theft losses by approximately 50% for both Mustang and Taurus models.

Additionally, Ford stated that its SecuriLock device has been demonstrated to various insurance companies, and as a result AAA Michigan and State Farm now give an anti-theft discount of 25% and 10% respectively on premiums for comprehensive insurance for all Ford vehicles equipped with the device.

Ford's proposed device, as well as other comparable devices that have received full exemptions from the parts-marking requirements, lack an audible or visible alarm. Therefore, these devices cannot perform one of the

functions listed in 49 CFR Part 542.6(a)(3), that is, to call attention to unauthorized attempts to enter or move the vehicle. However, theft data have indicated a decline in theft rates for vehicle lines that have been equipped with antitheft devices similar to that which Ford proposes. In these instances, the agency has concluded that the lack of a visual or audio alarm has not prevented these antitheft devices from being effective protection against theft.

On the basis of comparison, Ford has concluded that the antitheft device proposed for its vehicle line is no less effective than those devices in the lines for which NHTSA has already granted full exemptions from the parts-marking requirements.

Based on the evidence submitted by Ford, the agency believes that the antitheft device for the Ford Mustang vehicle line is likely to be as effective in reducing and deterring motor vehicle theft as compliance with the parts-marking requirements of the theft prevention standard (49 CFR Part 541).

The agency believes that the device will provide four of the five types of performance listed in 49 CFR Part 543.6(a)(3): promoting activation; preventing defeat or circumvention of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

As required by 49 U.S.C. 33106 and 49 CFR Part 543.6(a)(4) and (5), the agency finds that Ford has provided adequate reasons for its belief that the antitheft device will reduce and deter theft. This conclusion is based on the information Ford provided about its antitheft device.

For the foregoing reasons, the agency hereby grants in full Ford Motor Company's petition for an exemption for the MY 1999 Mustang vehicle line from the parts-marking requirements of 49 CFR Part 541.

If Ford decides not to use the exemption for this line, it must formally notify the agency, and, thereafter, the line must be fully marked as required by 49 CFR Parts 541.5 and 541.6 (marking of major component parts and replacement parts).

NHTSA notes that if Ford wishes in the future to modify the device on which this exemption is based, the company may have to submit a petition to modify the exemption. Part 543.7(d) states that a Part 543 exemption applies only to vehicles that belong to a line exempted under this part and equipped with the anti-theft device on which the line's exemption is based. Further, § 543.9(c)(2) provides for the submission

of petitions "to modify an exemption to permit the use of an antitheft device similar to but differing from the one specified in that exemption." The agency wishes to minimize the administrative burden that § 543.9(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend in drafting Part 543 to require the submission of a modification petition for every change to the components or design of an antitheft device. The significance of many such changes could be *de minimis*. Therefore, NHTSA suggests that if the manufacturer contemplates making any changes the effects of which might be characterized as *de minimis*, it should consult the agency before preparing and submitting a petition to modify.

Authority: 49 U.S.C. 33106; delegation of authority at 49 CFR 1.50.

Issued on September 4, 1998.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

[FR Doc. 98-24489 Filed 9-10-98; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB-33 (Sub-No. 125X)]

**Union Pacific Railroad Company—
Abandonment Exemption—in Orange
County, CA**

On August 24, 1998, Union Pacific Railroad Company (UP) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903-05¹ to abandon a 3.84-mile line of railroad known as the Los Alamitos Branch extending from milepost 514.26 near Los Alamitos Junction to the end of the line at milepost 518.10 near Los Alamitos, in Orange County, CA. The line traverses U.S. Postal Service Zip Code 90720, and includes the non-agency station of Los Alamitos at milepost 518.10.

The line does not contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

¹ In addition to an exemption from 49 U.S.C. 10903, UP seeks exemption from 49 U.S.C. 10904 (offer of financial assistance procedures) and 49 U.S.C. 10905 (public use conditions). These requests will be addressed in the final decision.

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by December 11, 1998.

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 the filing fee, which currently is set at \$1,000. 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 October 1, 1998. Each trail use request must be accompanied by a \$150 filing fee. See 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to STB Docket No. AB-33 (Sub-No. 125X) and must be sent to: (1) Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW, Washington, DC 20423-0001; and (2) Joseph D. Anthofer, 1416 Dodge Street, Room 830, Omaha, NE 68179-0830.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Services at (202) 565-1592 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 Section of Environmental Analysis (SEA) at (202) 565-1545. [TDD for the hearing impaired is available at (202) 565-1695.]

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by SEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA 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 be within 30 days of its service.

Board decisions and notices are available on our Website at "WWW.STB.DOT.GOV."

Decided: September 1, 1998.

By the Board, David M. Konschnik,
Director, Office of Proceedings.

Vernon A. Williams,
Secretary.

[FR Doc. 98-24051 Filed 9-10-98; 8:45 am]

BILLING CODE 4915-00-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0094]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits
Administration, Department of Veterans
Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits
Administration (VBA), Department of
Veterans Affairs (VA), is announcing an
opportunity for public comment on the
proposed collection of certain
information by the agency. Under the
Paperwork Reduction Act (PRA) of
1995, Federal agencies are required to
publish notice in the **Federal Register**
concerning each proposed collection of
information, including each proposed
extension of a currently approved
collection, and allow 60 days for public
comment in response to the notice. This
notice solicits comments on the
information needed to determine an
applicant's eligibility for VA benefits
based on service in the Commonwealth
Army of the Philippines or in
recognized guerrilla organizations.

DATES: Written comments and
recommendations on the proposed
collection of information should be
received on or before November 10,
1998.

ADDRESSES: Submit written comments
on the collection of information to
Nancy J. Kessinger, Veterans Benefits
Administration (20S52), Department of
Veterans Affairs, 810 Vermont Avenue,
NW, Washington, DC 20420. Please refer
to "OMB Control No. 2900-0094" in
any correspondence.

FOR FURTHER INFORMATION CONTACT:
Nancy J. Kessinger at (202) 273-7079 or
FAX (202) 275-5947.

SUPPLEMENTARY INFORMATION: Under the
PRA of 1995 (Pub. L. 104-13; 44 U.S.C.,
3501-3520), Federal agencies must
obtain approval from the Office of
Management and Budget (OMB) for each
collection of information they conduct
or sponsor. This request for comment is
being made pursuant to Section
3506(c)(2)(A) of the PRA.

With respect to the following
collection of information, VBA invites

comments on: (1) Whether the proposed
collection of information is necessary
for the proper performance of VBA's
functions, including whether the
information will have practical utility;
(2) the accuracy of VBA's estimate of the
burden of the proposed collection of
information; (3) ways to enhance the
quality, utility, and clarity of the
information to be collected; and (4)
ways to minimize the burden of the
collection of information on
respondents, including through the use
of automated collection techniques or
the use of other forms of information
technology.

Title: Supplement to VA Forms 21-
526, 21-534, and 21-535 (For
Philippine Claims), VA Form 21-4169.

OMB Control Number: 2900-0094.

Type of Review: Extension of a
currently approved collection.

Abstract: Title 38, U.S.C., Sections
101 and 6104 require VA to ascertain
from certain applicants service
information, place of residence,
evidence held by the applicant to prove
service, and whether the applicant was
a member of pro-Japanese, pro-German,
or anti-American Filipino organizations.
The information collected is used in
determining eligibility for benefits based
on Commonwealth Army or recognized
guerrilla service.

Affected Public: Individuals or
households.

Estimated Annual Burden: 250 hours.

Estimated Average Burden Per

Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents:
1,000.

Dated: August 14, 1998.

By direction of the Secretary.

Donald L. Neilson,

Director, Information Management Service.

[FR Doc. 98-24363 Filed 9-10-98; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0469]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits
Administration, Department of Veterans
Affairs.

ACTION: Notice

SUMMARY: The Veterans Benefits
Administration (VBA), Department of
Veterans Affairs (VA), is announcing an
opportunity for public comment on the
proposed collection of certain

information by the agency. Under the
Paperwork Reduction Act (PRA) of
1995, **Federal Register** concerning each
proposed collection of information,
including each proposed extension of a
currently approved collection, and
allow 60 days for public comment in
response to the notice. This notice
solicits comments for information
needed to establish entitlement to
Government Life Insurance proceeds.

DATES: Written comments and
recommendations on the proposed
collection of information should be
received on or before November 10,
1998.

ADDRESSES: Submit written comments
on the collection of information to
Nancy J. Kessinger, Veterans Benefits
Administration (20S52), Department of
Veterans Affairs, 810 Vermont Avenue,
NW, Washington, DC 20420. Please refer
to "OMB Control No. 2900-0469" in
any correspondence.

FOR FURTHER INFORMATION CONTACT:
Nancy J. Kessinger at (202) 273-7079 or
FAX (202) 275-5947.

SUPPLEMENTARY INFORMATION: Under the
PRA of 1995 (Pub. L. 104-13; 44 U.S.C.,
3501-3520), Federal agencies must
obtain approval from the Office of
Management and Budget (OMB) for each
collection of information they conduct
or sponsor. This request for comment is
being made pursuant to Section
3506(c)(2)(A) of the PRA.

With respect to the following
collection of information, VBA invites
comments on: (1) whether the proposed
collection of information is necessary
for the proper performance of VBA's
functions, including whether the
information will have practical utility;
(2) the accuracy of VBA's estimate of the
burden of the proposed collection of
information; (3) ways to enhance the
quality, utility, and clarity of the
information to be collected; and (4)
ways to minimize the burden of the
collection of information on
respondents, including through the use
of automated collection techniques or
the use of other forms of information
technology.

Title and Form Numbers: Certificate
Showing Residence and Heirs of
Deceased Veterans or Beneficiary, VA
Form 29-541.

OMB Control Number: 2900-0469.

Type of Review: Extension of a
currently approved collection.

Abstract: The form is used to establish
entitlement to Government Life
Insurance proceeds in estate cases when
formal administration of the estate is not
required. The information requested is
required by law, Title 38 U.S.C.,
Sections 1917 and 1950, and is used by

VA to determine entitlement to Government Life Insurance proceeds.
Affected Public: Individuals or households.

Estimated Annual Burden: 1,039 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: On occasion.
Estimated Number of Respondents: 2,078.

Dated: August 14, 1998.
By direction of the Secretary:

Donald L. Neilson,

Director, Information Management Service.
[FR Doc. 98-24364 Filed 9-10-98; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0032]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before October 13, 1998.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Ron Taylor, Information Management Service (045A4), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 273-8015 or FAX (202) 273-5981. Please refer to "OMB Control No. 2900-0032."

SUPPLEMENTARY INFORMATION:

Title: Report and Certification of Loan Disbursement, VA Form 26-1820.

OMB Control Number: 2900-0032.

Type of Review: Extension of a currently approved collection.

Abstract: The form is completed by lenders closing VA guaranteed and insured loans under the automatic or prior approval procedures. Such loans are not subject to prior approval of VA. Lenders are required to submit with VA Form 26-1820 a copy of the loan application (showing income, assets,

and obligations) which the lender requires the borrower to execute when applying for the loan; original employment and income verifications obtained from the borrower's place of employment; original verification of assets; and original credit report. VA Form 26-1820 provides VA with the necessary information on the loan and property sufficient for loan examination determinations and verification of compliance with Title 38, U.S.C., Chapter 37.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on March 24, 1998 at page 14176.

Affected Public: Business or other for-profit.

Estimated Annual Burden: 130,000 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: Generally one time per loan disbursement.

Estimated Number of Respondents: 260,000.

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, Allison Eydt, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395-4650. Please refer to "OMB Control No. 2900-0032" in any correspondence.

Dated: August 12, 1998.

By direction of the Secretary:

Donald L. Neilson,

Director, Information Management Service.
[FR Doc. 98-24360 Filed 9-10-98; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0066]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the

collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before October 13, 1998.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Ron Taylor, Information Management Service (045A4), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 273-8015 or FAX (202) 273-5981. Please refer to "OMB Control No. 2900-0066."

SUPPLEMENTARY INFORMATION:

Title and Form Number: Request to Employer for Employment Information in Connection with Claim for Disability Benefits, VA Form 29-459.

OMB Control Number: 2900-0066.

Type of Review: Extension of a currently approved collection.

Abstract: The form is used to request employment information in connection with a claim for disability insurance benefits. The information collected is used by VA to establish the insured's eligibility for disability insurance benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on January 29, 1998 at page 4528.

Affected Public: Individuals or households.

Estimated Annual Burden: 862 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 5,167.

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, Allison Eydt, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395-4650. Please refer to "OMB Control No. 2900-0066" in any correspondence.

Dated: August 14, 1998.

By direction of the Secretary:

Donald L. Neilson,

Director, Information Management Service.
[FR Doc. 98-24361 Filed 9-10-98; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0252]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 *et seq.*), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before October 13, 1998.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Ron Taylor, Information Management Service (045A4), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 273-8015 or FAX (202) 273-5981. Please refer to "OMB Control No. 2900-0252."

SUPPLEMENTARY INFORMATION:

Title: Application for Authority to Close Loans on an Automatic Basis—Nonsupervised Lenders, VA Form 26-8736.

OMB Control Number: 2900-0252.

Type of Review: Reinstatement, without change, of a previously approved collection for which approval has expired.

Abstract: Title 38, U.S.C., Section 3702(d)(3) provides for nonsupervised lenders to make automatically guaranteed loans if the Secretary of Veterans Affairs approves them for such

purposes. Automatic lending privileges eliminate the requirement for submission of loans to VA for prior approval. Lending institutions with automatic loan privileges may process and disburse such loans and subsequently report the loan to VA for issuance of guaranty. VA Form 26-8736 is used by nonsupervised lenders to request approval to close loans on an automatic basis. The form requests information considered crucial for VA to make acceptability determinations as to lenders who shall be approved for this privilege.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on February 11, 1998 at page 7050.

Affected Public: Business or other for-profit.

Estimated Annual Burden: 50 hours.

Estimated Average Burden Per Respondent: 25 minutes.

Frequency of Response: Generally one time.

Estimated Number of Respondents: 120.

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, Allison Eydt, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395-4650. Please refer to "OMB Control No. 2900-0252" in any correspondence.

Dated: August 14, 1998.

By direction of the Secretary.

Donald L. Neilson,

Director, Information Management Service.

[FR Doc. 98-24362 Filed 9-10-98; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS**Advisory Committee on Geriatrics and Gerontology, Notice of Meeting**

The Department of Veterans Affairs gives notice that a meeting of the Geriatrics and Gerontology Advisory Committee (GGAC) will be held on September 21-22, 1998, at the Department of Veterans Affairs, in Room 530, located at 810 Vermont Avenue, NW, Washington, DC. The purpose of the GGAC is to advise the Secretary of Veterans Affairs and the Under Secretary for Health relative to the care and treatment of the aging veterans, and to evaluate the Geriatric Research, Education, and Clinical Centers. The Committee will meet from 9:00 a.m. until 5:00 p.m. (EST) on September 21 and from 9:00 a.m. until noon (EST) on September 22.

The agenda for September 21 will begin with a discussion of VA support for Geriatric Research, Education, and Clinical Centers (GRECCs). The first day's agenda will also cover the Report of GRECC Site Visits and GRECC Performance Measures. On September 22, the Committee will review update on VA activities in Geriatrics and Extended Care.

The meeting will be open to the public. Individuals who wish to attend the meeting should contact Jacqueline Holmes, Program Assistant, Geriatrics and Extended Care Strategic Healthcare Group at (202) 273-8539.

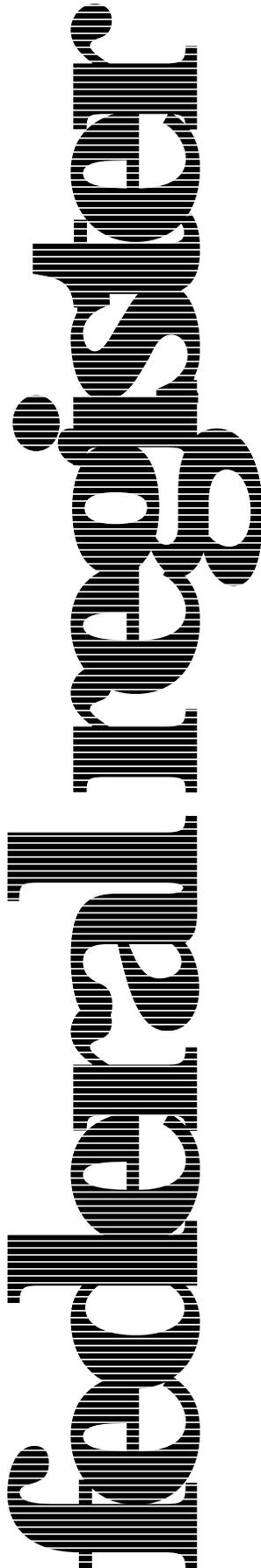
Dated: September 3, 1998.

Heyward Bannister,

Committee Management Officer.

[FR Doc. 98-24367 Filed 9-10-98; 8:45 am]

BILLING CODE 8320-01-M



Friday
September 11, 1998

Part II

**Environmental
Protection Agency**

**40 CFR Chapter I
Consumer and Commercial Products:
Schedule for Regulation; Final Rule**

**40 CFR Parts 9 and 59
National Volatile Organic Compound
Emission Standards for Automobile
Refinish Coatings and Consumer
Products; Final Rules**

**40 CFR Part 59
National Volatile Organic Compound
Emission Standards for Architectural
Coatings; Final Rule**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Chapter I

[AD-FRL-6149-6]

RIN 2060-AE24

Consumer and Commercial Products: Schedule for Regulation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final listing of product categories for regulations.

SUMMARY: This document announces the EPA's final decision to list the consumer products, architectural coatings, and automobile refinish coatings categories for regulation in the first group of consumer and commercial product categories for which regulations are mandated under section 183(e) of the Clean Air Act. The final rules for these three categories are published elsewhere in today's **Federal Register**.

DATES: This decision is effective September 11, 1998.

ADDRESSES: *Technical Support Document.* The background information document (BID) containing the Administrator's responses to significant comments on the section 183(e) study and Report to Congress (referred to as the "183-BID") may be obtained from the docket; the United States Environmental Protection Agency Library (MD-35), Research Triangle Park, North Carolina 27711, telephone (919) 541-2777; or from the National Technical Information Services, 5285 Port Royal Road, Springfield, Virginia 22151, telephone (703) 487-4650. Please refer to "Response to Comments on Section 183(e) Study and Report to Congress." The 183-BID contains a summary of all the significant public comments made on the section 183(e) study and Report to Congress and the list and schedule for regulation as well as the Administrator's responses to the comments.

Docket. Docket No. A-94-65 contains information considered by the EPA in development of the consumer and commercial products study and the subsequent list and schedule for regulation. Comments on the section 183(e) Report to Congress (Report) and the list and schedule of consumer product categories to be regulated were received in four different dockets: (1) the consumer and commercial product Report docket (A-94-65); (2) the architectural coatings rulemaking docket (A-92-18); (3) the consumer products rulemaking docket (A-95-40); and (4) the automobile refinish coatings rulemaking docket (A-95-18). The dockets are available for public inspection and copying from 8:00 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays. The dockets are located at the EPA's Air and Radiation Docket and Information Center, Waterside Mall, Room M1500, 1st Floor, 401 M Street SW, Washington, DC 20460; telephone (202) 260-7546 or fax (202) 260-4400. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. Bruce Moore at (919) 541-5460, Coatings and Consumer Products Group, Emission Standards Division (MD-13), United States Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION:

Background

Under section 183(e) of the Act, the EPA was required to conduct a study of volatile organic compounds (VOC) emissions from the use of consumer and commercial products to assess their potential to contribute to levels of ozone that violate the national ambient air quality standards (NAAQS) for ozone, and to establish criteria for regulating VOC emissions from these products. Section 183(e) also directed the EPA to list for regulation those categories of products that emit at least 80 percent of the VOC emissions into nonattainment

areas, and to schedule those categories for regulation in four groups. Ozone is a major component of smog which causes negative health and environmental impacts when present in high concentrations at ground level.

On March 23, 1995, the EPA submitted the consumer and commercial products Report to Congress required by section 183(e) of the CAA. On March 23, 1995, the EPA also published in the **Federal Register** a summary of the Report to Congress along with the list of product categories and the schedule for their regulation. As stated by the EPA, the March 23, 1995 notice did not represent a final Agency action on the listing determination. The notice announced that the EPA would take comment on the listing in connection with its rulemakings on emission standards for the categories on the initial list, and that final Agency action on the listing for each product category would occur upon publication of a final regulation for that category. The EPA received comments on the section 183(e) study, the Report to Congress, and the list and schedule of consumer and commercial products for regulation in response to the three proposed section 183(e) rules for the categories of consumer products, architectural coatings, and automobile refinish coatings, and the March 23, 1995 notice. This notice presents a summary of significant public comments and the EPA's responses. Based upon the study and the Report to Congress, the EPA has concluded that these three categories are properly within the first group of product categories for regulation.

Regulated Entities. Entities potentially affected by this action are manufacturers and distributors of consumer products, manufacturers and importers of architectural coatings, and manufacturers and importers of automobile refinish coatings or their components. Regulated categories and entities include:

Category	Examples of regulated entities
Industry	Manufacturers or distributors of consumer products. Manufacturers, packagers, repackagers, or importers of architectural coatings. Manufacturers or importers of automobile refinish coatings or their components.
State/local/tribal governments	State Agencies that manufacture their own consumer products or coatings.

This table is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be interested in this action. This table lists the types of entities that the EPA is now aware could potentially be interested in this action. Other types of entities not

listed in the table could also be interested. For additional information on applicability of these rules, please see the final rules published elsewhere in this **Federal Register** for these three categories of products. If you have questions regarding the applicability of

this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section of this preamble.

Judicial review. The initial listing of product categories and schedule for regulation was published on March 23,

1995 (60 FR 15264). This document announces the EPA's final decision to list consumer products, architectural coatings, and antibody refinishing categories for regulation under the first group of consumer and commercial product categories for which regulations are mandated under section 183(e) of the Act. Under section 307(b)(1) of the Act, judicial review of this final action is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by November 10, 1998. Under section 307(d)(7)(B) of the Act, only an objection to this action which was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the Act, the requirements established by today's final action may not be challenged separately in any civil or criminal proceeding brought by the EPA to enforce these requirements.

Technology Transfer Network. The Technology Transfer Network (TTN) provides information and technology exchange in various areas of air pollution control, including copies of the Report to Congress, all the proposed and final actions under section 183(e), and supporting documents. The TTN is free and is accessible through the Internet at "http://www.epa.gov/ttn/oarpg/ramain.html." For more information on the TTN, call the HELP line at (919) 541-5384.

Outline. The information presented in this preamble is organized as follows:

I. Background

- A. Purpose of regulation.
- B. Section 183(e) of the Act.
- C. Publication of the list and schedule for regulation.
- D. Regulatory criteria and ranking of product categories.

II. Significant Comments on Section 183(e) Study and Report to Congress

- A. Legitimacy of the Environmental Protection Agency's section 183(e) study.
 1. Reactivity.
 2. Role of consumer and commercial products in contributing to ozone nonattainment.
 3. Consideration of "emission magnitude" and "regulatory efficiency."
- B. Consumer and commercial product inventory.
 1. Role of biogenic emissions.
 2. Listing of biogenic products.
- C. The Environmental Protection Agency's regulatory strategy.
 1. Nitrogen oxides versus volatile organic compounds emissions control strategies.
 - a. Background: The current ozone control policy.
 - b. Effectiveness of a national volatile organic compounds control strategy.
 - c. Recent scientific studies.
 - d. Contribution of biogenic volatile organic compounds sources versus

anthropogenic sources to ozone nonattainment.

- e. The role of long-range transport of nitrogen oxides in ozone nonattainment.
- f. The Environmental Protection Agency's approach in determining the effects of precursor emissions on ozone nonattainment.

2. Regulation of attainment areas via national rules.

III. Administrative Requirements

- A. Docket.
- B. Paperwork Reduction Act.
- C. Executive Order 12866.
- D. Executive Order 12875.
- E. Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act of 1996.
- F. Unfunded Mandates Reform Act of 1995.
- G. Submission to Congress and the General Accounting Office.
- H. National Technology Transfer and Advancement Act.
- I. Executive Order 13045.

I. Background

A. Purpose of Regulation

Ground-level ozone, which is a major component of "smog," is formed in the atmosphere by reactions of VOC and oxides of nitrogen (NO_x) in the presence of sunlight. The formation of ground-level ozone is a complex process that is affected by many variables.

Exposure to ground-level ozone is associated with a wide variety of human health effects, agricultural crop loss, and damage to forests and ecosystems. Acute health effects are induced by short-term exposures to ozone (observed at concentrations as low as 0.12 parts per million (ppm)), generally while individuals are engaged in moderate or heavy exertion, and by prolonged exposures to ozone (observed at concentrations as low as 0.08 ppm), typically while individuals are engaged in moderate exertion. Moderate exertion levels are more frequently experienced by individuals than heavy exertion levels. The acute health effects include respiratory symptoms, effects on exercise performance, increased airway responsiveness, increased susceptibility to respiratory infection, increased hospital admissions and emergency room visits, and pulmonary inflammation. Groups at increased risk of experiencing such effects include active children, outdoor workers, and others who regularly engage in outdoor activities and individuals with preexisting respiratory disease. Currently available information also suggests that long-term exposures to ozone may cause chronic health effects (e.g., structural damage to lung tissue and accelerated decline in baseline lung function).

In accordance with section 183(e) of the Act, the Administrator has

determined that VOC emissions from the use of consumer products, architectural coatings, and automobile refinishing coatings have the potential to contribute to ozone levels that violate the NAAQS for ozone. Under authority of section 183(e), the EPA conducted a study of the VOC emissions from consumer and commercial products to determine their potential to contribute to ozone levels which violate the NAAQS for ozone. Based on the results of the study, the EPA determined that these categories of consumer products account for about 30 percent of the emissions from all consumer and commercial products. The EPA's determination that VOC emissions from the use of these categories of consumer and commercial products have the potential to contribute to nonattainment of the ozone NAAQS and the decisions to regulate these categories were discussed in the preambles to the proposed rules (61 FR 4531; 61 FR 19005; 61 FR 32729), in the Report to Congress on Consumer and Commercial Products (EPA 453/R-94-066A), and in the **Federal Register** document announcing the schedule for regulation (60 FR 15264).

B. Section 183(e) of the Act

Section 183(e) of the Act mandates a new regulatory program for controlling VOC emissions. Through this provision, Congress required the EPA to conduct a study of emissions of VOC into the ambient air from consumer and commercial products and to list for regulation, based on the study, certain categories of products that have the potential to contribute to ozone nonattainment.

The term "consumer and commercial products" is defined in section 183(e) of the Act to mean:

* * * any substance, product (including paints, coatings, and solvents), or article (including any containers or packaging) held by any person, the use, consumption, storage, disposal, destruction, or decomposition of which may result in the release of volatile organic compounds.

The statutory definition of consumer and commercial products thus includes a much broader array of products than those usually considered to be consumer products (e.g., personal care products, household cleaning products, or household pesticides) because it encompasses all VOC-emitting products used in the home, by businesses, and by institutions.

The stated objectives of the consumer and commercial products study mandated in section 183(e) of the Act were: (1) to determine the potential of VOC emissions from consumer and

commercial products to contribute to ozone levels which violate the ozone NAAQS; and (2) to establish criteria for regulating consumer and commercial products. In establishing criteria for regulating products, the Act required the Administrator to consider the following five factors: (1) the uses, benefits, and commercial demand of products; (2) the health or safety functions served by such products; (3) whether products emit highly reactive VOC into the ambient air; (4) the relative cost-effectiveness of controls for products; and (5) the availability of alternative products which are of comparable costs, considering health, safety, and environmental impacts.

Upon completion of the study, section 183(e) required the EPA to submit a report to Congress documenting the results of the study. The Act further required the EPA to list those categories of products that it determined, based on the study, account for at least 80 percent of the total VOC emissions, on a reactivity-adjusted basis, from consumer and commercial products in areas that violate the ozone NAAQS. In addition, section 183(e) required the EPA to divide the list of products into four groups establishing priority for regulation. Every 2 years following publication of the list, the EPA is required to regulate one group of categories until all four groups are regulated.

C. Publication of the List and Schedule for Regulation

In March 1995, the EPA submitted the consumer and commercial products Report to Congress required by section 183(e) of the Act. A summary of the 6-volume report (EPA-453/R-94-066-a through f) was published in the **Federal Register** on March 23, 1995 (60 FR 15264). In the same document, the list of products and the schedule for their regulation was published (60 FR 15267). Consumer products, architectural coatings, and autobody refinishing were included in Group 1 of the schedule for which the Act requires the EPA to promulgate regulations within 2 years of publication of the Report to Congress (i.e., by March 1997). The March 23, 1995 document stated that the list and schedule for regulation were not final EPA actions. As stated in the March 23 document:

Although today's document identifies consumer and commercial products that potentially could be regulated, this list and schedule may be amended as further information becomes available or is submitted to the EPA. The public will have an opportunity to comment on the listing and possible regulation of a particular product at

the time the EPA proposes to regulate that particular product. Thus, today's action does not represent final Agency action. Final Agency action occurs upon publication of a final regulation for each product.

Although not requested, the EPA received some public comments in response to the preliminary listing document (60 FR 15264). These comments were placed in a docket (A-94-65). However, because the EPA intended the list and schedule to be an interim step in the development of regulations rather than final EPA action, the EPA held no public hearing on the Report to Congress and the listing and schedule, and prepared no responses to the comments at that time. Instead, the EPA requested that the public submit comments on the section 183(e) list and schedule resulting from the study at the time of proposal of regulations for each particular consumer and commercial product category.

Final regulations are being published today for the consumer products, architectural coatings, and autobody refinishing categories. In developing these regulations, the EPA has taken into account all of the public comments received on the criteria for listing and regulating these categories, including comments submitted on the March 23, 1995 document. Thus, today's action represents a final EPA listing action on these three categories.

D. Regulatory Criteria and Ranking of Product Categories

As directed in section 183(e)(2)(B) of the Act, the EPA utilized the five factors in the statute to develop the following eight criteria for use in establishing the list of consumer and commercial product categories to be regulated:

- (1) Utility,
- (2) commercial demand,
- (3) health and safety functions,
- (4) emissions of highly reactive VOC,
- (5) availability of alternatives,
- (6) cost-effectiveness of controls,
- (7) magnitude of annual VOC emissions, and
- (8) regulatory efficiency and program considerations.

The first factor (uses, benefits, and commercial demand of products) stipulated by section 183(e) is reflected in two criteria developed by the EPA. Criterion 1 (utility) considers uses and benefits and Criterion 2 addresses commercial demand. The remaining four factors stipulated in section 183(e) are addressed individually by Criteria 3 through 6.

Criteria 7 and 8 (magnitude of emissions and regulatory efficiency) reflect additional considerations not specifically prescribed in the Act. The

EPA has exercised its discretion to include these criteria, because the EPA concluded that they are important in prioritizing product categories for regulation in a manner that best effectuates Congress's intent under section 183(e). The EPA's interpretation of each of the five factors and the rationale and intent of each of the eight criteria are discussed in detail in the section 183(e) Report to Congress.

The EPA developed Criteria 1 through 7 to allow each product category to be ranked numerically. The numerical ranking process involved objective and subjective considerations. Criteria 2, 3, 6, and 7 are objective in nature and could be scored quantitatively based on annual sales, VOC emissions, and cost of control. Application of Criteria 1, 3, and 5 included some subjective considerations. Scoring of these criteria could be affected by the scorer's background, knowledge of the category, or other considerations. In order to ensure consistency and fairness, the EPA convened the National Air Pollution Control Techniques Advisory Committee (NAPCTAC) to assist the EPA in application of these criteria. Because of the balance afforded by the diversity of the NAPCTAC membership, the EPA concluded that it was an appropriate and convenient choice. The NAPCTAC met in July 1994 in Durham, North Carolina, to assign preliminary scores for Criteria 1 through 7 to each of the product categories. Results of the preliminary scoring exercise are available in the docket (A-95-40). The EPA used NAPCTAC to provide expert advice on the question of product ranking, but exercised its own independent judgment to assign the final ranking of products for regulation.

Once the initial ranking of products based on exercise of Criteria 1 through 7 was completed, the EPA applied Criterion 8, regulatory efficiency and program considerations, to prioritize the products in the schedule for regulation, and thereby identify which product categories comprised at least 80 percent of VOC emissions in nonattainment areas. As required by section 183(e) of the Act, the EPA grouped the listed categories of consumer and commercial products into four groups for regulation in 2-year intervals. Although the statute does not require that the list be divided into 4 equal groups, the EPA placed product categories into the 4 groups as equally as possible with the goal of achieving VOC emissions reductions as early as possible given available EPA resources. Thus, nearly two-thirds of the cumulative emissions from consumer and commercial products result from

products in the first two groups of categories.

II. Significant Comments on Section 183(e) Study and Report to Congress

The EPA received 85 letters commenting on the section 183(e) Report to Congress and the regulatory list and schedule. These letters were submitted as part of comments on the three rules discussed in this action as well as comment on the Report to Congress. In addition, a total of 12 people testified about the listing of consumer and commercial products at three public hearings for the three rules being published today. The EPA has carefully considered all these comments in publishing today's final listing. The 183-BID, which is referenced in the ADDRESSES section of this preamble, contains full responses to each significant issue raised by commenters. A summary of the more significant comments and the EPA's responses to them are presented here.

Approximately half of the comments received on the section 183(e) list and regulatory schedule were submitted by a consortium of architectural coating manufacturers, including a regional firm and a number of smaller manufacturers. For purposes of clarity and simplicity of language, the following discussion refers to these commenters collectively as "the consortium." These companies dispute the EPA's basis for the architectural coatings rule being promulgated today in a separate **Federal Register** document. By contrast, a national paint and coatings association that represents approximately 225 companies of all sizes strongly supports promulgation of the architectural coatings rule.

Many of the individual comment letters from the consortium addressed several different issues, and many of these issues were raised by all of these parties. In addition, the comments were submitted to the EPA over several years, beginning before proposal of the three rules addressed in this action and extending throughout the respective comment periods and beyond. Over time, the arguments posed were repeated and expanded. Moreover, many of the comments are interrelated in terms of technical issues and policy implications. Therefore, the EPA decided to consolidate and combine the comments from these parties so as to present them and respond to them in an organized manner.

A. Legitimacy of the Environmental Protection Agency's Section 183(e) Study

Some commenters contended that the EPA failed to perform a proper study as mandated by the Act and that the EPA, therefore, lacks authority to propose regulations under section 183(e) of the Act until it conducts a proper study. The primary alleged deficiencies suggested by these commenters are that: (1) the EPA did not perform speciated reactivity studies of all VOC in consumer and commercial products; (2) the EPA failed to demonstrate that consumer and commercial products have the potential to contribute to ozone nonattainment; and (3) the EPA considered VOC emissions magnitude and regulatory efficiency, which was allegedly contrary to Congressional intent. Three other commenters testified that the EPA had fulfilled all necessary requirements of section 183(e) of the Act. These commenters agreed with the EPA's efforts in the section 183(e) study and Report to Congress.

These comments are summarized and addressed in the following sections.

1. Reactivity

The consortium claimed that the EPA failed to conduct a speciated relative reactivity study of all consumer and commercial product VOC and that such a study was mandated by section 183(e)(2)(A) of the Act. The consortium argued that the lack of a relative reactivity study precludes the EPA from determining which, if any, VOC from consumer and commercial products are logical targets for regulation. The consortium also disagreed with the EPA's conclusion that it was impossible to perform reactivity studies on all individual consumer and commercial product ingredients within the time frame allowed by Congress and the EPA's available budget. The consortium contended that the EPA could have developed a more effective regulatory program based on substitution of lower reactivity VOC for higher reactivity VOC if additional reactivity studies had been undertaken.

Another commenter, however, believed that the EPA met the requirements of section 183(e) of the Act regarding the consideration of reactivity, and noted what was included in the section 183(e) Report to Congress with respect to reactivity.

In response to these comments, the EPA believes that it has met all reactivity-related requirements of section 183(e) of the Act, and that relative reactivity was taken into account to the extent that currently

available scientific data and understanding allow. As required in section 183(e), the EPA considered reactivity in prioritizing and selecting product categories to be listed for regulation. The EPA disagrees that a speciated study of all consumer and commercial product VOC should have been performed; such a study is not required by the Act and would have been impractical to undertake. The EPA's analysis of the state of knowledge regarding reactivity and use of available reactivity data allowed the EPA to fulfill the requirements of the Act and to complete the mandated study and Report to Congress. Finally, currently available speciated reactivity data are not adequate to support the suggested regulations based on substitution of lower reactivity VOC for higher reactivity VOC. An analysis of whether such a system would result in more efficient regulation would need to consider all costs associated with implementing a speciated regulatory system (e.g., monitoring and recordkeeping). Also, it would be necessary to consider the ability of compounds to form ozone over a several-day period under different sets of environmental conditions in designing such an approach and considering its efficiency.

Consideration of reactivity in prioritizing product categories for possible regulation. Section 183(e)(2)(B)(iii) of the Act requires the EPA to consider five factors in establishing criteria for selecting product categories to be regulated. One factor is "those consumer and commercial products which emit highly reactive volatile organic compounds (VOC) into the ambient air." Accordingly, the EPA established "Emissions of Highly Reactive Compounds" as one of the criteria used to rank consumer and commercial products for possible regulation.

In its consumer and commercial products study, the EPA distinguished between three groups of compounds: highly reactive, reactive, and negligibly reactive. Negligibly reactive compounds, a category established by the EPA regulations, are certain listed compounds the EPA has formally determined to have insignificant ozone-forming potential and excluded from the definition of VOC. Compounds that were identified as negligibly reactive were excluded from the consumer and commercial product VOC emissions inventory, and will be excluded from any related regulation.

To identify highly reactive VOC, the EPA used available information to identify 10 classes of volatile organic

compounds—some of which represent very broad groups—as “highly reactive” under most conditions. In the study the EPA thus differentiated among classes of VOCs that were known to be reactive and those that were known to be highly reactive, using the most current, generally accepted reactivity scales. The EPA then identified those product categories known to contain quantities of these highly reactive compounds, and estimated the quantity of highly reactive compounds emitted by these product categories.

The EPA also took into consideration highly reactive VOC under another criterion, “Magnitude of Annual VOC Emissions.” For product categories known to contain highly reactive VOC, the EPA adjusted the mass emissions figures for those VOC to reflect their high reactivity.

The EPA subsequently ranked product categories for possible regulation, considering the criteria established by the EPA and advice from the independent NAPCTAC advisory group. In conducting the ranking, the EPA gave product categories containing highly reactive compounds a higher priority for regulation. In addressing the two criteria cited above, the EPA assigned a range of scores based on the number of tons of highly reactive VOCs emitted per year by a product category. The EPA included the scores from these criteria in the calculation of the total scores for each product category in considering the regulatory priority of each category.

Chapter 3 of the March 1995 Report to Congress provides a more detailed discussion of reactivity and the rationale for the list of highly reactive compounds on which the EPA relied. Chapter 4 of the Report to Congress discusses in more detail how the EPA applied each of the criteria.

Adjustment for reactivity in listing product categories. Section 183(e)(3)(A) of the Act requires the EPA to “list those categories of consumer or commercial products that the Administrator determines, based on the study, account for at least 80 percent of the VOC emissions, on a reactivity-adjusted basis, from consumer or commercial products in areas that violate the NAAQS for ozone.” The EPA fulfilled the reactivity adjustment requirement in the following manner. As previously noted, the EPA grouped all VOC into three divisions—highly reactive, reactive, and negligibly reactive. The EPA identified those product categories known to contain highly reactive compounds and estimated the mass quantity of these compounds found in each category. The EPA adjusted

emissions data for these product categories by applying a reactivity adjustment factor to the mass emissions of highly reactive ingredients. Compounds that were identified as negligibly reactive, which are not within the definition of VOC, were excluded from the emission inventory. After ranking the product categories based on the eight regulatory criteria, the EPA developed the list of categories for regulation starting with the highest ranked categories and proceeding through successive categories until 80 percent of the total emissions—including the aforementioned adjustments for reactivity—was accounted for. In this way, the EPA, fulfilled the reactivity adjustment requirement of section 183(e)(3)(A) of the Act.

Additional study was not required. The statutory requirements regarding reactivity are clearly stated in the Act. They are:

1. To consider consumer and commercial products that emit highly reactive VOC, and
2. To list those products that account for at least 80 percent of VOC emissions from consumer and commercial products in non-attainment areas, on a reactivity-adjusted basis.

The EPA believes that the Act does not require the speciated reactivity study suggested by the commenters. Nor does the Act include any requirements for the EPA to fill gaps in scientific understanding before proceeding with prioritizing and listing categories for regulation. The Act’s language regarding a study requires the EPA to address “emissions of volatile organic compounds into the ambient air from consumer and commercial products* * *” The EPA considered reactivity a significant issue in this study and assessed all reasonably available reliable data on reactivity of individual VOC species. The EPA does not believe that it was required to delay its listing decisions until it could conduct extensive research to quantify the reactivity of each VOC species.

To meet these requirements, the EPA ascertained which consumer and commercial products have the potential to contribute to ozone nonattainment and took reactivity into consideration to the extent that reasonably available information allows. As described in the preceding section, the EPA’s study of relative reactivity included assessment of currently available data and ozone formation models. Furthermore, since the study and Report to Congress were, in essence, a screening exercise to identify the EPA’s priorities for regulating categories of consumer and

commercial products, the EPA judged that the consideration of relative reactivity should be limited to currently available data and should not involve exhaustive testing of relative reactivity of all consumer and commercial products. The EPA does not believe that Congress could have intended to delay regulation of VOC emissions from consumer and commercial products indefinitely, pending development of complete information regarding reactivity for all individual species of VOC. As more complete information on the relative reactivity of consumer and commercial product VOC is developed over time, the EPA can incorporate it into the regulatory program. For example, if data become available to prove that a currently regulated VOC is negligibly reactive, the EPA will exempt that compound from the regulatory definition of VOC.

Impracticality of additional study. Some consortium members claim that the EPA should have attempted in the section 183(e) study to conduct a quantitative analysis of the relative reactivity of each of the thousands of VOC species in consumer and commercial products. Such a detailed, costly, and time-consuming analysis is not needed to justify listing of product categories for regulation and is not required by the statute. The effect of such a requirement would be to postpone for years promulgation of pollution control requirements needed to help the Nation achieve clean air. This would be inconsistent with Congress’s direction that the EPA complete the study within three years and expeditiously issue regulations for consumer and commercial products within deadlines set in the statute.

Even if the EPA could have determined reactivity values for the extremely large number of compounds in consumer and commercial products, the results would be of limited utility. Available computer models generally aggregate chemical compounds or consider them as general categories. As a result, models have limited use for evaluating the effects of reducing emissions of specific VOC species from a particular product category.

2. Role of Consumer and Commercial Products in Contributing to Ozone Nonattainment

The consortium also argued that the EPA’s section 183(e) study failed to determine the potential of VOC emissions from consumer and commercial products to contribute to ozone levels that violate the ozone NAAQS. Their argument included points that the EPA should have

determined the reactivity of each species of VOC and should have done a detailed study of the role of other factors, including the role of NO_x and biogenic emissions in ozone formation. In addition, the consortium asserted that the EPA should have determined which products and control strategies have the greatest ozone reduction potential in each individual nonattainment area and related the estimated cost of any proposed regulations to the amount of ozone reduced. As a result of these exercises, the consortium claimed the EPA would have listed for regulation only those products that have the greatest effect on ozone reduction for the least cost.

The EPA disagrees with the consortium that these studies are needed for proper implementation of the section 183(e) program, and disagrees that section 183(e) of the Act directs the EPA to undertake such a detailed level of analysis. The statutory mandate is to study the "emissions of VOC from consumer and commercial products * * * in order to determine their potential to contribute to ozone levels which violate the NAAQS for ozone."

The EPA has concluded that VOC emissions from consumer and commercial products have the potential to contribute to ozone nonattainment, based on the section 183(e) study and a large body of scientific knowledge on photochemical reactivity and the role of VOC in ozone formation.

The EPA is not alone in its assessment. A 1989 report by the Congressional Office of Technology Assessment, "Catching Our Breath: Next Steps for Reducing Urban Ozone," identified VOC emissions from solvents in paints and coatings, and from other types of products, as a significant contributor to the ozone pollution problem that had largely escaped regulation at the federal level. Several States have moved on their own to limit VOC emissions from paints and coatings because they contribute to ozone pollution. The National Governors' Association and Environmental Council of States, and the associations representing State and local air program administrators, have called upon the EPA to expedite adoption of national rules for architectural coatings and other consumer and commercial products. Further, in June 1997, the 37-State Ozone Transport Assessment Group (OTAG) recommended that the EPA proceed with finalizing the proposed national rules for architectural coatings, consumer products, and automobile refinish coatings, and even develop

more stringent future requirements for these categories.

The following considerations and scientific studies are among those supporting the EPA's position that the VOC in consumer and commercial products have the potential to contribute to the ozone pollution problem:

(i) Ozone pollution is caused by the reaction of VOC and NO_x. All VOC species have the potential to form ozone (i.e., are reactive) to some degree. Since the late 1940s, the scientific community has recognized this basic tenet of atmospheric chemistry. For example, the 1996 EPA document entitled "Air Quality Criteria for Ozone and Related Photochemical Oxidants" and its 1970 and 1977 predecessors include discussions of the atmospheric chemistry leading to formation of ozone and the important role of VOC in that formation. These documents have been extensively reviewed by independent scientific experts on the Clean Air Scientific Advisory Committee.

(ii) The EPA's consumer and commercial products study includes a broad inventory of VOC emissions from consumer and commercial products. The study showed that emissions from consumer and commercial products in 1990 were large— an estimated 28 percent (6 million tons per year) of total manmade VOC emissions nationwide. In ozone nonattainment areas, these emissions in 1990 totaled 3.3 million tons per year (tpy). These totals consist of contributions from a large number of individual pollution sources that are relatively small.

Architectural coatings—the category of principal interest to consortium members—are one of the largest identifiable unregulated sources of VOC in many States' emissions inventories, and one of the largest sources of VOC emissions among categories of consumer and commercial products. The EPA's section 183(e) study estimated nonattainment area emissions from this category at 315,000 tpy in 1990.

(iii) Both the amount of VOC emitted, and the reactivity of the VOC (which is dependent on ambient conditions that vary at different times and places), affect the amount of ozone formed. It is important to note that low-reactivity VOC can still be significant ozone producers if they occur at high concentrations and under favorable conditions. This is documented, for example, in a 1991 article by R.G. Derwent and M.E. Jenkin, "Hydrocarbons and the Long Range Transport of Ozone and PAN Across Europe," in *Atmospheric Environment* (25A, p.1661) and in the most recent

"National Air Quality and Emissions Trends Report, 1996," (EPA-454/R-97-013).

This point concerning low-reactivity VOC also is supported by empirical data from this country. The most recent "National Air Quality and Emissions Trends Report, 1996," (EPA-454/R-97-013), suggests that reducing low-reactivity VOC emissions from gasoline was effective in reducing national ozone levels. The report shows that national VOC emissions decreased 9 percent from 1987 to 1991, while national composite ozone levels decreased approximately 8 percent. A closer look at the VOC reductions over this period shows that they are primarily due to reductions in the transportation category, and this is due in large part to reductions in the vapor pressure of gasoline (Reid vapor pressure, or RVP) which were implemented nationally in 1989 and 1990. These RVP reductions are primarily achieved by reducing the content of short-chain hydrocarbons in gasoline. While these compounds are generally considered of lesser importance in the formation of ozone than their more highly-reactive hydrocarbon counterparts, their reduction seems to have been very effective in the reduction of ozone levels nationally between 1987 and 1991. This is an example of how the control of certain VOC emissions which are considered less reactive than other VOC emissions in isolation can, nonetheless, be effective in significantly reducing levels of ozone pollution. In any case, it has long been apparent that these "less reactive" VOC emissions (such as those which can be found in many paint solvent formulations) cannot be ignored when considering the need to control VOC to reduce ozone pollution.

(iv) It has been well documented that both VOC and NO_x control are needed to combat the national ozone problem. This point is further discussed elsewhere in this preamble.

The EPA is continuing to support research on atmospheric chemistry, including photochemical reactivity, to further improve models for predicting ozone formation. In the meantime, the EPA believes that there is ample scientific evidence that VOC emissions from consumer and commercial products have the potential to contribute to ozone nonattainment.

In the consumer and commercial products study, the EPA studied two indicators of a product category's relative potential to form ozone. These indicators, which the EPA identified as two of the criteria to be used in listing product categories for regulation, were (1) the quantity of VOC emissions

(adjusted for highly reactive emissions), and (2) the quantity of highly reactive emissions. In the study, the EPA determined the quantity of VOC emissions from each product category and created a comprehensive VOC emissions inventory for consumer and commercial products. In addition, using available data, the EPA identified classes of highly reactive VOC and determined the quantities of those compounds emitted by each product category.

The EPA subsequently considered both of these criteria in prioritizing and listing product categories for regulation. As detailed elsewhere in this preamble, product categories that had greater emissions of VOCs, or greater emissions of highly reactive VOCs, received higher priority scores on those two criteria and, therefore, were more likely to be listed for regulation.

In other words, the EPA studied indicators of product categories' relative potential to form ozone in conducting the consumer and commercial products study, and considered those indicators in prioritizing and listing product categories for regulation.

Some consortium members claim that the EPA should have attempted in the section 183(e) study to conduct a quantitative analysis of the amount of ozone formed by each of the thousands of VOC species in consumer and commercial products, for each product, in each airshed or nonattainment area—and do so for a range of control strategies. The Act does not require the EPA to establish quantitatively the contribution of each product to ozone nonattainment prior to listing. As previously noted, such a detailed, costly, and time-consuming analysis is not needed to justify the listing of product categories for regulation. The effect of such a requirement would be to postpone for years promulgation of pollution control requirements needed to help the Nation achieve clean air. This would be inconsistent with Congress's direction that the EPA complete the study within 3 years and expeditiously issue regulations for consumer and commercial products within deadlines set in the statute.

In this context, it is relevant to note that the types of VOC in consumer and commercial products are not unique—these same VOC are among the pollutants emitted by major industrial facilities. Consumer and commercial products are made from VOC-containing chemical feed stocks made at chemical manufacturing plants and refineries, for which VOC emission control regulations are comprehensive and stringent.

Other reasons that the extremely detailed analysis suggested was not feasible or appropriate involve data limitations and scientific complexities and uncertainties. Such an analysis would require, for example, substantial additional data on the types and quantities of individual VOC in each product within the broad universe of consumer and commercial products. To obtain this information would have placed an additional burden upon industries that the EPA believes was not necessary for the listing process. Also, studies to quantify the reactivity of a large number of individual VOC species would have been required for this analysis. In addition, many complexities make it difficult to make reliable predictions of the ozone-forming potential of individual VOC species. One reason is that this potential varies depending on ambient conditions—on an absolute scale, and occasionally on a relative scale as well. These conditions affecting reactivity include ambient conditions such as VOC-to-NO_x ratios, the presence of other VOC, and sunlight intensity. Each of these factors can vary widely. Also, in multiple day pollution episodes in an area, a VOC species that has low reactivity (based on a one-day reactivity scale) may continue to form ozone over several days. Even if the EPA could have obtained the needed data and accounted for these complications, the results would have been of limited utility. As mentioned previously, available computer models generally aggregate chemical compounds or consider them as general categories. As a result, models have limited use for evaluating the effects of reducing emissions of specific VOC species from a particular product category.

Finally, the EPA believes that an intensive study to quantify each product's effect on ozone levels in nonattainment areas is inconsistent with Congress' intent in enacting the section 183(e) program. Congress recognized that small quantities of VOC emissions from a very large number of products add up—and together make up a significant portion of ozone-forming VOC emissions. Congress created the 183(e) program to reduce the VOC emissions from consumer and commercial products as a group. Under section 183(e), it is not necessary to quantify the effect of each species of VOC, or each product, on ozone levels in each nonattainment area to make a reasoned selection of product categories to list for regulation.

The EPA has procedures available for considering evidence that a particular compound is not reactive enough to warrant regulation as an ozone

precursor under the Act. Existing EPA regulations allow persons or companies to apply to have a compound excluded from the definition of VOC—in effect, exempted from regulation—based on evidence that it is negligibly reactive. (See 40 CFR 51.100(s).) Working with industry, the EPA has exempted 42 compounds and two classes of compounds under this provision; 21 exemptions have been granted since 1990.

In summary, the EPA believes that the potential for the listed categories of products to contribute to ozone nonattainment has been established in accordance with the requirements of section 183(e).

3. Consideration of "Emission Magnitude" and "Regulatory Efficiency"

The consortium contended that the EPA lacked authority to use the "emission magnitude" and the "regulatory efficiency and program considerations" criteria because they do not directly reflect any of the five factors listed in section 183(e)(2)(B) of the Act. For this reason the consortium concluded that any EPA action relying on these criteria is illegal and invalid.

Although the Act requires that the EPA consider the five factors enumerated in section 183(e)(2)(B) of the Act in establishing criteria for regulating products, the statute does not require that the EPA establish criteria that precisely mirror the five factors, nor does it require that the EPA consider the list of factors to be exclusive. The EPA fulfilled its duty to establish criteria and to consider each of the five listed factors in developing the criteria. In addition, the EPA exercised its discretion by establishing two criteria that did not specifically mirror the five listed factors. The EPA believes these two criteria are important for the purposes of establishing priorities for regulation as instructed by Congress.

The EPA established Criterion 7, Magnitude of Annual VOC Emissions, to give greater regulatory priority to products that emit relatively large amounts of VOC. Magnitude of annual VOC emissions is a reasonable criterion for determining which product categories to regulate. It is logical to take into consideration how much VOC product categories emit relative to other products because the greater the emissions from a category, the greater the potential to achieve significant emission reductions and the corresponding reduction in ozone concentrations in areas violating the ozone standard.

The EPA established Criterion 8, Regulatory Efficiency and Program Considerations, to assure that the EPA continues to use resources in the most effective manner to meet the mandates of section 183(e) of the Act. It is reasonable for the EPA to consider whether a given product category has already been the subject of State, local, or Federal regulations. Such categories would have been well-characterized, alternatives of control would have been explored, and costs and economic impacts would have been investigated. The EPA believes it is also reasonable to consider the existence of this information because the EPA must regulate the first group of products in a relatively short time. The EPA carries out all of its activities mandated by the Act within budgetary and time constraints. It is the EPA's policy to focus regulatory activities so as to optimize the use of time and resources. Section 183(e)(2)(B) does not prohibit the EPA from considering this factor.

B. Consumer and Commercial Product Inventory

The consortium expressed the opinion that consumer and commercial products are not a significant VOC source. According to the consortium, many consumer and commercial products, such as architectural coatings, would not be listed for regulation had the EPA performed the inventory correctly, because such products may not be in the top 80 percent of consumer and commercial product emissions on a reactivity-adjusted basis. The consortium listed two alleged deficiencies with the consumer and commercial product inventory. First, the EPA's overall inventory did not include biogenic VOC. Second, the EPA excluded certain man-controlled biogenic VOC sources, such as plant nurseries and orchards, from the list of consumer and commercial products to be regulated.

1. Role of Biogenic Emissions

The consortium stated that a major deficiency existed in the consumer and commercial product inventory because the EPA failed to provide Congress with information about the insignificance of VOC from consumer and commercial products relative to the larger amount of biogenic VOC in the atmosphere. According to the consortium, the EPA's failure to list the specific sources of all VOC, including those from the global background, biogenic, and anthropogenic sources, along with the role that each source played in ozone formation, resulted in Congress being uninformed of the supposed

insignificance of anthropogenic emissions compared to biogenic emissions.

The EPA believes that the inclusion of biogenic emissions in the inventory of national VOC emission sources is one possible approach, but does not believe that such inclusion changes the proper analysis for controlling VOC from consumer and commercial products. The EPA estimated biogenic emissions in 1990 to be about 34 million tpy. Considering the 21 million tons of anthropogenic emissions, total VOC emissions nationwide are greater than 56 million tpy. For the purpose of determining relative contribution of consumer and commercial products, the EPA revised the inventory of all VOC sources to include biogenic emissions and included the revised table in the section 183(e) comment response document. These biogenic emissions are not amenable to control, because they emanate from sources for which there is no practical control option (i.e., forests, swamps, grasslands, etc.); therefore, the proportion of controllable VOC has remained unchanged. Of the 21 million tons of anthropogenic VOC emissions emitted nationwide in 1990, consumer and commercial products account for 6 million tons, or about 28 percent. Therefore, consumer and commercial products are still among the most significant Federally unregulated VOC sources for which additional VOC reductions are achievable.

Consumer and commercial product VOC contribute to ozone formation regardless of the precise amount of biogenic VOC in the inventory. In some regions of the country, biogenic VOC contribute significantly to ozone nonattainment. In other areas, biogenic VOC are emitted in the presence of limited amounts of NO_x, resulting in a limited amount of ozone formation. Moreover, under the right conditions, biogenic VOC tends to scavenge ozone from polluted air as well as form new ozone. Anthropogenic VOC, on the other hand, are usually emitted in the presence of NO_x, resulting in rapid ozone formation and are generally unreactive with ozone under most conditions. For these reasons, anthropogenic VOC contribute to ozone nonattainment in urban areas and other locations, regardless of any concomitant contribution by biogenic sources. Thus, VOC emissions from anthropogenic sources will play a proportionately greater role in ozone formation than is indicated by their percentage contribution to total national emissions. The EPA concluded that the existence of biogenic VOC does not negate the fact that VOC from consumer and

commercial products have the potential to contribute to ozone nonattainment as contemplated by section 183(e) of the Act.

2. Listing of Biogenic Products

The consortium argued that a second deficiency in the consumer and commercial product inventory and list for regulation was that the EPA excluded man-controlled biogenic sources (i.e., flowers, trees, food, etc.). The consortium argued that this exclusion is contrary to the Act, which required the EPA to conduct a complete inventory of all sources of VOC emissions from consumer and commercial products. The consortium stated that these biogenic sources, if included in the study, would have been a more significant source of VOC contribution to ozone than some of the consumer and commercial products that the EPA listed for regulation.

The EPA disagrees that biogenic products should be listed as categories of consumer and commercial products. It is reasonable to list only those products from which emission reductions are possible. In general, the EPA has interpreted the statutory definition of consumer and commercial products very broadly, and considers products ranging from hair sprays to automotive coatings to asphalt paving materials to fall within the definition of consumer and commercial products. These "products" differ greatly from man-controlled biogenic sources of VOC.

In each of the categories identified by the EPA to be consumer and commercial products for regulation, the products share at least one characteristic that sets them apart from biogenic sources. In every case, the "products" are formulated and manufactured using combinations of ingredients. The manufacturers have control over the VOC contents of these products, and, therefore, can reformulate or modify the products to emit less VOC. Plants, trees, and shrubs are not manufactured and, therefore, have inherent VOC emission characteristics, both in volume and speciation of emissions. These naturally occurring sources cannot be reformulated or modified to reduce VOC emissions. Options to control VOC emissions from plants, trees, and shrubs would be limited primarily to banning sale or distribution of such products which the EPA believes would not reflect Congress's intent in enacting Section 183(e).

The VOC emissions from biogenic sources could not be mitigated through regulation; therefore, it is highly unlikely that these sources would ever

be listed for regulation. Consequently, the EPA's decision not to identify these sources as consumer and commercial products under section 183(e) of the Act has not affected the selection of nor the priorities for those categories the EPA did list for regulation.

C. The Environmental Protection Agency's Regulatory Strategy

1. *Nitrogen oxides versus volatile organic compounds emissions control strategies.* As part of their comments opposing the EPA's approach to the section 183(e) study and Report to Congress, the consortium submitted a series of letters presenting a number of different arguments that the EPA is using the wrong regulatory policy for attainment of the ozone NAAQS. The common theme in these arguments was that the consortium believed that the EPA should control NO_x instead of VOC because, in their opinion, controlling NO_x is the most scientifically valid and the most effective strategy for achieving long term ground-level ozone attainment. The consortium's specific arguments are summarized and addressed in sections II.C.1.(b) through (f) of this document. An overview of the EPA's response to this group of arguments is presented below before discussion of the specific arguments.

The EPA believes that the present policy, which focuses on control of both NO_x and VOC, reflects the latest knowledge on factors affecting ozone formation and the technical feasibility of controls. The present policy, which relies on a combination of national, regional, and local control strategies, has been effective in improving ozone attainment and will achieve further improvements in ozone air quality. The consortium is correct in that scientific studies since the Clean Air Act Amendments of 1990 have more clearly recognized the role of NO_x and biogenic emissions in ozone nonattainment. The findings of these studies have been factored into the national ozone control policy. The EPA's policy has continuously evolved since the 1970's to recognize improved scientific understanding of this complex issue and will continue to evolve as the science advances. The EPA continues to believe that regulation of both NO_x and VOC is appropriate and that regulation of VOC through section 183(e) of the Act will contribute to reduced ozone levels. The consortium's position that the ozone NAAQS can be achieved at all locations by NO_x control alone is based, in part, on a misunderstanding of the ozone formation mechanism in urban air.

a. *Background: The current ozone control policy.* Unlike other criteria

pollutants, ozone is not directly emitted into the air. Ozone forms in the air when NO_x and VOC react in a complex set of reactions in the presence of sunlight and heat. The ozone reactions are initiated by the breakdown of nitrogen dioxide by sunlight and subsequent reaction with oxygen. In the absence of VOC, an equilibrium exists between NO_x and ozone, by which ozone is consumed in the series of photochemical reactions soon after formation. This equilibrium prevents the buildup of high concentrations of ozone in the air. Introduction of VOC disrupts this equilibrium (i.e., disrupts the reactions that scavenge ozone), thus resulting in accumulation of high concentrations of ozone.

The EPA's ozone reduction policy is to control both NO_x and VOC emissions. The EPA's policy is consistent with recent scientific studies and with explicit statutory directives to reduce both VOC and NO_x. Ozone control is a complex problem that must address a number of factors, including meteorological conditions, the relative concentrations of NO_x and VOC in the air, and the proximity of emission sources to one another. The EPA's policy recognizes that NO_x control is an effective means for reducing ozone. The EPA's policy also recognizes that VOC control, with or without NO_x control, is essential or beneficial in many areas for reducing peak ozone concentrations. The EPA believes that its ozone reduction policy is a scientifically valid strategy and that the consortium has mischaracterized the EPA's ozone policy and the past results of the policy.

Several of the comment letters implied that national standards for VOC are the only component of the EPA's policy. This implication is incorrect. The section 183(e) regulations are just one part of a reasoned ozone control plan consisting of national, regional, and local controls. First and foremost, ozone attainment is a State responsibility. States are responsible for designing control strategies for each nonattainment area in their jurisdiction. The strategies must consider local conditions, including contribution of biogenic VOC emissions, in determining an appropriate mix of NO_x and VOC controls and the level of control needed. States have developed emission regulations to achieve emission reductions necessary to demonstrate attainment through modeling studies. Multi-State planning zones in several regions of the country are being established to develop coordinated strategies to address interstate transportation of pollution. The Act also requires that State plans contain

provisions that prevent sources from contributing significantly to nonattainment or maintenance of attainment in other States.

The State and Regional plans are supplemented by Federal measures to reduce emissions for certain source categories. Federal programs may address source categories that are more efficient to regulate nationally than on a State-by-State basis. States rely on these reductions from the Federal measures in conducting their atmospheric modeling for control strategy development and attainment demonstrations. Examples of Federal VOC control measures include mobile source controls under title II of the Act, new source performance standards (NSPS), the marine vessel loading rule, and the consumer and commercial product regulations under section 183(e) of the Act. Federal NO_x controls include regulations for mobile sources, NSPS, and acid rain controls on utility boilers. Section 183(e) standards, therefore, are but one element of a coordinated Federal and State program for ozone control.

Recent regional ozone modeling studies over the 37-State region of the eastern United States have shown that additional emission reductions of both NO_x and VOC will be needed beyond the currently applicable State and Federal controls. The study was conducted by the Ozone Transport Assessment Group (OTAG), which included representatives of the 37 easternmost States, the EPA, and the public—in total, more than 700 public and private sector stakeholders. The OTAG States recommended in July 1997 that the EPA continue to adopt and implement stringent national control measures for a number of VOC emission sources, including consumer and commercial products.

b. *Effectiveness of a national volatile organic compound control strategy.* The consortium claimed that VOC control is ineffective and should be abandoned because the policy of controlling VOC has not achieved ozone attainment in all areas of the country. The consortium further maintained that, in some cases, VOC controls are counterproductive and will increase ozone formation.

The EPA disagrees with the conclusion that VOC control is ineffective. Past control strategies have improved air quality. Ozone trends data show that reductions in peak ozone concentrations are occurring across the country. Monitoring data from more than 700 sites show that composite averages of the second highest maximum 1-hour ozone concentrations have shown a clear, steady, downward

trend over the past 10 years. These downward trends apply also to the number of daily exceedances of the standard. Since historically the control policies placed greater reliance on VOC control, the trend of ozone reductions confirms that VOC control has been effective in many areas of the country.

Failure to obtain universal attainment is due to a number of factors. Some of these factors include the underestimation of VOC inventories and the inadequate consideration of the role of biogenics and the transport of ozone and NO_x. Even with these limitations, many areas of the country have achieved attainment or have improved ozone air quality measurably. With recent enhancements to the policy to better address the local impacts of biogenics and pollutant transport, future control strategies should continue to improve this trend.

The EPA also disagrees that VOC controls are counterproductive. The consortium's position is based on the fact that some species of VOC can reduce ozone under some conditions. Controlling these compounds, therefore, could conceivably increase ozone in certain circumstances. While the EPA acknowledges that some species of VOC can scavenge ozone, this phenomenon occurs in very limited circumstances (i.e., in relatively clean air, with highly reactive VOC under specific meteorological conditions, and in the presence of very low NO_x). This phenomenon is not widespread and certainly does not form the basis for a national ozone control policy. For a more detailed response to this comment, see section 2.2.2 of the 183-BID.

c. *Recent scientific studies.* The consortium charged that the EPA has failed to consider recent scientific studies published since the Clean Air Act Amendments of 1990, and has followed historic control policies which have failed. The consortium claimed that "Rethinking the Ozone Problem," "The Southern Oxidants Study," and other studies addressing the role of NO_x and biogenic VOC emissions prove that the current ozone reduction policy cannot work. They pointed to elements of these studies as support for their position that NO_x controls are a better means to achieve ozone attainment than VOC controls.

The EPA believes that the current ozone strategy of controlling both VOC and NO_x is scientifically valid and is consistent with recent scientific advances. Ozone control is a complex problem. Over the past 20 years, scientific understanding of ozone formation mechanisms has continued to evolve and the EPA's ozone strategy has

evolved accordingly. While the EPA agrees with some of the specific factual information cited by the consortium from the cited studies, the EPA disagrees with the consortium's conclusions that the proper response is to abandon VOC control altogether in favor of a NO_x-only control policy. The cited studies show the complexity of the problem, the importance of NO_x control in certain circumstances, and the importance of regional control strategies to reduce transport problems. But they do not suggest that VOC emission sources should not be controlled. These studies do not change the conclusion that VOC control helps reduce ozone in many circumstances.

Current scientific information shows that VOC reductions will reduce ozone in urban areas and in other areas where there is available NO_x present. The relative effectiveness of VOC and NO_x controls will vary from area to area, depending significantly upon VOC/NO_x ratios in the atmosphere. VOC reductions will help to reduce ozone in all urban areas because VOC/NO_x ratios vary at different times and places within an urban area. Modeling analyses indicate that a combination of VOC and NO_x controls is the most effective way to reduce ozone levels in many urban areas. Ozone reductions due to VOC control can also reduce ozone pollution in downwind areas affected by ozone transport.

The EPA agrees with the consortium on several points: (1) that the past control strategies have not produced the level of ozone reductions that were expected; (2) that science has only recently (in the last 10 years) recognized the significance of the contribution of biogenic VOC sources and transport of ozone and NO_x; and (3) that these studies provide a basis for fine-tuning certain aspects of the current policy. The EPA disagrees, however, that the proper action is to abandon VOC control altogether. The course that the EPA is following is to use improved scientific understanding from these studies to formulate an improved ozone policy. Recent EPA initiatives to improve ozone control strategy development include:

(1) Improvement of ozone air quality models.

(2) Collection of more and better air quality data upon which to base strategies (including simultaneous monitoring of ozone, NO_x, and speciated VOC concentrations).

(3) Improvement of VOC and NO_x emission inventories (including biogenic emissions).

(4) Regional application of ozone air quality models to account for long-range pollutant transport.

(5) Development of regional ozone control strategies for NO_x. (For example, a proposed rulemaking at 62 FR 60317 will require States to submit State Implementation Plan measures to mitigate transport of ozone and emissions of NO_x across State borders in the eastern half of the country.)

These improvements respond to the consensus of current scientific understanding of ozone formation and control. The EPA expects that its ozone control strategy will continue to evolve as scientific understanding of ozone formation and control improves.

d. *Contribution of biogenic volatile organic compounds sources versus anthropogenic sources to ozone nonattainment.* The consortium stated that anthropogenic VOC sources (like consumer and commercial products) are so insignificant compared to biogenic sources that controlling anthropogenic VOC will have no ozone reduction benefit. The consortium claimed that since biogenic sources might contribute as much as 90 percent of total VOC emissions on typical summer days, the only way to achieve the ozone standard is to control NO_x. The consortium pointed to the conclusions of the "Southern Oxidants Study" that showed that high biogenic emissions in the rural South can lead to exceedances of the ozone standard.

While the EPA agrees that biogenic emissions are indeed a major fraction of total VOC emissions, the contribution of biogenic sources to total VOC emissions on typical summer days will vary depending on local weather conditions and geography. Thus, although biogenic sources could contribute as much as 90 percent of total VOC emissions on some summer days, this is only true in some locations and is not universally true for all climatic conditions or geographical features.

In addition, the EPA disagrees that it is ineffectual or inappropriate to control anthropogenic sources of VOC. Under the proper conditions, ozone formation occurs rapidly and is affected (among other things) by the proximity of VOC and NO_x sources. Biogenic VOC generally are less important than anthropogenic VOC because biogenic VOC are emitted predominantly in rural atmospheres with limited amounts of NO_x, resulting in a limited amount of ozone formation. Moreover, as noted by the consortium, the biogenic VOC, under the right circumstances, tend to scavenge ozone from the atmosphere. Anthropogenic VOC, on the other hand, are usually emitted in the presence of NO_x, resulting in more ozone formation. Thus, the EPA concludes that anthropogenic VOC generally play a

proportionately greater role in ozone formation than does biogenic VOC.

The consortium may also be correct that, in some cases, biogenic VOC can be the predominant precursor in the reactions with NO_x. For example, in Atlanta, studies have predicted that the complete elimination of man-made VOC would still leave the area in nonattainment. For this reason, control strategies for areas like Atlanta, which have very high ratios of VOC/NO_x in the air, will focus on NO_x reductions. Even in such areas, however, the control of VOC will help reduce ozone formation.

Modeling in Atlanta has shown that VOC controls can help reduce ozone even in NO_x-limited areas. Because ozone formation is greatly affected by meteorological conditions and source/receptor orientation, ozone formation may be limited by either VOC or NO_x concentrations at different times and locations within the area. Moreover, modeling results suggest that unless NO_x controls can be implemented all at once, detrimental effects can occur from piecemeal implementation under some circumstances. Results show that VOC controls could mitigate some undesirable effects in the interim. Thus, even though NO_x control may be an effective means of reducing ozone levels on many of the worst days in many locations, reduction of VOC emissions is still necessary to reduce peak ozone concentrations under the variety of meteorological and source receptor conditions in urban areas. As previously noted, modeling analyses indicate that a combination of VOC and NO_x controls is the most effective way to reduce ozone levels in many urban areas.

e. The role of long-range transport of nitrogen oxides in ozone nonattainment. The consortium stated that a VOC control strategy will not work because the transport of NO_x will cause downwind exceedances of the ozone standard. The consortium maintained that downwind reactions with biogenic VOC would be sufficient to cause violations and, therefore, control of anthropogenic VOC would be ineffective.

The EPA agrees that the transport of ozone can contribute to ozone nonattainment. The EPA also agrees that additional NO_x emissions reductions are essential to reduce long range transport problems. Ozone transport has been most problematic and most studied in the eastern States, and plans have been proposed for a regional NO_x emission reduction strategy. However, the control of transported ozone and NO_x will not solve the ozone problem universally. Control of VOC beyond current State and Federal VOC control

measures will be necessary to achieve attainment in many areas—particularly those with longstanding and serious problems with nonattainment.

Ozone nonattainment can be a function of two components: locally formed ozone and transported ozone. Historically, most control strategies have focused on controlling locally formed ozone by controlling local NO_x and VOC sources in the immediate vicinity of nonattainment. The Clean Air Act Amendments of 1990 recognized that certain downwind areas receive transported ozone and ozone precursors that can contribute to nonattainment. Many of these areas may be close to violating the standard due to local emissions even after applying all reasonably available controls, and the additional contribution of transported ozone can lead to periods of nonattainment.

More recently, exhaustive modeling studies of the eastern States by OTAG and others have explored the transport phenomenon. These studies have concluded that control measures mandated by the Act for ozone nonattainment areas will provide ozone reductions in many nonattainment areas. However, some areas will remain in nonattainment, and new nonattainment may arise due to economic growth. The studies predict that regional NO_x reductions will decrease ozone concentrations across broad regions and will be more effective in reducing long-range ozone transport than will VOC reductions.

The EPA has recognized the role of NO_x in the ozone transport problem. On November 7, 1997 (62 FR 60317), the EPA issued a proposed rulemaking requiring certain eastern States to adopt NO_x emission reduction measures as needed to mitigate the transport of ozone and NO_x across State boundaries. Considering the State-by-State emission budgets, an overall NO_x emission reduction of 35 percent is targeted for the 23-State region.

The modeling conclusions about the importance of ozone transport does not mean that VOC reductions are not also needed. The OTAG study concluded that attaining the standard will require local VOC and/or NO_x controls in addition to the recommended regional NO_x controls. The OTAG modeling suggested that reduction of VOC emissions will be most effective in and near urban core areas and will be necessary to control the component of locally produced ozone that contributes to nonattainment. The OTAG States recommended national rules for architectural coatings, consumer products, and automobile refinishing

coatings to help achieve needed VOC reductions.

In conclusion, the consortium is incorrect that the control of anthropogenic VOC emissions is unnecessary to attain the ozone standard. The VOC emitted in close proximity to NO_x will generally react to form ozone. Depending on the relevant conditions, this ozone may contribute to nonattainment. To achieve and maintain the standard will require a program to address effectively both local and transported ozone. Control of anthropogenic VOC, therefore, will continue to be a vital part of the strategy to reduce ozone pollution, particularly in urban settings.

f. The Environmental Protection Agency's approach in determining the effects of precursor emissions on ozone nonattainment. The consortium asserted that the EPA has misinterpreted the intent of section 183(e) of the Act and, therefore, arrived at an incorrect ozone control strategy. The consortium explained that the EPA's strategy is to reduce the peak ozone concentration by examining polluted air and determining the level of precursor emissions that must be removed to achieve attainment. The consortium argued that the only appropriate interpretation of section 183(e) of the Act is to determine which precursors can be added to pristine air and at what levels without exceeding the ozone standard. The consortium claimed that this second interpretation would result in a NO_x-only control strategy. These two interpretations of section 183(e) of the Act are referred to in the comments as the "two sciences" for ozone regulation. The consortium made extensive use of an ozone isopleth chart for one site (Washington, DC) on a specific date to support a number of general conclusions about ozone control.

The consortium's theory is based on the observation that VOC in isolation cannot form ozone. Depending on the existing ratio of VOC to NO_x in local areas, reducing VOC may have a variety of effects on ozone. Reductions in VOC emissions can increase, decrease, or have no effect on ozone concentration. Therefore, the consortium concluded that a control strategy based on national VOC emissions reductions will not be uniformly effective and is not justified. The correct science, in the opinion of the commenters, is to consider what amount of VOC can be added to pristine air before causing a violation of the ozone standard. Since ozone is formed only when NO_x is present, the commenters argued that NO_x should be the exclusive target for emissions reductions. If NO_x concentrations are

sufficiently low, then no amount of VOC added to the ambient air will cause violation of the ozone standard. The consortium asserted that the EPA has chosen an approach that will never achieve permanent attainment, but rather only a temporary false attainment. The consortium reasoned that as additional VOC is added to an airshed that is in attainment and that contains NO_x, nonattainment can recur. A control strategy based on control of NO_x emissions, according to the commenters, would ensure permanent attainment regardless of future VOC levels.

The EPA disagrees that there are two sciences and that the EPA chose the wrong one. One of the purported "sciences" is the present EPA ozone policy of controlling NO_x and VOC. The other purported "science" is a policy choice (using the same scientific basis as the first science) of controlling only NO_x. The EPA does not consider the exclusive control of NO_x emissions to be a practical approach.

The consortium's conclusion that the EPA's goal should be preventing saturation of the air by NO_x is derived from a misunderstanding of the roles of precursors in ozone formation and a misinterpretation of isopleth charts. Isopleth charts show the downwind peak 1-hour ozone concentrations as a function of initial concentrations of VOC and NO_x for an urban area. City-specific charts can be used to estimate the reduction in VOC or NO_x levels needed to achieve the ozone NAAQS in a specific urban area. Isopleth charts are generated from computer modeling of an area considering a number of local atmospheric conditions influencing ozone formation. The consortium has inappropriately used one-day, single-location simulations as representing all of atmospheric chemistry. The consortium has overlooked the acknowledged limitations of isopleth diagrams for use in determining control strategies.

The most serious limitation of use of isopleth charts is that the predictions are critically dependent on the initial VOC/NO_x ratio used in the calculations. This ratio cannot be determined with any certainty because it is quite variable in time and space. Because these isopleth charts are derived using initial VOC/NO_x ratios in the morning, the charts do not depict the evolution of the emissions as the air mass is carried downwind. The VOC/NO_x ratio in an urban plume near the city center can change substantially as the air parcel ages and moves downwind. This change occurs because of the photochemical reactions in the air and the addition of

other emissions to the plume. The implication of this evolution is that different locations in a large urban area can show very different ozone sensitivities to VOC and NO_x controls. The consortium's position does not recognize the dynamic nature of the process and assumes that the composition of urban air remains static.

Unlike the consortium's approach, the EPA's approach recognizes that ozone formation may be limited by VOC or by NO_x at different times and different locations. Thus, even though NO_x control may be the most effective means for achieving the standard on many of the worst days in many locations, reduction of VOC emissions is still necessary to reduce peak ozone concentrations under the variety of meteorological and source receptor conditions that occur in urban areas.

2. Regulation of Attainment Areas via National Rules

The consortium contended that section 183(e) authorizes the EPA to implement rules that regulate consumer and commercial products only in nonattainment areas. The consortium also argued that it is inappropriate and unnecessary for the EPA to develop limits for VOC emissions that apply to all attainment and nonattainment areas under section 183(e) of the Act. The commenters stated that the goal of section 183(e) of the Act is to prevent exceedances of the ozone NAAQS and noted that only certain areas of the country, accounting for a small total land mass, exceed the ozone NAAQS. Furthermore, even within those nonattainment areas, they argued that the EPA should develop a regulatory strategy on a regional basis due to variations in factors affecting ozone formation (e.g., meteorology). Finally, the consortium noted that some ozone nonattainment areas will be able to reach attainment status under present regulations using existing technology to reduce emissions from other sources. Therefore, the consortium's view is that attainment areas and some nonattainment areas do not require regulation under section 183(e) of the Act.

The EPA agrees that the degree of VOC reductions necessary to prevent exceedances of the ozone standard varies regionally. However, it does not agree with the consortium's conclusion that regulations applying to both attainment and nonattainment areas under section 183(e) of the Act are illegal, unnecessary, or inappropriate.

The EPA interprets section 183(e) of the Act to permit the EPA to promulgate rules that apply nationwide. The EPA

bases this interpretation both upon the statutory language of section 183(e), and upon the Congressional directive to utilize any system or systems of regulation necessary to achieve the appropriate reductions. In particular, the EPA believes that the transportability of products and the difficulties attendant upon tracking their ultimate place of use compel the nationwide scope of the final rule.

First, the express statutory language of section 183(e) of the Act does not preclude regulation of products in attainment areas. To the contrary, in section 183(e)(2)(A) and in 183(e)(3)(A) of the Act, Congress explicitly directed the EPA to examine VOC emissions "into the ambient air" without restriction regarding whether such air was in attainment or nonattainment areas. Moreover, the EPA believes that no such distinction between attainment and nonattainment areas is appropriate because section 183(e)(2)(A)(ii) of the Act requires the EPA to assess emissions from consumer and commercial products for their "potential to contribute" to ozone NAAQS violations wherever they may occur. Although commenters argued that the "potential to contribute" clause links the VOC emissions only to those products used in nonattainment areas, the EPA believes that the language of the statute compels no such reading and that it would be illogical given that VOC emissions in attainment areas can contribute to nonattainment in adjoining nonattainment areas.

In section 183(e)(3)(A) of the Act, Congress also explicitly granted the EPA broad powers to reduce emissions into the ambient air in order to combat ozone nonattainment. These powers provided that, to meet the objectives of section 183(e), the EPA may, "by regulation, control or prohibit any activity, including the manufacture or introduction into commerce, offering for sale, or sale of any consumer or commercial product which results in emission of [VOC] into the ambient air." In section 183(e)(4) Congress explicitly provided that to meet the objectives of the provision, the EPA may "include any system or systems of regulation as the Administrator may deem appropriate." The EPA believes that Congress thereby granted the EPA discretion to determine which measures would best obtain reductions and to determine the appropriate geographical scope for such measures. Inherent in this authority is the power to determine that a national rule with nationwide applicability across both attainment and nonattainment areas is the most

appropriate means to obtain the requisite reductions.

In addition, section 183(e)(3)(A) of the Act expressly directs the EPA to promulgate regulations that "require best available controls." In accordance with the definition of that term in the statute, the EPA is to consider "technological and economic feasibility, health, environmental, and energy impacts" and is to consider, among other things, "the most effective equipment, measures, processes, methods, systems, or techniques" to obtain the reductions. The EPA believes that Congress, thus, clearly directed the EPA to take into account the relative effectiveness of the available means to obtain reductions, including controls that would be applicable to all areas or only to nonattainment areas, and to make its determination as to the proper geographic scope of controls based upon appropriate factors. The EPA has determined that national rules that apply nationwide to both attainment and nonattainment areas are the BAC to insure that reductions in VOC emissions occur for certain categories of products.

The EPA has concluded that a national rule is the more effective approach for reducing emissions from consumer products, automobile refinish coatings, and architectural coatings for the following reasons. First, the EPA believes that a national rule is an appropriate means to deal with the issue of products that are, by their nature, easily transported across area boundaries and many are widely distributed and are used by widely varied types of end-users. For many such products, the end-user may use them in different locations from day-to-day. Because the products themselves are easily transportable, a national rule would preempt opportunities for end-users to purchase such consumer and commercial products in attainment areas and then use them in nonattainment areas, thereby circumventing the regulations and undermining the decrease in VOC emissions in nonattainment areas. The EPA, therefore, believes that a national rule with applicability to products, regardless of where they are marketed, is a reasonable means to ensure that the regulations result in the requisite degree of VOC emission reduction.

Second, the EPA believes that rules applicable only in nonattainment areas would be unnecessarily complex and burdensome for many regulated entities to comply with and for the EPA to administer. The potentially regulated entities under section 183(e) are the manufacturers, processors, wholesale distributors, or importers of consumer

and commercial products. For these three product categories, EPA believes that regulations that would differentiate between products destined for attainment and nonattainment areas should adequately insure that only compliant products go to nonattainment areas. For such a rule to be effective, EPA believes that this would necessitate requiring regulated entities to track their products and control their distribution, sale, and ultimate destination for use to insure that only compliant products go to nonattainment areas. The EPA notes that for architectural coatings and consumer products, regulated entities do not currently track or control distribution of their products once they sell them to retail distributors. Although the EPA recognizes that some product lines in some product categories may only be distributed regionally in areas that are already in attainment, the large majority of the product lines will be distributed nationally. Regulations targeted only at nonattainment areas could, thus, impose significant additional burdens upon regulated entities to achieve the goals of section 183(e).

By comparison, existing State regulations in some instances apply to a broader range of entities, including retail distributors and end users. Given the limitations of section 183(e) as to regulated entities, the EPA believes that regulations applicable to both attainment areas and nonattainment areas is a reasonable means to ensure use of complying products where necessary, while avoiding potentially burdensome impacts and less reliable mechanisms to achieve the goals of section 183(e). Several of the trade associations of the industries for whom the EPA has proposed national rules (i.e., architectural coatings, consumer products, and automobile refinish coatings) have supported national rules that apply to all areas as the most efficient regulatory mechanism from the perspective of marketing and distribution of products. The EPA's consideration of this factor, however, is not meant to imply that it would be inappropriate for States to develop more stringent levels of controls where necessary to attain the ozone standard. Instead, the national standard is expected to reduce the number of States needing to develop separate rules for these categories.

Third, the EPA believes that national rules with nationwide applicability may help to mitigate the impact of ozone and ozone precursor transport across some area boundaries. Recent modeling performed by OTAG and others suggests that, in some circumstances, VOC

emitted outside nonattainment area boundaries can contribute to ozone pollution in nonattainment areas—for example, by traveling relatively short distances into neighboring nonattainment areas. The EPA has recognized the potential for VOC transport in the December 29, 1997, "Guidance for Implementing the 1-hour Ozone and Pre-Existing PM₁₀ NAAQS," concerning credit for VOC emission reductions towards rate of progress requirements. The guidance indicates that the EPA may give credit for VOC reductions within 100 kilometers of nonattainment areas. In addition, the June 1997 recommendations made by OTAG supported the EPA's use of VOC regulations that apply to both nonattainment and attainment areas to implement section 183(e) of the Act for certain products. The particular product categories OTAG cited for national VOC regulations are automobile refinishing coatings, consumer products, and architectural coatings. The EPA believes that regulation of products in attainment areas is necessary to mitigate VOC emissions that have the potential to contribute to ozone nonattainment in accordance with section 183(e) of the Act.

The EPA notes that some commenters asserted that one clause in section 183(e)(3)(A) of the Act compels the conclusion that Congress intended the EPA to regulate consumer and commercial products only in nonattainment areas. That subsection of the Act instructs the EPA to list the products that account for at least 80 percent of the VOC emissions "from consumer or commercial products in areas that violate the NAAQS for ozone." The EPA believes that this clause pertains not to the scope of the regulations that the EPA may choose to impose, but rather to the listing process itself. Thus, the EPA believes that this provision of the statute requires the EPA to regulate the categories of products that account for at least 80 percent of the VOC emissions in nonattainment areas, but does not necessarily control whether the EPA is to regulate such products only in nonattainment areas. Because the EPA has otherwise determined that a national rule with applicability in both attainment and nonattainment areas is the best means to obtain the necessary VOC emission reductions intended by Congress, the EPA believes that the language in question does not preclude that strategy.

Finally, the arguments in this section supporting the EPA's authority and rationale for regulating both nonattainment and attainment areas under section 183(e) of the Act are not

intended to imply that the EPA would not consider using its discretion to develop a control techniques guidelines (CTG) document (which would affect VOC emissions only in nonattainment areas) for a category in lieu of a regulation. The EPA recognizes that patterns of distribution and use will vary among categories of products. Therefore, the EPA intends to use its discretion to determine the most efficient and effective mode of regulation for each of the categories listed for regulation under section 183(e) of the Act.

III. Administrative Requirements

A. Dockets

The docket is an organized and complete file of all the information considered by the EPA in the development of this rulemaking. The docket is a dynamic file, since material is added throughout the rulemaking development. The docketing system is intended to allow members of the public to readily identify and locate documents so that they can effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated standards (technical support document submitted at proposal) and the EPA responses to significant comments, the contents of the Docket will serve as the record in case of judicial review (see 42 U.S.C. 7607(d)(7)(A)).

As noted under the "Docket" discussion in the ADDRESSES section of this document, there are four dockets that contain information considered in these listing determinations. Docket No. A-94-65 contains information considered by the EPA in development of the consumer and commercial products study and the subsequent list and schedule for regulation. Docket No. A-92-18 contains information considered by the EPA in the development of the architectural coatings rule. Docket No. A-95-40 contains information on the consumer products rule. Docket No. A-95-18 contains information on the automobile refinishing coatings rulemaking.

B. Paperwork Reduction Act

This action does not involve any information collection requirements subject to an Office of Management and Budget (OMB) review under the *Paperwork Reduction Act*, 44 U.S.C. 3501, *et seq.*

C. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the EPA must determine whether regulatory actions

are significant and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to lead to a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more, or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligation of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, OMB has notified the EPA that it considers this a "significant regulatory action" within the meaning of the Executive Order because it is likely to lead to rules which may meet one or more of the criteria. Accordingly, the EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

D. Executive Order 12875

To reduce the burden of Federal regulations on States and small governments, the President issued Executive Order 12875 on October 26, 1993, entitled *Enhancing the Intergovernmental Partnership*. This executive order requires agencies to assess the effects of regulations that are not required by statute and that create mandates upon State, local, or tribal governments. This action does not create mandates on State, local, or tribal governments. Therefore, the requirements of Executive Order 12875 do not apply to this action.

E. Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act of 1996

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601, *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), requires the EPA to give special consideration to the effect of Federal regulations on small entities and to consider regulatory options that might mitigate any such impacts. The EPA is required to prepare a regulatory flexibility analysis and coordinate with small entity stakeholders if the EPA determines that a rule will have a

significant economic impact on a substantial number of small entities.

The EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final listing action. The EPA has also determined that this listing action will not have a significant economic impact on a substantial number of small entities because this action imposes no requirements. In accordance with the RFA and SBREFA, the EPA has performed the requisite analysis for each of the three rules. A statement of this analysis accompanies each of the three rules, published elsewhere in today's **Federal Register**.

F. Unfunded Mandates Reform Act of 1995

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, the EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more in any one year. Under section 205, the EPA must select the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires the EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that because the final listing action taken today imposes no requirements, it does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector, in any one year. Therefore, the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act do not apply to this action.

The EPA has determined, for the same reason, that the final listing action taken today does not include any regulatory requirements that might significantly or uniquely affect small governments. Thus, today's action is not subject to the requirements of section 203 of the Unfunded Mandates Act.

G. Submission to Congress and the General Accounting Office

The Congressional Review Act, 5 U.S.C. 801, *et seq.*, as added by the SBREFA of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a

copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to publication of this action in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective September 11, 1998.

H. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (the NTTAA), Pub. L. No. 104-113, section 12(d) (15 U.S.C. 272 note), directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standard bodies. The NTTAA requires the EPA to provide Congress, through OMB, explanations when the EPA decides not to use available and applicable voluntary consensus standards.

This action does not involve any technical standards that would require the EPA consideration of voluntary consensus standards pursuant to § 12(d) of the NTTAA. This action does not establish any requirements.

I. Executive Order 13045

Executive Order 13045 applies to any rule that the EPA determines (1) that the rule is economically significant as defined under Executive Order 12866, and (2) that the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the EPA must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the EPA.

This final action is not subject to Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), because it is not an economically significant regulatory action as defined by Executive Order 12866, and it does

not address an environmental health or safety risk that would have a disproportionate effect on children.

Executive Order 13084

Under Executive Order 13084, the EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or the EPA provides to the Office of Management and Budget a description of the prior consultation and communications the agency has had with representatives of tribal governments and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires the EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." Information available to the Administrator does not indicate that this action will have any effect on Indian tribal governments.

List of Subjects in 40 CFR Ch. I

Environmental protection, Air pollution control, Consumer and commercial products, Consumer products, Ozone, Volatile organic compound.

Dated: August 14, 1998.

Carol M. Browner,
Administrator.

[FR Doc. 98-22658 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 59

[AD-FRL-6149-5]

RIN 2060-AE35

National Volatile Organic Compound Emission Standards for Automobile Refinish Coatings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action promulgates national volatile organic compound (VOC) emission standards for automobile refinish coatings pursuant to

section 183(e) of the Clean Air Act (Act). This final rule is based on the Administrator's determination that VOC emissions from the use of automobile refinish coatings have the potential to cause or contribute to ozone levels that violate the national ambient air quality standards (NAAQS) for ozone. Ozone is a major component of smog which causes negative health and environmental impacts when present in high concentrations at ground level. The final rule is estimated to reduce VOC emissions by 31,900 tons per year (tpy) by requiring manufacturers and importers to limit the VOC content of automobile refinish coatings.

EFFECTIVE DATE: The effective date is September 11, 1998. Incorporation by reference of certain publications listed in the regulation is approved by the Director of the Federal Register as of September 11, 1998.

ADDRESSES: *Technical Support Documents.* The regulation promulgated today is supported by two background information documents (BIDs), one specific to the automobile refinish coatings rule, and one that addresses comments on the study and Report to Congress under section 183(e) that is a basis for this rule. The document, "Volatile Organic Compound Emissions from Automobile Refinishing—Background Information for Promulgated Standards" (EPA-453/R-96-011b), contains a summary of the public comments made on the proposed automobile refinish coatings rule and the Agency's responses to the comments. The document, "Response to Comments on Section 183(e) Study and Report to Congress" (EPA-453/R-98-007), contains a summary of all the public comments made on the section 183(e) study and Report to Congress and the list and schedule for regulation as well as the Agency's responses to the comments.

These documents may be obtained from several sources: (1) the docket for this rulemaking; (2) the U.S. Environmental Protection Agency Library (MD-35), Research Triangle Park, North Carolina 27711, telephone (919) 541-2777; (3) National Technical Information Services, 5285 Port Royal Road, Springfield, Virginia 22151, telephone (703) 487-4650; and (4) through the Internet at <http://www.epa.gov/ttn/oarpg/ramain.html>.

Docket. Docket No. A-95-18, containing supporting information used in developing the promulgated standards, is available for public inspection and copying from 8:00 a.m. to 5:30 p.m. Monday through Friday, at the EPA's Air and Radiation Docket and

Information Center, Waterside Mall, Room M-1500, Ground Floor, 401 M Street SW, Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Morris at (919) 541-5416, Organic Chemicals Group, Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711 (morris.mark@epamail.epa.gov).

SUPPLEMENTARY INFORMATION:

Regulated Entities. Entities potentially regulated by this action are manufacturers and importers of automobile refinish coatings or coating components. An automobile refinish coating component is a portion of a coating, such as a reducer or thinner, hardener, additive, etc., recommended (by its manufacturer or importer) to distributors or end-users for automobile refinishing. Automobile refinishing is the process of coating automobiles or their parts, including partial body collision repairs, that is subsequent to the original coating applied at an automobile original equipment manufacturing plant. Regulated categories and entities include:

Category	Examples of regulated entities
Industry ..	Manufacturers or importers of automobile refinish coatings or coating components that are manufactured for sale or distribution in the U.S., including all U.S. territories.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that the EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your product is regulated by this action, you should carefully examine the applicability criteria in § 59.100 of the final rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section of this preamble.

Judicial review. The EPA proposed this section 183(e) rule for automobile refinish coatings on April 30, 1996 (61 FR 19005), and issued a supplemental proposal on December 30, 1997 (62 FR 67784). This notice promulgating a rule for automobile refinish coatings constitutes final administrative action concerning the proposal. Under section 307(b)(1) of the Act, judicial review of

this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by November 10, 1998. Under section 307(d)(7)(B) of the Act, only an objection to this rule which was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the Act, the requirements established by today's final action may not be challenged separately in any civil or criminal proceeding brought by the EPA to enforce these requirements.

Technology Transfer Network. The Technology Transfer Network (TTN) is one of the EPA's electronic bulletin boards. The TTN provides information and technology exchange in various areas of air pollution control, including copies of this rule and supporting documents. The TTN is free and is accessible through the Internet at "<http://www.epa.gov/ttn>." For more information on the TTN, call the HELP line at (919) 541-5384.

Outline. The following outline is provided to aid in reading this preamble to the final rule.

I. Purpose and Summary of the Standards

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I. Purpose and Summary of the Standards

A. Purpose of Regulation

1. Ground-Level Ozone

Ground-level ozone, which is a major component of "smog," is formed in the atmosphere by reactions of VOC and oxides of nitrogen (NO_x) in the presence of sunlight. The formation of ground-level ozone is a complex process that is affected by many variables.

Exposure to ground-level ozone is associated with a wide variety of human health effects, agricultural crop loss, and damage to forests and ecosystems. Acute health effects are induced by short-term exposures to ozone (observed at concentrations as low as 0.12 parts per million (ppm)), generally while individuals are engaged in moderate or heavy exertion, and by prolonged exposures to ozone (observed at concentrations as low as 0.08 ppm), typically while individuals are engaged in moderate exertion. Moderate exertion levels are more frequently experienced by individuals than heavy exertion levels. The acute health effects include pulmonary function responses, transient respiratory symptoms, effects on exercise performance, increased sensitivity of airways to irritants, increased susceptibility to respiratory infection, increased hospital admissions and emergency room visits, and pulmonary inflammation. Groups at increased risk of experiencing such effects include active children, outdoor workers, and others who regularly engage in outdoor activities and individuals with preexisting respiratory disease. Available information also suggests that long-term exposures to ozone may cause chronic health effects (e.g., structural damage to lung tissue and accelerated decline in baseline lung function).

2. Automobile Refinish Coatings Regulation

Before today's rule, VOC emissions from the use of automobile refinish coatings were not regulated at the Federal level. However, several States have developed automobile refinishing rules. Some industry parties and States have urged the EPA to issue rules for automobile refinish coatings to encourage consistency across the country. Many States with ozone pollution problems are supportive of an EPA rulemaking that will assist them in their efforts toward achievement of ozone attainment. Although regulated entities in all States will be required to comply with these national standards, some States may wish to promulgate

VOC standards more stringent than the national rule to assist in achieving attainment with the NAAQS for ozone.

3. Background on Section 183(e)

Section 183(e) of the Act mandates a new regulatory program for controlling VOC emissions. Through this provision, Congress required the EPA to conduct a study of emissions of VOC into the ambient air from consumer and commercial products to determine their potential to contribute to ozone nonattainment, to develop criteria based upon statutory factors for regulation of such products, and to list for regulation, based on the criteria, categories of products that account for at least 80 percent of the emissions from such products in nonattainment areas, on a reactivity adjusted basis.

In accordance with section 183(e) of the Act, the Administrator has determined that VOC emissions from the use of automobile refinish coatings have the potential to contribute to ozone levels that violate the NAAQS for ozone. Under authority of section 183(e), the EPA conducted a study of the VOC emissions from consumer and commercial products to determine their potential to contribute to ozone levels which violate the NAAQS for ozone. Based on the results of the study, and by application of the criteria, the EPA determined that the emissions from automobile refinish coatings should be regulated under section 183(e). Consequently, the EPA and many States consider the regulation of automobile refinish coatings to be an important component of the overall approach to reducing those emissions that contribute to ozone nonattainment. The EPA's determination that VOC emissions from the use of automobile refinish coatings have the potential to contribute to nonattainment of the ozone NAAQS and the decision to regulate automobile refinish coatings are discussed in the preamble to the proposed rule (61 FR 19005), in the "Consumer and Commercial Products Report to Congress" (EPA-453/R-94-066-A), in the **Federal Register** notice announcing the schedule for regulation (60 FR 15264), and in a separate **Federal Register** notice published today that constitutes final action on the agency's listing of automobile refinish coatings for regulation.

B. Summary of the Standards

Applicability

The provisions of the rule apply to automobile refinish coatings and coating components that are manufactured on or after January 11, 1999 for sale or

distribution in the United States, including the District of Columbia and all U.S. territories. The entities regulated by the rule include manufacturers and importers of automobile refinish coatings or coating components.

The final rule does not apply to coatings or coating components manufactured before the compliance date of the rule, for use by original equipment manufacturers, or for sale outside the United States. The final rule also does not apply to coatings supplied in nonrefillable aerosol containers, lacquer topcoats or their components, or touch-up coatings.

Regulated Entities

Regulated entities are generally defined under section 183(e) of the Act to include potentially manufacturers, processors, wholesale distributors, and importers. Under this final rule, regulated entities include manufacturers and importers of automobile refinish coatings or coating components which are manufactured for sale or distribution in the United States. Since the distribution of coatings has no effect on whether compliant coatings are used, distributors are not regulated entities under this rule.

Standards

Coatings subject to this rule shall comply with the VOC content standards listed in table 1. Combinations of automobile refinish coating components recommended for use in the coating categories given in table 1 shall comply with the appropriate VOC content standards.

TABLE 1.—VOC CONTENT STANDARDS FOR AUTOMOBILE REFINISH COATINGS

Coating category	VOC Content, ^a grams/liter (pounds/gallon)
Pretreatment Wash Primer	780 (6.5)
Primer/Primer Surfacer	580 (4.8)
Primer Sealer	550 (4.6)
Single/2-Stage Topcoats	600 (5.0)
Topcoats of 3 or more stages ..	630 (5.2)
Multi-colored topcoats	680 (5.7)
Specialty Coatings ^b	840 (7.0)

^a VOC content means the amount of VOC in a coating that has been prepared for application according to the regulated entity's mixing instructions, excluding water and exempt compounds. English units are provided for information only. Regulation enforcement will be based on the metric levels.

^b Specialty coatings include adhesion promoters, low-gloss coatings, bright metal trim repair coatings, cut-in (jamming) clearcoats, elastomeric materials, impact-resistant coatings, underbody coatings, uniform finish blenders, and weld-through primers.

Labeling Requirements

Each regulated entity must provide the following information on each container: (1) the day, month, and year on which the product was manufactured; or (2) a code indicating such a date.

Reporting

Regulated entities must file an initial report to the appropriate EPA Regional Office no later than January 11, 1999 or within 180 days after a regulated entity becomes subject to the rule, whichever is later. Addresses for the EPA Regional Offices are provided in § 59.108. The initial report must include the following information:

- (1) The name and mailing address of the regulated entity.
- (2) In cases where codes are used to represent the date of manufacture, the regulated entity shall submit an explanation of each date code to the Administrator.
- (3) The street address of each of the regulated entity's facilities in the United States that is producing, packaging, or importing automobile refinish coatings or coating components subject to the provisions of this subpart.
- (4) A list of the categories from table 1 of this subpart for which the regulated entity recommends the use of automobile refinish coatings or coating components.

Each regulated entity must submit an explanation of any new date codes used by the regulated entity no later than 30 days after products bearing the new date code are first introduced into commerce.

Except for applications that may be submitted by regulated entities requesting variances, there are no reporting requirements beyond those described above.

Variance

The rule allows regulated entities to submit a written application to the Administrator requesting a variance if, for technological or economic reasons beyond their reasonable control, they cannot comply with the requirements of the rule.

Upon receipt of a variance application, the Administrator will determine whether, under what conditions, and to what extent, a variance from the requirements of the rule is necessary and will be permitted.

An approved variance will designate a final compliance date and a condition

that specifies increments of progress necessary to assure timely compliance. A variance shall end immediately upon the failure of the party to whom the variance was granted to comply with any term or condition of the variance.

Compliance Provisions

The rule specifies the procedures to determine the VOC content of coatings subject to the rule. The VOC content of coatings will be determined using the EPA's Method 24—"Determination of Volatile Matter Content, Water Content, Density, Volume Solids, and Weight Solids of Surface Coatings," found in 40 CFR part 60, appendix A. Method 24 is the EPA's standard method for determining the VOC content of coatings.

For purposes of determining whether a primer qualifies as a pretreatment wash primer, the acid weight percent of such primers shall be determined using the American Society for Testing and Materials (ASTM) Test Method D 1613-96 (incorporated by reference) to determine compliance with the definition of pretreatment wash primer as provided in § 59.101 of this subpart.

For purposes of determining whether a coating qualifies as a low-gloss coating, the gloss reading of low-gloss coatings shall be determined using ASTM Test Method D 523-89 (incorporated by reference) to determine compliance with the definition of low-gloss coating as provided in § 59.101 of this subpart.

Although the EPA has chosen Method 24 as the reference method for determining compliance with the VOC content requirements of this rule, it is not the exclusive method for determining compliance. The manufacturer or importer may also use a different analytical method than Method 24 (if it approved by the Administrator on a case-by-case basis), formulation data, or any other reasonable means to determine the VOC content of coatings. However, the EPA may require a Method 24 analysis to be conducted, and if there are any inconsistencies between the results of a Method 24 test and any other means for determining VOC content, the Method 24 test results will govern. The EPA can use other evidence as well to establish whether or not a manufacturer or importer is in compliance with the provisions of this rule.

II. Summary of Considerations in Developing the Rule

A. Technical Basis of Regulation

Standards under Section 183(e) of the Act must reflect the Agency's

determination of best available controls (BAC) for the product category. The Act defines BAC as:

The degree of emissions reduction the Administrator determines, on the basis of technological and economic feasibility, health, environmental, and energy impacts, is achievable through the application of the most effective equipment, measures, processes, methods, systems or techniques, including chemical reformulation, product or feedstock substitution, repackaging, and directions for use, consumption, storage, or disposal.

The statute thus empowers the EPA to examine a variety of considerations to use in determining the best means of obtaining VOC emission reductions from a given consumer or commercial product category. As discussed in the preamble to the proposed rule (61 FR 19005, April 30, 1996), the primary factors the EPA considered in determining BAC for automobile refinishing coatings were technological and economic feasibility, and environmental impacts.

The EPA has determined that BAC for automobile refinishing coatings consists of specific VOC content limits, expressed as mass of VOC per volume of coating, for each type of coating as listed in § 59.102. Section 183(e) of the Act allows the EPA to consider a wide range of strategies and technologies in determining BAC. The determination must be based on technological and economic feasibility, as well as on health, environmental, and energy impacts. The EPA has determined that, in most cases, all or most of a coating's VOC content is emitted during use. Therefore, the EPA concluded that limits on the VOC content would be the most feasible and least disruptive control measure to obtain appropriate VOC emission reductions. In working to comply with State VOC rules over the past several years, automobile refinishing coating manufacturers have already developed low-VOC coatings. The standards reflect the degree of emission reduction that the EPA has determined to be BAC for different types of automobile refinishing coatings. The EPA selected the VOC limits based primarily on existing State and local VOC emission standards, coating VOC content and sales information, analysis of coating technologies, performance considerations, cost considerations, market impacts, and stakeholder input.

As discussed in the preamble to the proposed rule, the BAC selection process involved the selection of coating categories and the determination of VOC content limits for those categories. Primers and topcoats are the general categories of automobile refinishing

coatings. Decisions to divide these categories into more specific categories was a direct consequence of the VOC content levels under consideration. For example, the primer category is fairly broad and encompasses several coating applications. The determination of the primer (and primer surfacer) VOC limit was discussed in the preamble to the proposed rule. The creation of a separate category for pretreatment wash primers was necessary because the EPA had no information indicating this specific primer type could achieve the lower VOC limit of the general primer category. The limit selected for the pretreatment wash primer category is essentially the VOC level of such primers in use today; therefore, the EPA anticipates no emission reductions from this low-usage category. The VOC content limit determined to be BAC for another category, primer sealers, is lower than the primer limit, since coating product information indicates that primer sealers can achieve a lower limit.

Topcoats are also divided into several categories. BAC for single and 2-stage topcoats was determined after considering the technical feasibility and cost impacts of the use of topcoats at various VOC content levels. As discussed in the preamble to the proposed rule, the EPA has no information indicating that topcoats of 3 or more stages can achieve the same limit as single and 2-stage topcoats; therefore, a separate category was created for such topcoats. As a result of a public comment, another topcoat category has been added in this final rule for multi-colored topcoats. These low-usage coatings are durable and wear resistant, and are used mainly for lining the cargo beds of trucks. The EPA established the VOC limit for this category based on State rules and public comments. The EPA has no information indicating that a lower VOC limit can be achieved.

The specialty coating category contains several coatings designed for very specific uses. These coatings do not exist with a wide variety of VOC levels. Like pretreatment wash primers, the VOC limit for specialty coatings is essentially the VOC level of such coatings already in use. This category contains coatings that are used infrequently, and the EPA does not anticipate VOC reductions from this category.

B. Stakeholder and Public Participation

The EPA proposed the automobile refinishing coatings rule and published the preamble in the **Federal Register** on April 30, 1996 (61 FR 19005) and

December 30, 1997 (62 FR 67784). The EPA placed the proposed regulatory text, BID, and Economic Impact Analysis (EIA) in a docket open to the public at that time and made them available to interested parties. The EPA solicited comments at the time of the proposal.

To provide interested persons the opportunity for oral presentation of data, views, or arguments concerning the proposed standards, a public hearing was held in Research Triangle Park, North Carolina on May 30, 1996. Seven people presented oral testimony at this hearing. The public comment period was open from April 30, 1996, to July 1, 1996, and from December 30, 1997, to February 13, 1998. Twenty-six comment letters were received. Commenters included industry representatives, States, trade associations, and others. The comments have been carefully considered, and changes have been made to the proposed standards when determined by the Administrator to be appropriate. A detailed discussion of these comments and responses can be found in the Background Information Document, which is referenced in the ADDRESSES section of this preamble.

A separate document in today's **Federal Register** contains a summary of public comments and EPA responses regarding the section 183(e) study, the Report to Congress, the list of consumer and commercial product categories selected for regulation, and the schedule for regulation.

III. Summary of Impacts

A. Volatile Organic Compound Reductions

The proposed standards would reduce nationwide emissions of VOC from the use of automobile refinish coatings by an estimated 28,900 Mg (31,900 tons). These reductions represent a 33% reduction from the 1995 baseline emissions estimates. Since many regulated VOC species are also on the list of hazardous air pollutants (HAP) in section 112 of the Act, the proposed rule is expected to reduce some HAP emissions from the use of automobile refinish coatings.

B. Health Effects

Because VOC are precursors to ozone formation, the VOC reductions from automobile refinish coatings will contribute to a decrease in adverse health effects that result from exposure to ground-level ozone. These health effects result from short-term or prolonged exposure to ground-level ozone and include transient respiratory

symptoms, effects on exercise performance, increased airway responsiveness, increased susceptibility to respiratory infection, increased hospital admissions and emergency room visits, and transient pulmonary inflammation. Available information also suggests that long-term exposures to ozone may cause chronic health effects (e.g., structural damage to lung tissue and accelerated decline in baseline lung function).

C. Secondary Air, Water, and Solid Waste Impacts

No significant adverse secondary air, water, or solid waste impacts are anticipated from compliance with these standards. Generally, the use of low-VOC coatings, a pollution prevention technique, will be used to comply with these standards. In cases where conversion from solventborne to waterborne coatings is the method used to achieve compliance, an increase in wastewater discharge may occur if waste from the manufacture of waterborne coatings is discharged by manufacturers to publicly owned treatment works.

The regulations do not impact existing product inventories. Products manufactured before the compliance deadline are not affected. Excluding existing product inventories from the regulations will eliminate any incremental solid waste increase due to discarded unsold products. The new products are not expected to require any more packaging than existing products, and thus the volume of discarded packaging should not increase.

D. Energy Impacts

The EPA anticipates no increase in energy usage as a result of this rule. The standards do not require the use of control devices that utilize energy to reduce the amount of VOC emitted to the air. The EPA is also not aware of any incremental energy use increase expected from the production of new formulations of automobile refinish coatings and coating components.

E. Cost and Economic Impacts

The total cost of this rule includes coating manufacturer process modification costs, and costs for training coating manufacturer representatives, distributors, and body shop personnel. The annual cost of this rule is 4.5 million dollars (1993 dollars), or about \$160 per megagram of VOC emissions reductions. This cost per megagram of VOC emission reduction makes this rule an economically efficient means of obtaining VOC emission reductions, when compared to

the cost per megagram of reduction potentially available through other control measures. Economic impacts are predicted to be minimal with a maximum price increase of two-tenths of one percent (0.2%) or less, and a 0.02% increase in the cost of an average repair job. Small business impacts are not expected to be significant.

IV. Significant Comments and Changes to the Proposed Standards

The EPA received a total of 26 comment letters on the proposed rule. In addition, 7 speakers presented testimony at a public hearing held in Research Triangle Park, North Carolina, on May 30, 1996. The more significant comments on the rule are discussed in this section of the preamble. A complete summary of comments and the EPA's full responses are presented in the BID for the promulgated rule, as referenced in the ADDRESSES section of this preamble.

In response to public comments on the proposed standards, the EPA has made several changes to the final rule. While most of the changes are clarifications designed to make the Agency's intent clearer, the EPA did make changes to the proposed rule based upon comments received. The changes include:

- Addition of definitions for "automobile refinish coating component," "low-gloss coating," and "multi-colored topcoat,"
- Exemption of lacquer topcoats,
- Clarification of the requirements for coatings with multiple uses,
- Addition of the multi-colored topcoat category, and
- Reorganization of the rule for clarity.

The following sections of the preamble discuss the most significant issues raised by commenters and the EPA's responses to them.

A. Applicability

Several commenters supported including manufacturers and importers of automobile refinish coating components, such as thinners and hardeners, as regulated entities. The commenters stated that excluding coating component manufacturers and importers would likely result in the use of coatings with VOC levels higher than the proposed standards, since these components would not be required to be part of a compliant coating system.

Regulated entities under the April 30, 1996, proposed rule included only manufacturers and importers of complete automobile refinish coatings. The VOC content of an automobile refinish coating depends, however, on

the VOC content levels of all components that make up the coating. Coating users sometimes combine components made by multiple manufacturers when preparing a coating. Since components themselves are not coatings, a manufacturer who produces only hardeners, for example, would not have been subject to the April 1996 proposed rule. Such a manufacturer could recommend that its hardener be combined with components of other manufacturers, possibly resulting in a coating that exceeds the VOC content standards of the rule. Such a situation could essentially undermine the VOC emission reductions of the rule.

The EPA proposed in a supplemental notice (December 30, 1997, 62 FR 67784) to include as regulated entities all manufacturers and importers of automobile refinish coatings or coating components. The EPA also proposed a mechanism for determining compliance with the rule for coatings consisting of components made or imported by multiple entities. Under this approach, manufacturers and importers of coatings or coating components must comply with the VOC content limits for complete coatings by calculating the VOC content of coatings that result from the use of their components in accordance with their recommendations.

Determining compliance for coatings consisting of components made or imported by one regulated entity is relatively easy. In general, compliance would be determined by "spot checking," where the EPA (or the regulated entity, if requested by the EPA) would obtain coating components, mix the components in the ratios recommended by the regulated entity (on the containers or in any product literature), and analyze the resulting coating using Method 24. The EPA considered requiring regulated entities to perform VOC testing of their coatings on a regular basis (e.g., every nth batch) to demonstrate compliance with the rule, but believes that such a requirement would be economically burdensome. The EPA believes that random spot checks will be adequate to encourage regulated entities to assure that all of their coating batches are compliant.

Determining the compliance of coatings that consist of components made or imported by multiple regulated entities is more difficult. The EPA considered several options for determining compliance in these cases. The EPA considered requiring regulated entities (that recommend the use of their components with those of other

regulated entities) to use Method 24 to test the coatings resulting from their recommendations. Using this information, the entities could establish the maximum allowable VOC content of their components, and the EPA would spot check components to determine compliance. However, the EPA has no standard method for determining the VOC content of individual components. Also, the VOC content of a coating is not simply the sum of the VOC contents its components, so component VOC content is not necessarily an indicator of the VOC content of the overall coating. Therefore, the EPA believes it is technically infeasible to determine compliance using component VOC content information.

Because of the technical infeasibility of the approach described above, the EPA has concluded that the responsibility for coatings should be based on product recommendations. In other words, if an entity recommends a combination of components (made or imported by one or more regulated entities), then that entity is responsible for the compliance of the resulting coating. There may be cases where a coating resulting from an entity's recommendation is noncompliant because of the components of other entities. Since this occurrence may be beyond the control of the recommending entity, the Agency determined that it would be appropriate to provide regulated entities with a means to establish their compliance with the rule, and the Agency solicited comments on such a mechanism. In this event, the final rule provides regulated entities the opportunity to submit new or existing Method 24 test data demonstrating the compliance of the coating resulting from their recommendation. This option is technically feasible, and is appropriate since compliance is determined in essentially the same way for all regulated entities.

It is important to note that regulated entities would be liable only for the VOC content of the coatings that result from their recommendations. For example, if a regulated entity recommends that three of its coating components be combined and used in automobile refinishing, it is responsible for the coating that results from that combination. If a regulated entity recommends the substitution of one of its components for that of another regulated entity, the former entity is responsible for the resulting coating. A regulated entity is not responsible for coatings resulting from the recommendations of others, even if such

recommendations involve the use of components of that regulated entity.

B. Lacquer Topcoats

In the proposed rule, the EPA indicated that it was considering exempting lacquer topcoats from the rule or including them in a specialty coating category and limiting their production. Several commenters supported the exemption of lacquer topcoats from the rule because they account for only 5–10% of coating usage, and their use is decreasing because automobile manufacturers use other coating types on new automobiles. These commenters stated that lacquers are used mainly by hobbyists who wish to restore vehicles to their original condition, including the paint finish. One commenter stated the use of lacquers to refinish modern vehicles is untenable because of inferior durability and aesthetics.

Another commenter stated that the EPA should classify lacquer topcoats as specialty coatings and consider limiting their production, since an exemption for lacquers would create inconsistencies between the national rule and State rules that do not exempt them. The commenter stated that limiting lacquer production would aid in the compliance with State rules.

The EPA has determined that it is appropriate to exempt lacquer topcoats from the final rule. The EPA agrees lacquer topcoats are less desirable than other coating types for refinishing modern automobiles, and that their use is therefore not likely to increase since they are not used on new automobiles. Lacquers are not as durable as other coatings. Since they dry by solvent evaporation alone (rather than through chemical crosslinking), they are not resistant to solvent attack. Although other coatings generally can be used to refinish antique and classic automobiles, the finish would not be the "original" finish desired by users in this niche of automobile refinishing. The EPA exempted lacquer topcoats from the final rule because their use is decreasing, their contribution to the total VOC emissions is small, they fill a niche in the automobile refinish industry, and they cannot be reformulated to meet the VOC content limit for topcoats.

Including lacquer topcoats in a specialty coating category and limiting their production, as suggested by one commenter, does not appear to be a viable option. First, production limits set significantly below current usage levels would cause shortages of lacquer topcoats. Such shortages would restrict consumer access to the product. Second,

production limits set at or near current usage levels would be equivalent to an exemption, since lacquer topcoat usage is not likely to increase. The additional recordkeeping necessary to make a production limit enforceable would be burdensome on both regulated entities and the EPA. For these reasons, the EPA decided against the creation of a specialty category with limits on production for lacquer topcoats.

Some commenters noted that an exemption would lead to an inconsistency between State and federal rules for this coating type. The EPA acknowledges that an exemption for lacquer topcoats under the national rule may make the rule less stringent than some State rules, but the EPA notes that States may still choose to be more stringent than the national rule by the inclusion of such coatings in their own rules.

C. Specialty Coatings

In the preamble to the proposed rule, the EPA requested comments on methods to determine and enforce production limits for specialty coatings. Production limits were considered by the EPA as a way to prevent abuse of an open-ended definition of specialty coatings. Several commenters on the proposed rule stated that an open-ended definition of specialty coatings would allow refinish coating manufacturers to produce coatings compatible with new substrates and coatings used on new vehicles.

In the preamble to the proposed rule, the EPA discussed the difficulties associated with specialty coating production limits. Since some specialty coatings are just modifications of other coatings, it is unclear what should be limited. Also, production limits would adversely affect manufacturers and importers that produce primarily specialty coatings. Several commenters reiterated these concerns, but no comments were received suggesting production limits or how such limits could be determined or enforced. Therefore, the final rule does not include production limits for specialty coatings.

D. Test Methods

One commenter stated that the EPA had not designated a reliable test method for determining the acid content of pretreatment wash primers. The proposed method, ASTM Test Method D 1613-91, covers the determination of total acidity in organic compound and hydrocarbon mixtures used in paints and other substances. This method consists of a titration using a color indicator to determine the endpoint of

the titration. The EPA agrees that since some pretreatment wash primers are pigmented, tests using color indicators may not work. However, the proposed method can be used to determine the acid content of the acid-containing component of the primer, which does not contain the pigment.

Pretreatment wash primers typically consist of two components: a "base" coating and a catalyst. The base contains the pigment, and the catalyst contains the acid. The catalyst is a mixture of organic compounds that contains acid; therefore, it is in the scope of the proposed method. To determine the overall weight percent of acid in the primer, calculations must be performed that involve the acid content of the catalyst and the mixing ratio of the base to the catalyst. The EPA proposed this use of ASTM Test Method D 1613-91 in the December 30, 1997, supplemental proposal. Several commenters agreed with this use of the method. One commenter on the supplemental proposal, however, stated that coating manufacturers may develop a single component pretreatment wash primer, and wondered what method would be used in such cases. Since no such coatings currently exist, the EPA has not proposed a test method for them; however, the final rule does contain a provision which allows the use of alternative methods when warranted.

E. Coatings With Multiple Uses

Several commenters recommended clarification of a proposed rule provision dealing with coatings having multiple uses. One commenter stated that a topcoat modified for a specific purpose, thus making it a specialty coating, can be interpreted to be noncompliant under the proposed rule if it does not meet the topcoat limit, which is the lowest applicable VOC content standard.

To avoid confusion, the EPA has removed the provision mentioned by the commenters. The EPA's intent in the proposed provision was to clarify that if the same combination (and mixing ratio) of coating components were recommended for use in more than one coating category, then the lowest VOC content standard would apply. Different combinations and/or mixing ratios of coating components are considered different coatings. The modified topcoat described by a commenter is not considered a topcoat if it meets the definition of a specialty coating; therefore, it would not be required to meet the topcoat VOC content standard. A provision has been added to the final rule (§ 59.102(b)) for clarification.

V. Administrative Requirements

A. Docket

The docket is an organized and complete file of all the information considered by the EPA in the development of this rulemaking. The docket is a dynamic file, since material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to readily identify and locate documents so that they can effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated standards and the EPA responses to significant comments, the contents of the docket will serve as the record in case of judicial review [see 42 U.S.C. 7607(d)(7)(A)].

B. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060-0353.

The information collections required under this rule are needed as part of the overall compliance and enforcement program. The information will be used by the EPA to identify the regulated entities subject to the rule and to ensure their compliance with the rule. The reporting and labeling requirements are mandatory and are being established under sections 114 and 183(e) of the Act. All information submitted to the EPA for which a claim of confidentiality is made will be safeguarded according to the EPA policies set forth in Title 40, Chapter 1, Part 2, Subpart B—Confidentiality of Information (see 40 CFR part 2; 41 FR 36902, September 1, 1976; amended by 43 FR 39999, September 8, 1978; 43 FR 42251, September 28, 1978; 44 FR 17674, March 23, 1979).

The only information collection requirements of the rule are for labeling and reporting. To determine whether a coating or coating component is manufactured before or after the compliance date of the rule, the date of manufacture, or code representing the date, must appear on the container. Manufacturers currently include this information on containers. The rule requires all coating or coating component manufacturers and importers to submit an initial report containing their name and mailing address, an explanation of coating or coating component date codes, if codes are used to represent the date of

manufacture or import, and a list of facilities where coatings or coating components are manufactured or imported. Reporting beyond the initial report is required only for the explanation of any new date codes used by manufacturers or importers, and for requests for variances. The information to be reported is not of a sensitive nature.

The EPA estimated the cost and hour burden of the information collection requirements of the rule. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency.

This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The initial report must be submitted by all coating or coating component manufacturers and importers. Averaged over a 3 year period, the EPA estimates that the initial report will require 8 hours to complete, and will be submitted by 10 respondents annually. Beyond the initial report, the EPA estimates that 3 respondents per year will spend 2 hours each reporting the explanations of any new date codes used. The total annual cost of the reporting requirements of the proposed rule is \$3,200.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15. The EPA is amending the table in 40 CFR part 9 of currently approved information collection request control numbers issued by OMB for various regulations to list the information requirements contained in this final rule.

C. Executive Order 12866

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), the EPA must determine whether a regulatory action is "significant" and therefore subject to OMB review and the requirements of

this Executive Order to prepare a regulatory impact analysis (RIA). The Order defines "significant regulatory action" as one that is likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the executive order.

Pursuant to the terms of the executive order, the EPA has determined that this final rule is not a "significant regulatory action" within the meaning of the executive order.

D. Executive Order 12875

To reduce the burden of federal regulations on States and small governments, the President issued Executive Order 12875 on October 26, 1993, entitled Enhancing the Intergovernmental Partnership. In particular, this executive order is designed to require agencies to assess the effects of regulations that are not required by statute and that create mandates upon State, local, or tribal governments. This regulation does not create mandates upon State, local, or tribal governments.

E. Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act of 1996

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601, *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), requires the EPA to give special consideration to the effect of Federal regulations on small entities and to consider regulatory options that might mitigate any such impacts. The EPA is required to prepare a regulatory flexibility analysis, including consideration of regulatory options for reducing any significant impacts, unless the Agency determines that a rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

The EPA performed an Initial Regulatory Flexibility Analysis (IRFA)

to determine the extent of any impacts under the proposed rule. This IRFA was included in the docket for the proposed rule. In the supplemental proposal, the EPA proposed to expand the class of regulated entities to include all automobile refinish coating component manufacturers and importers.

The EPA estimates there are about 20-25 companies producing automobile refinish coatings and coating components. At least 10 of these are large companies that have the majority of the industry market share. The EPA believes that the remaining 10-15 companies have fewer than 500 employees and are therefore small entities in accordance with Small Business Administration regulations applicable to this rule. Several of the small companies produce only thinners and reducers. The thinners/reducers used in low-VOC coatings are not significantly different from those used in conventional coatings; therefore, the rule will not have a significant impact on manufacturers of thinners/reducers because little, if any, reformulation of these components will be necessary under the rule. Some of the remaining small companies already produce low-VOC coatings and coating components because they operate in areas that already have State or local automobile refinish rules in effect. Most State and local rules are at least as stringent as the national rule. The EPA concludes, therefore, that the rule will not have a significant impact on these companies.

The remaining small companies will be impacted by the rule, but the EPA believes that the impact will not be significant. The impacts of the rule are from process modifications, training, and reporting requirements, as discussed in the IRFA. Process modifications are those changes that may be necessary for the production of low-VOC (high-solids) coatings, including the use of different mixing and pumping equipment. Some manufacturers affected by State and local rules have already complied with those rules by changing the recommended mixing ratios of components and have not changed the components themselves in a significant way; therefore, few process modifications have likely been necessary in these cases. Where process modifications are necessary, their impact will not be significant; when such impacts are examined assuming that they will be passed on to the user (as was done in the IFRA), the impacts do not significantly affect the cost of coatings or refinish jobs.

The EPA believes that the impacts from training and reporting

requirements of the final rule will be minimal. Many States have developed automobile refinish rules since the time the impacts analysis for the proposed national rule was performed, and the regulated entities have already taken steps to comply with such regulations. It is likely that most, if not all, regulated entities are already familiar with low-VOC coatings; therefore, the need for training (and, thus, training costs) are likely overstated in the analysis for the proposed rule. Training was estimated to cost less than \$500 per individual for the proposed rule. For small entities with few employees needing training, this cost would not be significant. Reporting requirements of the proposed rule consisted of an initial report that provides the EPA with basic information about regulated entities (name, location, etc.), and periodic reports (if necessary) to explain any new date codes that regulated entities may use to indicate the manufacture date of components. The EPA has retained the same labeling and reporting requirements in the final rule. Given the limited nature of the reporting requirements, the EPA believes that the impact of the reporting requirements of the final rule will not be significant.

The EPA does not have data sufficient to quantify precisely the impact of the rule by measures such as percentage of sales, but the nature of the impacts are such that the impacts will be small. The EPA bases this conclusion upon the information that was reasonably available to the Agency.

There are several aspects of the final rule which the EPA has included to minimize any impacts to small entities. First, the EPA has not required regulated entities to perform initial VOC testing of coatings or coating components or any of the coatings that might result from the combination of the entity's components with those of other regulated entities. The EPA believes that such an approach would have required regulated entities to perform numerous tests which, in the aggregate, could have imposed significant costs upon regulated entities. The EPA believes that such a requirement could have a disproportionate impact upon small entities. Instead, the EPA has linked responsibility for a coating's compliance with the regulated entity's recommendations for use. The EPA will assure compliance by "spot-checking" the VOC content of the coatings that result from such recommendations.

Second, the EPA has not required regulated entities to perform periodic VOC testing of coating or coating component batches. The EPA considered requiring regulated entities

periodically to test batches of their coatings or coating components to ensure that the VOC content of coatings resulting from the combination of such components would be compliant. As discussed above, compliance with the rule will be determined by the spot-checking of coatings. Regulated entities may rely on formulation data only to assure themselves of their compliance, or they may decide to perform some VOC testing for this purpose, but the EPA is not requiring batch testing. The EPA believes that not requiring batch testing will limit the impact upon regulated entities and, in particular, will help to alleviate impacts upon small entities.

Finally, the EPA has not required recordkeeping by regulated entities. The EPA considered requiring regulated entities to maintain records containing information on coating and coating component batches but determined that such records would not aid significantly in the enforcement of the standard. As stated above, the only reporting requirements are an initial report that allows the EPA to determine the universe of regulated entities, and reports that explain date codes if such codes are used to indicate the date of manufacture. The EPA believes that minimization of recordkeeping and reporting requirements will help to decrease impacts upon small entities.

The EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. Based on the results of the analysis at proposal (which was unaffected by public comments), the EPA concluded that this rule does not have a significant economic impact on a substantial number of small entities.

F. *Unfunded Mandates Act of 1995*

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, the EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more in any one year. Under section 205, the EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires the EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

Based upon the analysis presented in the EIA, the EPA has determined that the action promulgated today does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector, in any one year. Therefore, the requirements of Sections 202 and 205 of the Unfunded Mandates Reform Act do not apply to this action. The EPA has likewise determined that the final rule does not include regulatory requirements that would significantly or uniquely affect small governments. Thus, today's action is not subject to the requirements of section 203 of the Unfunded Mandates Act.

G. *Submission to Congress and the Comptroller General*

The Congressional Review Act, 5 U.S.C. § 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. § 804(2). This rule will be effective September 11, 1998.

H. *National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (the NTTAA), Pub. L. No. 104-113, § 12(d) (15 U.S.C. 272 note), directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standard bodies. The NTTAA requires the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

Today's rule includes three test methods. To determine the VOC content of coatings, this rule specifies the use of

the EPA's Method 24. This method describes how to determine VOC content using several American Society for Testing and Materials (ASTM) methods. To determine the acid content of pretreatment wash primers, and to determine the specular gloss of topcoats, this rule specifies the use of other ASTM methods. The EPA proposed these voluntary consensus standards and received no adverse comment on their use for the stated purposes. In preparing the final rule, however, the EPA has investigated to determine the availability of any other existing voluntary consensus standards for use in lieu of the proposed methods. The EPA has searched for additional voluntary consensus standards that might be applicable. The search included use of the National Standards System Network, an automated service provided by the American National Standards Institute for identifying available national and international standards. The EPA has not identified any voluntary consensus standards that are not presently included in Method 24 and that would result in equivalent results. The EPA did identify another voluntary consensus method (ASTM D-3960) that provides instructions for calculating VOC content in many different units. Because this other method does not specify which units to use, it may result in inconsistent applications of the procedure and could make the standard more difficult to enforce. Consequently, the EPA determined that this other voluntary consensus method would be impractical to adopt. In addition, the EPA believes that it is appropriate to use Method 24 both because it has proven reliable and practical to achieve the goals of reducing VOC and because the EPA wishes to foster uniformity in testing nationwide. Accordingly, the EPA has determined that Method 24 constitutes the appropriate method for determining product compliance under this final rule. The EPA has located no alternative voluntary consensus standards more appropriate than those included in today's rule.

I. Executive Order 13045

Executive Order 13045 applies to any rule that the EPA determines (1) is economically significant as defined under Executive Order 12866, and (2) for which the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the EPA must evaluate the environmental health or safety effects of the planned rule on children and

explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), because it is not an economically significant regulatory action as defined by Executive Order 12866, and it does not address an environmental health or safety risk that would have a disproportionate effect on children.

Executive Order 13084

Under Executive Order 13084, the EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or the EPA provides to the Office of Management and Budget a description of the prior consultation and communications the agency has had with representatives of tribal governments and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires the EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." Information available to the Administrator does not indicate that this action will have any effect on Indian tribal governments.

List of Subjects

40 CFR Part 9

Reporting and recordkeeping requirements.

40 CFR Part 59

Environmental protection, Air pollution control, Automobile refinishing, Consumer and commercial products, Incorporation by reference, Ozone, Volatile organic compound.

Dated: August 14, 1998.

Carol M. Browner,
Administrator.

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

PART 9—OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.*, 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.*, 1311, 1313d, 1314, 1321, 1326, 1330, 1344, 1345(d), and (e), 1381; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–i, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.*, 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

2. Section 9.1 is amended by adding the new entries and a heading to the table in numerical order to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

40 CFR citation	OMB control No.
* * * * *	* * * * *
National Volatile Organic Compound Emission Standards for Automobile Refinish Coatings: 59.105	2060–0353
* * * * *	* * * * *

1. Part 59 is added to read as follows:

PART 59—NATIONAL VOLATILE ORGANIC COMPOUND EMISSION STANDARDS FOR CONSUMER AND COMMERCIAL PRODUCTS

Subpart A [Reserved]

Subpart B—National Volatile Organic Compound Emission Standards for Automobile Refinish Coatings

- Sec.
- 59.100 Applicability and designation of regulated entity.
 - 59.101 Definitions.
 - 59.102 Standards.
 - 59.103 Container labeling requirements.
 - 59.104 Compliance provisions.
 - 59.105 Reporting requirements.
 - 59.106 Variance.
 - 59.107 Addresses of EPA Regional offices.
 - 59.108 State Authority.
 - 59.109 Circumvention.
 - 59.110 Incorporations by reference.
 - 59.111 Availability of information and confidentiality.

Table 1 to Subpart B—Volatile Organic Compound (VOC) Content Limits for Automobile Refinish Coatings

Authority: 42 U.S.C. 7511b(e).

Subpart A—[Reserved]**Subpart B—National Volatile Organic Compound Emission Standards for Automobile Refinish Coatings****§ 59.100 Applicability and designation of regulated entity.**

(a) The provisions of this subpart apply to automobile refinishing coatings and coating components manufactured on or after January 11, 1999 for sale or distribution in the United States.

(b) Regulated entities are manufacturers and importers of automobile refinishing coatings or coating components that sell or distribute these coatings or coating components in the United States.

(c) The provisions of this subpart do not apply to automobile refinishing coatings or coating components meeting the criteria in paragraphs (c)(1) through (c)(6) of this section.

(1) Coatings or coating components that are manufactured (in or outside the United States) exclusively for sale outside the United States.

(2) Coatings or coating components that are manufactured (in or outside the United States) before January 11, 1999.

(3) Coatings or coating components that are manufactured (in or outside the United States) for use by original equipment manufacturers.

(4) Coatings that are sold in nonrefillable aerosol containers.

(5) Lacquer topcoats or their components.

(6) Touch-up coatings.

§ 59.101 Definitions.

Adhesion promoter means a coating designed to facilitate the bonding of a primer or topcoat on surfaces such as trim moldings, door locks, and door sills, where sanding is impracticable, and on plastic parts and the edges of sanded areas.

Administrator means the Administrator of the United States Environmental Protection Agency (U.S. EPA) or an authorized representative.

Automobile means passenger cars, vans, motorcycles, trucks, and all other mobile equipment.

Automobile refinishing coating component means any portion of a coating, such as a reducer or thinner, hardener, additive, etc., recommended (by its manufacturer or importer) to distributors or end-users for automobile refinishing. The raw materials used to produce the components that are mixed by the end-user to prepare a coating for application are not considered automobile refinishing coating components. Any reference to automobile refinishing made by a

manufacturer or importer on a container or in product literature constitutes a recommendation for automobile refinishing.

Automobile refinishing coating or coating component importer, or importer, means any company, group, or individual that brings automobile refinishing coatings or coating components from a location outside the United States into the United States for sale or distribution in the United States.

Automobile refinishing coating or coating component manufacturer, or manufacturer, means any company, group, or individual that produces or packages automobile refinishing coatings or coating components for sale or distribution in the United States, including an entity which produces or packages such coatings or coating components under a private label for another party.

Automobile refinishing means the process of coating automobiles or their parts, including partial body collision repairs, that is subsequent to the original coating applied at an automobile original equipment manufacturing plant.

Container means the individual receptacle that holds a coating or coating component for storage and distribution.

Cut-in, or jambing, clearcoat means a fast-drying, ready-to-spray clearcoat applied to surfaces such as door jambs and trunk and hood edges to allow for quick closure.

Elastomeric coating means a coating designed for application over flexible parts, such as elastomeric bumpers.

Exempt compounds means specific organic compounds that are not considered volatile organic compounds due to negligible photochemical reactivity. The exempt compounds are specified in § 51.100(s) of this chapter.

Hardener means a coating component specifically designed to promote a faster cure of an enamel finish.

Impact-resistant coating means a coating designed to resist chipping caused by road debris.

Label means any written, printed, or graphic matter affixed to or appearing upon any automobile refinishing coating or coating component container or package for purposes of identifying or giving information on the product, use of the product, or contents of the container or package.

Lacquer means a thermoplastic coating which dries primarily by solvent evaporation, and which is resolvable in its original solvent.

Low-gloss coating means a coating which exhibits a gloss reading less than or equal to 25 on a 60° glossmeter.

Mixing instructions means the coating or coating component manufacturer's or importer's specification of the quantities of coating components for mixing a coating.

Mobile equipment means any equipment that is physically capable of being driven or drawn upon a highway including, but not limited to, the following types of equipment: construction vehicles (such as mobile cranes, bulldozers, concrete mixers); farming equipment (wheel tractor, plow, pesticide sprayer); hauling equipment (truck trailers, utility bodies, camper shells); and miscellaneous equipment (street cleaners, golf carts).

Multi-colored topcoat means a topcoat that exhibits more than one color, is packaged in a single container, and camouflages surface defects on areas of heavy use, such as cargo beds and other surfaces of trucks and other utility vehicles.

Pretreatment wash primer means a primer that contains a minimum of 0.5 percent acid, by weight, that is applied directly to bare metal surfaces to provide corrosion resistance and to promote adhesion of subsequent coatings.

Primer means any coating applied prior to the application of a topcoat for the purpose of corrosion resistance and/or adhesion.

Primer-sealer means any coating applied prior to the application of a topcoat for the purpose of corrosion resistance, adhesion of the topcoat, and/or color uniformity and to promote the ability of an undercoat to resist penetration by the topcoat.

Primer-surfacer means any coating applied prior to the application of a topcoat for the purpose of filling surface imperfections in the substrate, corrosion resistance, and/or adhesion of the topcoat.

Reducer means any solvent used to thin enamels.

Underbody coating means a coating designed for protection and sound deadening that is typically applied to the wheel wells and underbody of an automobile.

Single-stage topcoat means a topcoat consisting of only one coating.

Specialty coatings means adhesion promoters, low-gloss coatings, bright metal trim repair coatings, jambing (cut-in) clearcoats, elastomeric coatings, impact resistant coatings, underbody coatings, uniform finish blenders, and weld-through primers.

Thinner means any solvent used to reduce the viscosity or solids content of a coating.

Three-stage topcoat means a topcoat composed of a pigmented basecoat, a midcoat, and a transparent clearcoat.

Topcoat means any coating or series of coatings applied over a primer or an existing finish for the purpose of protection or beautification.

Touch-up coating means a coating applied by brush, air-brush, or nonrefillable aerosol can to cover minor surface damage.

Two-stage topcoat means a topcoat consisting of a pigmented basecoat and a transparent clearcoat.

Uniform finish blender means a coating designed to blend a repaired topcoat into an existing topcoat.

United States means the United States of America, including the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and Commonwealth of the Northern Mariana Islands.

Volatile organic compounds or *VOC* means any compound of carbon, other than those organic compounds that the Administrator has excluded in 40 CFR part 51, § 51.100 from this definition.

VOC content means the weight of VOC per volume of coating, calculated according to the procedures in § 59.104(a) of this subpart.

Water hold-out coating means a coating applied to the interior cavity areas of doors, quarter panels and rocker panels for the purpose of corrosion resistance to prolonged water exposure.

Weld-through primer means a primer that is applied to an area before welding is performed, and that provides corrosion resistance to the surface after welding has been performed.

§ 59.102 Standards.

(a) Except as provided in § 59.106 of this subpart, any coating resulting from the mixing instructions of a regulated entity must meet the VOC content limit given in table 1 of this subpart. VOC content is determined according to § 59.104(a).

(b) Different combinations or mixing ratios of coating components constitute different coatings. For example, coating components may be mixed one way to make a primer, and mixed another way to make a primer sealer. Each of these coatings must meet its corresponding VOC content limit in table 1 of this subpart. If the same combination and mixing ratio of coating components is recommended by a regulated entity for use in more than one category in table 1 of this subpart, then the most restrictive VOC content limit shall apply.

§ 59.103 Container labeling requirements.

Each regulated entity subject to this subpart must clearly display on each

automobile refinish coating or coating component container or package, the day, month, and year on which the product was manufactured, or a code indicating such date.

§ 59.104 Compliance provisions.

(a) For the purpose of determining compliance with the VOC content limits in § 59.102(a) of this subpart, each regulated entity shall determine the VOC content of a coating using the procedures described in paragraph (a)(1) or (a)(2) of this section, as appropriate.

(1) Determine the VOC content in grams of VOC per liter of coating prepared for application according to its mixing instructions, excluding the volume of any water or exempt compounds. VOC content shall be calculated using the following equation:

$$\text{VOC} = \frac{(W_v - W_w - W_{ec})}{(V - V_w - V_{ec})}$$

Where:

VOC content = grams of VOC per liter of coating;

W_v = mass of total volatiles, in grams;

W_w = mass of water, in grams;

W_{ec} = mass of exempt compounds, in grams;

V = volume of coating, in liters;

V_w = volume of water, in liters; and

V_{ec} = volume of exempt compounds, in liters.

(2) The VOC content of a multi-stage topcoat shall be calculated using the following equation:

$$\text{VOC}_{\text{multi}} = \frac{\text{VOC}_{\text{bc}} \sum_{i=0}^M \text{VOC}_{\text{mci}} + 2(\text{VOC}_{\text{cc}})}{M + 3}$$

Where:

$\text{VOC}_{\text{multi}}$ = VOC content of a multi-stage topcoat, in grams of VOC per liter of coating;

VOC_{bc} = VOC content of the basecoat, as determined in paragraph (a)(1) or (f) of this section;

VOC_{mci} = VOC content of midcoat i , as determined in paragraph (a)(1) or (f) of this section;

VOC_{cc} = VOC content of the clearcoat, as determined in paragraph (a)(1) or (f) of this section; and

M = Number of midcoats.

(b) To determine the composition of a coating in order to perform the calculations in paragraph (a) of this section, the reference method for VOC content is Method 24 of appendix A of 40 CFR part 60, except as provided in paragraph (f) of this section. To determine the VOC content of a coating, the regulated entity may use Method 24 of appendix A of 40 CFR part 60, an

alternative method as provided in paragraph (f) of this section, or any other reasonable means for predicting that the coating has been formulated as intended (e.g., quality assurance checks, recordkeeping). However, if there are any inconsistencies between the results of a Method 24 test and any other means for determining VOC content, the Method 24 test results will govern. The Administrator may require the regulated to conduct a Method 24 analysis.

(c) If a regulated entity recommends that its coating component(s) be combined with coating components of another regulated entity, and if the coating resulting from such a combination does not comply with the VOC content limit in § 59.102 (a) of this subpart, then the former regulated entity is out of compliance, unless the entity submits Method 24 data to the Administrator demonstrating that its recommended combination of coating components meets the VOC content limit in § 59.102(a). If the latter regulated entity does not make the recommendation of such use of the coating components, then that entity is not out of compliance for purposes of that resulting coating.

(d) Pretreatment wash primers: Except as provided in paragraph (f) of this section, the acid weight percent of pretreatment wash primers must be determined using the American Society for Testing and Materials Test Method D 1613-96 (incorporated by reference in § 59.110). If the pigment in a pretreatment wash primer prevents the use of this test method for determining the acid weight percent of the coating, then the test method shall be used for the nonpigmented component of the coating, and the acid weight percent shall be calculated based on the acid content of the nonpigmented component and the mixing ratio of the nonpigmented component to the remaining components recommended by the regulated entity.

(e) Low-gloss coatings: Except as provided in paragraph (f) of this section, the gloss reading of low-gloss coatings must be determined using the American Society for Testing and Materials Test Method D 523-89 (incorporated by reference in § 59.110).

(f) The Administrator may approve, on a case-by-case basis, a regulated entity's use of an alternative method in lieu of Method 24 for determining the VOC content of coatings if the alternative method is demonstrated to the Administrator's satisfaction to provide results that are acceptable for purposes of determining compliance with this subpart.

(g) The Administrator may determine a regulated entity's compliance with the provisions of this subpart based on information required by this subpart or any other information available to the Administrator.

§ 59.105 Reporting requirements.

(a) Each regulated entity must submit an initial report no later than January 11, 1999 or within 180 days of the date that the regulated entity first manufactures or imports automobile refinish coatings or coating components, whichever is later. The initial report must include the information in paragraphs (a)(1) through (a)(4) of this section.

(1) The name and mailing address of the regulated entity.

(2) An explanation of each date code, if such codes are used to represent the date of manufacture, as provided in § 59.103.

(3) The street address of each of the regulated entity's facilities in the United States that is producing, packaging, or importing automobile refinish coatings or coating components subject to the provisions of this subpart.

(4) A list of the categories from table 1 of this subpart for which the regulated entity recommends the use of automobile refinish coatings or coating components.

(b) Each regulated entity must submit an explanation of any new date codes used by the regulated entity no later than 30 days after products bearing the new date code are first introduced into commerce.

§ 59.106 Variance.

(a) Any regulated entity that cannot comply with the requirements of this subpart because of circumstances beyond its reasonable control may apply in writing to the Administrator for a temporary variance. The variance application must include the information specified in paragraphs (a)(1) through (a)(3).

(1) The specific grounds upon which the variance is sought.

(2) The proposed date(s) by which the regulated entity will achieve compliance with the provisions of this subpart. This date must be no later than 5 years after the issuance of a variance.

(3) A compliance plan detailing the method(s) by which the regulated entity will achieve compliance with the provisions of this subpart.

(b) Upon receipt of a variance application containing the information required in paragraph (a) of this section, the Administrator will publish a notice of such application in the **Federal Register** and, if requested by any party,

will hold a public hearing to determine whether, under what conditions, and to what extent, a variance from the requirements of this subpart is necessary and will be granted. If requested, a hearing will be held no later than 75 days after receipt of a variance application. Notice of the time and place of the hearing will be sent to the applicant by certified mail not less than 30 days prior to the hearing. At least 30 days prior to the hearing, the variance application will be made available to the public for inspection. Information submitted to the Administrator by a variance applicant may be claimed as confidential. The Administrator may consider such confidential information in reaching a decision on a variance application. Interested members of the public will be allowed a reasonable opportunity to testify at the hearing.

(c) The Administrator will issue a variance if the criteria specified in paragraphs (c)(1) and (c)(2) are met to the satisfaction of the Administrator.

(1) If complying with the provisions of this subpart would not be technologically or economically feasible, and

(2) The compliance plan proposed by the applicant can reasonably be implemented and will achieve compliance as expeditiously as possible.

(d) Any variance will specify dates by which the regulated entity will achieve increments of progress towards compliance, and will specify a final compliance date by which the regulated entity will achieve compliance with this subpart.

(e) A variance will cease to be effective upon failure of the party to whom the variance was issued to comply with any term or condition of the variance.

(f) Upon the application of any party, the Administrator may review and, for good cause, modify or revoke a variance after holding a public hearing in accordance with the provisions of paragraph (b) of this section.

§ 59.107 Addresses of EPA Regional Offices.

All requests, reports, submittals, and other communications to the Administrator pursuant to this regulation shall be submitted to the Regional Office of the EPA which serves the State or territory in which the corporate headquarters of the regulated entity resides. These areas are indicated in the following list of EPA Regional Offices.

EPA Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), Director, Office of

Environmental Stewardship, Mailcode: SAA, JFK Building, Boston, MA 02203.

EPA Region II (New Jersey, New York, Puerto Rico, Virgin Islands), Director, Division of Enforcement and Compliance Assistance, 290 Broadway, New York, NY 10007-1866.

EPA Region III (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia), Air Protection Division, 1650 Arch Street, Philadelphia, PA 19103.

EPA Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee), Director, Air, Pesticides and Toxics, Management Division, 345 Courtland Street, NE., Atlanta, GA 30365.

EPA Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin), Director, Air and Radiation Division, 77 West Jackson Blvd., Chicago, IL 60604-3507.

EPA Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, Texas), Director, Air, Pesticides and Toxics Division, 1445 Ross Avenue, Dallas, TX 75202-2733.

EPA Region VII (Iowa, Kansas, Missouri, Nebraska), Director, Air and Toxics Division, 726 Minnesota Avenue, Kansas City, KS 66101.

EPA Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming), Director, Air and Toxics Division, 999 18th Street, 1 Denver Place, Suite 500, Denver, Colorado 80202-2405.

EPA Region IX (American Samoa, Arizona, California, Guam, Hawaii, Nevada), Director, Air and Toxics Division, 75 Hawthorne Street, San Francisco, CA 94105.

EPA Region X (Alaska, Oregon, Idaho, Washington), Director, Air and Toxics Division, 1200 Sixth Avenue, Seattle, WA 98101.

§ 59.108 State Authority.

The provisions in this regulation shall not be construed in any manner to preclude any State or political subdivision thereof from:

(a) Adopting and enforcing any emission standard or limitation applicable to a manufacturer or importer of automobile refinish coatings or components in addition to the requirements of this subpart.

(b) Requiring the manufacturer or importer of automobile refinish coatings or components to obtain permits, licenses, or approvals prior to initiating construction, modification, or operation of a facility for manufacturing an automobile refinish coating component.

§ 59.109 Circumvention.

Each manufacturer and importer of any automobile refinish coating or component subject to the provisions of this subpart must not alter, destroy, or falsify any record or report, to conceal what would otherwise be noncompliance with this subpart. Such concealment includes, but is not limited to, refusing to provide the Administrator access to all required records and date-

coding information, altering the VOC content of a coating or component batch, or altering the results of any required tests to determine VOC content.

§ 59.110 Incorporations by Reference.

(a) The following material is incorporated by reference in the paragraphs noted in § 59.104. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they exist on the date of the approval, and notice of any changes in these materials will be published in the **Federal Register**.

(1) ASTM D 1613-96, Standard Test Method for Acidity in Volatile Solvents

and Chemical Intermediates Used in Paint, Varnish, Lacquer, and Related Products, IBR approved for § 59.104(d).

(2) ASTM D 523-89, Standard Test Method for Specular Gloss, IBR approved for § 59.104(e).

(b) The materials are available for inspection at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC; the Air and Radiation Docket and Information Center, U.S. EPA, 401 M Street, SW, Washington, DC; and at the EPA Library (MD-35), U.S. EPA, Research Triangle Park, North Carolina. The materials are available for purchase from the following address: American Society for Testing and Materials (ASTM), 100 Barr Harbor Drive, West Conshohocken, PA,

19428, telephone number (610) 832-9500.

§ 59.111 Availability of information and confidentiality.

(a) Availability of information. The availability to the public of information provided to or otherwise obtained by the Administrator under this part shall be governed by part 2 of this chapter.

(b) Confidentiality. All confidential business information entitled to protection under section 114(c) of the Act that must be submitted or maintained by each regulated entity pursuant to this section shall be treated in accordance with 40 CFR part 2, subpart B.

TABLE 1 TO SUBPART B.—VOLATILE ORGANIC COMPOUND (VOC) CONTENT LIMITS FOR AUTOMOBILE REFINISH COATINGS

Coating category	Grams VOC per liter	Pounds VOC per gallon ^a
Pretreatment wash primers	780	6.5
Primers/primer surfacers	580	4.8
Primer sealers	550	4.6
Single/two-stage topcoats	600	5.0
Topcoats of more than two stages	630	5.2
Multi-colored topcoats	680	5.7
Specialty coatings	840	7.0

^a English units are provided for information only. Compliance will be determined based on the VOC content limit, as expressed in metric units.

[FR Doc. 98-22657 Filed 9-10-98; 8:45 am]
BILLING CODE 6560-50-p

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 59

[AD-FRL-6149-8]

RIN 2060-AF62

National Volatile Organic Compound Emission Standards for Consumer Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action promulgates national volatile organic compound (VOC) emission standards for certain categories of consumer products pursuant to section 183(e) of the Clean Air Act (Act). This final rule is based on the Administrator's determination that VOC emissions from the use of consumer products can cause or contribute to ozone levels that violate the national ambient air quality standards (NAAQS) for ozone. Ozone is a major component of smog which causes negative health and

environmental impacts when present in high concentrations at ground level. The final rule is estimated to reduce VOC emissions by 90,000 tons per year (tpy) by requiring manufacturers, importers, and distributors to limit the VOC content of consumer products. The EPA developed these requirements in consultation with major stakeholders and these requirements are similar to existing standards in certain States. To date, many companies have taken steps to reformulate their products to emit less VOC.

EFFECTIVE DATE: The effective date is September 11, 1998. The incorporation by reference of certain publications listed in the regulation is approved by the Director of the Federal Register as of September 11, 1998.

ADDRESSES: *Background Information Document.* The background information document (BID) for the promulgated consumer product standards (referred to as the "CP-BID") may be obtained from the docket for this rulemaking and is also available for downloading from the Technology Transfer Network (TTN) at "http://www.epa.gov/ttn/oarpg/remain.html," or from the United States Environmental Protection Agency Library (MD-35), Research Triangle Park, North Carolina 27711, telephone

(919) 541-2777. Please refer to "National Volatile Organic Compound Emission Standards for Consumer Products—Background for Promulgated Standards" (EPA Document Number 453/R-98-008B). The CP-BID contains a summary of the changes made to the standards since proposal, a summary of all the public comments made on the standards, and EPA's responses to the comments.

Docket. Docket No. A-95-40, containing supporting information used in developing the promulgated standards, is available for public inspection and copying from 8:00 a.m. to 5:30 p.m. Monday through Friday, at the EPA's Air and Radiation Docket and Information Center, Waterside Mall, Room M-1500, Ground Floor, 401 M Street, SW, Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. Bruce Moore at (919) 541-5460, Coatings and Consumer Products Group, Emission Standards Division (MD-13), United States Environmental Protection Agency, Research Triangle Park, North Carolina 27711 (moore.bruce@epa.gov).

SUPPLEMENTARY INFORMATION:

Regulated Entities. Regulated categories and entities include:

Category	Examples of regulated entities
Industry	Manufacturers, distributors, or importers of consumer products that are listed in tables 1-3 and that are manufactured for sale or distribution in the United States, including all United States territories.
Federal government	Not affected.
State/local/tribal government	Not affected.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that the EPA is now aware could potentially be regulated by this action. To determine whether you are regulated by this action, you should carefully examine the applicability criteria in Section 59.201 of the final rule. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Judicial review. The EPA proposed this section 183(e) rule for consumer products on April 2, 1996 (61 FR 14531). This notice promulgating a rule for consumer products constitutes final administrative action concerning that proposal. Under section 307(b)(1) of the Act, judicial review of this final rule is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by November 10, 1998. Under section 307(d)(7)(B) of the Act, only an objection to this rule which was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the Act, the requirements established by today's final action may not be challenged separately in any civil or criminal proceeding brought by the EPA to enforce these requirements.

Technology Transfer Network. The TTN is one of the EPA's technical web sites. The TTN provides information and technology exchange in various areas of air pollution control, including copies of this rule and supporting documents. The TTN is free and is accessible through the Internet at "<http://www.epa.gov/ttn/oarpg/ramain.html>" For more information on the TTN, call the HELP line at (919) 541-5384.

Outline. The following outline is provided to aid in reading this preamble to the final rule.

- I. Purpose and Summary of the Standards
 - A. Purpose of Regulation
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 - 2. Consumer products regulation
 - 3. Background on section 183(e)

- B. Summary of the Standards
- II. Summary of Considerations in Developing the Rule
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- IV. Significant Comments and Changes to the Proposed Rule
 - A. Changes to the Proposed Rule
 - 1. Definition of regulated entity
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 - B. Significant Comments for Which No Rule Changes Were Made
 - 1. Cost-effectiveness
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 - A. Docket
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 - C. Executive Order 12866
 - D. Executive Order 12875
 - E. Regulatory Flexibility Act
 - F. Submission to Congress and the Comptroller General
 - G. Unfunded Mandates Act of 1995
 - H. National Technology Transfer and Advancement Act
 - I. Applicability of Executive Order 13045

I. Purpose and Summary of the Standards

A. Purpose of Regulation

1. Ground-level Ozone

Ground-level ozone, which is a major component of "smog," is formed in the atmosphere by reactions of VOC and oxides of nitrogen (NO_x) in the presence of sunlight. The formation of ground-level ozone is a complex process that is affected by many variables.

Exposure to ground-level ozone is associated with a wide variety of human health effects, agricultural crop loss, and damage to forests and ecosystems. Acute health effects are induced by short-term exposures to ozone (observed at concentrations as low as 0.12 parts per million (ppm)), generally while individuals are engaged in moderate or heavy exertion, and by prolonged exposures to ozone (observed at

concentrations as low as 0.08 ppm), typically while individuals are engaged in moderate exertion. Moderate exertion levels are more frequently experienced by individuals than heavy exertion levels. The acute health effects include transient pulmonary function responses, transient respiratory symptoms, effects on exercise performance, increased sensitivity of airways to irritants, increased susceptibility to respiratory infection, increased hospital admissions and emergency room visits, and transient pulmonary inflammation. Groups at increased risk of experiencing such effects include active children, outdoor workers, and others who regularly engage in outdoor activities and individuals with preexisting respiratory disease.

2. Consumer Products Regulation

Emissions of VOC from the use of consumer products are not currently regulated at the Federal level. However, eight States (California, Connecticut, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Texas) are currently enforcing VOC standards for various categories of consumer products. All of these State rules address at least some of the products covered by this rule. Representatives of the consumer products industry have expressed concern that differences in State and local requirements for consumer products could disrupt the national distribution network for consumer products. They have, therefore, urged the EPA to issue rules for consumer products to encourage consistency across the country. Many States with ozone pollution problems are also supportive of an EPA rulemaking that will assist them in their efforts toward achievement of ozone attainment. At least 13 States have included anticipated reductions from the Federal consumer products rule as part of their State implementation plans to reduce their State's overall VOC emissions.

In response to these concerns, the EPA listed for regulation the 24 categories of household consumer products addressed by this rule. The standards establish VOC content limits for these 24 categories of consumer products. The existence of a national rule is not meant to imply that it would

be inappropriate for States to develop more stringent levels of controls, or maintain more stringent controls already in place, where necessary, to attain the ozone standard. Instead, the national standard is expected to reduce the number of States needing to develop new, separate rules for these categories.

3. Background on Section 183(e)

Section 183(e) of the Act mandates a new regulatory program for controlling VOC emissions. Through this provision, Congress required the EPA to conduct a study of emissions of VOC into the ambient air from consumer and commercial products and to list for regulation, based on the study, categories of products that have the potential to contribute to ozone nonattainment.

In accordance with section 183(e) of the Act, the Administrator has determined that VOC emissions from the use of consumer products have the potential to contribute to ozone levels that violate the NAAQS for ozone. The EPA and many States consider the regulation of consumer products to be an important component of the overall approach to reducing those emissions that contribute to nonattainment. The

EPA's determination that VOC emissions from the use of consumer products have the potential to contribute to nonattainment of the ozone NAAQS and the decision to regulate consumer products were discussed in the preamble to the proposed rule (61 FR 32729), in the Report to Congress on Consumer and Commercial Products (Docket No. A-95-40, Item No., II-A-1), and in the **Federal Register** notice announcing the schedule for regulation (60 FR 15264).

A separate document in today's **Federal Register** contains the final notice that lists consumer products for regulation under section 183(e). The document describes section 183(e) of the Act and provides a summary of public comments and the EPA responses regarding the Report to Congress and the list and schedule for regulation.

B. Summary of the Standards

The final rule applies to manufacturers, importers, and distributors of subject consumer products manufactured for sale or distribution in the United States, including the District of Columbia and all United States territories. The

regulated entity in each case is the manufacturer, distributor, or importer named on the label of the regulated consumer product. If the product is manufactured by a company not named on the label of the product, the manufacturer of the product is also a regulated entity for purposes of compliance with the VOC content or emission limits. The VOC content limits for all product categories except charcoal lighter material are presented in tables 1 and 2, and the VOC emission limit for charcoal lighter material is presented in table 3 of this preamble. The VOC content limits presented in tables 1 and 2 and the VOC emission limit presented in table 3 must be achieved by December 10, 1998 for all products that are not registered under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136-136y) (FIFRA). Because of the time needed for registration of new or reformulated products under FIFRA, the compliance date for FIFRA-regulated products is 1 year later than that for non-FIFRA-regulated products. Accordingly, for those consumer products that are subject to FIFRA, the VOC content limits must be achieved by December 10, 1999.

TABLE 1 OF SUBPART C.—PRODUCT CATEGORY TABLE OF STANDARDS: VOC CONTENT LIMITS

Product category	VOC content limit (weight-percent VOC)
Air fresheners:	
Single-phase	70
Double-phase	30
Liquids/pump sprays	18
Solids/gels	3
Automotive windshield washer fluid	35
Bathroom and tile cleaners:	
Aerosols	7
All other forms	5
Carburetor and choke cleaners	75
Cooking sprays— aerosol	18
Dusting aids:	
Aerosols	35
All other forms	7
Engine degreasers	75
Fabric protectants	75
Floor polishes/waxes:	
Products for flexible flooring materials	7
Products for nonresilient flooring	10
Wood floor wax	90
Furniture maintenance products— aerosol	25
General purpose cleaners	10
Glass cleaners:	
Aerosols	12
All other forms	8
Hairsprays	80
Hair mousses	16
Hair styling gels	6
Household adhesives:	
Aerosols	75
Contact	80
Construction and panel	40
General purpose	10
Structural waterproof	15

TABLE 1 OF SUBPART C.—PRODUCT CATEGORY TABLE OF STANDARDS: VOC CONTENT LIMITS—Continued

Product category	VOC content limit (weight-percent VOC)
Insecticides:	
Crawling bug	40
Flea and tick	25
Flying bug	35
Foggers	45
Lawn and Garden	20
Laundry prewash:	
Aerosols/solids	22
All other forms	5
Laundry starch products	5
Nail polish removers	85
Oven cleaners:	
Aerosols/pump sprays	8
Liquids	5
Shaving creams	5

TABLE 2 OF SUBPART C.—UNDERARM ANTIPERSPIRANT AND UNDERARM DEODORANT TABLE OF STANDARDS: HVOC^a CONTENT LIMITS

Product category	Percent HVOC content limit (weight-percent HVOC)
Underarm antiperspirants—aerosol	60
Underarm deodorants—aerosol	20

^a High-volatility organic compound (HVOC) are VOC with vapor pressure greater than 80 millimeters of mercury at 20 °C.

TABLE 3 OF SUBPART C.—CHARCOAL LIGHTER MATERIAL TABLE OF STANDARDS: VOC EMISSION LIMIT

Product category	VOC emission limit (grams (g)/start)
Charcoal Lighter Material	9

Charcoal lighter material manufactured after December 10, 1998 may not emit greater than 9 grams of VOC per start, as determined using procedures specified in the regulation. Regulated entities for subject charcoal lighter material must label their products with information specifying the quantity of charcoal lighter material per pound of charcoal that was used in the testing protocol for that product.

These compliance periods are consistent with those presented in the proposed rule. The EPA believes that these intervals will provide adequate time for the vast majority of regulated entities to achieve compliance. The EPA included a variance provision in this rule (see section 59.206) that may provide temporary relief for regulated entities, especially small businesses, who cannot achieve compliance because of extraordinary circumstances beyond reasonable control.

To identify consumer products that are subject to the rule, each regulated entity of a subject consumer product must display on each consumer product

container or package, the day, month, and year on which the product was manufactured, or a code indicating such date.

The following consumer products are exempt from the rule:

- (1) Any consumer product manufactured solely for shipment and use outside of the United States.
- (2) Insecticides and air fresheners containing at least 98-percent paradichlorobenzene or at least 98-percent naphthalene.
- (3) Adhesives sold in containers of 0.03 liter (1 ounce) or less.
- (4) Bait station insecticides. For the purpose of this rule, bait station insecticides are containers enclosing an insecticidal bait that does not weigh more than 14 grams, where bait is designed to be ingested by insects and is composed of solid material feeding stimulants with less than 5 percent by weight active ingredients.
- (5) Air fresheners whose VOC constituents are 100-percent fragrance materials.

(6) Non-aerosol moth proofing products that are principally for the protection of fabric from damage by moths and other fabric pests in adult, juvenile, or larval forms.

(7) Flooring seam sealers used to join or fill the seam between two adjoining pieces of flexible sheet flooring.

The final rule also includes an innovative product provision which allows a regulated entity to market a product with VOC content that exceeds the limit in the rule under certain circumstances. The regulated entity must provide supporting documentation that demonstrates that the use of the product will result in VOC emissions equal to or less than a complying consumer product due to some characteristic of the product formulation, design, delivery system, or other factor.

The final rule also allows a regulated entity to apply for a temporary variance if, due to extraordinary circumstances beyond reasonable control, the regulated entity cannot comply with the VOC content limit requirements by the

specified compliance date. The final rule specifies the criteria that must be met before the Administrator will grant a variance.

The rule does not require the submission of routine reports. However, a regulated entity must provide evidence of compliance with the rule whenever requested by the Administrator. Compliance with the VOC content limits in tables 1 and 2 must be calculated from records of the weight-percent of constituents used to make each batch of the product. Compliance with the VOC emission limit for lighter material in table 3 is based on procedures specified in section 59.208 of the rule, or an alternate method approved by the Administrator.

Regulated entities must keep records of the design formulation for each consumer product subject to the rule (except for charcoal lighter materials), unless the manufacturer has submitted to the EPA a written certification that the manufacturer will maintain the records for the regulated entity. For each batch of production, a regulated entity must maintain for 3 years accurate records of the weight-percent and chemical composition of the individual product constituents. Regulated entities of subject charcoal lighter materials must keep records for 3 years of the results of tests performed according to section 59.208 of the final rule.

The final rule requires that each regulated entity of any subject consumer product submit a one-time Initial Notification Report to the EPA containing the following information: (1) company name; (2) name, title, phone number, address, and signature of certifying company official; (3) a list of product categories and subcategories subject to sections 59.203 and 59.204, as found in tables 1 and 2, for which the company is currently the regulated entity; (4) description of date coding systems, clearly explaining how the date of manufacture is marked on each sales unit of subject consumer products and (5) name and location of the designated recordkeeping agent, if any. If a date code is revised, an updated description must be submitted within 30 days following the change. The Initial Notification Report must be submitted to the appropriate EPA Regional Office no later than December 10, 1998 or 30 days after becoming a regulated entity. Addresses for the EPA Regional Offices are provided in section 59.210.

II. Summary of Considerations in Developing the Rule

A. Technical Basis of Regulation

Regulations under section 183(e) of the Act must reflect the EPA's determination of best available controls (BAC) for the category of product. As defined in section 183(e)(1) of the Act, BAC is

* * * the degree of emission reduction that the Administrator determines, on the basis of technological and economic feasibility, health, environmental, and energy impacts, is achievable through the application of the most effective equipment, measures, processes, methods, systems, or techniques, including chemical reformulation, product or feedstock substitution, repackaging, and directions for use, consumption, storage, or disposal.

As discussed in the preamble to the proposed rule (61 FR 14531, April 2, 1996), the EPA has determined that BAC for 23 of the consumer product categories covered by this rule consists of imposing specific VOC content limits, expressed as the weight-percent VOC, for each consumer product category. For charcoal lighter fluid, VOC limits are best expressed as the amount of VOC emitted during use as determined by the test method presented in section 59.208 of the rule. Section 183(e) of the Act allows the EPA to consider a wide range of strategies to achieve emission reductions through BAC. Section 183(e) provides that the determination must be based upon technological and economic feasibility, and upon health, environmental, and energy impacts. The EPA has determined that, in most cases, all or most of a product's VOC content is emitted during product use. Therefore, the EPA concluded that limits on the amount of VOC incorporated into the products would be the most feasible and least disruptive control measure. Additionally, in working to comply with State VOC rules over the past several years, the consumer products industry has established product reformulation as the most technologically and economically feasible strategy for reducing VOC emissions. The standards thus reflect the degree of emission reduction that the EPA determines to be BAC. The EPA selected the VOC limits based primarily on the EPA's consumer products survey, analysis of existing State rules for consumer products, and information gathered during the EPA's study of the consumer and commercial products industry.

B. Stakeholder and Public Participation

Consumer product regulation development. The consumer product

standards were proposed and the preamble was published in the **Federal Register** on April 2, 1996 (61 FR 14531). The EPA solicited public comments at the time of proposal, and made available copies of the regulatory text, Technical Support Document, and Economic Impact Analysis for interested parties.

To provide interested parties the opportunity for oral presentation of data, views, or arguments concerning the proposed consumer product standards, the EPA held a public hearing in Research Triangle Park, North Carolina on May 17, 1996. Thirteen speakers presented oral testimony at this hearing. The public comment period was open from April 2, 1996 to June 17, 1996. In all, the EPA received 67 comment letters on the consumer products rule. Commenters included industry representatives, States, trade associations, and others. The comments have been carefully considered, and changes have been made to the proposed standards when determined by the Administrator to be appropriate. Significant comments are discussed in section IV of this preamble. A detailed discussion of all public comments and the EPA's responses can be found in the CP-BID, referenced in the **ADDRESSES** section of this preamble.

Development of list and schedule for regulation. The EPA submitted the Report to Congress, including the required criteria for regulation, on March 23, 1995. A summary of the six-volume report (EPA-453/R-94-066-a through f) was published at 60 FR 15264, along with a list of product categories and the schedule for regulating them. The EPA accepted public comments for submittal to the docket after this publication. However, the EPA considered the list and schedule as an interim step to regulation rather than final EPA action. Therefore, the EPA requested submission of public comments on the section 183(e) regulatory list and schedule at the time the EPA proposes to regulate a particular category of product. Since publication of the list and schedule for regulation, the EPA has proposed regulations for three product categories: architectural coatings (61 FR 32729), automobile refinishing coatings (61 FR 19005), and consumer products (61 FR 4531). Commenters submitted a total of 85 comment letters on the section 183(e) study and Report to Congress and the list and schedule for regulation. In addition, a total of 12 speakers testified on the list and schedule for regulation at the three individual public hearings held for these rules. The listing notice for consumer products, which can be found elsewhere in today's **Federal**

Register, contains a detailed discussion of all these public comments and the EPA's responses.

III. Summary of Impacts

A. Volatile Organic Compound Reductions

The standards imposed by these regulations will reduce nationwide emissions of VOC from consumer products by 82,000 megagrams per year (Mg/yr) (90,000 tpy) relative to emissions in 1990. This reduction represents a 20 percent reduction from the 1990 baseline.

B. Secondary Air, Water, and Solid Waste Impacts

The EPA anticipates no adverse secondary air, water, or solid waste impacts from compliance with these standards. In general, the standards will lead to product reformulation to reduce the amount of VOC released into the ambient air. While some additional water is likely to be added to formulations, this increase is not expected to result in additional waste water discharges to the environment.

The regulations do not impact existing product inventories. Products manufactured before the compliance dates discussed in section I.B. are not affected. Excluding existing product inventories from the regulations will eliminate any incremental solid waste increase due to discarded unsold products. The new products are not expected to require any more packaging than existing products; thus, the volume of discarded packaging should not increase.

C. Energy Impacts

The EPA anticipates no increase in energy usage as a result of this rule. The standards do not require the use of control devices that utilize energy to reduce the amount of VOC emitted to the air. The EPA is also not aware of any incremental energy use increase expected from the production of new formulations of consumer products.

D. Economic Impact Analysis

By establishing a set of product-specific standards for VOC content, the rule has cost implications for producers of the affected products. Manufacturers of consumer products that do not meet the VOC levels in the rule will be required to reformulate such products if they wish to continue marketing these products. Each option imposes costs, some of which will be passed on to other members of society (consumers) in the form of higher prices, and some of which will be borne directly by manufacturers.

The cost of reformulation includes the resources that must be devoted to creating a compliant product, e.g., research and development expenditures plus any net changes in the variable cost of producing the new product. Variable costs may be affected by changes in the material composition of the new product. The cost for each noncompliant product depends on the level of effort required to develop a new product and how these expenditures are incurred over time. Reformulation cost data were provided by industry to the EPA for prototype reformulations in the consumer product categories.

Under a worst-case scenario, implementation of these standards would result in national annualized costs of \$26 million per year (presented in 1991 dollars). This estimate includes the annualized one-time costs of product reformulation assuming all products exceeding the VOC standards will be reformulated. Recordkeeping and reporting costs have been estimated to be approximately \$960,000 per year. Therefore, the total annualized costs are approximately \$27 million. There are no monitoring requirements for this rule. No significant capital expenditures are expected. The EPA has determined, and the consumer products industry has concurred, that a significant proportion of subject products have been reformulated in response to State regulations and in anticipation of this final rule. Data are not available to quantify the proportion of the one-time reformulation costs that have already been incurred. To the extent that reformulations have already taken place since 1990, this cost estimate will overstate the true costs of this regulation. Also, products produced in small volumes are likely to be withdrawn from the market rather than incur the fixed costs of reformulation. This also leads to a lower national cost.

The collective effect of some products being removed from the market and other products bearing higher costs of production will likely lead to changes in market prices and quantities. The estimated market effects are generally quite small. Price effects in each market range from no effect to an approximated 3-percent price increase. Market-level price effects are expected to be typically less than one-tenth of 1 percent. Similarly, the reduction in production is projected to be small, ranging from virtually no effect to a 1.7-percent reduction. The reduction in production will typically be less than one-tenth of one percent.

Giving consideration to producers' choices for the least costly compliance option (i.e., reformulation or product

withdrawal) and adjustments that will occur in the market, the estimated social cost of the regulation (including reformulation costs or lost profits from product withdraws) is approximately \$21 million per year (estimated in 1991 dollars), with an estimated range from \$17 million to \$23 million by varying some key assumptions. This range of total social cost falls below 1 percent of baseline revenue for the affected industry sectors.

IV. Significant Comments and Changes to the Proposed Rule

The EPA received a total of 67 comment letters during the public comment period following proposal of the consumer products rule. In addition, 13 speakers presented testimony at a public hearing held in Research Triangle Park, North Carolina, on May 17, 1996. The more significant comments on the consumer products rule are discussed in this section of the preamble. A complete summary of comments on the consumer products rule and the EPA's full responses are presented in the CP-BID, as referenced in the ADDRESSES section of this preamble.

In response to public comments on the proposed standards, the EPA has made several changes to the final rule. While most of the changes are clarifications designed to make the EPA's intent clearer, the EPA did make minor changes to the proposed requirements based upon comments received.

A. Changes to the Proposed Rule

The EPA has made certain changes to the final rule regarding definitions, variances, recordkeeping, and reporting requirements, and administrative provisions as detailed below.

1. Definitions of Regulated Entity, Manufacturer, and Person

The proposed rule specified that the standards would "apply to manufacturers, processors, wholesale distributors, or importers of consumer products." A "manufacturer" was defined as any person who imports, manufactures, processes, or distributes a consumer product. A "distributor" was defined as any person to whom a consumer product is sold or supplied for the purposes of resale or distribution in commerce.

Several commenters indicated that the rule could be interpreted as applying too broadly to entities that are not responsible for development or formulation of a product. Clarification of the definition of regulated entity was also requested by several commenters

concerned about unclear responsibility for recordkeeping and reporting.

The EPA has revised the definition of "regulated entity" and "manufacturer" in order to clarify its intent. Since "regulated entity" is defined under section 59.201, it has been deleted from section 59.202 to avoid redundancy. Under section 59.201(b), "regulated entity" is now defined as follows:

The regulated entity is (1) the manufacturer or importer of the product and (2) any distributor that is named on the product label. The manufacturer or importer of the product is a regulated entity for purposes of compliance with the VOC content or emission limits in section 59.203, regardless of whether the manufacturer or importer is named on the label or not.

The distributor, if named on the label, is the regulated entity for purposes of compliance with all sections of the rule, except for section 59.203. Distributors whose names do not appear on the label are not regulated entities. If no distributor is named on the label, then the manufacturer or importer is responsible for compliance with all sections of the rule.

In order to avoid having a processor or contract filler be solely accountable for products manufactured to a customer's specifications, the definition of "manufacturer" in section 59.202 was revised as follows:

Manufacturer means any person who manufactures or processes a consumer product. Manufacturers include: (1) processors who blend and mix consumer products; (2) contract fillers who develop formulas and package these formulas under a distributor's label; (3) contract fillers who manufacture products using formulas provided by a distributor; and (4) distributors who specify formulas to be used by contract fillers or processors.

The intent of these revisions is to clarify that, under conditions where distributors have no direct control over the product VOC content (either through manufacturing or processing the product themselves, or by specifying a particular formulation to be used), distributors named on the label are subject to all the provisions of subpart C *except* the VOC content or emission limits in section 59.203. However, distributors (whether or not named on the label) who specify that a particular formulation be used would be considered "manufacturers" and would, therefore, be subject to the VOC content or emission limits.

In order to clarify what is meant by the term "person," EPA has revised section 59.202 to include a definition of "person" as follows:

Person means an individual, corporation, partnership, association, State, any agency, department, or instrumentality of the United

States, and any officer, agent, or employee thereof.

2. Definition of United States

Following publication of the proposed rule, several inquiries were received regarding applicability of the regulation to areas outside the 50 States. The EPA's intent is for the regulation to apply in the 50 States, the District of Columbia, and United States territories. Consequently, in order to clarify this intent, the EPA has added a definition of United States.

3. Variances

Section 59.206 of the proposed rule required that a public hearing be held for each variance application. In order to streamline the process, the EPA has changed the rule to provide that a hearing is not mandatory. Notice of each variance application received will be published in the **Federal Register**, and a hearing will be held only if requested by the public.

Regulated entities may request a variance for a number of reasons. For example, some manufacturers may need additional time for research and development of a reformulated product that will comply with the VOC limits in the rule. In some cases, manufacturers may need time to perform product testing and to obtain approval from other government agencies in order to reformulate certain products to comply with the rule. In other cases, manufacturers may require additional time to complete the registration process for reformulated pesticide products.

While some variances may be sought in order to delay initial compliance with the rule for a variety of reasons, there may be occasions in the future when regulated entities may not be able to comply for some finite period of time. For example, a particular ingredient essential to the formulation of a compliant product might be temporarily unavailable due to reasons beyond the control of the regulated entity. In that case, the manufacturer may need to substitute an ingredient that would cause the product to exceed the VOC content or emission standard for that product category. In such a case, the manufacturer could seek a variance to allow continued marketing of the product during the period of time that the proper feedstock is unavailable.

4. Recordkeeping and Reporting Requirements

The proposed rule stated that the recordkeeping and reporting requirements applied to each manufacturer or importer subject to provisions of § 59.203(a). Commenters

questioned who exactly was required to meet the recordkeeping and reporting requirements, (i.e., the manufacturer, the importer, or the distributor). Some manufacturers mentioned that they had distributors who would be unable to meet the recordkeeping and reporting requirements because they did not have access to the manufacturer's product formulation data. Manufacturers, distributors, and retailers expressed concern about trade secrets and proprietary formulations being revealed to other commercial businesses in order to achieve compliance. Because of such concerns, several commenters requested that the regulated entity be allowed to delegate the responsibility for maintaining records.

It was the EPA's intent that the regulated entity (the party with ultimate control over the VOC content of the product) also be responsible for the recordkeeping and reporting requirements. In response to concerns raised about trade secrets and proprietary information, the recordkeeping and reporting requirements of section 59.209(a) were revised to indicate that the manufacturer may provide written certification to the EPA accepting responsibility for the recordkeeping requirements on behalf of the regulated entity.

Failure to maintain the required records may result in enforcement action by the EPA against the certifying manufacturer in accordance with the enforcement provisions applicable to violations of these provisions by regulated entities. The certifying manufacturer may revoke the written certification by sending a written statement to the EPA and the regulated entity giving at least 90 days notice that the certifying manufacturer is rescinding acceptance of responsibility for compliance with the recordkeeping requirements listed in this paragraph. Upon expiration of the notice period, the regulated entity must assume responsibility for maintaining the records specified in this paragraph. Written certifications and revocation statements to the EPA from the certifying manufacturer shall be signed by the responsible official of the certifying manufacturer, provide the name and address of the certifying manufacturer, and be sent to the appropriate EPA Regional Office at the address listed in Section 59.210. Such written certifications are not transferable by the manufacturer.

The EPA has made other changes to simplify the recordkeeping and reporting requirements. Some commenters asserted that since the

Initial Notification Report contains the location where VOC content records are maintained, it would be unnecessary to report the location of all facilities where the subject products are manufactured or distributed. The EPA simplified the recordkeeping and reporting section for the initial notification reporting requirements to reduce the amount of reporting required.

Because the Initial Notification Report contains the title, name, address, and phone number of the responsible official, the location of each facility and the location where the VOC content records are maintained need only be supplied upon request by the Administrator, rather than with each Initial Notification Report. In addition, if the records specified in paragraphs (a)(1) and (a)(2) of section 59.209 are to be maintained by the manufacturer, the name and location of the designated recordkeeping agent must also be submitted as part of the Initial Notification Report.

5. Administrative provisions

Since proposal, the EPA has added several new sections to the regulation to aid in implementing the rule. These administrative provisions do not add any new compliance requirements to the rule, and pose no additional impacts on regulated entities. The new requirements were added to provide consistent procedures for implementation. The provisions that were added are as follow: (1) Addresses of EPA Regional Offices, (2) State Authority, (3) Circumvention, (4) Incorporations by Reference, and (5) Availability of Information and Confidentiality.

The section on addresses specifies the mailing addresses of EPA Regional Offices for the submittal of required reports. The States and territories served by the various Regional Offices are listed in this section as well. The appropriate Regional Office for purposes of reporting, variance applications, and innovative product applications would be that Regional Office which serves the State or territory in which the regulated entity's corporate headquarters are physically located.

The section on State authority clarifies that this rule in no way prevents States from adopting more stringent regulations. The section on circumvention prohibits regulated entities from doing anything to conceal what would otherwise be noncompliance, by such means as falsifying records of product formulation or VOC content. The section on incorporations by reference includes as part of the rule the

American Society for Testing and Materials (ASTM) methods that are cited by reference. Finally, the section on availability of information and confidentiality clarifies the type of information that is available to the public, and provides for the confidential handling of any proprietary information that may be submitted in response to the rule.

B. Significant Comments for Which No Rule Changes Were Made

In the preamble to the proposed rule (61 FR 14531, April 2, 1996), the EPA solicited comments on several issues pertinent to this and other section 183(e) rules. These issues included alternative approaches to cost-effectiveness calculation, other systems of regulation, use of control techniques guidelines (CTG) in lieu of regulations, and regulation of only the most cost-effective subset of the 24 consumer product categories. In addition, other significant issues that were the topic of public comments (e.g., exemption of low vapor pressure VOC, etc.) are discussed below. As distinct from EPA's consideration of cost in the BAC analysis, the discussion in this section did not form a basis for EPA's selection of BAC for the categories of products regulated by the rule.

1. Cost-Effectiveness

Cost-effectiveness is a measure used to compare alternative strategies for reducing pollutant emissions, or to provide a comparison of a new strategy with historical strategies. The EPA's established method of calculating cost-effectiveness of a rule with nationwide applicability is to divide the total cost of the rule by total emission reductions. In the proposal, the EPA requested comment on two alternative ways of calculating cost-effectiveness for the consumer products rule: (1) Cost-effectiveness considering emission reductions in ozone nonattainment areas only, and (2) cost-effectiveness considering emission reductions in ozone nonattainment areas during the ozone season only.

Before discussing the comments received on this cost-effectiveness methodology issue, it is important to note that the provisions and rationale for today's rule are not dependent upon the disposition of this issue. The EPA nonetheless took comment on the issue because this rule was the first to be proposed under section 183(e) of the Act and presented an opportunity to receive public input early in the program.

In regard to cost-effectiveness methodologies, the EPA received

comments from seven commenters who expressed divergent views on the proper approach. Some favored the EPA's traditional measure of cost-effectiveness, while others favored alternative approaches. After considering these comments, the EPA does not plan to adopt these alternative approaches to calculating cost-effectiveness for rules with nationwide control requirements, for reasons that are presented below.

One issue raised by the comments is whether the EPA's traditional measure creates a bias against strategies that apply in a limited geographic area (e.g., in nonattainment areas) relative to nationwide strategies, or against seasonal strategies relative to year-round strategies. This issue would arise if the EPA used cost-effectiveness figures to compare the desirability of these dissimilar types of strategies. In fact, the EPA did not use cost-effectiveness estimates in this way in developing the consumer products rule.

In the case of the consumer products rule, the EPA considered applying restrictions to consumer products only in nonattainment areas (either by rule or through CTG for States). The EPA believes that geographically targeted restrictions for these nationally distributed consumer products would pose substantial implementation difficulties for government and would impose substantial compliance burdens on a large number of regulated entities. The EPA also believes that such geographically targeted restrictions for these nationally distributed products would be less effective at reducing emissions than a national rule (see section IV.A. for further discussion). Because the EPA determined that a strategy applicable only to nonattainment areas would be less desirable than a national rule, the EPA did not see a need to invest resources to pursue that strategy and calculate its cost-effectiveness.

Some commenters said using one of the alternative cost-effectiveness methodologies would enable the EPA to make valid cost-effectiveness comparisons between nationwide and targeted geographic strategies, or year-round and seasonal strategies, for reducing ozone pollution. The EPA has not chosen these alternatives because it has the following concerns about the two alternative approaches:

First, VOC emission reductions have benefits other than reducing ozone levels in nonattainment areas. As a result, the EPA believes the cost-effectiveness calculation for a nationwide, year-round rule should not exclude VOC emission reductions in

attainment areas or outside the ozone season. The EPA recognizes that a primary objective of section 183(e) of the Act is to reduce VOC emissions in ozone nonattainment areas. However, as previously explained, in the development of the consumer products rule, the EPA believes that the best policy alternative is to implement a nationwide rule. Therefore, emission reductions from this rule will not only be realized in ozone nonattainment areas, but also in all other parts of the country in which consumer products are distributed and consumed.

In general, the benefits of VOC reductions in ozone attainment areas include reductions in emissions of VOC air toxics, reductions in the contribution from VOC emissions to the formation of fine particulate matter, and reductions in damage to agricultural crops, forests, and ecosystems from ozone exposure. Emission reductions in attainment areas help to maintain clean air as the economy grows and new pollution sources come into existence. Also, ozone health benefits can result from reductions in attainment areas, although the most certain health effects from ozone exposure below the NAAQS appear to be both transient and reversible. The closure letter from the Clear Air Science Advisory Committee (CASAC) for the recent review of the ozone NAAQS states that there is no apparent threshold for biological responses to ozone exposure (Source: U.S. EPA; Review of NAAQS for Ozone, Assessment of Scientific and Technical Information, Office of Air Quality Planning and Standards Staff Paper; document number: EPA-452/R-96-007).

Second, under either alternative approach, emission reductions in ozone attainment areas would not be included in the calculation. This appears to imply that emissions reductions in attainment areas do not contribute to cleaner air in nonattainment areas. VOC sources in regions adjacent to nonattainment areas may contribute to ozone levels in nonattainment areas. As a result, a cost-effectiveness comparison based on the alternative approaches sometimes could create a bias against a nationwide rule relative to a strategy that applies in nonattainment areas only.

In light of the transport issue, one commenter suggested that the EPA apply a weighting factor to account for differences in the extent to which emissions inside and outside nonattainment areas contribute to ozone formation in nonattainment areas. The EPA is concerned that in order to calculate cost-effectiveness using this concept, the EPA would have to

conduct extensive and costly air quality modeling to estimate ozone reductions resulting from each candidate control strategy and that this would require extensive data on the location of emissions. Such detailed analysis is appropriate for some policy decisions, but not for others. As a result, the EPA is skeptical that this weighting approach would represent a generally useful analytical tool for decision making.

The EPA, of course, agrees that differences in the location and timing of emission reductions are a significant consideration in choosing among alternative strategies. The extent of ozone reductions and other benefits resulting from VOC emission reductions varies, partly based on location and season. In considering nationwide vs. geographically targeted controls, and year-round vs. seasonal controls, the EPA considers available information on the effectiveness of those strategies in reducing ozone—as well as other health and environmental considerations, economic considerations, and other relevant factors—in making a holistic assessment of which strategy is most desirable from an overall public policy standpoint.

There are instances where the EPA does provide an estimate of cost-effectiveness of a control strategy during the ozone season—generally, when a control strategy is feasible to apply on a seasonal basis, or when limits are set on a seasonal basis. Although these figures are useful for comparing different seasonal strategies, the EPA does not plan to use cost-effectiveness figures for inappropriate (i.e., apple to orange) comparisons between seasonal and year-round strategies for the 183(e) program for the reasons presented above. In regard to today's rule, the EPA notes that the nature of consumer product emissions does not allow for control strategies that reduce emissions only during the ozone season to be an objective for consideration. One reason is that the shelf life and consumption rate of consumer products varies greatly and one cannot predict that a certain percentage of a product made with a specified formulation will be consumed and thus emitted during the ozone season. Because the Agency has concluded that an ozone season-based approach is not a viable control strategy for consumer products, the EPA did not believe it was appropriate to develop a seasonal-based approach to measuring cost-effectiveness for the consumer product rule.

2. Other Systems of Regulation

In the preamble to the proposed rule (61 FR 14531, April 2, 1996) the EPA

requested comment on any alternative to the proposed system of regulation. Two commenters commented on the inclusion of emissions trading under the proposed Open Market Trading Rule (OMTR) or Guidance Document as an option for compliance with the consumer product regulation. One commenter stated that open market trading assures product quality while providing flexibility, cost savings, incentives for innovation, and increased environmental performance to both consumers and manufacturers of consumer products. The commenter stated that open market trading increases the performance and effectiveness of the consumer products rule in achieving meaningful ozone reduction. The commenter stated that open market compliance options also ensure that smaller manufacturers or marketers are not disadvantaged or put out of business by the implementation of the regulations, which would reduce competition and increase consumer costs.

One commenter stated that consumer product emission credit trading is not appropriate for this regulation because market incentives, including allowance for trading of emission credits from consumer products, have not been adequately considered in this rulemaking action and consumer product credit trading is extremely controversial. This commenter stated that allowing the trading of emission credits can put some companies at an extreme competitive disadvantage because of the highly competitive nature of the consumer product market and the wide diversity of resources and product mix between consumer product manufacturers and distributors.

The EPA believes it is not appropriate to include the open market trading provisions as a means for complying with the VOC limits for the categories of consumer products subject to the final rule. The national standards for consumer products would regulate products that typically are distributed nationwide. By comparison, the open market trading guidance alluded to by the commenter (proposed August 25, 1995, 60 FR 44290) is for State-developed regional trading programs addressing the generation and use of discrete emission reductions within the nonattainment areas covered by the program.

Three commenters requested that the EPA adopt an alternative control plan (ACP) similar to the California Air Resources Board's ACP. An ACP allows manufacturers that are unable to meet a specific VOC content limit for one product to balance their non-compliant

product with the VOC reduction benefit from an over-compliant product. One commenter indicated that an ACP is essential for sound consumer product regulation because it provides the ability to reduce VOC emissions while retaining the flexibility of continuing to market a regulated product with a formulation that has superior performance, thereby benefiting consumers. The commenter stated that an ACP would provide an economic incentive to develop product technologies that are lower in VOC than required by the table of standards and that a table of standards alone tends to freeze technology development. The commenter suggested that the EPA add an ACP provision to the national consumer product rule at the first opportunity, without delaying the adoption of the national rule.

The EPA has not adopted an ACP in the final rule but is still considering whether or not to engage in a separate rulemaking effort to develop one. The commenter's points will be factored into this consideration. If warranted, the ACP will be proposed at a later date.

3. Use of Control Techniques Guidelines in Lieu of a National Rule

The EPA requested comment on whether and how a CTG approach would be as effective as a national rule in reducing VOC emissions from consumer products in ozone nonattainment areas. Over 40 commenters stated that they support a national consumer products rule. In general, the commenters gave similar reasons for their position as presented below:

(i) A national rule is an effective way to ensure substantial reduction in VOC emissions from consumer products without banning any one product category or product form.

(ii) A national rule would reduce burden on manufacturers since it would reduce or eliminate the need for multiple formulations to comply with different State and local requirements.

Three commenters opposed a CTG approach for the following reasons:

(iii) A CTG would require that States with ozone nonattainment areas adopt minimum requirements for those specific areas which would discourage States from implementing a statewide regulation and would, therefore, result in fewer emission reductions.

(iv) Ozone precursor emissions reductions (i.e., VOC and NO_x) are necessary in both attainment and nonattainment areas for nonattainment areas to achieve the ozone NAAQS.

(v) A CTG-based approach would complicate both rule development and

rule enforcement as it is possible that each nonattainment area could adopt slightly different regulations.

(vi) A CTG would not be as effective as a national rule for consumer products due to transportability of products and other considerations.

The EPA believes that regulating manufacturers and importers is an effective approach for reducing emissions from consumer products, especially those that are easily transportable and widely distributed to consumers for use in unlimited locations. For these types of products, it appears that regulating only in nonattainment areas would not be as effective as a uniform, national regulation. The transportability of products tends to decrease rule effectiveness for rules that vary by location due to the likelihood of unregulated, non-compliant products being bought in attainment areas and used in nonattainment areas. For this reason and since the end-users include widely varied consumers, effective enforcement would be limited.

In addition, industry has advised the EPA that the cost of having different product lines for attainment versus nonattainment areas could be cost-prohibitive because of the duplicative effort of labeling, storage, and distribution management. Therefore, the EPA expects that using CTG or rules that apply only in nonattainment areas would be less effective than a national rule. Also, during the development of the proposed rule, industry representatives expressed concern that differences in State and local requirements for consumer products, as would occur under a CTG approach, could disrupt the national distribution network for consumer products. Based on these considerations and comments received, the EPA has determined that a CTG for the consumer products category would not be substantially as effective as a national rule in reducing VOC emissions in ozone nonattainment areas. Therefore, the EPA is promulgating the standards for consumer products as a uniform, national rule.

4. Regulation of Only a Subset of Consumer Products

The EPA requested comment on setting emission limits for a subset of the 24 consumer product categories that were most cost effective for regulation. One commenter supported selecting the categories which provided the biggest emissions reductions for the least cost. Another responder supported the EPA regulating all 24 categories. The EPA has concluded that the most reasonable

approach is to promulgate rules for all 24 of the listed consumer product categories. Based on public comments, there are no adverse impacts of promulgating BAC for these products. While controls for some products may be more cost-effective than for others, the EPA has concluded that a strategy of regulating a subset of these categories based on cost-effectiveness would be counter productive. The potential efficiency from a cost-effectiveness approach would be more than offset by the extra costs to the industry of inconsistent regulations across the States.

V. Administrative Requirements

A. Docket

The docket is an organized and complete file of all the information considered by the EPA in the development of this rulemaking. The docket is a dynamic file, since material is added throughout the rulemaking development. The docketing system is intended to allow members of the public to readily identify and locate documents so that they can effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated standards (technical support document submitted at proposal) and the EPA responses to significant comments, the contents of the Docket will serve as the record in case of judicial review (see 42 U.S.C. 7607(d)(7)(A)).

B. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501, *et seq.*, and has assigned OMB Control Number 2060-0348.

The information collection required by this rule is needed as part of the overall compliance and enforcement program. It is necessary to identify the regulated entities who are subject to the rule and ensure their compliance with the rule. The recordkeeping and reporting requirements are mandatory and are being established under section 114 of the Act. All information submitted to the EPA for which a claim of confidentiality is made will be safeguarded according to the EPA policies set forth in Title 40, Chapter 1, Part 2, Subpart B—Confidentiality of Information (see 40 CFR part 2; 41 FR 36902, September 1, 1976; amended by 43 FR 39999, September 8, 1978; 43 FR 42251, September 28, 1978; 44 FR 17674, March 23, 1979).

The total annual reporting and recordkeeping burden for this collection averaged over the first 3 years is estimated to be 28,386 hours per year. The average burden, per respondent, is 129 hours per year. The total annualized recordkeeping and reporting costs for this rule are estimated to be \$964,416 and consist wholly of operation and maintenance costs. There are no capital or startup costs, or purchased services costs associated with the reporting and recordkeeping requirements of this rule. There would be an estimated 220 respondents to the collection requirements. Average annualized cost of reporting and recordkeeping, per respondent, is \$4,384.

This rule requires an initial one-time notification from each respondent and subsequent notifications each time the date code is changed.

Formulations and ingredient usage would be recorded for each batch of production. Respondents seeking a variance must submit an application which provides information to the EPA necessary in determining whether to grant the variance.

The application would include the specific grounds on which the variance is sought, proposed date by which the requirements of the rule will be met, and a plan for achieving compliance. Supporting documentation is required of companies who wish to market a product subject to the "innovative products" provision of the rule. This documentation includes information on VOC emissions from the use of the product as compared to emissions from a product formulated in compliance with the rule. The rule requires that the packaging of all subject consumer products display the date of manufacture. The date can be in coded form. However, there should be no additional burden imposed due to this labeling requirement, because manufacturers routinely date-code their products. All regulated entities of subject products must submit an explanation of all date codes used. Date code explanations must be included with the initial report. Thereafter, respondents must submit explanations of any new date codes within 30 days following the change.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing

and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number. The OMB Control Numbers for the EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15. The EPA is amending the table in 40 CFR part 9 of currently approved information collection request control numbers issued by OMB for various regulations to list the information requirements contained in this final rule.

C. Executive Order 12866

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), the EPA must determine whether a regulatory action is "significant" and, therefore, subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of this Executive Order, OMB has notified the EPA that it considers this a "significant regulatory action" within the meaning of the Order. The EPA submitted this action to OMB for review. Any changes made in response to OMB suggestions or recommendations are documented in the public record.

D. Executive Order 12875

To reduce the burden of Federal regulations on States and small governments, the President issued Executive Order 12875 on October 26, 1993, entitled "Enhancing the Intergovernmental Partnership." In particular, this Executive Order is

designed to require agencies to assess the effects of regulations that are not required by statute and that create mandates upon State, local, or tribal governments. While this regulation does not create mandates upon State, local, or tribal governments, the EPA has involved State and local governments in the development of this rule. State and local air pollution control associations (California Air Resources Board, New Jersey Department of Environmental Protection, Wisconsin Department of Natural Resources, and State and Territorial Air Pollution Program Administrators/Association of Local Air Pollution Control Officials) have provided regulatory review support.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires Federal agencies to give special consideration to the impact of regulations on small entities. Under the RFA, an agency is required to prepare a regulatory flexibility analysis for a rule that the agency certifies will have a significant economic impact on a substantial number of small entities. While the EPA is certifying that today's rule will not have a significant economic impact on a substantial number of small entities, the EPA nonetheless prepared analyses to support both the proposed and final rules that are equivalent to that required by the RFA as modified by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

The analysis supporting the proposed rule was published in the report titled, "Economic Impact and Regulatory Flexibility Analysis of Air Pollution Regulations: Consumer and Commercial Products," (January 1996). This analysis showed that almost 80 percent of the consumer product firms identified as subject to the regulation are considered "small" according to the Small Business Administration's definitions for the affected industries. This analysis indicated that for most of the consumer products categories evaluated, there are relatively few large producers which account for the majority of market output in most categories and numerous small producers accounting for a small percentage of the remaining market volume. The EPA analysis concludes that the rule will have some impact on small producers by virtue of the fact that they have a considerable presence in a small number of regulated industries and may be likely to experience higher rates of product withdrawal (in comparison to large firms) because it would cost less to forego product profits than to incur the cost of reformulation. In addition, the analysis does not find

any indications of a disproportionate impact on small businesses in comparison to large firms because the impact of the regulation will not fall most heavily on those product categories with the largest small business presence. The markets most heavily affected by the consumer and commercial products regulation are not the markets with the greatest small business presence. Therefore, the EPA certified at proposal that there was not a significant impact on a substantial number of small entities. The EPA did not receive any comments on the technical approach to the analysis.

The analysis prepared to support the final rule builds upon the analysis performed for the proposal. In this analysis, the EPA calculated compliance costs as a percentage of firm revenues for a sample of 173 small entities (as defined by the Small Business Administration). Of these firms, only 21 (12 percent) may experience compliance costs greater than one percent of revenues and only 15 firms (9 percent) may experience compliance costs greater than 3 percent of revenues. The EPA assumes that the impacts on the sample of firms is representative of the distribution of impacts likely to be imposed on all firms that are affected by the rule.

The EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. The EPA has also determined that this rule will not have a significant economic impact on a substantial number of small entities. Based on the results of the analysis at proposal (which was unaffected by public comments), and the fact that 88 percent of the sampled firms show low cost-to-sales ratios, the EPA concluded that this rule does not have a significant economic impact on a substantial number of small entities.

F. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801, *et seq.*, as added by SBREFA, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the United States Senate, the United States 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 rule is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective September 11, 1998.

G. Unfunded Mandates Act of 1995

Under section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act), signed into law on March 22, 1995, the EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more. Under section 205, the EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires the EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that the action promulgated today does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. Therefore, the requirements of the Unfunded Mandates Act do not apply to this action.

H. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (the NTTAA), Pub. L. No. 104-113, section 12(d) (15 U.S.C. 272 note), directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standard bodies. The NTTAA requires the EPA to provide Congress, through OMB, explanations when the EPA decides that to use available and applicable voluntary consensus standards.

In the case of this rule, the proposed rule set forth the procedures for the testing of charcoal lighter fluid as the required "charcoal lighter material testing protocol." The EPA intended the charcoal lighter material testing protocol to be the equivalent of the existing test method used by the California South Coast Air Quality Management District (SCAQMD). The EPA chose this method, in part, to avoid creation of

multiple testing protocols and to make use of an existing method which the EPA considered appropriate. In response to the proposed rule, the EPA received no comments pertaining to the use of voluntary consensus standards rather than the proposed testing protocol, either during or after the comment period. In preparing the final rule, however, the EPA has investigated to determine the availability of any other existing voluntary consensus standards for use in lieu of the proposed testing protocol.

The EPA has reviewed the standards listed in the National Standards System Network maintained by the American National Standards Institute and the EPA has located no alternative voluntary consensus standards for performing the function to be accomplished by the testing protocol. In addition, the EPA believes that it is appropriate to use the testing protocol developed by SCAQMD both because it has proven reliable and practical to achieve the goals of reducing VOC and because the EPA wishes to foster uniformity in testing nationwide. Accordingly, the EPA has determined that the charcoal lighter material testing protocol set forth in the proposed rule, as modified pursuant to comments for consistency with the SCAQMD test method, constitutes the appropriate method for determining product compliance under this final rule.

I. Applicability of Executive Order 13045

Executive Order 13045 applies to any rule that the EPA determines: (1) "economically significant" as defined under Executive Order 12866, and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the EPA must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the EPA.

This proposed rule is not subject to Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not an economically significant regulatory action as defined by Executive Order 12866, and it does not address an environmental health or safety risk that would have a disproportionate effect on children.

Executive Order 13084

Under Executive Order 13084, the EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or the EPA provides to the Office of Management and Budget a description of the prior consultation and communications the agency has had with representatives of tribal governments and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires the EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." Information available to the Administrator does not indicate that this action will have any effect on Indian tribal governments.

List of Subjects*40 CFR Part 59*

Environmental protection, Air pollution control, Consumer and commercial products, Consumer products, Incorporation by reference, Ozone, Volatile organic compound.

40 CFR Part 9

Reporting and recordkeeping requirements.

Dated: August 14, 1998.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, parts 9 and 59 of title 40 of the Code of Federal Regulations are amended as follows:

PART 9—OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.*, 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.*, 1311, 1313d, 1314, 1321, 1326, 1330, 1344, 1345(d), and (e), 1381; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–I, 300j–2, 300–3, 300j–4, 300j–9, 1857 *et seq.*, 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

2. Section 9.1 is amended by adding a new entry to the table under the

indicted heading in numerical order to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

40 CFR citation	OMB control No.
* * *	* * *
National Volatile Organic Compound Emission Standards for Consumer Products	
* * *	* * *
59.209	2060–0348
* * *	* * *

PART 59—NATIONAL VOLATILE ORGANIC COMPOUND EMISSION STANDARDS FOR CONSUMER AND COMMERCIAL PRODUCTS

1. The authority citation for part 59 continues to read as follows:

Authority: 42 U.S.C. 7511b(e)

2. Part 59 is amended by adding subpart C to read as follows:

Subpart C—National Volatile Organic Compound Emission Standards for Consumer Products

Sec.

- 59201 Applicability and designation of regulated entity.
 59202 Definitions.
 59203 Standards for consumer products.
 59204 Innovative product provisions.
 59205 Labeling.
 59206 Variances.
 59207 Test methods.
 59208 Charcoal lighter material testing protocol.
 59209 Recordkeeping and reporting requirements.
 59210 Addresses of EPA Regional Offices.
 59211 State authority.
 59212 Circumvention.
 59213 Incorporations by reference.
 59214 Availability of information and confidentiality.
 Table 1 to Subpart C—VOC Content Limits by Product Category
 Table 2 to Subpart C—HVOC1 Content Limits for Underarm Deodorants and Underarm AntiPerspirants
 Appendix A to Subpart C—Figures

Subpart C—National Volatile Organic Compound Emission Standards for Consumer Products**§ 59.201 Applicability and designation of regulated entity.**

(a) The provisions of the subpart apply to consumer products manufactured or imported on or after December 10, 1998 for sale or distribution in the United States.

(b) The regulated entity is: the manufacturer or importer of the product; and any distributor that is named on the product label. The manufacturer or importer of the product

is a regulated entity for purposes of compliance with the volatile organic compounds (VOC) content or emission limits in § 49.203, regardless of whether the manufacturer or importer is named on the label or not. The distributor, if named on the label, is the regulated entity for purposes of compliance with all sections of this part except for § 59.203. Distributors whose names do not appear on the label are not regulated entities. If no distributor is named on the label, then the manufacturer or importer is responsible for compliance with all sections of this part.

(c) The provisions of this subpart do not apply to consumer products that meet the criteria specified in paragraph (c)(1) through (c)(7) of this section.

(1) Any consumer product manufacturer in the United States for shipment and use outside of the United States.

(2) Insecticides and air fresheners containing at least 98-percent paradichlorobenzene or at least 98-percent naphthalene.

(3) Adhesives sold in containers of 0.03 liter (1 ounce) or less.

(4) Bait station insecticides. For the purpose of this subpart, bait station insecticides are containers enclosing an insecticidal bait that does not weigh more than 14 grams (0.5 ounce), where bait is designed to be ingested by insects and is composed of solid material feeding stimulants with less than 5-percent by weight active ingredients.

(5) Air fresheners whose VOC constituents, as defined in §§ 59.202 and 59.203(f), consist of 100-percent fragrance.

(6) Non-aerosol moth proofing products that are principally for the protection of fabric from damage by moths and other fabric pests in adult, juvenile, or larval forms.

(7) Flooring seam sealers used to join or fill the seam between two adjoining pieces of flexible sheet flooring.

§ 59.202 Definitions.

The terms used in this subpart are defined in the Clean Air Act (Act) or in this section as follows:

Administrator means the Administrator of the United States Environmental Protection Agency (EPA) or an authorized representative.

Aerosol cooking spray means any aerosol product designed either to reduce sticking on cooking and baking surfaces or to be directly applied on food for the purpose of reducing sticking on cooking and baking surfaces, or both.

Aerosol product means a product characterized by a pressurized spray system that dispenses product

ingredients in aerosol form by means of a propellant (i.e., a liquefied or compressed gas that is used in whole or in part, such as a co-solvent, to expel a liquid or any other material from the same self-pressurized container or from a separate container) or mechanically induced force. "Aerosol product" does not include pump sprays.

Agricultural use means the use of any pesticide or method or device for the control of pests in connection with the commercial production, storage, or processing of any animal or plant crop. "Agricultural use" does not include the sale or use of pesticides in properly labeled packages or containers that are intended for:

- (1) Household use;
- (2) Use in structural pest control; or
- (3) Institutional use.

Air freshener means any consumer product including, but not limited to, sprays, wicks, powders, and crystals designed for the purpose of masking odors, or freshening, cleaning, scenting, or deodorizing the air. This does not include products that are used on the human body, products that function primarily as cleaning products, disinfectant products claiming to deodorize by killing germs on surfaces, or institutional/industrial disinfectants when offered for sale solely through institutional and industrial channels of distribution. It does include spray disinfectants and other products that are expressly represented for use as air fresheners, except institutional and industrial disinfectants when offered for sale through institutional and industrial channels of distribution. To determine whether a product is an air freshener, all verbal and visual representations regarding product use on the label or packaging and in the product's literature and advertising may be considered. The presence of, and representations about, a product's fragrance and ability to deodorize (resulting from surface application) shall not constitute a claim of air freshening.

All other forms means all consumer product forms for which no form-specific VOC standard is specified. Unless specified otherwise by the applicable VOC standard, "all other forms" include, but are not limited to, solids, liquids, wicks, powders, crystals, and cloth or paper wipes (towelettes).

Automotive windshield washer fluid means any liquid designed for use in a motor vehicle windshield washer system either as an antifreeze or for the purpose of cleaning, washing, or wetting the windshield. "Automotive windshield washer fluid" does not include fluids placed by the manufacturer in a new vehicle.

Bathroom and tile cleaner means a product designed to clean tile or surfaces in bathrooms. "Bathroom and tile cleaner" does not include products specifically designed to clean toilet bowls or toilet tanks.

Carburetor and choke cleaner means a product designed to remove dirt and other contaminants from a carburetor or choke. "Carburetor and choke cleaner" does not include products designed to be introduced directly into the fuel lines or fuel storage tank prior to introduction into the carburetor, or solvent use regulated under 40 CFR part 63, subpart T (halogenated solvent national emission standards for hazardous air pollutants (NESHAP)).

Charcoal lighter material means any combustible material designed to be applied on, incorporated in, added to, or used with charcoal to enhance ignition. "Charcoal lighter material" does not include any of the following:

- (1) Electrical starters and probes;
- (2) Metallic cylinders using paper tinder;
- (3) Natural gas; and
- (4) Propane.

Construction and panel adhesive means any one-component household adhesive having gap-filling capabilities that distributes stress uniformly throughout the bonded area resulting in a reduction or elimination of mechanical fasteners.

Consumer means any person who purchases or acquires any consumer product for personal, family, household, or institutional use. Persons acquiring a consumer product for resale are not "consumers" of that product.

Consumer product means any household or institutional product (including paints, coatings, and solvents), or substance, or article (including any container or packaging) held by any person, the use, consumption, storage, disposal, destruction, or decomposition of which may result in the release of VOC. For the purposes of this subpart, consumer product means any product listed in tables 1 or 2 of this subpart.

Contact adhesive means any household adhesive that:

- (1) When applied to two substrates, forms an instantaneous, nonrepositionable bond;
- (2) When dried to touch, exhibits a minimum 30-minute bonding range; and
- (3) Bonds only to itself without the need for reactivation by solvents or heat.

Container or packaging means the part or parts of the consumer product that serve only to contain, enclose, incorporate, deliver, dispense, wrap, or store the chemically formulated substance or mixture of substances that

is solely responsible for accomplishing the purposes for which the product was designed or intended. "Container or packaging" includes any article onto or into which the principal display panel is incorporated, etched, printed, or attached.

Crawling bug insecticide means any insecticide product that is designed for use against crawling arthropods including, but not limited to, ants, cockroaches, mites (but not house dust mites), silverfish, or spiders. "Crawling bug insecticide" does not include products for agricultural use or products designed to be used exclusively on humans or animals.

Distributor means any person to whom a consumer product is sold or supplied for the purposes of resale or distribution in commerce.

Double-phase aerosol air freshener means an aerosol air freshener with liquid contents in two or more distinct phases that requires the product container to be shaken before use to mix the phases, producing an emulsion.

Dusting aid means a product designed to assist in removing dust and other soils from floors and other surfaces without leaving a wax or silicone-based coating. "Dusting aid" does not include products that consist entirely of compressed gases for use in electronic or other specialty areas.

Engine degreaser means a cleaning product designed to remove grease, grime, oil, and other contaminants from the external surfaces of engines and other mechanical parts. "Engine degreaser" does not include any solvent used in parts washing equipment, or any solvent use regulated under 40 CFR part 63, subpart T (halogenated solvent NESHAP).

Fabric protectant means a product designed to be applied to fabric substrates to protect the surface from soiling from dirt and other impurities or to reduce absorption of water into the fabric's fibers. "Fabric protectant" does not include silicone-based products whose function is to provide water repellency, or products designed for use solely on fabrics that are labeled "dry clean only."

Flea and tick insecticide means any insecticide product that is designed for use against fleas, ticks, and their larvae, or their eggs. "Flea and tick insecticide" does not include products that are designed to be used exclusively on humans or animals or their bedding.

Flexible flooring material means asphalt, cork, linoleum, no-wax, rubber, seamless vinyl, and vinyl composite flooring.

Floor polish or wax means a wax, polish, or any other product designed to

polish, protect, or enhance floor surfaces by leaving a protective coating that is designed to be periodically replenished. "Floor polish or wax" does not include "spray buff products," products designed solely for the purpose of cleaning floors, floor finish strippers, products designed for unfinished wood floors, and coatings subject to 40 CFR part 59, subpart D—National Volatile Organic Compound Emission Standards for Architectural Coatings.

Floor seam sealer means any low viscosity specialty adhesive used in small quantities for the sole purpose of bonding adjoining rolls of installed flexible sheet flooring or to fill any minute gaps between and adjoining rolls.

Flying bug insecticide means any insecticide product that is designed for use against flying insects including, but not limited to, flies, mosquitoes, and gnats. "Flying bug insecticide" does not include "wasp and hornet insecticide" products that are designed to be used exclusively on humans or animals or their bedding.

Fragrance means a substance or mixture of aroma chemicals, natural essential oils, and other functional components that is added to a consumer product to impart an order or scent, or to counteract a malodor.

Furniture maintenance product means a wax, polish, conditioner, or any other product designed for the product designed for the purpose of polishing, protecting, or enhancing finished wood surfaces other than floors. Furniture maintenance product" does not include dusting aids, products designed solely for the purpose of cleaning, and products designed to leave a permanent finish such as stains, sanding sealers, and lacquers.

Gel means a colloid in which the dispersed phase has combined with the continuous phase to produce a semisolid material, such as jelly.

General purpose adhesive means any nonaerosol household adhesive designed for use on a variety of substrates. General purpose adhesives do not include contact adhesives or construction and panel adhesives.

General purpose cleaner means a product designed for general all-purpose cleaning, in contrast to cleaning products designed to clean specific substrates in certain situations. "General purpose cleaner" includes products designed for general floor cleaning, kitchen or countertop cleaning, and cleaners designed to be used on a variety of hard surfaces.

Glass cleaner means a cleaning product designed primarily for cleaning

surfaces made of glass. Glass cleaner does not include products designed solely for the purpose of cleaning optical materials used in eyeglasses, photographic equipment, scientific equipment, and photocopying machines.

Hair mousse means a hairstyling foam designed to facilitate styling of a coiffure and provide limited holding power.

Hair styling gel means a high-viscosity, often gelatinous product that contains a resin and is designed for the application to hair to aid in styling and sculpting of the hair coiffure.

Hairspray means a consumer product designed primarily for the purpose of dispensing droplets of a resin on and into a hair coiffure to impart sufficient rigidity to the coiffure to establish or retain the style for a period of time.

High-volatility organic compound or HVOC means any organic compound that exerts a vapor pressure greater than 80 millimeters of mercury when measured at 20 degrees Celsius.

Household adhesive means any household product that is used to bond one surface to another by attachment. "Household adhesive" does not include products used on humans or animals, adhesive tape, contact paper, wallpaper shelf liners, or any other product with an adhesive incorporated onto or in an inert substrate.

Household product means any consumer product that is primarily designed to be used inside or outside of living quarters or residences, including the immediate surroundings, that are occupied or intended for occupation by individuals.

Household use means use of a product in a home or its immediate environment.

Importer means any person who brings a consumer product that was manufactured, filled, or packaged at a location outside of the United States into the United States for sale or distribution in the United States.

Industrial use means use for, or in, a manufacturing, mining, or chemical process or use in the operation of factories, processing plants, and similar sites.

Insecticide means a pesticide product that is designed for use against insects or other arthropods, excluding any product that is:

- (1) For agricultural use; or
- (2) A restricted use pesticide.

Insecticide fogger means any insecticide product designed to release all or most of its content as a fog or mist into indoor areas during a single application. Floggers may target a variety of pests including (but not

limited to) fleas and ticks, crawling insects, lawn and garden pests, and flying insects. Foggers are not subject to the specific VOC limitations or other categories of insecticides list in table 1 of this subpart.

Institutional product means a consumer product that is designed for use in the maintenance or operation of an establishment that manufactures, transports, or sells goods or commodities, or provides services for profit; or is engaged in the nonprofit promotion of a particular public, educational, or charitable cause. "Establishments" include, but are not limited to, government agencies, factories, schools, hospitals, sanitariums, prisons, restaurants, hotels, stores, automobile service and parts centers, health clubs, theaters, or transportation companies. "Institutional product" does not include household products and products that are incorporated into or used exclusively in the manufacture or construction of the goods or commodities that are produced by the establishment.

Institutional use means use within the confines of or on property necessary for the operation of buildings' including, but not limited to, government agencies, factories, sanitariums, prisons, restaurants, hotels, stores, automobile service and parts centers, health clubs, theaters, transportation companies, hospitals, schools, libraries, auditoriums, and office complexes.

Label means any written, printed, or graphic matter affixed to, applied to, attached to, blown into, formed, molded into, embossed on, or appearing upon any consumer product package for purposes of branding, identifying, or giving information with respect to the product or to the contents of the package.

Laundry prewash means a product that is designed for application to a fabric prior to laundering and that supplements and contributes to the effectiveness of laundry detergents and/or provides specialized performance.

Laundry starch product means a product that is designed for application to a fabric, either during or after laundering, to impart and prolong a crisp look and may also facilitate ironing of the fabric. "Laundry starch product" includes, but it not limited to, fabric finish, sizing, and starch.

Lawn and garden insecticide means an insecticide product designed primarily to be used in household lawn and garden areas to protect plants from insects or other arthropods.

Liquid means a substance or mixture of substances that flows readily, but, unlike a gas, does not expand

indefinitely (i.e., a substance with constant volume but not constant shape). "Liquid" does not include powders or other materials that are composed entirely of solid particles.

Manufacturer means any person who manufactures or processes a consumer product. Manufacturers include:

- (1) Processors who blend and mix consumer products,
- (2) Contract fillers who develop formulas and package these formulas under a distributor's label;
- (3) Contract fillers who manufacture products using formulas provided by a distributor; and
- (4) Distributors who specify formulas to be used by a contract filler or processor.

Nail polish remover means a product designed to remove nail polish or coatings from fingernails or toenails.

Nonagricultural pesticide means and includes any substance or mixture of substances that is a pesticide as defined in section 2(u) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136-136y).

Nonresilient flooring means floor of a mineral content that is not flexible. "Nonresilient flooring" includes, but is not limited to, terrazzo, marble, slate, granite, brick, stone, ceramic tile, and concrete.

Oven cleaner means any cleaning product designed to clean and to remove dried food deposits from oven interiors.

Person means an individual corporation, partnership, association, State, any agency, department, or instrumentality of the United States, and any officer, agent, or employee thereof.

Principal display panel(s) means that part, or those parts, of a label that are so designed as to most likely be displayed, presented, shown, or examined under normal and customary conditions of display or purchase. Whenever a principal display panel appears more than once, all requirements pertaining to the "principal display panel" shall pertain to all such "principal display panels."

Product category means that applicable category which best describes the product as listed in tables 1 or 2 of this subpart and which appears on the product's principal display panel.

Product form means the form that most accurately describes the product's dispensing from including aerosols, gels, liquids, pump sprays, and solids.

Pump spray means a packaging system in which the product ingredients are expelled only while a pumping action is applied to a button, trigger, or

other actuator. Pump spray product ingredients are not under pressure.

Representative consumer product means a consumer product that is subject to the same VOC limit in § 59.203 as the innovative product.

Restricted use pesticide means a pesticide that has been classified for restricted use under the provisions of section 3(d) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136-136y).

Shaving cream means an aerosol product that dispenses a foam lather intended to be used with a blade or cartridge razor, or other wet-shaving system in the removal of facial or other body hair.

Single-phase aerosol air freshener means an aerosol air freshener with liquid contents in a single homogeneous phase that does not require that the product container be shaken before use.

Solid means a substance or mixture of substances that does not flow or expand readily (i.e., a substance with constant volume such as the particles constituting a powder). "Solid" does not include liquids or gels.

Spray buff product means a product designed to restore a worn floor finish in conjunction with a floor buffing machine and special pad.

Structural waterproof adhesive means an adhesive whose bond lines are resistant to conditions of continuous immersion in fresh or salt water, and that conforms with Federal Specification MMM-A-181 (Type 1, Grade A), and MIL-A-4605 (Type A, Grade A and Grade C).

Underarm antiperspirant means any aerosol product that is intended by the manufacturer to be used to reduce perspiration in the human axilla by at least 20 percent in at least 50 percent of a target population.

Underarm deodorant means any aerosol product that is intended by the manufacturer to be used minimize odor in the human axilla by retarding the growth of bacteria that cause the decomposition of perspiration.

United States means the United States of America, including the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Usage directions means the text or graphics on the consumer product's label or accompanying literature that describes to the end user how and in what quantity the product is to be used.

Volatile organic compound or VOC means any compound that meets the definition of a VOC, as defined under 40

CFR part 51, subpart F, and in subsequent amendments.

Wasp and hornet insecticide means any insecticide product that is designed for use against wasps, hornets, yellow jackets, or bees by allowing the user to spray a high-volume directed stream or burst from a safe distance at the intended pest or its hiding place.

Wax means an organic mixture or compound with low melting point and high molecular weight, which is solid at room temperature. Waxes are generally similar in composition to fats and oils except that they contain no glycerides. "Wax" includes, but is not limited to, substances such as carnauba wax, lanolin, and beeswax derived from the secretions of plants and animals; substances of a mineral origin such as ozocerite, montan, and paraffin; and synthetic substances such as chlorinated naphthalenes and ethylenic polymers.

Wood floor wax means wax-based products for use solely on wood floors.

§ 59.203 Standards for consumer products.

(a) The manufacturer or importer of any consumer product subject to this subpart shall ensure that the VOC content levels in table 1 of this subpart and HVO content levels in table 2 of this subpart are not exceeded for any consumer product manufactured or imported on or after December 10, 1998, except as provided in paragraphs (b) and (c) of this section, or in §§ 59.204 or 59.206.

(b) For consumer products for which the label, packaging, or accompanying literature specifically states that the product should be diluted prior to use, the VOC content limits specified in paragraph (a) of this section shall apply to the product only after the minimum recommended dilution has taken place. For purposes of this paragraph, "minimum recommended dilution" shall not include recommendations for incidental use of a concentrated product to deal with limited special applications such as hard-to-remove soils or stains.

(c) For those consumer products that are registered under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. section 136-136y) (FIFRA), the compliance date of the VOC standards specified in paragraph (a) of this section is December 10, 1999.

(d) The provisions specified in paragraphs (d)(1) through (d)(4) of this section apply to charcoal lighter materials.

(1) No person shall manufacture or import any charcoal lighter material after December 10, 1998 that emits, on average, greater than 9 grams of VOC per

start, as determined by the procedures specified in § 59.208.

(2) The regulated entity for a charcoal lighter material shall label the product with usage directions that specify the quantity of charcoal lighter material per pound of charcoal that was used in the testing protocol specified in § 59.208 for that product unless the provisions in either paragraph (e)(2)(i) or (e)(2)(ii) of this section apply.

(i) The charcoal lighter material is intended to be used in fixed amounts independent of the amount of charcoal used, such as paraffin cubes; or

(ii) The charcoal lighter material is already incorporated into the charcoal, such as certain "bag light," "instant light," or "match light" products.

(3) Records of emission testing results for all charcoal lighter materials must be made available upon request to the Administrator for enforcement purposes within 30 days of receipt of such requests.

(4) If a manufacturer or importer has submitted records of emission testing of a charcoal lighter material to a State or local regulatory agency, such existing records may be submitted under paragraph (d)(3) of this section in lieu of new test data, provided the product formulation is unchanged from that which was previously tested. Such previous testing must have been conducted in accordance with the test protocol described in § 59.208 or a test protocol that is approved by the Administrator as an alternate.

(e) Fragrances incorporated into a consumer product up to a combined level of 2 weight-percent shall not be included in the weight-percent VOC calculation.

(f) The VOC content limits in table 1 of this subpart shall not include any VOC that:

(1) Has a vapor pressure of less than 0.1 millimeters of mercury at 20 degrees Celsius; or

(2) Consists of more than 12 carbon atoms, if the vapor pressure is unknown; or

(3) Has a melting point higher than 20 degrees Celsius and does not sublime (i.e., does not change directly from a solid into a gas without melting), if the vapor pressure is unknown.

(g) The requirements of paragraph (a) of this Section shall not apply to those VOC in antiperspirants or deodorants that contain more than 10 carbon atoms per molecule and for which the vapor pressure is unknown, or that have a vapor pressure of 2 millimeters of mercury or less at 20 degrees Celsius.

(h) a manufacturer or importer may use the vapor pressure information provided by the raw material supplier as

long as the supplier uses a method to determine vapor pressure that is generally accepted by the scientific community.

(i) For hydrocarbon solvents that are complex mixtures of many different compounds and that are supplied on a specification basis for use in a consumer product, the vapor pressure of the hydrocarbon blend may be used to demonstrate compliance with the VOC content limits of this section. Identification of the concentration and vapor pressure for each such component in the blend is not required for compliance with this subpart.

§ 59.204 Innovative product provisions.

(a) Upon notification to the Administrator, a consumer product that is subject to this subpart may exceed the applicable limit in table 1 or 2 of this subpart if the regulated entity demonstrates that, due to some characteristic of the product formulation, design, delivery systems, or other factors, the use of the product will result in equal or less VOC emissions that specified in paragraph (a)(1) or (a)(2) of this section.

(1) The VOC emissions from a representative consumer product, as described in § 59.202, that complies with the VOC standards specified in § 59.203(a); or

(2) The calculated VOC emissions from a noncomplying representative product, if the product had been reformulated to comply with the VOC standards specified in § 59.203(a). The VOC emissions shall be calculated by using Equation 1.

$$E_R = E_{NC} \times \frac{VOC_{STD}}{VOC_{NC}} \quad \text{Equation 1}$$

Where

E_R = The VOC emissions from the noncomplying representative product, had it been reformulated.

E_{NC} = The VOC emissions from the noncomplying representative product in its current formulation.

VOC_{STD} = The VOC standard specified in § 59.203(a).

VOC_{NC} = The VOC content of the noncomplying product in its current formulation.

(b) If a regulated entity demonstrates to the satisfaction of the Administrator that the equation in paragraph (a)(2) of this section yields inaccurate results due to some characteristic of the product formulation or other factors, an alternate method that accurately calculates emissions may be used upon approval of the Administrator.

(c) A regulated entity shall notify the Administrator in writing of its intent to

enter into the market an innovative product meeting the requirements of paragraph (a) of this section. The Administrator must receive the written notification by the time the innovative product is available for sale or distribution to consumers. Notification shall include the information specified in paragraph (c)(1) and (c)(2) of this section.

(1) Supporting documentation that demonstrates the emissions from the innovative product, including the actual physical test methods used to generate the data and, if necessary, the consumer testing undertaken to document product usage;

(2) Any information necessary to enable the Administrator to establish enforceable conditions for the innovative product, including the VOC content of the innovative product expressed as a weight-percentage, and test methods for determining the VOC content.

(d) At the option of the regulated entity, the regulated entity may submit a written request for the Administrator's written concurrence that the innovative product fulfills the requirements of paragraph (a) of this section. If such a request is made, the Administrator will respond as specified in paragraphs (d)(1) through (d)(3) of this section.

(1) The Administrator will determine within 30 days of receipt whether the documentation submitted in accordance with paragraph (d) of this section is complete.

(2) The Administrator will determine whether the innovative product shall be exempt from the requirements of § 59.203(a) within 90 days after an application has been deemed complete.

The applicant and the Administrator may mutually agree to a longer time period for reaching a decision, and additional supporting documentation may be submitted by the applicant before a decision has been reached. The Administrator will notify the applicant of the decision in writing and specify such terms and conditions that are necessary to insure that emissions from the product will meet the emissions reductions specified in paragraph (a) of this section, and that such emissions reductions can be enforced.

(3) If an applicant has been granted an exemption to a State or local regulation for an innovative product by a State or local agency whose criteria for exemption meet or exceed those provided for in this section, the applicant may submit the factual basis for such an exemption as part of the documentation required under paragraph (d) of this section. In such case, the Administrator will make the

determination required under this paragraph within 45 days after the applications is considered complete.

(e) In granting an exemption for a product, the Administrator will establish conditions that are enforceable. These conditions may include the VOC content of the innovative product, dispensing rates, application rates, and any other parameters determined by the Administrator to be necessary. The Administrator will also specify the test methods for determining conformance to the conditions established, including criteria for reproducibility, accuracy, and sampling and laboratory procedures.

(f) For any product for which an exemption has been granted pursuant to this section, the regulated entity to whom the exemption was granted shall notify the Administrator in writing within 30 days after any change in the product formulation or recommended product usage directions, and shall also notify the Administrator within 30 days after the regulated entity learns of any information that would alter the emissions estimates submitted to the Administrator in support of the exemption application.

(g) If lower VOC content limits are promulgated for a product category through any subsequent rulemaking, all exemptions granted under this section for products in the product category shall no longer apply unless the innovative product has been demonstrated to have VOC emissions less than the applicable revised VOC content limits.

(h) If the Administrator determines that a consumer product for which an exemption has been granted no longer meets the VOC emissions criteria specified in paragraph (a) of this section for an innovative product, the Administrator may modify or revoke the exemption as necessary to assure that the product will meet these criteria. The Administrator will not modify or revoke an exemption without first affording the applicant an opportunity for a public hearing to determine if the exemption should be modified or revoked.

§ 59.205 Labeling.

(a) The container or package of each consumer product that is subject to this subpart shall clearly display the day, month, and year on which the product was manufactured, or a code indicating such date. The requirements of this provision shall not apply to products that are offered to consumers free of charge for the purposes of sampling the product.

(b) In addition, the container or package for each charcoal lighter material that is subject to this subpart shall be labeled according to the provisions of § 59.203(d)(2).

§ 59.206 Variances.

(a) Any regulated entity who cannot comply with the requirements of this subpart because of extraordinary circumstances beyond reasonable control may apply in writing to the Administrator for a variance. The variance application shall include the information specified in paragraph (a)(1) through (a)(3) of this section.

(1) The specific grounds upon which the variance is sought,

(2) The proposed date(s) by which compliance with the provisions of this subpart will be achieved. Such date(s) shall be no later than 5 years after the issuance of a variance; and

(3) A compliance plan detailing the method(s) by which compliance will be achieved.

(b) Upon receipt of a variance application containing the information required in paragraph (a) of this section, the Administrator will publish a notice of such application in the **Federal Register** and, if requested by any party, will hold a public hearing to determine whether, under what conditions, and to what extent, a variance from the requirements of this subpart is necessary and will be granted. If requested, a hearing will be held no later than 75 days after receipt of a variance application. Notice of the time and place of the hearing will be sent to the applicant by certified mail not less than 30 days prior to the hearing. At least 30 days prior to the hearing, the variance application will be made available to the public for inspection. Information submitted to the Administrator by a variance applicant may be claimed as confidential. The Administrator may consider such confidential information in reaching a decision on a variance application. Interested members of the public will be allowed a reasonable opportunity to testify at the hearing.

(c) The Administrator will grant a variance if the criteria specified in paragraphs (c)(1) and (c)(2) of this section are met.

(1) If there are circumstances beyond the reasonable control of the applicant so that complying with the provisions of this subpart by the compliance date would not be technologically or economically feasible, and

(2) The compliance plan proposed by the applicant can be implemented and will achieve compliance as expeditiously as possible.

(d) Any variance order will specify a final compliance date by which the requirements of this subpart will be achieved and increments of progress necessary to assure timely compliance.

(e) A variance shall cease to be effective upon failure of the regulated entity to comply with any term or condition of the variance.

(f) Upon the application of any party, the Administrator may review, and for good cause, modify or revoke a variance after holding a public hearing in accordance with the procedures described in paragraph (b) of this section.

§ 59.207 Test methods.

Each manufacturer or importer subject to the provisions of § 59.203(a) shall demonstrate compliance with the requirements of this subpart through calculation of the VOC content using records of the amounts of constituents used to manufacture the product.

§ 59.208 Charcoal lighter material testing protocol.

(a) Each manufacturer or importer of charcoal lighter material subject to this subpart shall demonstrate compliance with the applicable requirements of § 59.203(d) using the procedures specified in this section. Any lighter material that has received certification from California South Coast Air Quality Management District (SCAQMD) under their Rule 1174, Ignition Method Compliance Certification Testing Protocol, will be considered as having demonstrated compliance with the applicable requirements of this subpart using the procedures in this section.

(b) The manufacturer or importer shall obtain from the testing laboratory conducting the testing, a report of findings, including all raw data sheets/charts and laboratory analytical data. The testing must demonstrate that VOC emissions resulting from the ignition of the barbecue charcoal are, on average, less than or equal to 9 grams per start. The manufacturer or importer shall maintain the report of findings.

(c) When a charcoal lighter material does not fall within the testing guidelines of this protocol, the protocol may be modified following a determination by the Administrator that the modified protocol is an acceptable alternative to the method described in this section and written approval of the Administrator.

(d) *Meteorological and environmental criteria.* (1) Testing shall be conducted under the following conditions:

(i) Inlet combustion air temperature is 16 to 27 degrees Celsius (60 to 80

degrees Fahrenheit) with a relative humidity of 20 to 80 percent;

(ii) The charcoal and lighter material are stored 72 hours before testing in a location with a relative humidity between 45 and 65 percent, and a temperature between 18 and 24 degrees Celsius (65 to 75 degrees Fahrenheit); and

(iii) The outside wind speed, including gusts, may be no more than 16 kilometers per hour (10 miles per hour) if the test stack is exhausted outdoors, or, if the test stack is exhausted indoors, indoor air must be stagnant.

(2) Temperature and relative humidity of the combustion air shall be continuously monitored during the test. Temperature and relative humidity of the place where the charcoal and lighter material are stored prior to the test shall be monitored and recorded during the 72 hours immediately prior to the test. If the stack is exhausted outdoors, the continuous outdoor wind speed monitor shall be observed or recorded continuously during testing. If the wind speed monitor is manually observed rather than electronically recorded, the maximum wind speed observed during the test shall be recorded.

(e) *Definitions.* For the purposes of this test protocol, the following definitions shall apply:

(1) *Baseline VOC emissions (E^b)* means the 3.6 grams (0.008 pounds) per start of subject VOC mass emissions (calculated as CH_2) resulting from the ignition of charcoal by electric probe.

(2) *Emission limit for VOC* means 9 grams per start of resultant VOC emissions (E_r), (expressed as CH_2).

(3) *Equivalent* means equipment that has been demonstrated to meet or exceed the performance, design, and operation specifications of the prescribed equipment. A demonstration that equipment or a test method is a suitable alternative requires written approval from the Administrator prior to compliance testing, based on an evaluation of comparative performance specifications and/or actual performance test data.

(4) *Ignition* means the ready-to-cook condition of the charcoal determined by the temperature above the charcoal, the organic vapor concentration measured by the continuous organic emission monitor, and percent ash.

(5) *Ignition VOC emissions (e_i)*—means the grams (pounds) per start of total subject VOC mass emissions (expressed as CH_2) resulting from the ignition of charcoal by the lighter material undergoing evaluation, including both charcoal and lighter material emissions.

(6) *Labeled directions* means those directions affixed to the charcoal lighter material which specify:

(1) The amount of lighter material to use per kilogram (or pound) of charcoal, unless the lighter material is already impregnated or treated in the charcoal;

(2) How to use or apply the lighter material; and

(3) How and when to light the lighter material.

(7) *Percent ash* means a qualitative observation of the ratio of visible charcoal surface area ignited (grayish/white ash) to total charcoal surface area times 100.

(8) *Reference VOC emissions (E_{ep})*—means the grams (pounds) per start of subject VOC mass emissions (calculated as CH_2) resulting from the ignition of charcoal by the reference electric probe during the testing.

(9) *Resultant VOC emissions (E_r)*—means the ignition VOC emission (E_i) less the reference VOC emissions (E_{ep}) plus baseline emissions (E_b).

(10) *Start* means a 25-minute period commencing from the instant that emissions may be released from the lighter material, either by evaporation or combustion, and further characterized such that by the end of said 25-minute period, ignition is achieved.

(f) *Test structure, equipment specifications, and reference materials.*

(1) The test structure is to be located in a building or fabricated total enclosure (i.e., with enclosed sides and top). The enclosure shall be such that there are no constant or intermittent air flows within it that cause fluctuations in the stack velocity and/or disruptions of air flow patterns within the test chamber containing the reference grill.

(WARNING: If the stack is vented into the building enclosure, caution must be taken to avoid carbon monoxide poisoning and the reduction of oxygen.)

(2) Test structure components. The following test structure components, as shown in figures 1 and 2 of Appendix A of this subpart, shall be used:

(i) Test chamber—Standard large, prefabricated fireplace manufactured by Marco[®],¹ Model No. C41CF, with flue damper removed; or a fabricated structure with the same dimensions. Spacers are required at the rear of the test chamber to ensure a constant 5-centimeter (2-inch) distance between the reference grill and the rear wall of the test chamber.

(ii) Test stack—25-centimeter (10-inch) diameter galvanized steel ducting with velocity traverse port holes located

approximately 8 diameters downstream from the stack outlet of the fireplace chamber and sampling ports located approximately 2½ diameters downstream of the velocity traverse ports.

(iii) Fan—25-centimeter (10-inch) diameter axial fan (duct fan) capable of maintaining an air velocity of 140 ± 9 meters per minute (450 ± 30 feet per minute) and located in the stack approximately 3 diameters downstream of the sampling ports.

(iv) Test stack insulation—The stack shall be insulated with fiberglass blanket insulation (or equivalent) with a minimum R-value of 6.4, that totally surrounds the stack from the top of the fireplace to the level of the blower which minimizes temperature gradients in the stack and prevents hydrocarbons from condensing on the stack wall.

(v) Stack mounts—Supports for fixing in position the stack velocity measurement device for measuring reference point velocity readings and the continuous organic emission monitor probe/meter.

(vi) Blower speed control—A rheostat for controlling voltage to the fan.

(3) Test equipment and materials. The following test equipment and materials shall be used:

(i) Continuous recording device—A YEW[®] model 4088 dot matrix, roster scanning chart recorder, Omega strip recorder with a Strawberry Tree Data Acquisition System, or equivalent, shall be used to continuously (6-second cycle) record temperatures, velocity, and continuous organic emission monitor output signals. The recording may be done manually, recording temperature using a digital potentiometer (20-second intervals), reference point velocity with a Pitot tube (20-second intervals), and continuous organic emission monitor readings with the analyzer's meter (10-second intervals).

(ii) Grill temperature probe—A type "K" thermocouple silver soldered to a 7.6 centimeter (3-inch) square brass plate 0.083-centimeter (0.033 inches) thick painted flat black using high temperature (> 370 degrees Celsius [> 700 degrees Fahrenheit]) paint; set on an adjustable stand to maintain 11 centimeters (4.5 inches) above the maximum height of the briquette pile and made such that it can be removed and replaced within the chamber.

(iii) Stack temperature probe—The Kurz[®] digital air velocity meter or a type "K" thermocouple shall be used.

(iv) Stack velocity measurement device—The velocity in meters (feet) per minute for the reference point using a Kurz[®] digital air velocity meter, Davis[®]

¹Note: Mention of trade names or specific products does not constitute endorsement by the EPA.

DTA 4000 vane anemometer, or equivalent to method 1A of 40 CFR part 60, appendix A.

(v) Continuous organic emissions monitor—Century® Model 128 Organic Vapor Analyzer, Ralfisch® RS55 total hydrocarbon analyzer, or equivalent, with response in parts per million (ranges 0 to 10 parts per million, 0 to 100 parts per million, 0 to 1,000 parts per million).

(vi) Temperature and humidity monitor—A chart recorder type with humidity accuracy of ± 3 percent from 15 to 85 percent.

(vii) Wind speed and direction monitor—A wind speed and direction device meeting a tolerance of ± 10 percent.

(viii) Analytical balance—An electronic scale with a resolution of ± 2 grams.

(ix) Charcoal stacking ring—Rigid metal cylinder 21.6 centimeters (8.5 inches) in diameter with indicators to determine that the pile of briquettes does not exceed 12.7 centimeters (5 inches) in height.

(x) Camera—To document ignition condition of charcoal at the end of each start.

(xi) Particulate filter—Nupro® inline filter, Catalog Number SS-4FW-2 with 0.64 centimeter ($\frac{1}{4}$ -inch) Swagelok inlet and outlet or equivalent.

(xii) Barbecue Grill—The charcoal shall be ignited in a Weber® “Go Anywhere” barbecue grill (Model Number #121001), 39.4 centimeters \times 24 centimeters \times 12.7 centimeters (15.5 inch \times 9.5 inch \times 5.0 inch) with the grate 4.4 centimeters (1.75 inches) above the bottom of the grill, or another grill that meets these specifications. The grill shall be set on its bottom when placed in the test chamber and all grill air vents shall be in full open position.

(xiii) Electric probe—A 600-watt electric probe shall be used for electric probe ignition tests.

(xiv) Untreated charcoal—The laboratory conducting the testing shall purchase “off the shelf” untreated charcoal from a retail outlet. Charcoal shall not be provided by the manufacturer of the charcoal lighter material to be tested or by the charcoal manufacturer. The charcoal to be used is Kingsford® “Original Charcoal Briquets.” All untreated charcoal used in the certification testing of a single ignition source is to come from the same lot as indicated by the number printed on the bag.

(xv) Treated or impregnated charcoal—If the charcoal lighter material to be tested is a substance used to treat or impregnate charcoal, the regulated entity shall provide to the

laboratory conducting the tests a sample of impregnated charcoal. The sample shall be impregnated or treated barbecue charcoal that is ignited either outside of package or ignited by the package. If commercially available, the independent testing laboratory conducting the test shall purchase “off the shelf” from a retail outlet.

(g) *Sampling and analytical methods.*

(1) Gas volumetric flow rate. Conduct a full velocity traverse using the stack velocity measurement device as shown in figure 3 of this Appendix A to this Subpart, or use Method 1A of 40 CFR part 60, appendix A. Continuously record a velocity reference point reading during each test run using a chart recorder or once every 20 seconds if using Method 1A. Calculate the volumetric flow rate using the gas velocity, moisture content, and the stack cross-sectional area. For the purposes of this protocol, the static pressure shall be assumed to be atmospheric, the molar density correction factor in the stack to be 1.0, and the moisture content to be 2 percent.

(2) Integrated VOC sample. Collect integrated VOC gas samples at the sampling port in the exhaust stack using a 40 CFR part 60, appendix A, Method 25 Total Combustion Analysis (TCA) sampling apparatus consisting of two evacuated 9-liter tanks, each equipped with flow controllers, vacuum gauges, and probes, as shown in figure 4 of Appendix A of this Subpart. Use 40 CFR part 60, appendix A, Method 25, SCAQMD Method 25.1 (incorporated by reference—§ 59.213 of this subpart), or equivalent, for analysis. Carbon monoxide, carbon dioxide, methane, and non-methane organic carbon are analyzed by the TCA and TCA/Flame Ionization Detector (FID) methods. Oxygen content is determined by gas chromatography using a thermal conductivity detector. Clean particulate filters between use by heating to 760 degrees Celsius (1400 degrees Fahrenheit) while using compressed air as a carrier for cleaning and purging.

(3) Continuous organic emissions monitor. A continuous organic emissions monitor which uses a continuous FID shall be used for each test run to measure the real time organic concentration of the exhaust as methane. Record the emission monitor response in parts per million continuously during the sampling period using a chart recorder or at least once every 10 seconds. The VOC analyzer shall be operated as prescribed in the manufacturer's directions unless otherwise noted in this protocol.

(h) *Pretest procedure.* (1) Charcoal lighter material—charcoal. Before each

test run, remove charcoal from a sealed bag that has been stored for at least 72 hours in a humidity and temperature controlled room which satisfies the requirements of paragraph (d)(1) of this section and weight out 0.9 kilograms (2 pounds) of charcoal briquettes, to the nearest whole briquette over 0.9 kilograms (2 pounds), of uniform shape with no broken pieces using an analytical balance. Reseal the bag. Charcoal must be ignited within 10 minutes after removal from bag. A sealed or resealed bag of charcoal cannot be stored at the test site for greater than 45 minutes. It must be returned to a humidity and temperature controlled room from 72 hours. The lighter material must be purchased, stored, weighed, and handled the same as the barbecue charcoal.

(i) For the reference VOC emission tests using an electric probe, place a single layer of charcoal, slightly larger than the area/circle of the electric probe heating element, onto the grate. Place the heating element on top of this first layer and cover the heating element with the remaining charcoal briquettes.

(ii) For the ignition VOC emissions tests, arrange the briquettes on the barbecue grate in the manner specified by the ignition manufacturer's directions. If these manufacturer's directions do not specify a stacking arrangement for the briquettes, randomly stack the briquettes in a pile using the stacking ring described in paragraph (f)(3)(ix) of this section.

(2) Charcoal lighter material—or impregnated charcoal. Store, handle, weigh, and stack barbecue charcoal that is designed to be lit without the packaging, the same as in paragraph (h)(1) of this section. For those products which require both the package and charcoal be lit, weigh the whole package—do not remove charcoal. Weigh an empty package (not the same one to be used during the test).

Subtract the package weight from the overall weight of the package and charcoal. The full package and empty package must be stored, handled, and weighed the same as in paragraph (h)(1) of this section. If the difference (the charcoal weight) is between 0.7 to 1.4 kilograms (1.5 to 3.0 pounds), the test may proceed. The emissions measured (E) in Equation 5 of paragraph (k)(7) of this section must be adjusted to a 0.9 kilogram (2-pound) charge. Place packaged barbecue charcoal on the grate in the manner specified by the manufacturer's directions.

(3) Initial meteorological and environmental criteria in paragraph (d) shall be complied with.

(4) The stack velocity must be set before each day of testing at 140 ± 9 meters per minute (450 ± 30 feet per minute) by performing a velocity traverse as specified in paragraph (g)(1) of this section. The velocity will be attained by adjusting the axial fan speed using a rheostat.

(5) The fireplace shall be conditioned at the start of each day before sampling tests by using a grill ignited by the electric probe. If a time period of over 60 minutes between sampling test runs occur, the condition step must be repeated.

(6) Before each test run, leak check the continuous organic emissions monitor by blocking the flow to the probe. Allow the instrument to warm up for the duration specified by the manufacturer's directions. Select the 0 to 100 parts per million range. Check the battery level and hydrogen pressure. Zero with hydrocarbon-free air (<0.1 parts per million hydrocarbons as methane) span with 90 parts per million methane in ultra pure air. Zero and span another instrument selection range if needed for test purposes.

(7) Before the testing program begins, establish a point of average concentration of organics in the stack by using a continuous organic emissions monitor and a grill with charcoal ignited by the electric probe 40 minutes after initial release of emissions. Record the continuous organic emissions monitor traverse data.

(8) Prepare the integrated VOC sampling equipment and perform the required leak checks. Fit the probes with nozzles housing two micron particulate filters. Insert the probes and nozzles into the sampling port to draw a sample of the exhaust gas from the point of average organic concentration as determined from the continuous organic emissions monitor sample traverse described in paragraph (h)(4) of this section. Also, position the nozzles such that they point downstream in the stack. Obtain the samples concurrently and continuously over the test run.

(9) Insert the continuous organic emissions monitor probe into the sampling port to draw a sample of the exhaust gas from the point of average organic concentration as determined from the continuous organic emissions monitor sample traverse described in paragraph (h)(7) of this section.

(i) *Test procedure.* The labeled directions, as defined in paragraph (e) of this section, shall be followed throughout the course of the testing. In cases where the directions are incompatible with this protocol, circumvent the intent of this protocol, or are unclear (subject to different

interpretations) and inadequate, the Administrator must be informed in writing of the nature of the conflict, as well as the proposed resolution, prior to commencing testing. When the labeled directions for a charcoal lighter material do not fall within the testing guidelines of this protocol, the protocol may only be modified upon written approval of the Administrator.

(1) Place the bottom of the barbecue grill on the floor of the fireplace, 5 centimeters (2 inches) from the rear wall. Ignite charcoal as specified by manufacturer's labeled directions.

(2) For electric probe ignition, carefully remove probe without disturbing charcoal after 10 minutes of operation.

(3) For fluid ignition, simultaneously match light fluid on charcoal and fluid that has fallen to the bottom of the grill.

(4) Place the grill temperature probe 11 centimeters (4.5 inches) above the top of the charcoal immediately after the charcoal lighter material flame goes out, or before, if the lighter material does not flame.

(5) Conduct at least six test runs for both the electric probe ignition and for the lighter material being evaluated. Alternate these lighter material for all 12 runs. All runs must be conducted over 3 consecutive days or less.

Alternatively, baseline emissions testing (using the electric probe) may be applied to other test runs provided the test runs occur within 4 months of the baseline testing. Integrated VOC sampling and continuous organic emissions monitoring begin for each test run when the charcoal lighter material and/or materials start to generate/release organics (this will be the time of pouring for lighter fluids and the time of ignition for most other ignition sources). Option: Because the manufacturer of treated or impregnated charcoal supplies both the lighter material and barbecue charcoal, they may apply the 9 grams VOC per start emission limit as an absolute value without an adjustment for the VOC emissions from an electric probe.

(6) Sampling ends for each test run when all the following conditions are met:

(i) The temperature 11 centimeters (4.5 inches) above the maximum height of the briquette pile, using the grill temperature probe described in paragraph (d)(3)(ii) of this section, is at least 93 degrees Celsius (200 degrees Fahrenheit);

(ii) The continuous organic emissions monitor is reading below 30 parts per million for at least 2 minutes;

(iii) The test sampling has continued for 25 minutes (but not more) and

(iv) The charcoal surface is 70 percent covered with ash (to be documented with photograph on top and 60 degrees above the horizon).

(7) During the sampling test runs, temperatures (excluding ambient) and continuous organic emission monitor readings shall be recorded and shall comply with the requirements in paragraph (b) of this section. Humidity, wind speed, and ambient temperature readings shall be monitored and shall comply with the requirements in paragraph (b) of this section.

(8) Collect one blank sample for VOC and one ambient air sample during one run of each day per paragraph (k) of this section.

(J) *Post-run procedure.* (1) Record temperatures (including ambient), humidity, wind speed, and continuous organic emissions monitor reading.

(2) Record the drift using zero and span gases. Leak check and span the continuous organic emissions monitor as described in paragraph (h)(6) of this section for the next run.

(3) Leak check and disassemble the integrated VOC sampling equipment as described in Method 25 of 40 CFR part 60, appendix A or SCAQMD Method 25.1 (incorporated by reference—see § 59.213 of this subpart), or equivalent.

(4) Thoroughly clean grill surfaces of all residue before conducting next ignition run.

(k) *Calculations.* Calculations shall be carried out to at least one significant digit beyond that of the acquired data, and then rounded off after final calculation to two significant digits for each run. All rounding off of numbers should be in accordance with the American Society for Testing and Materials (ASTM) E 380-93, Standard Practice for Use of the SI International System of Units, procedures (incorporated by reference—see § 59.213 of this subpart).

(1) Calculate the average stack reference point temperature during sampling (t_{sr}).

(2) Calculate the average measured velocities (in meters per minute [feet per minute]): Traverse (u), traverse reference point (u_{tr}), and reference point during sampling (u_{sr}).

(3) Calculate the corrected average sampling velocity (u_s) by applying Equation 2:

$$u_s = u_{sr} \frac{u_t}{u_{tr}} \quad \text{Equation 2}$$

(4) Calculate the average flow rate (Q_s) in cubic meters per minute (cubic feet per minute) by applying Equation 3:

$$Q_s = u_s A \quad \text{Equation 3}$$

Where

A=Duct cross-sectional area, (square meters [square feet])
 (5) Correct the flow rate to dry standard conditions (Q_{ds}) by applying Equation 4. Assume the static pressure to be atmospheric and the molar density correction factor to be 1.0

$$Q_{ds} = \frac{T_s}{(T_s + t_{sr})} (1 - H) Q_s \quad \text{Equation 4}$$

Where

$T_s=289$ K (520 R)
 $T_s=273$ K (460 R)
 H=Percent moisture-100
 =0.02

(6) Calculate the average total gaseous non-methane organic carbon for each duplicate sample run analyzed.

(7) Calculate the grams (pounds) of VOC as CH_2 emitted per start (normalized to 0.9 kilograms [2 pounds] of charcoal) for each run using Equation 5:

$$E = \frac{A}{B} * \frac{C}{10^6} * D * d * \frac{N}{M} Q_{ds} \quad \text{Equation 5}$$

Where

E=Emissions of VOC per start for each test run (grams VOC/start [pounds VOC/start])
 A=Hydrocarbon molecular weight =14.0268 grams per gram-mole (14.0268 pounds per pound-mole)
 B=Carbon number =1
 C=Average concentration for each duplicate run of total gaseous nonmethane organic compounds as CO_2 (parts per million, from lab analysis sheet)
 D=Sampling duration =25 minutes
 d=Molar density of gas at standard conditions =42.33 gram-mole per cubic meter (0.0026353 pound-mole per cubic foot)
 N=Normalized mass (0.9 kilograms [2 pounds])
 M=Mass of charge (kilograms [pounds])

(8) Calculate the average VOC emissions for each lighter material tested. Identify and discard statistical outliers. Note a minimum of five valid results are required for a determination. This procedure for eliminating an outlier may only be performed once for each lighter material tested.

(9) Using Equation 6, calculate the resultant VOC emissions per start (E_r) and determine if it is less than or equal to the 9 grams VOC per start emission limit.

$$E_r = e_i - e_{ep} + E_b \quad \text{Equation 6}$$

Where

e_i =Average emissions of VOC per start from the charcoal lighter material being evaluated (grams VOC/start [pounds VOC/start] expressed as CH_2)
 e_{ep} =Average reference VOC emissions per start from the ignition by electric probe (grams VOC/start [pounds VOC/start] expressed as CH_2)
 =0 grams VOC/start (0 pounds VOC/start) for treated or impregnated charcoal
 E_b =Standard baseline VOC emissions per start from the ignition by electric probe (expressed as CH_2)
 =0 grams VOC/start (0 pounds VOC/start) for treated or impregnated charcoal
 =3.6 grams VOC/start (0.008 pounds VOC/start) for all other charcoal lighter material

(1) *Recordkeeping.* A record of the following charcoal lighter material compliance test information shall be kept for at least 5 years:

- (1) Real time temperature and continuous organic emissions monitor readings from continuous chart recorder and/or manual reading of temperatures and the continuous organic emissions monitor output.
- (2) A description of quality assurance/quality control (QA/QC) procedures followed for all measuring equipment and calibration test data.
- (3) A description of QA/QC procedures followed for all sampling and analysis equipment and calibration test data.
- (4) Time and quantity of blanks and ambient air samples.
- (5) Chain of custody for samples.
- (6) Labeled directions.
- (7) Field notes and data sheets.
- (8) Calculation/averaging sheets/printouts.
- (9) Sample (in its normal package from the same lot) of barbecue charcoal and lighter material used for testing.
- (10) Formulation of lighter material tested (indicate if the information is to be handled confidentially).
- (11) Photographs documenting charcoal surface ash coverage.
- (m) *Quality Assurance/Quality Control (QA/QC) Requirements.* The QA/QC guidelines in the EPA's Quality Assistance Handbook (EPA 600.4-77-027b) shall be followed. In addition, the following procedures shall be used:
 - (1) A blank sample for VOC shall be performed once each day, during the start period of one of the lighter materials, using the integrated VOC sampling apparatus.
 - (2) An ambient air sample for VOC shall be taken once each day, during the

start period of one of the lighter materials, using the integrated VOC sampling apparatus with Nupro® 2 micron filters.

(3) Traceability certificates shall be provided for all calibration gases used for the continuous organic emissions monitor and integrated VOC analysis.

(4) Grill temperature probe shall be calibrated using the procedures in ASTM Method E220-86 (incorporated by reference as specified in United States § 59.213).

(5) Supply documentation for place of purchase (or origin if experimental) and chain of custody for lighter material tested. Documentation to be included for both treated and impregnated charcoal.

(6) Supply documentation for place of purchase and chain of custody for untreated charcoal.

§ 59.209 Recordkeeping and reporting requirements.

(a) The distributor that is named on the product label shall maintain the records specified in paragraphs (a)(1) and (a)(2) of this section, unless the manufacturer or importer has submitted to the Administrator a written certification that the manufacturer or importer will maintain the records for the distributor in accordance with paragraph (a)(3) of this section. If no distributor is named on the label, the manufacturer or importer must maintain the specified records. The records must be retained for at least 3 years and must be in a form suitable and readily available for inspection and review.

- (1) Records or formulations being manufactured or imported on or after December 10, 1998 for all consumer products subject to § 59.213(a), or December 10, 1999 for all consumer products subject to § 59.203(c) and
- (2) Accurate records for each batch of production, starting on December 10, 1998 for all consumer products subject to § 59.203(a) or December 10, 1999 for all consumer products subject to § 59.203(c), of the weight-percent and chemical composition of the individual product constituents.

(3) By providing this written certification to the Administrator, the certifying manufacturer accepts responsibility for compliance with the recordkeeping requirements in paragraphs (a)(1) and (a)(2) of this section with respect to any products covered by the written certification. Failure to maintain the required records may result in enforcement action by the EPA against the certifying manufacturer in accordance with the enforcement provisions applicable to violations of these provisions by regulated entities.

The certifying manufacturer may revoke the written certification by sending a written statement to the Administrator and the regulated entity giving at least 90 days notice that the certifying manufacturer is rescinding acceptance of responsibility for compliance with the recordkeeping requirements listed in this paragraph. Upon expiration of the notice period, the regulated entity must assume responsibility for maintaining the records specified in this paragraph. Written certifications and revocation statements, to the Administrator from the certifying manufacturer shall be signed by the responsible official of the certifying manufacturer, provide the name and address of the certifying manufacturer, and be sent to the appropriate EPA Regional Office at the addresses listed in § 59.210 of this subpart. Such written certifications are not transferable by the manufacturer.

(b) If requested by the Administrator, product VOC content must be demonstrated to the Administrator's satisfaction to comply with the VOC content limits presented in § 59.203(a).

(c) Each manufacturer or importer subject to the provisions of § 59.203(d) shall maintain records specified in either paragraph (c)(1) or (c)(2) of this section for each charcoal lighter material.

(1) Test report from each certification test performed as specified in § 59.208(b) and all information and data specified in § 59.208(l); or

(2) Records of emission testing, which was performed by a method determined by the Administrator to be an acceptable alternative to that described in § 59.208, previously submitted to a State or local regulatory agency.

(d) The distributor that is named on the product label, or if no distributor is named on the label, the manufacturer or importer, shall submit by the applicable compliance date, or within 30 days after becoming a regulated entity, a one-time Initial Notification Report including the information specified in paragraphs (d)(1) through (d)(5) of this section.

(1) Company name;

(2) Name, title, phone number, address, and signature or certifying company official;

(3) A list of product categories and subcategories subject to § 59.203 for which the company is currently the regulated entity;

(4) A description of date coding systems, clearly explaining how the date of manufacture is marked on each sales unit of subject consumer products; and

(5) The name and location of the designated recordkeeping agent, if the records specified in paragraphs (a)(1) and (a)(2) are to be maintained by the manufacturer.

(e) If a regulated entity changes the date coding system reported according to paragraph (d)(4) of this section, the regulated entity shall notify the Administrator of such changes within 30 days following the change.

(f) If requested by the Administrator, the following information shall be made available within 30 days after receiving the request:

(1) Location of facility(ies) manufacturing, importing, or distributing subject consumer products;

(2) A list of product categories and subcategories, as found in tables 1 and 2 of this subpart, that are manufactured, imported, or distributed at each facility; and

(3) Location where VOC content records are kept for each subject consumer product.

(g) Each manufacturer or importer subject to the innovative product provisions in § 49.204 shall submit notifications as indicated in § 59.204(d) and (e).

§ 59.210 Addresses of EPA Regional Offices.

All requests, reports, submittals, and other communications to the Administrator pursuant to this regulation shall be submitted to the Regional Office of the EPA which serves the State or territory in which the corporate headquarters of the regulated entity resides. These areas are indicated in the following list of EPA Regional Offices:

EPA Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), Director, Office of Ecosystem Protection, J.F.K. Federal Building, Boston, MA 02203-2211.

EPA Region II (New Jersey, New York, Puerto Rico, Virgin Islands), Director, Division of Environmental Planning and Protection, 290 Broadway, New York, NY 10007.

EPA Region III (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia), Director, Air, Radiation, and Toxics Division, 841 Chestnut Building, Philadelphia, PA 19107.

EPA Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee), Director, Air, Pesticides, and Toxics Management Division, 61 Forsyth Street, Atlanta, GA 30303.

EPA Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin), Director, Air and Radiation Division, 77 West Jackson Blvd., Chicago, IL 60604-3507.

EPA Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, Texas), Director, Multimedia Planning and Permitting Division, 1445 Ross Avenue, Dallas, TX 75202-2733.

EPA Region VII (Iowa, Kansas, Missouri, Nebraska), Director, Air, RCRA, and Toxics Division, 726 Minnesota Avenue, Kansas City, KS 66101.

EPA Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah,

Wyoming), Director, Office of Pollution Prevention, State, and Tribal Assistance, 999 18th Street, Suite 500, Denver, Colorado 80202-2466.

EPA Region IX (American Samoa, Arizona, California, Guam, Hawaii, Nevada) Director, Air Divisions, 75 Hawthorne Street, San Francisco, CA 94105.

EPA Region X (Alaska, Oregon, Idaho, Washington), Director, Office of Air Quality, 1200 Sixth Avenue, Seattle, WA 98101.

§ 59.211 State authority.

(a) The provisions in this regulation shall not be construed in any manner to preclude any State or political subdivision thereof from:

(1) Adopting and enforcing any emission standard or limitation applicable to a regulated entity.

(2) Requiring the regulated entity to obtain permits, licenses, or approvals prior to initiating construction, modification, or operation of a facility for manufacturing a consumer product.

(b) [Reserved]

§ 59.212 Circumvention.

No regulated entity subject to these standards shall alter, destroy, or falsify any record or report to conceal what would otherwise be noncompliance with these standards. Such concealment includes, but is not limited to refusing to provide the Administrator access to all required records and date-coding information, altering the percent VOC content of a product batch, or altering the results of any required performance tests.

§ 59.213 Incorporation by reference.

(a) The materials listed in this section are incorporated by reference in the paragraphs noted in § 59.207. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they exist on the date of the approval, and notice of any changes in these materials will be published in the **Federal Register**. The materials are available for purchase at the corresponding addresses noted below, and all are available for inspection at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC 20408, at the Air and Radiation Docket and Information Center, U.S. EPA, 401 M Street, SW., Washington, DC 20460, and at the EPA Library (MD-35), U.S. EPA, Research Triangle Park, NC 27711.

(b) The materials listed below are available for purchase from at least one of the following addresses: American Society for Testing and Materials

(ASTM), 1916 Race Street, Philadelphia, PA, 19103; SCAQMD Subscription Services, P.O. Box 4932; 21865 Copley Drive, Diamond Bar, CA 91765-0932; or University Microfilms International, 300 North Zeeb Road, Ann Arbor MI, 48106.

(1) ASTM Method E220-86 Standard Method for Calibration of Thermocouples by Comparisons Techniques, incorporation by reference (IBR) approved for § 59.208(m)(4).

(2) ASTM Method E380-82 Metric Practice, IBR approved for § 59.208(k).
 (3) SCAQMD Method 25.1, March 1989 Determination of Total Gaseous Non-Methane Organic Emissions as Carbon (amended February 26, 1991) IBR approved for § 59.208(g)(2).

§ 59.214 Availability of information and confidentiality

(a) Availability of information. Specific reports or records required by this subpart are not available to the

public. The Administrator will, upon request, provide information as to the compliance status of a product or regulated entity.

(b) Confidentiality. All confidential business information entitled to protection under section 114(c) of the CAA that must be submitted or maintained by a regulated entity pursuant to this section shall be treated in accordance with 40 CFR part 2, Subpart B.

TABLE 1 TO SUBPART C.—VOC CONTENT LIMITS BY PRODUCT CATEGORY

Product category	VOC content limit (weight-percent VOC)
Air fresheners:	
Single-phase	70
Double-phase	30
Liquids/pump sprays	18
Solids/gels	3
Automotive windshield washer fluid	35
Bathroom and tile cleaners:	
Aerosols	7
All other forms	5
Carburetor and choke cleaners	75
Cooking sprays—aerosol	18
Dusting aids:	
Aerosols	35
All other forms	7
Engine degreasers	75
Fabric protectants	75
Floor polishes/waxes:	
Products for flexible flooring materials	7
Products for nonresilient flooring	10
Wood floor wax	90
Furniture maintenance products-aerosol	25
General purpose cleaners	10
Glass cleaners:	
Aerosols	12
All other forms	8
Hairsprays	80
Hair mousses	16
Hair Styling gels	6
Household adhesives:	
Aerosols	75
Contact	80
Construction and panel	40
General purpose	10
Structural waterproof	15
Insecticides:	
Crawling bug	40
Flea and tick	25
Flying bug	35
Foggers	45
Lawn and Garden	20
Laundry prewash:	
Aerosols/solids	22
All other forms	5
Laundry starch products	5
Nail polish removers	85
Oven cleaners:	
Aerosols/pump	8
Liquids	5
Shaving creams	5

TABLE 2 TO SUBPART C.—HVOC¹ CONTENT LIMITS FOR UNDERARM DEODORANTS AND UNDERARM ANTIPERSPIRANTS

Product category	Percent HVOC content limit (weight-per-cent HVOC)
Underarm antiperspirants— aerosol	60
Underarm deodorants— aerosol	20

¹ High-volatility organic compound (HVOC) are VOC with vapor pressure greater than 80 millimeters of mercury at 20 degrees Celsius.

BILLING CODE 6560-50-M

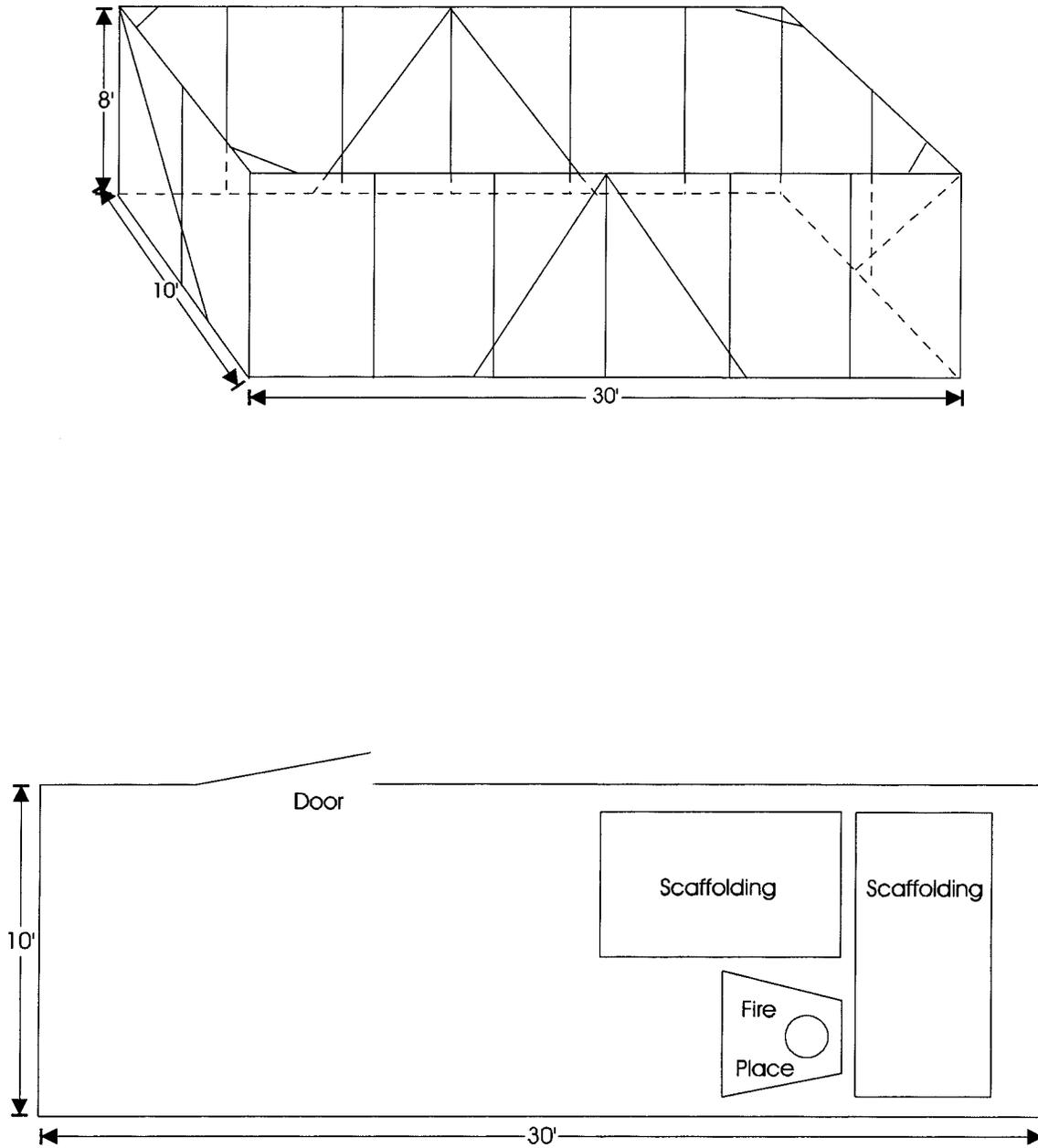


Figure 2. Suggested Enclosure Design

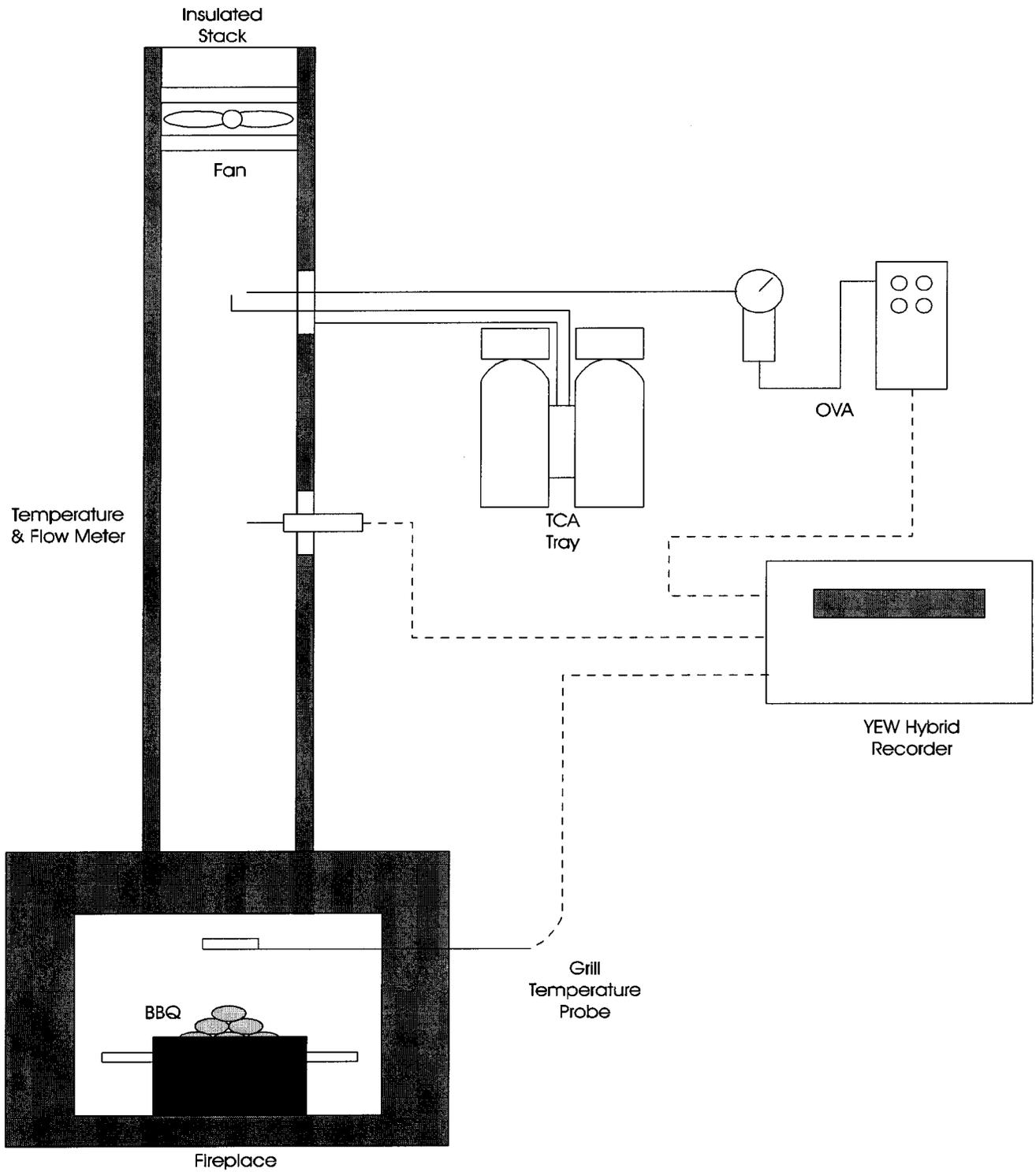
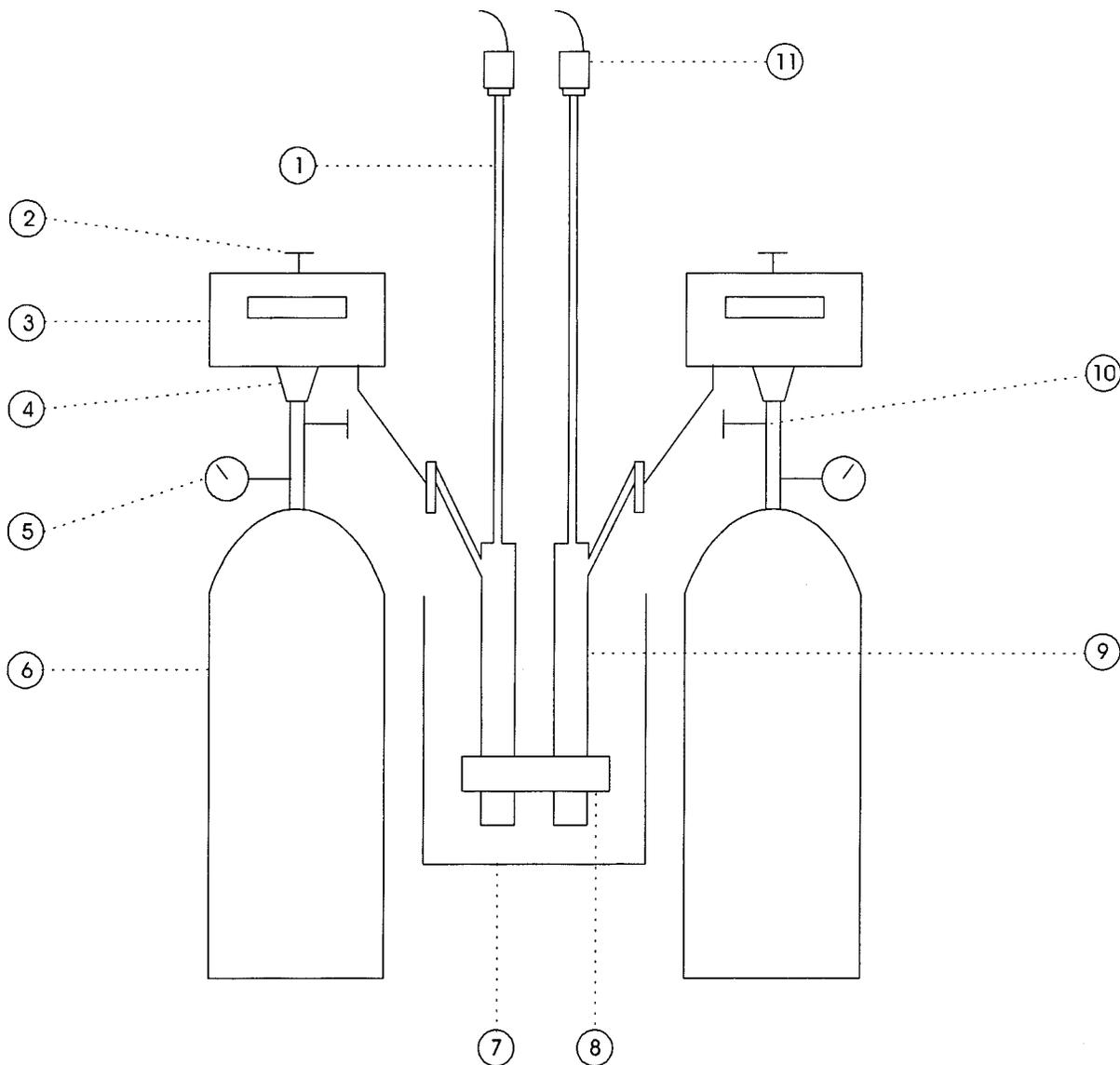


Figure 3. Sampling Apparatus Set-up with Chart Recorder



- | | |
|--|-----------------------------------|
| 1. Sampling Probe | 7. Condensate Trap Container |
| 2. Flow Rate Control Valve | 8. Heat Sink Trap |
| 3. Minihelic Differential Pressure Gauge | 9. Condensate Trap |
| 4. Vacuum Regulator | 10. Sample Flow Valve |
| 5. Vacuum Gauge | 11. Two Micron Particulate Filter |
| 6. Evacuated Tank | |

Figure 4. Sampling Apparatus for Organics

950156C-1a-RTP

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 59**

[AD-FRL-6149-7]

RIN 2060-AE55

National Volatile Organic Compound Emission Standards for Architectural Coatings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action promulgates national volatile organic compound (VOC) emission standards for architectural coatings pursuant to section 183(e) of the Clean Air Act (Act). This final rule is based on the Administrator's determination that VOC emissions from the use of architectural coatings have the potential to cause or contribute to ozone levels that violate the national ambient air quality standards (NAAQS) for ozone. Ozone is a major component of smog which causes negative health and environmental impacts when present in high concentrations at ground level. The final rule is estimated to reduce VOC emissions by 103,000 megagrams per year (Mg/yr) (113,500 tons per year

[tpy]) by requiring manufacturers and importers to limit the VOC content of architectural coatings.

DATES: The effective date is September 11, 1998. The incorporation by reference of certain publications listed in the regulation is approved by the Director of the Federal Register as of September 11, 1998.

ADDRESSES: *Technical Support Documents.* The regulation promulgated today is supported by two background information documents (BID); one specific to the architectural coatings rule, and one that addresses comments on the study and Report to Congress under section 183(e). These documents are: the BID for the promulgated architectural coating standards, National Volatile Organic Compound Emission Standards for Architectural Coatings—Background for Promulgated Standards (Architectural Coatings BID); and the BID containing the Administrator's response to comments on the section 183(e) study and Report to Congress, Response to Comments on Section 183(e) Study and Report to Congress (183-BID). The Architectural Coatings BID contains a summary of the changes made to the standards since proposal, a summary of all the public comments on the standards, and the Administrator's response to the comments and the 183-

BID contains a summary of all the public comments made on the section 183(e) study and Report to Congress and the list and schedule for regulation as well as the Administrator's response to the comments. Both documents may be obtained from the docket for this rulemaking and are also accessible through the Internet at <http://www.epa.gov/ttn/oarpg/ramain.html>; or from the United States Environmental Protection Agency Library (MD-35), Research Triangle Park, North Carolina 27711, telephone (919) 541-2777. Please refer to "National Volatile Organic Compound Emission Standards for Architectural Coatings—Background for Promulgated Standards," EPA-453/R-98-006b, or "Response to Comments on Section 183(e) Study and Report to Congress" EPA-453/R-98-007.

Docket. Docket No. A-92-18, contains supporting information used in developing the promulgated standards. Docket No. A-94-65 contains information considered by the EPA in development of the consumer and commercial products study and the subsequent list and schedule for regulation. The dockets are available for public inspection and copying from 8:00 a.m. to 5:30 p.m. Monday through Friday, excluding legal holidays. The

dockets are located at the EPA's Air and Radiation Docket and Information Center, Waterside Mall, Room M1500, 1st Floor, 401 M Street, SW, Washington, DC 20460; telephone (202) 260-7548 or fax (202) 260-4400. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Ms. Ellen Ducey at (919) 541-5408, Coatings and Consumer Products Group, Emission Standards Division (MD-13), United States Environmental Protection Agency, Research Triangle Park, North Carolina 27711 (ducey.ellen@epa.gov). Any correspondence related to compliance with this rule must be submitted to the appropriate EPA Regional Office listed in § 59.409 of the rule.

SUPPLEMENTARY INFORMATION:

Regulated Entities. Entities potentially regulated by this action are manufacturers and importers of architectural coatings. Architectural coatings are coatings that are recommended for field application to stationary structures and their appurtenances, to portable buildings, to pavements, or to curbs. Regulated categories and entities include:

Category	Examples of regulated entities
Industry	Manufacturers (which includes packagers and re-packagers) and importers of architectural coatings that are manufactured for sale or distribution in the United States, including all United States territories.
State/local/tribal governments.	State Departments of Transportation that manufacture their own coatings.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that the EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether your product is regulated by this action, you should carefully examine the applicability criteria in § 59.400 of the final rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section of this preamble.

Judicial review. This section 183(e) rule for architectural coatings was proposed on June 25, 1996 (61 FR

32729). This notice promulgating a rule for architectural coatings constitutes final administrative action concerning that proposal. Under section 307(b)(1) of the Act, judicial review of this final rule is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by November 10, 1998. Under section 307(d)(7)(B) of the Act, only an objection to this rule which was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the Act, the requirements established by today's final action may not be challenged separately in any civil or criminal proceeding brought by the EPA to enforce these requirements.

Outline. The information presented in this preamble is organized as follows:

- I. Background
 - A. Purpose of Regulation
 - B. Statutory and Regulatory Background
- II. Summary of Standards
 - A. Applicability
 - B. Volatile Organic Compound Content Limits
 - C. Exceedance Fee
 - D. Tonnage Exemption
 - E. Labeling
 - F. Recordkeeping
 - G. Reporting

- H. Compliance Provisions
- III. Summary of Considerations in Developing Standards
 - A. Basis of the Regulation
 - B. Stakeholder and Public Participation
- IV. Summary of Impacts
 - A. Environmental Impacts
 - B. Energy Impacts
 - C. Cost and Economic Impacts
- V. Significant Comments and Changes to Proposed Standards
 - A. National Rule versus Control Techniques Guidelines
 - B. Applicability and Regulated Entities
 - C. General Comments on Determination of Best Available Controls
 - D. Changes in Proposed Coating Categories
 - E. Addition of New Coating Categories
 - F. Category Overlap
 - G. Low Volume/Tonnage Exemption
 - H. Compliance Variance Provisions
 - I. Exceedance Fee Option
 - J. Labeling, Recordkeeping, and Reporting
 - K. Determination of Volatile Organic Compound Content
 - L. Compliance Date
 - M. Cost/Economic Impacts
 - N. Small Business Issues
 - O. Cost-Effectiveness
 - P. Future Study and Future Limits
 - Q. Administrative Provisions
- VI. Administrative Requirements
 - A. Docket
 - B. Paperwork Reduction Act
 - C. Executive Order 12866
 - D. Executive Order 12875
 - E. Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act of 1996
 - F. Unfunded Mandates Reform Act of 1995
 - G. Submission to Congress and the General Accounting Office
 - H. National Technology Transfer and Advancement Act
 - I. Executive Order 13045

I. Background

A. Purpose of Regulation

Ground-level ozone, which is a major component of "smog," is formed in the atmosphere by reactions of VOC and oxides of nitrogen (NO_x) in the presence of sunlight. The formation of ground-level ozone is a complex process that is affected by many variables.

Exposure to ground-level ozone is associated with a wide variety of human health effects, agricultural crop loss, and damage to forests and ecosystems. Acute health effects are induced by short-term exposures to ozone (observed at concentrations as low as 0.12 parts per million [ppm]), generally while individuals are engaged in moderate or heavy exertion, and by prolonged exposures to ozone (observed at concentrations as low as 0.08 ppm), typically while individuals are engaged in moderate exertion. Moderate exertion levels are more frequently experienced by individuals than heavy exertion levels. The acute health effects include respiratory symptoms, effects on

exercise performance, increased airway responsiveness, increased susceptibility to respiratory infection, increased hospital admissions and emergency room visits, and pulmonary inflammation. Groups at increased risk of experiencing such effects include active children, outdoor workers, and others who regularly engage in outdoor activities and individuals with preexisting respiratory disease. Available information also suggests that long-term exposures to ozone may cause chronic health effects (e.g., structural damage to lung tissue and accelerated decline in baseline lung function).

In accordance with section 183(e) of the Act, the Administrator has determined that VOC emissions from the use of architectural coatings have the potential to contribute to ozone levels that violate the NAAQS for ozone. Under authority of section 183(e), the EPA conducted a study of the VOC emissions from consumer and commercial products to determine their potential to contribute to ozone levels which violate the NAAQS for ozone. Based on the results of the study, the EPA determined that the architectural coatings category accounts for about 9 percent of the emissions from all consumer and commercial products. It is one of the largest emission sources among the consumer and commercial products categories and in many States represents one of the largest identifiable sources of unregulated VOC emissions. Consequently, the EPA and many States consider the regulation of architectural coatings to be an important component of the overall approach to reducing those emissions that contribute to ozone nonattainment. The EPA's determination that VOC emissions from the use of architectural coatings have the potential to contribute to nonattainment of the ozone NAAQS and the decision to regulate architectural coatings are discussed in the preamble to the proposed rule (61 FR 32729), in the "Consumer and Commercial Products Report to Congress" (EPA-453/R-94-066-A), in the **Federal Register** notice announcing the schedule for regulation (60 FR 15264), and in a separate **Federal Register** document published today that constitutes final action on the EPA's listing of architectural coatings for regulation.

B. Statutory and Regulatory Background

1. Section 183(e)

In 1990, Congress enacted section 183(e) of the Act, establishing a new regulatory program for controlling VOC emissions from consumer and

commercial products. Section 183(e) directs the Administrator to list, and schedule for regulation, categories of consumer and commercial products after completion of a study and report to Congress concerning the products and their potential to contribute to levels of ozone which violate the ozone NAAQS. A separate document in today's **Federal Register** contains a description of section 183(e) of the Act and contains a summary of significant public comments and the EPA responses regarding the section 183(e) study, the Report to Congress, and the list and schedule for regulation.

2. Regulatory Negotiation

In 1992, the EPA initiated a regulatory negotiation to address architectural coatings. The regulatory negotiation process is an alternative to the traditional approach to rulemaking. The members of the architectural coatings regulatory negotiation committee represented the affected industries, consumers, Federal agencies, State and local air pollution control agencies, environmental groups, and labor organizations. Regulatory negotiation meetings were held from October 1992 to February 1994. Despite negotiation efforts, the committee could not reach consensus on some key regulatory issues for developing the rule, and on September 23, 1994, the regulatory negotiation concluded without consensus. Therefore, the EPA initiated development of the architectural coatings rule through conventional rule development procedures. The EPA utilized data and information obtained from the regulatory negotiation to complement additional information gathered during the rule development. Specifically, the EPA took into consideration information on the volume, VOC content, and hazardous air pollutant (HAP) content of coatings produced in 1990 in the VOC Emissions Inventory Survey conducted by industry.

3. Relationship to State and Local Regulation of Architectural Coatings

Emissions from the use of architectural coatings are not currently regulated at the Federal level. Although a few States have had architectural coatings regulations in place for a number of years, many State and local areas are still seeking to obtain VOC reductions from this source category either from a national rule or from additional regulation at the State or local level.

Differing requirements of State and local architectural coating regulations have created administrative, technical,

and marketing problems for both large and small companies that market and distribute products in multiple States. Both large and small manufacturers have noted the additional burden associated with differences in State and local requirements. These industry representatives have noted that a Federal rule would provide some degree of consistency, predictability, and administrative ease for the industry.

States with ozone pollution problems are supportive of the EPA rulemakings that will assist them in their efforts toward achievement of the ozone standard. The National Governors' Association and Environmental Council of States (a group composed of environmental commissioners from each State), the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control program Administrators, and the 37-State Ozone Transport Assessment Group (OTAG) all have urged the EPA to finalize national rules for architectural coatings. State representatives have long recommended that the EPA develop a national rule for this product category. In part, this is because a national rule will help reduce compliance problems associated with transportation of noncompliant coatings into nonattainment areas from neighboring areas and neighboring States.

Given the EPA's commitment to develop a national VOC rule for architectural coatings, 14 States currently are depending on anticipated reductions from the rule to meet a Clean Air Act requirement for State Implementation Plans (SIP) to achieve a 15-percent reduction in overall VOC emissions, which is required for areas with ozone pollution classed as moderate nonattainment or worse. Other States can use these emission reductions to meet Clean Air Act requirements for additional rate-of-progress plans required for 1999 and beyond. If the EPA failed to promulgate a Federal rule for architectural coatings, these States

would need to make up the shortfall in emission reductions needed to achieve attainment through other regulations, which would likely target substantially more expensive reductions from local industries and businesses.

II. Summary of Standards

A. Applicability

The architectural coatings rule applies to manufacturers and importers of architectural coatings that are manufactured after September 13, 1999 for sale or distribution in the United States, including the District of Columbia and all United States territories. For architectural coatings registered under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Section 136, *et seq.*) (FIFRA), the applicable date is March 10, 2000.

The regulated entity under this rule is the manufacturer or importer of a regulated architectural coating. The regulated entities include any manufacturers or importers that produce, package, or repack architectural coatings for sale or distribution in the United States, including the District of Columbia and all United States territories. A person that repackages architectural coatings as part of a paint exchange and does not produce, package, or repack any other architectural coatings for sale or distribution in the United States, is not included in the definition of manufacturer. Similarly, a person that repackages an architectural coating by transferring it from one container to another is not included in the definitions of importer and manufacturer, provided the VOC content of the coating is not altered and the coating is not sold or distributed to another party.

An architectural coating is defined in the rule as: "a coating recommended for field application to stationary structures and their appurtenances, to portable buildings, to pavements, or to curbs." The definition of architectural coating excludes: "adhesives and coatings

recommended by the manufacturer or importer solely for shop applications or solely for application to non-stationary structures, such as airplanes, ships, boats, and railcars."

Architectural coatings that are subject to the rule are divided into a number of coating categories, such as "exterior flats" or "industrial maintenance coatings." These coating categories are defined in the rule for purposes of specifying the applicable emission limits. In determining if a coating is subject to this rule, a coating must first meet the general definition of an architectural coating.

The standards do not apply to the following:

- (1) Coatings manufactured exclusively for sale or distribution outside the United States;
- (2) Coatings manufactured prior to September 13, 1999;
- (3) Coatings sold in nonrefillable aerosol containers;
- (4) Coatings that are collected and redistributed at paint exchanges in accordance with this rule; and
- (5) coatings sold in containers with a volume of 1 liter or less.

B. Volatile Organic Compound Content Limits

Manufacturers and importers must limit the VOC content of subject coatings to the VOC content levels presented in table 1 of this subpart, unless they utilize the exceedance fee or tonnage exemption provisions described below. These limits apply to the VOC content that would result after thinning a coating according to the manufacturer's maximum thinning recommendations. Each subject coating must be classified by the manufacturer or importer as belonging to at least one of the categories listed in table 1. Each category is defined in the rule's definitions section. If none of the specific category definitions applies to a coating, then the coating is included in either the flat or nonflat category, depending on its gloss level.

TABLE 1 OF SUBPART D.—VOLATILE ORGANIC COMPOUND (VOC) CONTENT LIMITS FOR ARCHITECTURAL COATINGS

[Unless otherwise specified, limits are expressed in grams of VOC per liter of coating thinned to the manufacturer's maximum recommendation excluding the volume of any water, exempt compounds, or colorant added to tint bases.]

Coating category	Grams per liter	Pounds per gallon ^a
Antenna coatings	530	4.4
Anti-fouling coatings	450	3.8
Anti-graffiti coatings	600	5.0
Bituminous coatings and mastics	500	4.2
Bond breakers	600	5.0
Calcimine recoater	475	4.0
Chalkboard resurfacers	450	3.8
Concrete curing compounds	350	2.9
Concrete curing and sealing compounds	700	5.8

TABLE 1 OF SUBPART D.—VOLATILE ORGANIC COMPOUND (VOC) CONTENT LIMITS FOR ARCHITECTURAL COATINGS—
Continued

[Unless otherwise specified, limits are expressed in grams of VOC per liter of coating thinned to the manufacturer's maximum recommendation excluding the volume of any water, exempt compounds, or colorant added to tint bases.]

Coating category	Grams per liter	Pounds per gallon ^a
Concrete protective coatings	400	3.3
Concrete surface retarders	780	6.5
Conversion varnish	725	6.0
Dry fog coatings	400	3.3
Extreme high durability coatings	800	6.7
Faux finishing/glazing	700	5.8
Fire-retardant/resistive coatings:		
Clear	850	7.1
Opaque	450	3.8
Flat coatings:		
Exterior	250	2.1
Interior	250	2.1
Floor coatings	400	3.3
Flow coatings	650	5.4
Form release compounds	450	3.8
Graphic arts coatings (sign paints)	500	4.2
Heat reactive coatings	420	3.5
High temperature coatings	650	5.4
Impacted immersion coatings	780	6.5
Industrial maintenance coatings	450	3.8
Lacquers (including lacquer sanding sealers)	680	5.7
Magnesite cement coatings	600	5.0
Mastic texture coatings	300	2.5
Metallic pigmented coatings	500	4.2
Multi-colored coatings	580	4.8
Nonferrous ornamental metal lacquers and surface protectants	870	7.3
Nonflat coatings:		
Exterior	380	3.2
Interior	380	3.2
Nuclear coatings	450	3.8
Pretreatment wash primers	780	6.5
Primers and undercoaters	350	2.9
Quick-dry coatings:		
Enamels	450	3.8
Primers, sealers, and undercoaters	450	3.8
Repair and maintenance thermoplastic coatings	650	5.4
Roof coatings	250	2.1
Rust preventative coatings	400	3.3
Sanding sealers (other than lacquer sanding sealers)	550	4.6
Sealers (including interior clear wood sealers)	400	3.3
Shellacs:		
Clear	730	6.1
Opaque	550	4.6
Stains:		
Clear and semitransparent	550	4.6
Opaque	350	2.9
Low solids	^b 120	^b 1.0
Stain controllers	720	6.0
Swimming pool coatings	600	5.0
Thermoplastic rubber coatings and mastics	550	4.6
Traffic marking coatings	150	1.3
Varnishes	450	3.8
Waterproofing sealers and treatments	600	5.0
Wood preservatives:		
Below ground wood preservatives	550	4.6
Clear and semitransparent	550	4.6
Opaque	350	2.9
Low solids	^b 120	^b 1.0
Zone marking coatings	450	3.8

^a English units are provided for information only. Enforcement of the rule will be based on the metric units.

^b Units are grams of VOC per liter (pounds of VOC per gallon) of coating, including water and exempt compounds, thinned to the maximum thinning recommended by the manufacturer.

If a coating is marketed in more than one of the coating categories listed in table 1 of this subpart, the manufacturer or importer must comply with the lowest applicable VOC content limit, unless an exception is specified in

§ 59.402(c) of the rule. These exceptions were developed to clarify which VOC content limit applies in situations where inherent overlap exists between category definitions. For example, varnishes used on wood floors were not intended to be subject to the more stringent emission limit for floor coatings. Therefore, an exception paragraph is included in the rule stating that varnishes recommended for use on floors are subject to the VOC content limit for varnishes, and not the limit for floor coatings.

Manufacturers and importers of recycled coatings are given the compliance option of calculating an adjusted-VOC content. Manufacturers and importers of recycled architectural coatings are defined as those that collect, reprocess, and market coatings that contain a percentage of post-consumer coating. Such use is environmentally beneficial because it reduces the amount of waste from architectural coatings that would otherwise result from evaporation of VOC from unused coatings or of coatings sent to landfills or elsewhere. The adjusted-VOC content provides regulated entities some credit for the amount of post-consumer material contained in the coating. The EPA is providing this credit to encourage recycling of unused coatings. The adjusted-VOC content is determined by multiplying the percentage of post-consumer content of the coating by the VOC content of the recycled coating, which is then subtracted from the VOC content of the end product. An explicit equation for the calculation is given in the rule.

C. Exceedance Fee

The rule includes an exceedance fee compliance option. This is an economic incentive approach whereby manufacturers and importers may choose to comply with the rule by paying a fee in lieu of meeting the VOC content limits for their coating products. The fee is \$0.0028 per gram (\$2,500 per ton) of excess VOC. The fee is calculated using the amount of VOC in excess of the applicable VOC content limit. The exceedance fee is paid annually to the appropriate EPA Regional Office and is due no later than March 1 in the year following the calendar year in which the coating is manufactured or imported.

D. Tonnage Exemption

The final rule also includes a tonnage exemption that allows each manufacturer and importer to sell or distribute limited quantities of architectural coatings that do not comply with the VOC content limits and

for which no exceedance fee is paid. The tonnage exemption can be used for multiple products, but the total mass of VOC contained in a single manufacturer's or importer's exempt coatings may not exceed the amounts in table 2. The total mass of VOC is calculated based on the volume of coatings manufactured or imported and the total VOC content of each of the coatings for which an exemption is claimed. To reiterate, the calculation is based on the total mass of VOC contained in all exempt coatings, not the difference between the VOC content of each coating and the applicable VOC content limit in the rule.

TABLE 2.—TONNAGE EXEMPTION

The total mass of VOC contained in all exempt coatings combined may not exceed	During the time period of
23 megagrams (25 tons) VOC.	September 13, 1999 through December 31, 2000.
18 megagrams (20 tons) VOC.	Calendar year 2001
9 megagrams (10 tons) VOC.	Calendar year 2002 and each year thereafter.

E. Labeling

For coatings complying with the VOC content limits in table 1 of this subpart, manufacturers and importers must provide the following information on the label or lid of each coating: (1) the date the coating was manufactured, or a code indicating this date (this information may alternatively be provided on the bottom of the can); (2) a statement of the manufacturer's recommendation regarding thinning of the coating (does not apply to thinning with water); and (3) either the VOC content of the coating in the container, or the VOC content limit from table 1 of the rule with which the coating must comply and with which it does comply. (Any coating for which the exceedance fee or tonnage exemption provision is being used must be labeled with its VOC content because it would not be in compliance with the VOC content limits in table 1 of this subpart.)

Industrial maintenance coatings must be labeled with one of several prescribed phrases indicating that the coating is not intended for general consumer use. For recycled coatings, manufacturers and importers must indicate the post-consumer coating content on the container label or lid.

F. Recordkeeping

There are no recordkeeping requirements for coatings complying

with the VOC content limits in table 1 of this subpart. However, the rule does include recordkeeping requirements for compliance with the recycled coating, exceedance fee, and tonnage exemption provisions.

For recycled coatings, the manufacturer or importer must keep records of the volume of coatings received for recycling, the volume of coatings received that is unusable, the volume of virgin coatings used with recycled coatings, and the volume of final recycled coatings manufactured or imported. In addition, manufacturers and importers of recycled coatings must keep records of the calculation of adjusted-VOC contents.

For compliance with the exceedance fee provisions, manufacturers and importers must keep records on an annual basis for each coating of the VOC content, the VOC content in excess of the applicable limit, and the volume manufactured or imported. Manufacturers and importers must also keep records of the calculation of fees, the annual fee for each coating, and the total annual fee.

For the tonnage exemption, manufacturers and importers must keep records of the products claimed under the exemption, the VOC content and actual sales or distribution for each exempt product, and the total mass of VOC contained in all products claimed under the exemption.

All required records must be retained for a period of 3 years in a form suitable for inspection.

Although the retention of test data is not required by this rule, the EPA encourages facilities to keep any information resulting from either Method 24 or any other acceptable method to determine compliance. This information will help the EPA make a preliminary assessment of compliance for the coatings subject to this rule. In the absence of demonstrable indications of compliance, the EPA may require Method 24 testing by the facility in accordance with § 59.406(b).

G. Reporting

All manufacturers and importers of subject coatings must file an initial notification report listing the coating categories from table 1 of this subpart that they manufacture or import and the locations of facilities that manufacture architectural coatings in the United States. The initial notification report must be submitted no later than September 13, 1999 or 180 days after the date that the manufacturer or importer first manufactures or imports a subject coating, whichever is later.

In addition, if a manufacturer or importer uses a date coding system, an explanation of the coding system must be submitted with the initial report. Explanations of new codes must be filed within 30 days after their first use.

There are no reporting requirements beyond the initial notification and date code explanation for manufacturers and importers who meet the VOC content limits in table 1. There are additional reporting requirements for manufacturers and importers who choose to take advantage of optional provisions, including: (1) the calculation of an adjusted-VOC content for recycled coatings (based on post-consumer coating content); (2) the payment of the exceedance fee; and (3) the tonnage exemption. An annual report is required for each of these provisions.

H. Compliance Provisions

The rule specifies the procedure to determine the VOC content of coatings subject to the rule. Although the EPA has chosen Method 24 as the reference method for determining compliance with the VOC content requirements of this rule, it is not the exclusive method for determining compliance. The manufacturer or importer may also use a different analytical method than Method 24 (if it is approved by the Administrator on a case-by-case basis), formulation data, or any other reasonable means to determine the VOC content of coatings. However, the EPA may require a Method 24 analysis to be conducted, and if there are any inconsistencies between the results of a Method 24 test and any other means for determining VOC content, the Method 24 test results will govern. The EPA can use other evidence as well to establish whether or not a manufacturer or importer is in compliance with the provisions of this rule.

III. Summary of Considerations in Developing Standards

A. Basis of the Regulation

Section 183(e) of the Act directs the EPA to regulate products using best available controls (BAC), and defines BAC as:

the degree of emissions reduction the Administrator determines, on the basis of technological and economic feasibility, health, environmental, and energy impacts, is achievable through the application of the most effective equipment, measures, processes, methods, systems or techniques, including chemical reformulation, product or feedstock substitution, repackaging, and directions for use, consumption, storage, or disposal.

The statute thus empowers the EPA to examine a variety of considerations to use in determining the best means of obtaining VOC emission reductions from a given consumer or commercial product category. As discussed in the preamble to the proposed rule (61 FR 32737, June 25, 1996), the primary factors the EPA considered in determining BAC for architectural coatings were technological and economic feasibility, and environmental impacts.

Non-air environmental impacts (solid waste and water) and energy impacts are expected to be minimal and, therefore, do not vary significantly among various VOC control levels. With regard to health impacts, the EPA has concluded that reductions in VOC emissions and concomitant reductions in ozone will reduce health impacts of exposure to ozone.

For architectural coatings, the EPA determined that BAC is the degree of emission reduction achievable through a system of regulation that encourages product reformulation to meet the VOC content limits in table 1 of this subpart, provides an economic incentive (the exceedance fee option) to lower VOC content of coatings, and allows for limited exemption of coatings (the VOC tonnage exemption). The EPA concluded that for this product category, pollution prevention is the most effective means of achieving VOC emission reductions. In working to comply with State VOC rules over the past several years, the architectural coatings industry has established product reformulation as the most technologically and economically feasible strategy for reducing VOC emissions. Reformulation can consist of minor adjustments in coating VOC contents or larger adjustments involving a change in resin technology. The EPA considered many factors in evaluating the economic and technological feasibility of different VOC content levels and different degrees of reformulation. These factors included existing State and local VOC emission standards, coating VOC content and sales information, analysis of coating technologies, performance considerations, cost considerations, market impacts, and stakeholder input. In addition, the EPA considered the relative contribution of different coating types to overall VOC emissions from architectural coatings.

At proposal, the EPA requested comment on alternatives to the proposed VOC content limits that would provide flexibility, if additional time were needed or it was not cost-effective to develop a low-VOC formulation.

Based on comments received, the EPA included in the final rule an exceedance fee (discussed in sections II.C and V.I) and an exemption for a certain tonnage of VOC content (discussed in sections II.D and V.G).

The final VOC content limits in conjunction with the exceedance fee and tonnage exemption reflect the EPA's determination of BAC and are based primarily on the 1990 VOC Emissions Inventory Survey, analysis of existing State rules for architectural coatings, data obtained from participants in the regulatory negotiation, and information submitted by coating manufacturers and other interested parties during the course of the rule development and public comment period.

B. Stakeholder and Public Participation

The EPA proposed the architectural coatings rule and published the preamble in the **Federal Register** on June 25, 1996 (61 FR 32729). The EPA placed the proposed regulatory text, BID, and Economic Impact Analysis (EIA) in a docket open to the public at that time and made them available to interested parties. The EPA solicited comments at the time of the proposal. To provide easier access by the public, the EPA subsequently published the proposed regulatory text in the **Federal Register** on September 3, 1996 (61 FR 46410) and extended the comment period from August 30 to September 30, 1996. The EPA again extended the comment period to November 4, 1996 (notice published at 61 FR 52735, October 8, 1996).

To provide interested persons the opportunity for oral presentation of data, views, or arguments concerning the proposed architectural coating rule, the EPA held a public hearing in Durham, North Carolina on July 30, 1996. Nineteen speakers presented oral testimony at this hearing. The EPA held another public meeting to discuss issues related to the impact of the proposed rule on small manufacturers in Rosemont, Illinois, on August 13, 1996. There were 77 persons who participated in the meeting, and 18 speakers presented oral testimony.

The EPA received over 200 comment letters on the proposed rule. Commenters included coating manufacturers and importers, State regulatory agencies, trade associations, environmental groups, the United States military, and others. The EPA has carefully considered the comments and has made changes to the proposed rule where determined by the Administrator to be appropriate. The most significant comments and responses are discussed in section V of this preamble. A detailed

discussion of all significant comments and responses on the rule itself can be found in the architectural coatings BID, which is referenced in the ADDRESSES section of this preamble.

A separate document in today's **Federal Register** contains a summary of public comments and the EPA's responses regarding the section 183(e) study, the Report to Congress, the list of consumer and commercial product categories selected for regulation, and the schedule for regulation.

IV. Summary of Impacts

A. Environmental Impacts

1. VOC Reductions

The standards will reduce nationwide emissions of VOC from architectural coating products by an estimated 103,000 Mg/yr (113,500 tpy). These reductions are compared to the 1990 baseline emissions estimate of 510,000 Mg/yr (561,000 tpy). This reduction equates to a 20-percent reduction, compared to the emissions that would have resulted in the absence of these standards.

2. Health Effects

Because VOC are precursors to ozone formation, the VOC reductions from architectural coatings will contribute to a decrease in adverse health effects that result from exposure to ground-level ozone. These health effects result from short-term or prolonged exposure to ground-level ozone and include respiratory symptoms, effects on exercise performance, increased airway responsiveness, increased susceptibility to respiratory infection, increased hospital admissions and emergency room visits, and pulmonary inflammation. Available information also suggests that long-term exposures to ozone may cause chronic health effects (e.g., structural damage to lung tissue and accelerated decline in baseline lung function).

3. Secondary Air, Water, and Solid Waste Impacts

No significant adverse secondary air, water, or solid waste impacts are anticipated from compliance with these standards. Generally, coating reformulation, a pollution prevention technique, will be used to comply with these standards. In cases where conversion from solventborne to waterborne coatings is the method used to achieve compliance, an increase in wastewater discharge may occur if waste from the manufacture of waterborne coatings is discharged by manufacturers to publicly owned treatment works. The provisions for

recycling of coatings in the rule may potentially reduce the amount of coating discarded as solid waste.

The regulations do not impact existing product inventories. Products manufactured before the compliance deadline are not affected. Excluding existing product inventories from the regulations will eliminate any incremental solid waste increase due to discarded, unsold products. The new products are not expected to require any more packaging than existing products, and thus the volume of discarded packaging should not increase.

B. Energy Impacts

The EPA anticipates that there will be no increase in national annual energy usage as a result of this rule. The standards do not require the use of air pollution control devices, which can affect energy use.

C. Cost and Economic Impacts

Sixty-four percent of the products included in the 1990 industry survey meet the VOC content limits in this rule and, therefore, there will be no costs to reformulate these products. The manufacturer of an architectural coating that does not meet the VOC content limits in table 1 of this subpart, will be required to reformulate the product if it will continue to be marketed, unless the manufacturer chooses to use an alternative compliance mechanism such as the exceedance fee or tonnage exemption provisions. The EPA presumes that manufacturers will choose the option that is most advantageous to them, but each option imposes costs, some of which will be passed on to consumers in the form of moderately higher prices and some of which will be borne directly by the manufacturers.

The cost for reformulating noncompliant products depends on the level of effort required to develop a new product (e.g., research and development and market testing expenditures) and how these expenditures are incurred over time. Based on comments received at proposal and the original data presented at proposal, the EPA revised its estimate of the cost to reformulate a product from a lump-sum initial investment of \$250,000 to \$87,000 (in 1991 dollars), which is annualized to an upper bound value of \$14,570 per reformulation (see Section V. M of this preamble for further discussion). Although variations are likely to exist, for purposes of this analysis, this reformulation cost estimate is assumed to be the same for all product types and variations, so the value is independent of VOC content and the annual sales

volume of the product. Other costs and cost savings associated with reformulation are likely, but could not be quantified. These costs are discussed qualitatively in the EIA. Reformulation costs are direct costs imposed on manufacturers of noncompliant products. Based on public comments, the EPA found that in the traffic markings category, the user of the coating may have to modify technology or purchase new equipment to apply the coating. This additional cost is not considered a direct impact because it occurs as a result of restrictions on coating manufacturers, but the cost is borne by the user of the coating rather than the manufacturer. Nevertheless, the EPA examined the indirect impacts of this category because the changed equipment costs are so directly related to the change of formulation. The EPA estimates that changes in traffic marking equipment may cost up to \$3 million annually (in 1991 dollars). For other regulated categories, it is not anticipated that new equipment or other indirect costs will be incurred to apply compliant coatings.

Based on the information above, implementation of this regulation is estimated to result in national annualized costs of approximately \$25.6 million (in 1991 dollars). (For the benefit of readers, this value is equivalent to approximately \$29 million in 1996 dollars.) This estimate includes \$0.6 million in costs for manufacturers and importers that the EPA anticipates will take advantage of the alternative exceedance fee compliance provision. The rule does not impose monitoring requirements (and associated costs), but ensures compliance through recordkeeping, reporting, and labeling requirements. The annual cost for these requirements is expected to be approximately \$2.5 million. Therefore, the EPA estimates the total cost associated with the rule to be \$28 million per year (1991 dollars) (or \$32 million in 1996 dollars). In comparison, the 1991 value of shipments for this industry was \$6.3 billion. Thus, the estimated costs amount to roughly 0.4 percent of the baseline revenues for this industry.

The estimated cost-effectiveness of the rule is \$270 per megagram (\$250 per ton) of VOC emission reduction. This cost per megagram of VOC emission reduction makes the architectural coatings rule an economically efficient means of obtaining VOC emission reductions, when compared to the cost per megagram of reduction potentially available through other control measures. As a result of the costs discussed above, the EPA anticipates

that the average change in market prices and output across all market segments are minimal, with an average estimated impact of less than one-tenth of 1 percent of baseline values.

The EPA believes the estimates of total cost and associated economic impacts are conservatively high. Since the best available data on VOC content of architectural coatings is from 1990, and the final rule has VOC content requirements similar to State rules which have been enforced since 1990, the EPA believes the estimated number of reformulations and/or their reformulation cost that result from this action may be overstated in that the compliant products developed by manufacturers to comply with various State rules can be used to meet the requirements of the Federal rule. The EIA also takes a conservative approach to several assumptions to produce an upper bound estimate of social cost.

V. Significant Comments and Changes to Proposed Standards

A complete summary of public comments on the architectural coatings rule and the EPA's responses are presented in the Architectural Coatings BID, as referenced in the "ADDRESSES" section of this preamble. The EPA received many comments addressing a wide variety of issues in the proposed rule for architectural coatings. After careful consideration of these comments, the EPA has made a number of changes to the proposed rule. The major changes made to the rule since proposal include: (1) clarification of the definitions of "architectural coating," "coating," "importer," "manufacturer," and "paint exchange,;" (2) addition of definitions for "imported" and "manufactured,;" (3) clarification of which standards apply to overlapping coating categories; (4) changes to the definitions and VOC content limits for certain categories; (5) addition of certain new coating categories; (6) addition of the exceedance fee provision; (7) deletion of the variance provisions; (8) addition of an exemption for prescribed quantities of coatings (tonnage exemption); (9) addition of administrative provisions; and (10) reorganization and reformatting of the rule for clarity.

The following sections of the preamble discuss the most significant issues raised by commenters and the EPA's responses to them.

A. National Rule Versus Control Techniques Guidelines

The EPA requested comment on whether and how a CTG approach would be as effective as a national rule

in reducing VOC emissions from architectural coatings in ozone nonattainment areas. Section 183(e) of the Act authorizes the Administrator to issue a CTG in lieu of a national rule if the CTG will be substantially as effective in reducing VOC emissions in ozone nonattainment areas.

Over 20 commenters stated that they support a national architectural coatings rule. Commenters who supported a national rule with VOC content limits stated that complying with a single uniform regulation would be less burdensome, and more cost-effective than complying with many different standards in different States. Commenters also stated that small manufacturers and importers are less likely to have the resources necessary to produce different lines of products to meet varying standards for different areas of the country. Furthermore, many commenters pointed out that coatings are widely distributed and easily transported from attainment areas to nonattainment areas. Therefore, regulating products only in nonattainment areas would be a less effective strategy, and a more difficult one to enforce.

Seven commenters stated that they support a CTG in lieu of a national rule. Commenters favoring a CTG generally contended that section 183(e) targets VOC emissions in nonattainment areas, and that a national rule is not warranted. The commenters stated that a CTG would be more appropriate since issuance of a CTG requires States to implement standards only in nonattainment areas. According to these commenters, allowing coatings manufactured or imported in attainment areas to remain unregulated would provide market niches for small manufacturers and importers. Some commenters also argued that consumers in attainment areas should not have to forego the alleged benefits of higher VOC content coatings.

Several commenters noted that, even with implementation of a national rule, States can promulgate more stringent standards. Therefore, even a national rule does not ensure uniform nationwide VOC standards. Some commenters urged cooperation and discussion between the EPA and States that consider implementing standards more stringent than the national rule.

The EPA has concluded that a national rule is the more effective approach for reducing emissions from architectural coatings for the following reasons. First, the EPA believes that a national rule is an appropriate means to reduce emissions from products that are, by their nature, easily transported

across area boundaries, and many are widely distributed and are used by widely varied types of end-users. For many such products, the end-user may use them in different locations from day-to-day. Because the products themselves are easily transportable, a national rule would preempt opportunities for end-users to purchase such consumer and commercial products in attainment areas and then use them in nonattainment areas, thereby circumventing the regulations and undermining the decrease in VOC emissions in nonattainment areas. The EPA, therefore, believes that a national rule with applicability to products, regardless of where they are marketed, is a reasonable means to ensure that the regulations result in the requisite degree of VOC emission reduction.

Second, the EPA believes that national rules with nationwide applicability may help to mitigate the impact of ozone and ozone precursor transport across some area boundaries. Recent modeling performed by the OTAG and others suggests that in some circumstances VOC emitted outside nonattainment area boundaries can contribute to ozone pollution in nonattainment areas, for example, by traveling into neighboring nonattainment areas. The EPA has recognized the potential for VOC transport in the December 29, 1997, "Guidance for Implementing the 1-hour Ozone and Pre-Existing PM₁₀ NAAQS" concerning credit for VOC emission reductions towards rate-of-progress requirements. The guidance indicates that the EPA may give credit for VOC reductions within 100 kilometers of nonattainment areas. In addition, the June 1997 recommendations made by OTAG supported the EPA's use of VOC regulations that apply to both nonattainment and attainment areas to implement section 183(e) of the Act for certain products. The particular product categories OTAG cited for national VOC regulations are automobile refinishing coatings, consumer products, and architectural coatings. The EPA believes that regulation of products in at least some attainment areas is necessary to mitigate VOC emissions that have the potential to contribute to ozone nonattainment in accordance with section 183(e) of the Act.

Based on these considerations, and considerations of the effectiveness and enforceability of emission controls, the EPA has determined that a CTG for architectural coatings would not be substantially as effective as a national rule in reducing VOC emissions in ozone nonattainment areas.

A major trade association representing many architectural coating manufacturers provided comments supporting a national rule that applies to all areas as the most efficient regulatory mechanism from the perspective of marketing and distribution of products. In addition, comments from a number of small and large manufacturers favored a national rule to encourage uniformity in regulation from State to State, and thereby minimize significant costs and burdens associated with understanding and meeting differing State and local requirements.

The EPA also received some comments suggesting that a national rule apply only in nonattainment areas. The EPA believes that rules applicable only in nonattainment areas would be unnecessarily complex and burdensome for many regulated entities to comply with and for the EPA to administer. The potentially regulated entities under section 183(e) are the manufacturers, processors, wholesale distributors, or importers of consumer and commercial products. For these three product categories, EPA believes that regulations that would differentiate between products destined for attainment and nonattainment areas should adequately insure that only compliant products go to nonattainment areas. For such a rule to be effective, EPA believes that this would necessitate requiring regulated entities to track their products and control their distribution, sale, and ultimate destination for use to insure that only compliant products go to nonattainment areas. The EPA notes that for architectural coatings, regulated entities do not currently track or control distribution of their products once they sell them to retail distributors. Although the EPA recognizes that some product lines in some product categories may only be distributed regionally in areas that are already in attainment, the large majority of the product lines will be distributed nationally. Regulations targeted only at nonattainment areas could, thus, impose significant additional burdens upon regulated entities to achieve the goals of section 183(e).

By comparison, existing State regulations in some instances apply to a broader range of entities, including retail distributors and end-users. Given the limitations of section 183(e) as to regulated entities, the EPA believes that regulations applicable to both attainment areas and nonattainment areas is a reasonable means to ensure use of complying products where necessary, while avoiding potentially burdensome impacts and less reliable

mechanisms to achieve the goals of section 183(e).

The EPA expects a national VOC rule for architectural coatings to encourage uniformity in requirements across the country. Many States may choose to rely on the EPA rule rather than adopt their own requirements. The EPA's consideration of this factor, however, is not meant to imply that it would be inappropriate for States to develop more stringent levels of controls where necessary to attain the ozone standard. Some States, particularly those with long-standing and significant nonattainment problems, may need additional emission reductions to achieve attainment of the NAAQS and may need to adopt or maintain more stringent requirements for consumer products like architectural coatings in order to help reach attainment of the ozone NAAQS. The final rule has been amended to include provisions in § 59.410, State authority, to clarify that States are not restricted by this rule in establishing and enforcing their own additional standards and limits.

The consultation provisions of section 183(e)(9) of the Act are designed to promote uniformity in such cases where States or local areas need to adopt requirements other than those promulgated by the EPA. Section 183(e)(9) requires the EPA to provide relevant information and studies requested by any State. The EPA expects such consultation and cooperation to result in States developing options for regulation that will be compatible with other States and with the national standards. The EPA considers a national VOC rule an important element in promoting consistency among architectural coating standards.

B. Applicability and Regulated Entities

1. Subject Coatings

The EPA received several comments requesting clarification regarding the definition of "coating" and what particular coatings are subject to the architectural coatings rule. The EPA has modified the definition of "coating" so that it no longer defines a coating as an application that creates a film when applied. The revised definition states that a coating is a "material applied onto or impregnated into" a substrate. The EPA did not intend to limit rule applicability to film-building products.

Commenters questioned whether coatings recommended for both architectural uses and non-architectural uses would be subject to the rule. The commenters also questioned whether shop-applied and factory-applied coatings would be subject. Additional

commenters requested clarification as to whether adhesives are subject to the rule.

The architectural coatings rule applies to coatings "recommended for field application to stationary structures and their appurtenances, to portable buildings, to pavements, or to curbs." Therefore, the rule does not apply to coatings that are marketed solely for shop application, such as in a manufacturing setting, or coatings marketed solely for application to non-stationary structures, such as aircraft and ships. However, a coating that is recommended by the manufacturer or importer for use as an architectural coating is subject to the architectural coatings rule even if the coating is also recommended for non-architectural uses. The fact that a coating regulated by the architectural coatings rule may also be subject to other rules with different requirements does not alter the manufacturer's or importer's obligation to meet the requirements of the architectural coatings rule.

The EPA did not intend to regulate adhesives of any kind in the architectural coatings rule. The EPA intends to regulate industrial adhesives as a separate product category under section 183(e) authority.

To clarify the EPA's intent regarding what products are covered by this final rule, the definition of architectural coating has been revised to exclude adhesives and coatings recommended solely for shop application or for application to non-stationary structures. For additional clarity, definitions of "adhesive" and "shop application" have also been added to the final rule.

The EPA has added definitions of "imported" and "manufactured" to the final rule to clarify the point at which an architectural coating becomes subject to the requirements in the rule. The final rule also includes additional language in the definitions of "importer" and "manufacturer" to clarify that all divisions of a company, subsidiaries, and parent companies are considered to be a single importer or manufacturer for the purpose of this rule.

2. Regulation of Processors

Section 183(e)(1)(C) of the Act allows the regulation of processors of consumer and commercial products. For the proposed architectural coatings rule, the EPA considered regulating processors as well as manufacturers and importers. "Processors" would be defined as individuals who add organic thinner to coatings in a commercial or industrial setting at the point of application. The EPA's concern was to provide a means

to enforce against thinning of coatings beyond manufacturers' recommendations. Thus, the EPA considered a provision to prohibit an applicator from using organic solvents to thin a coating beyond the manufacturer's recommendation.

In the proposal preamble (61 FR 32737), the EPA requested comment on the possible regulation of processors under the architectural coatings rule. Commenters generally opposed the regulation of applicators, arguing that: (1) over-thinning is not likely to occur since the proposed VOC content limits are reasonable; (2) rules promulgated under section 183(e) of the Act are not intended to apply to end-users or applicators; and (3) restrictions on thinning at the point of application would be difficult to enforce. The commenters stated that the term "processors" was intended to mean entities that repackage coating materials or further enhance finished products before they are offered for sale to end-users.

The final rule does not include processors as a regulated entity. The EPA believes that end-users' compliance with thinning restrictions for architectural coatings would be difficult to enforce in practice. Instead, the EPA has determined that it will be more effective to guard against excessive VOC emissions from thinning by taking into account the amount of thinning in advance. Thus, the final limits are expressed as VOC content of coating "thinned to the manufacturer's maximum recommendation." The EPA believes that these limits provide adequate assurance that compliant coatings will be manufactured to perform optimally with recommended thinning. Regulation of processors would not add significantly to the effectiveness of the rule.

C. General Comments on Determination of Best Available Controls

Many commenters provided general comments on the overall stringency of the VOC content limits in the proposed rule. One group of commenters, composed mainly of manufacturers and trade organizations representing coating users and manufacturers, stated that the VOC content limits in the proposed rule represent BAC and are technologically and economically achievable. One of these commenters, representing a national association of coating manufacturers, stated that the proposal recognized the need for solventborne coatings in certain specialty areas, as well as in some more general usage categories, and adequately addressed the fact that the same coating must be

able to perform in all regions and climates of the United States. Another commenter, representing a national association of coating users, stated that the proposed limits fit squarely within current technologies and are consistent with various existing State regulations. And finally, a commenter representing another national trade association of coating users, stated that the proposed table of VOC content limits will not significantly increase construction costs and will not appreciably reduce coating performance.

A second group of commenters, mainly composed of individual State regulatory agencies, organizations of State and regional regulatory agencies, and environmental groups, stated that they did not support the VOC content limits in the rule because they believe they are too lenient. Two of the commenters, representing environmental groups, contended that the EPA's BAC determination did not include consideration of lower VOC coatings that have been developed since 1990. Several of the commenters cited the existence of more stringent State and local architectural coating regulations that have been in place for many years as evidence that the proposed limits do not represent BAC. Several of the commenters added that the proposed rule falls short of State VOC reduction goals and may result in the States adopting more stringent control measures for this source category and for other source categories. The majority of the commenters in this group supported an alternative, more stringent, table of VOC content limits submitted by one of the commenters. (The commenter also suggested a second phase of limits that would take effect in the future. For comments and responses regarding the suggested second phase of limits, see section V.P of this preamble). The alternative table contains more stringent limits for several categories and would achieve a 30-percent emission reduction (calculated on a solids basis). The more stringent VOC content limits in the table are based on the 1989 California Air Resources Board Suggested Control Measure.

Finally, a third group of commenters, composed mainly of coating manufacturers, did not support the limits in the rule because they believe they are too stringent. These commenters stated that low-VOC products (i.e., products meeting the proposed standards) do not perform as well as higher-VOC (non-compliant) products. These commenters claimed that low-VOC coatings are too thick and require considerable thinning to apply, are less durable and require more

frequent repainting, and exhibit poor gloss properties. Two of the commenters explained that these performance problems could result in more emissions, rather than less. Two of the commenters stated that available paint raw materials are not adequate to reformulate every non-compliant coating the paint industry offers and still meet customer performance requirements. One commenter stated that the proposed rule will require a massive reformulation of products in the paint and coating industry. The commenter claimed that some organizations were supporting lower limits based on improper data or based on environmental conditions that do not represent circumstances in other areas.

The EPA believes that the final rule represents BAC. Best available control is "the degree of emissions reduction that the Administrator determines on the basis of technological and economic feasibility, health, and energy impacts, is achievable." In developing the rule, the EPA considered many factors in evaluating the economic and technological feasibility of different VOC content levels and different degrees of product reformulation. These factors included: (1) limits in State/local regulations; (2) coating VOC content and sales information; (3) performance considerations; (4) cost considerations; and (5) market impacts.

The sources of information for these factors included: (1) pre-proposal letters; (2) the 1992 industry survey (collected 1990 data); (3) public comments on the proposed rule; (4) follow-up discussions with commenters to gather additional technical information; (5) State/local regulations and pre-proposal discussions with State/local regulators; (6) input from coating manufacturers and other stakeholders; and (7) EPA expertise. Considering all these factors, the EPA concluded that the VOC content limits in table 1 of the rule, along with the exceedance fee provisions and the tonnage exemption, represent BAC for architectural coatings. The EPA's process for developing BAC was described in the proposal preamble (61 FR 32737) and is further discussed in the following paragraphs.

Technical Feasibility and Coating Performance Issues

Throughout development of this rule, there has been debate among stakeholders over the degree to which the VOC content in architectural coatings can be reduced and on the performance characteristics of low-VOC coatings. The term "performance" refers to the coating qualities that are

acceptable to consumers and that maximize the interval required between repainting. Performance is particularly difficult to assess. As discussed in the preamble to the proposed rule (61 FR 32738), these acceptable qualities can vary significantly depending on the consumer and the coating category. There is no consensus within the architectural coatings industry on standards by which to evaluate acceptable coating performance. Therefore, the EPA requested comment on the technological feasibility of the limits in the proposed table of standards and on performance issues. The proposal requested documentation, tests, and factual evidence to support or refute claims about performance and the technological feasibility of low-VOC systems.

The EPA evaluated all data that were submitted by commenters pertaining to the feasibility of the rule and sought additional information that was reasonably available. In evaluating the degree of emission reduction that represents BAC, the EPA took into consideration that these requirements would apply to all areas of the country and to all manufacturers and importers of architectural coatings within a specific time frame (i.e., approximately 1 year from promulgation). Based on the public comments received, a number of changes were made to the proposed rule. These changes are discussed in section 2.2.4 of the BID (Coating Categories and VOC Content Limits). In some cases, commenters claimed that the rule is not feasible or does not represent BAC, but provided no data to support the general claim. In such cases, the EPA sought additional information that was reasonably available and considered the comments in the context of the overall BAC decision, but often found no basis for making substantive changes to the proposed rule.

Relationship of BAC to State and Local Regulations

State and local regulations were one of the primary factors used by the EPA to develop BAC. As stated in the proposal preamble (61 FR 32737), State and local architectural coating requirements were used prior to proposal as a starting point in determining "what categories and associated VOC limits might constitute the degree of emissions reduction that represents BAC." After proposal, the EPA used State and local architectural coating requirements as a primary factor in the evaluation of public comments on the proposed VOC content limits.

However, the EPA does not agree with commenters who believe that, at a

minimum, BAC for the national rule should be equivalent to or more stringent than the lowest emission limits that exist in any State regulation (as presented in a table of standards by one commenter). In the development of a national rule under section 183(e), the EPA has the obligation to determine that the emission limits are technologically and economically feasible on a national scale. State and local VOC limits are based on coating performance under the local meteorological conditions and patterns of coating demand, some of which may be very different than in other locations. Moreover, based on local air quality and existing regulatory programs, a State or local agency may set rules based on a balancing of technological, economic, and environmental factors that might differ from the balance appropriate for a national rule.

Therefore, the EPA departed from the State and local requirements where other factors, such as information on VOC content and sales, performance, costs, and market effects indicated that the limits were not technologically or economically feasible on a national scale.

The Role of the Exceedance Fee and Tonnage Exemption in BAC

While the EPA believes that the technology exists to meet the limits in table 1 of this subpart, some manufacturers may need more time beyond the compliance deadline to obtain the necessary technology. Still other manufacturers may find that reformulation of some of their specialty products that are produced in low volume is not cost-effective. The exceedance fee and tonnage exemption provisions were included in the final rule to minimize impacts on the supply of coating products and to avoid unnecessary impacts upon small manufacturers. The exceedance fee (discussed in section 2.4 of the BID) is intended to allow manufacturers and importers additional time to develop low-VOC formulations while providing an appropriate economic incentive to encourage reformulation. The tonnage exemption (see section 2.2.1.2 of the BID) is intended to allow manufacturers and importers the flexibility to continue to market certain low-volume product lines where reformulation of a specialty product used for unique applications may not be cost-effective. The EPA anticipates that use of the tonnage exemption and exceedance fee will reduce the potential VOC emission reductions of the rule by only a small percentage and that foregoing this portion of the reductions to achieve

other objectives of the BAC analysis is an appropriate balancing of the relevant factors to achieve BAC reductions. The EPA believes that all available data indicate that the system of regulation adopted in the final rule, consisting of VOC content limits, an exceedance fee provision, and a tonnage exemption, reflects BAC for the architectural coatings category.

Consideration of New Low-VOC Coatings

The EPA recognizes that the 1992 industry survey that the EPA used as one of the factors for developing BAC collected 1990 data. Although the data in this survey are now 7 years old, they still represent the most complete set of data for the architectural coatings industry (the survey captured approximately 75 percent of the coating volume). In addition, the industry survey was only one of the many factors used in determining BAC. Information on advances since 1990 were obtained from over 300 pre-proposal letters, over 200 public comment letters, over 40 follow-up telephone calls, and information obtained from State regulatory agencies. The EPA believes that the final rule represents BAC based on the survey database and other data available to the EPA.

The EPA acknowledges that there are coating technologies in existence with VOC contents lower than those listed in table 1. However, section 183(e) of the Act does not require the EPA to set BAC at the level of the lowest-VOC product. It requires that the EPA determine BAC based on "the degree of emissions reduction that the Administrator determines on the basis of technological and economic feasibility, health, and energy impacts, is achievable." To determine whether a more stringent rule would meet the criteria for BAC, the EPA would need to undertake additional study of the recent technological developments for the architectural coatings category. As discussed in section 2.6 of the Architectural Coatings BID (see ADDRESSES section of this preamble), such an additional study is under consideration. However, the EPA does not believe it would be appropriate to delay issuing this rule to await the results of that additional study.

D. Changes in Proposed Coating Categories

Several commenters addressed the selection of the coating categories to which the rule applies and the VOC content limits for specific categories. In response to these comments, the EPA has modified the definitions of several

of the proposed categories and has added seven new coating categories. In addition, the EPA has modified the proposed VOC content limits for several categories based on information provided by commenters. This section of the preamble discusses the changes made to the requirements for the proposed coating categories. (The new categories are described in section V.E below.) A detailed discussion of all of the comments and responses pertaining to the proposed coating categories and their VOC content limits is contained in section 2.2.4.3 of the Architectural Coatings BID (see ADDRESSES section of this preamble).

Some commenters suggested changes and clarifications to the proposed category definitions. In response to these comments, the EPA has changed the definitions of a number of the coating categories. The purpose of these changes is to clarify which particular coatings are included in these categories.

There were also many requests to revise the VOC content limits in the proposed rule. The EPA contacted many of the commenters, most of whom were coating manufacturers, to obtain additional information in order to evaluate these requests more fully. Based upon consideration of the public comments and additional information obtained since proposal, the EPA has changed the VOC content limits where deemed appropriate. In addition, the final rule provides a tonnage exemption and an exceedance fee option. These provisions provide flexible compliance options that accommodate the need for higher VOC contents in unique or niche products, and in limited-use products. The significant comments and changes made with regard to the VOC content limits are discussed in the following paragraphs. The EPA's rationale for each of these issues is explained more fully in the Architectural Coatings BID (see ADDRESSES section of this preamble).

Roof Coatings and Bituminous Coatings and Mastics

One commenter, a national trade association of roof coating manufacturers, supported the proposed VOC content limits for roof coatings (250 grams per liter (g/l)) and for bituminous coatings and mastics (500 g/l), and the inclusion of all bituminous coatings in the bituminous coatings and mastics category. Another commenter suggested reducing the VOC content limit for bituminous coatings and mastics from 500 g/l to 350 g/l. A third commenter suggested adopting one roof coating category that includes bituminous materials at a VOC content

limit of 300 g/l, consistent with State architectural coating rules. This commenter argued that the proposed rule permitted bituminous roofing materials to comply with a less stringent limit (500 g/l) than other roofing materials (250 g/l) and that this discrepancy afforded an unfair competitive advantage to the bituminous roofing products.

The EPA reviewed its basis for establishing the proposed category for bituminous coatings and mastics and VOC content limit of 500 g/l and has decided to retain this category and limit in the final rule. The EPA reviewed information submitted by a national trade association comprised of 60 bituminous and nonbituminous coatings manufacturers and suppliers, before proposal (Docket Item No. II-D-56), regarding the composition, specialized manufacture, performance, and use limitations of these coatings. According to this information, a significant portion of these coatings are needed for repair and maintenance of existing roofs as well as for installing new roofing systems. The trade association pointed out that waterborne bituminous coatings and mastics are not practical in almost all of the applications where solventborne bituminous coatings and mastics are used and that coating performance comparisons between waterborne and solventborne bituminous coatings and mastics range from good to very poor, depending on conditions. Another national trade association for roofing contractors, which has over 3,000 members represented in all 50 States, argued that there is no viable alternative to solventborne bituminous coatings in many circumstances and pointed to bituminous primers as an example of this. According to this trade association, if the VOC content limit were reduced by any significant amount in these primers, the adhesion properties, the application process, and the life of the roof would suffer dramatically.

Therefore, in order to satisfy performance requirements of bituminous coatings and mastics nationwide, the EPA has retained this category with a VOC content limit of 500 g/l in the final rule.

With respect to the comments on the separate category for roof coatings, the EPA has decided to retain the category as proposed. Although there are several State architectural coating rules that have a VOC content limit of 300 g/l for roof coatings, the EPA believes that the national Roof Coatings Manufacturers Association's support (Docket Item No. IV-D-181) of the proposed VOC content limit for roof coatings at 250 g/l

provides persuasive evidence that this limit is achievable nationwide. Therefore, the EPA has retained the VOC content limit of 250 g/l for roof coatings in the final rule.

Concrete Curing Compounds

Several commenters commented on the proposed VOC content limit of 350 g/l for concrete curing compounds, which are used predominantly in highway construction. Seven commenters stated that the proposed limit for concrete curing compounds is achievable based on existing technology, and one of these commenters maintained that the limit could be lowered to 300 g/l. On the other hand, one commenter took issue with the achievability and performance at the proposed limit of 350 g/l. The latter commenter suggested a VOC content limit of 625 g/l for this category, arguing that the proposed limit would eliminate most concrete curing membranes from the market, and that many companies do not sell curing compounds in States that have the 350 g/l limit.

In addition to consideration of these comments, the EPA reviewed the VOC content limits for this category in State rules. Several States, including Arizona, California, Massachusetts, New Jersey, and New York have had a VOC content limit of 350 g/l for concrete curing compounds for several years. The availability of compliant products in these States suggests that the limits are achievable, notwithstanding that not all manufacturers have chosen to market in those States. Based on the information provided by the commenters in favor of the proposed limits and upon the existing State rules, the EPA has concluded that the proposed VOC content limit of 350 g/l for concrete curing compounds is technologically achievable and has retained this limit in the final rule.

Graphic Arts Coatings

Two commenters indicated concern about the performance of shop-applied graphic arts coatings at the proposed VOC content limit of 500 g/l. One commenter's specific concerns with coatings at this level included difficulty in achieving variation in gloss levels, variation in the required drying times in the drying room (implying shop-applied coatings), need for greater application amounts, and higher costs. Graphic arts coatings recommended by the manufacturer solely for shop applications are not required to meet the 500 g/l VOC content limit. As discussed earlier, the EPA has revised the definition of architectural coating to

clarify that coatings recommended by the manufacturer solely for shop application are not subject to the rule. In addition, the definition of graphic arts coatings has been modified by removing the reference to in-shop coatings, and a definition of "shop application" has been added to the rule.

Based on a review of the 1990 VOC emission inventory survey and State architectural coating rules, the EPA determined that the 500 g/l VOC content limit for field-applied graphic arts coatings should not be changed.

Shellac—Clear

Two commenters requested that the EPA raise the VOC content limit for clear shellac from the proposed level of 650 g/l to 730 g/l. The commenters requested the higher level to accommodate the degree of thinning required for certain uses of shellac to meet performance specifications.

According to information provided by one commenter, the elevated cost and limited availability of shellac (referring to secretions of the lac beetle) minimize the potential use of this product.

Based on a review of State architectural coating rules, which limit clear shellac VOC content to 730 g/l, and the information provided by the commenters, the EPA has raised the VOC content limit for clear shellac from 650 g/l to 730 g/l.

Nuclear Coatings

Four commenters objected to the proposed 420 g/l VOC content limit for nuclear coatings, in light of the 450 g/l limit for industrial maintenance coatings. The commenters pointed out that nuclear coatings must meet more exacting performance specifications (set by the Nuclear Regulatory Commission) than industrial maintenance coatings and, therefore, should not be subject to a more stringent VOC content limit. One commenter was also concerned that the proposed limit offered no flexibility for cold weather thinning as provided in the Shipbuilding and Ship Repair (Surface Coating) National Emission Standards for Hazardous Air Pollutants (NESHAP) for this category.

The EPA agrees that the nuclear coatings category VOC content limit should not be more stringent than the VOC content limit for industrial maintenance coatings since nuclear coatings are subject to some of the same extreme environmental conditions as industrial maintenance coatings, and must also meet further specifications and rigorous requirements of the Nuclear Regulatory Commission. The nuclear coatings category is intended to include coatings manufactured for use

at nuclear facilities to ensure operational safety, and the definition requires that these coatings meet various testing requirements. The EPA expects that a limited amount of coatings will be affected by this change due to the various testing requirements to qualify for classification in this category and the limited number of nuclear facilities where such coatings are used. Also, as pointed out in the proposal preamble (61 FR 32739), this is one of 17 specialty coating categories that did not appear in existing State architectural coating rules, and no data were collected in the 1990 VOC emissions inventory survey. In consideration of performance specifications for this category and the need to allow for thinning, the EPA has raised the VOC content limit for the nuclear coatings category to 450 g/l. This limit is the same as the limit for industrial maintenance coatings.

Antifouling Coatings

Two commenters requested a higher VOC content limit for the antifouling coating category (400 g/l proposed), and one of these commenters specifically requested that the EPA increase the level to 450 g/l. One of the commenters indicated that antifouling architectural coatings are generally not applied at fixed installations where painting conditions are more easily controlled, and that a thinning allowance should be included to accommodate application of the coating in cold weather.

The EPA agrees with the commenters that the limit for antifouling coatings should be raised to allow for cold weather thinning. Also, similar to nuclear coatings, these coatings are subject to some of the same extreme environmental conditions as industrial maintenance coatings and must meet other rigorous requirements, such as those under the FIFRA. Moreover, this is one of 17 specialty coating categories that did not appear in existing State architectural coating rules, and no data were collected in the 1990 VOC emissions inventory survey. Therefore, the EPA believes a low volume of coatings will be affected by a change to the proposed limit. The final rule specifies a VOC content limit of 450 g/l for this category.

Floor Coatings

One commenter suggested that the EPA either add an exemption paragraph to clarify that floor coatings that meet the definition for industrial maintenance coatings are subject to the industrial maintenance coating VOC content limit of 450 g/l or specify that the floor coating category applies to floor coatings intended for residential

use. The commenter believed that high performance floor coatings cannot achieve the 400 g/l VOC level proposed for floor coatings. Although the commenter reportedly has developed lower-performing systems that meet the 400 g/l level, the commenter stated that they are not acceptable for all applications.

Two commenters recommended that opaque floor paint be regulated at a 400 g/l VOC level. However, one of these commenters requested clarification of whether the floor coating category included clear floor finishes, such as varnishes.

The EPA has retained the floor coatings category, with a modified definition, and VOC content limit of 400 g/l as proposed. The floor coatings category includes opaque coatings that have a high degree of abrasion resistance that are formulated for application to flooring, including but not limited to decks, porches, and steps in a residential setting. The EPA did not intend to include floor coatings that meet the definition of industrial maintenance coatings under the floor coating category. The definition of floor coating has been changed to specify that it applies to floor coatings intended for use in a residential setting. Thus, floor coatings that meet the definition of industrial maintenance coatings are subject to only the industrial maintenance coating category limit of 450 g/l.

Based on information from commenters, the EPA agrees that opaque floor coatings should be subject to the 400 g/l limit as proposed. However, clear varnishes that may be recommended for use as floor coatings are subject to the VOC content limit of 450 g/l for clear varnishes. An exception paragraph has been included in § 59.402 of the rule to clarify this category overlap.

Waterproofing Sealers and Treatments

Eight commenters provided assessments of the achievability of the proposed VOC content limit for waterproofing sealers and treatments. Five commenters suggested that the EPA raise the VOC content limit, and two commenters suggested that the EPA lower it. One commenter maintained that there is no need to distinguish between clear and opaque waterproofing sealers and treatments (600 g/l and 400 g/l, respectively) in the rule since many opaque sealers penetrate the substrate and perform the same function as clear sealers. This manufacturer requested a VOC content limit of 700 g/l for all waterproofing sealers and treatments and explained that this level would still

require reformulation of existing technologies. Another manufacturer has reported that it has not been successful in reformulating to meet the 600 g/l level for clear waterproofing sealers and treatments. On the other hand, one manufacturer strongly encouraged the EPA to adopt a lower VOC content limit of 350 g/l applicable to both clear and opaque waterproofing sealers and treatments based on the VOC content of its products, which are available now in the marketplace. Another commenter agreed that the proposed levels for waterproofing sealers are technologically and economically feasible.

Based on evaluation of the comments and a review of survey data and State architectural coating regulations, the EPA has combined the clear and opaque waterproofing treatment sealer categories into one category with a VOC content limit of 600 g/l. The EPA agrees that there is no need to distinguish between clear and opaque waterproofing sealers and treatments since many opaque sealers penetrate the substrate and perform the same function as clear sealers. The EPA believes that, based on information provided by these commenters/manufacturers, the appropriate limit for this combined category is 600 g/l. Before proposal, industry representatives (Docket Item No. III-B-1) argued that multipurpose waterproofing sealers at 400 g/l do not meet minimum performance criteria for clear waterproofing sealers (that is, 60-percent water repellency for wood and 1 percent or less water absorption for brick). The representatives stated that 400 g/l products are high-solids products that may leave an oily residue or cause darkening of the surfaces to which they are applied and, thus, product performance may not meet industry standards. Combining clear and opaque waterproofing treatment sealers into one category is consistent with all existing State rules, which do not divide the category into clear and opaque waterproofing sealers and treatments. The State architectural coating VOC content limits for waterproofing sealers and treatments are either 400 g/l (for example, Arizona and California) or 600 g/l (Massachusetts, New Jersey, and New York).

E. Addition of New Coating Categories

The EPA received requests to establish 20 new coating categories in the final rule. In response to these comments, the EPA has established seven new categories: (1) calcimine recoaters; (2) concrete surface retarders; (3) concrete curing and sealing compounds; (4) conversion varnishes;

(5) zone markings; (6) faux finishing/glazing; and (7) stain controllers. The EPA also evaluated requests, but did not establish new categories, for the following coatings: (1) adhesion promoters; (2) asbestos and lead-based paint encapsulation; (3) concrete/masonry conditioners; (4) porcelain repair coatings; (5) marine/architectural coatings; (6) alkali-resistant primers; (7) tung oil finishes; (8) lacquer stains; (9) elastomeric high performance industrial finishes; (10) low solids coatings; (11) oil-modified urethanes; (12) thermoplastic (treatment) sealers; and (13) zinc-rich coatings. In general, new categories were not established for these coatings because the EPA determined that it is technologically and economically feasible for coating manufacturers and importers to achieve compliance with the rule. Further discussion of the rationale for the EPA's decisions on the new categories is contained in section 2.2.4.2 of the Architectural Coatings BID referenced under the ADDRESSES section of this preamble.

In general, the EPA considered creation of new categories if commenters submitted information supporting higher VOC content limits for such products than the otherwise applicable limits. The EPA considered the data submitted by commenters and obtained all reasonably available additional data to evaluate these requests. In cases where the EPA concluded that the proposed emission limits were not achievable, the EPA established a separate category with an appropriate emission limit. The following is a discussion of the rationale for each of the new coating categories and its VOC content limit.

Calcimine Recoaters

Under the proposed standards, calcimine recoaters would have been subject to the VOC content limit for interior flat coatings (250 g/l). However, several commenters stated that calcimine recoaters have a higher VOC content of 475 g/l, cannot be reformulated, are low-volume coatings, and serve a unique function of recoating water soluble calcimine paints. These paints are used in Victorian and Early American homes, especially on ceilings. Due to their low density, calcimine recoaters do not disbond the existing calcimine ceiling coatings, as conventional (250 g/l VOC) high-solids flat alkyd paints would tend to do. If a calcimine recoater is not used, the only alternative is to remove the existing coating, which is labor-intensive and expensive. Because these low-volume coatings reportedly cannot be

reformulated, their composition is unique, and there is no substitute for these products, the EPA has added a separate category for calcimine recoater products to the rule with a VOC content limit of 475 g/l.

Concrete Curing and Sealing Compounds

Under the proposed rule, these coatings would be subject to the 350 g/l VOC content limit for concrete curing compounds. However, commenters presented information not previously considered by the EPA demonstrating that compounds designed for curing and sealing, as opposed to those designed for curing only, have different technical specifications that make it difficult to achieve the 350 g/l level. Concrete curing and sealing compounds function as longer term sealers that provide protection, aesthetic benefits, and durability in addition to curing. Commenters pointed out that there are separate American Society for Testing and Materials (ASTM) methods available for each of these categories and that ASTM Committee experts and at least two government agencies consider them distinct categories with different performance requirements.

Through follow-up phone calls with several concrete curing and sealing coating manufacturers, the EPA confirmed that concrete curing and sealing products are typically sold at levels much higher than 350 g/l. While waterborne products below 350 g/l are available, some industry representatives cited drawbacks such as poor low-temperature performance and stability. Since these products must often be used in low-temperature environments, the EPA agrees that the VOC content limit should reflect this usage. Therefore, the final rule includes a new category for concrete curing and sealing compounds. Based on an analysis of VOC content and sales data for these products, the EPA has established the VOC content limit at 700 g/l.

Concrete Surface Retarders

Concrete surface retarders do not fall within any of the proposed categories except the general category for interior flat coatings with a VOC content limit of 250 g/l. These products are generally used in a manufacturing setting at a precast facility, but a small volume of products are field-applied. Commenters argued that these products cannot meet the 250 g/l level and, furthermore, that they are not coatings and should not be subject to the rule. However, they requested a VOC content limit of 780 g/l if the EPA regulated these products.

The EPA has concluded that concrete surface retarders meet the rule's definition of a "coating." Concrete surface retarders that are recommended by the manufacturer for use in the field at job sites are, therefore, subject to the rule. When retarders are recommended by the manufacturer solely for use in a manufacturing setting, such as at a precast facility, which is the typical situation, they are not subject to the rule. The EPA determined that concrete surface retarders that are used in the field at the actual job location are specialized, low-volume coatings used in limited circumstances, and there is no lower VOC content substitute for the function of these products. Therefore, the EPA has included a separate category for these products in the final rule, with a VOC content limit of 780 g/l as requested by the commenters.

Zone Marking Coatings

Under the proposed rule, zone marking coatings were subject to the 150 g/l VOC content limit for traffic marking coatings. Zone marking coatings are those used to mark surfaces such as parking lots, driveways, sidewalks, and airport runways; they are generally applied by small commercial applicators. In contrast, traffic marking coatings are applied to streets and highways and are usually applied by large contractors or State Departments of Transportation. The commenters noted two issues associated with meeting the 150 g/l content limit for zone marking coatings. First, the 150 g/l content limit could only be met with waterborne coatings, which require different application equipment than solventborne coatings. Small applicators would be disproportionately impacted by the cost of acquiring the new equipment that is compatible with waterborne zone marking coatings. Secondly, the commenters asserted that waterborne zone marking coatings do not dry or cure properly during high humidity or low temperatures, conditions under which they must sometimes be applied.

After consideration of these comments, the EPA has added a separate category for zone marking coatings and has established the VOC content limit at 450 g/l. This level allows the use of solventborne coatings. However, the new category applies only to zone marking coatings sold in containers of 5 gallons or less. Available information reveals that State Departments of Transportation buy traffic marking coatings in larger than 5 gallon containers. Thus, this size restriction should limit the use of zone marking coatings to applications smaller

than those of general traffic marking coatings intended for use on public roads and highways. Zone marking coatings sold in larger containers fall within the traffic marking coatings category and are subject to the 150 g/l limit. The establishment of this category allows the use of solventborne coatings by small applicators and under adverse drying and curing conditions.

Conversion Varnishes

Conversion varnishes are specialty products used by contractors for wood floor finishing. Under the proposed rule, these coatings would have been subject to the 450 g/l VOC content limit for varnishes. Commenters argued that conversion varnishes cannot be reformulated to meet the 450 g/l level, and that they have unique chemical formulation and performance specifications, compared to other varnishes, (i.e., appearance and proven durability). Furthermore, the commenters noted that only three companies manufacture conversion varnishes and that they market them only to licensed wood flooring contractors, thereby implying that these are specialty coatings deserving different standards.

In response to these comments, the final rule includes a new category for conversion varnishes with a VOC content limit of 725 g/l. Due to the chemical make-up of these products, manufacturers reportedly have been unable to reformulate to meet the 450 g/l level for varnishes. The EPA believes that the category comprises a well-defined coating technology that is limited, due to its chemical formulation, to the applications for which it is intended. Several wood flooring contractors' comments support the performance arguments made by the manufacturers. The EPA determined that the VOC content limit of 725 g/l is the lowest level achievable based on analysis of currently available products.

The EPA has added a definition for this category to the rule. The category definition was developed from information provided by two of the manufacturers.

Faux Finishing/Glazing

Under the proposed rule, faux finishing/glazing coatings were subject to the VOC content limit of 380 g/l for nonflat interior coatings. Faux finishing/glazing coatings include waterborne acrylic finishes and other waterborne products with miscible VOC that are designed to retard drying time. One commenter stated that these products provide open time required for wet-in-wet techniques, such as faux wood

grain, faux marble, and simulated aging, which require the finish to remain wet for an extended period of time.

The commenter stated that, based on formulation including water, the calculated VOC content of these coatings can range up to 340 g/l. However, because the products are waterborne, the VOC "less water" calculation results in a range up to 700 g/l. The commenter stated that the VOC content limit for a similar category (Japan/faux finishing coatings) has been proposed by California's South Coast Air Quality Management District (SCAQMD) at 700 g/l. The commenter stated that, to date, there has not been an identifiable way to reformulate these products to achieve a lower VOC while maintaining the characteristics required for acceptable use.

Upon review and evaluation of available information, the EPA has determined that creating a separate category for faux finishing/glazing with a VOC content limit of 700 g/l is warranted. According to the commenter, there are no competing compliant products on the market. Despite 2 years of reported reformulation efforts, this coating cannot meet the proposed VOC content limit of 380 g/l for nonflat interior coatings. The EPA notes that this specialty coating category is low volume and that the foregone VOC emission reductions that may result from setting a higher limit for this category should be limited.

Stain Controllers

Under the proposed rule, stain controllers were subject to the VOC content limit of 400 g/l for sealers. "Stain controllers" (also called "wood conditioners" or "prestains") are products that are applied to soft woods before applying a stain to prevent uneven penetration or blotching of the stain by filling those pores where excess penetration would occur. One commenter asserted that these products cannot achieve the 400 g/l level for sealers. According to the commenter, after 3 years of reformulation efforts, they have concluded that it is technologically infeasible to reformulate stain controllers to the proposed 400 g/l VOC content limit. The current VOC content of the commenter's products is 714 g/l. According to the commenter, the 400 g/l level for sealers would force a very high solids content, which would make these products unfit for use as prestains. The commenter asserted that, in order to be effective, stain controllers must have a very low solids content because excessive solids will overload the texture of the substrate so that the wood will not properly accept the stain.

Water cannot be added to these products because they are used almost exclusively to treat interior fine wood and contact with water would produce an undesirable grain-raising effect in the wood. Stain controllers are low-volume, specialized products that are important to the consumer and have a minimal effect on air quality. The commenter asserted that about 97 percent of total sales for these products are already exempt under the small container exemptions in regulated areas.

After review and evaluation of these comments and follow-up information provided by the commenter, the EPA has determined that a new category for stain controllers with a VOC content limit of 720 g/l is warranted. This is a specialized, limited use product that is important to consumers, and the EPA believes that the additional emissions from this low-volume coating would be negligible. According to the commenter, reformulation attempts during the last 3 years have been unsuccessful, and the commenter considers it technologically infeasible to reformulate stain controllers to achieve the proposed VOC content limit of 400 g/l for sealers (the category the commenter's coating would be subject to under the proposed rule). According to the commenter, there are competing waterbased products meeting the proposed limit on the market, but there are performance problems with these coatings. The EPA believes that this is an example of a low-volume, specialty niche coating for which it may not be cost-effective for the manufacturer to continue reformulation attempts. Therefore, the final rule contains a separate category for stain controllers.

F. Category Overlap

Many commenters expressed concern about the VOC content limit that applies to coatings that fall into more than one category. The proposed rule stated that if a manufacturer made the representation that a coating was suitable for use in more than one category, then the coating must comply with the VOC limit for the category with the most restrictive limit. Commenters objected that a coating may be "suitable" for many uses, even though not intended by the manufacturer for those uses. Coatings could potentially be used in ways for which they were never intended and, thus, be subject to unduly restrictive VOC content limits.

The EPA agrees with the commenters and has reworded the provisions as suggested by the commenters. In the final rule, if the manufacturer or importer makes any representation that indicates that the coating "meets the

definition" of more than one coating category, then the most restrictive limit applies. The EPA has removed the phrase "may be suitable for use" from the rule so that the manufacturer or importer is not responsible to meet the limits of other categories if consumers choose to use them for purposes not recommended by the manufacturer or importer. However, if a manufacturer or importer indicates that a coating may be suitable for uses like coatings in other categories, the EPA will consider this a representation that requires the coating to meet the most restrictive applicable limit. Thus, determination of the applicable category and VOC content limit is based on a comparison between the technical criteria in the rule's definitions and the coating manufacturer's or importer's representations.

The proposed rule also included exceptions for seven types of coatings to the requirement that the most restrictive limit always applies. The EPA recognizes that these seven coatings potentially meet the definition of more than one category of coating, but cannot meet the more restrictive limit. For these exceptions, the rule explicitly specifies that the less restrictive limit applies. Commenters suggested additional instances of overlap that might also warrant special exceptions. After considering the information presented by these commenters, the EPA has included further exceptions, in addition to the proposed exceptions, to the most restrictive limit provision. The EPA has added the following exceptions: (1) anti-graffiti coatings, high temperature coatings, impacted immersion coatings, thermoplastic rubber coatings and mastics, repair and maintenance thermoplastic coatings, pretreatment wash primers, and flow coatings are not required to meet the VOC content limit for industrial maintenance coatings; (2) industrial maintenance coatings are not required to meet the VOC content limit for primers and undercoaters, sealers, or mastic texture coatings; (3) varnishes and conversion varnishes used as floor coatings are not required to meet the VOC content limit for floor coatings; (4) sanding sealers are not required to meet the VOC content limit for quick-dry sealers; (5) waterproofing sealers and treatment coatings are not required to meet the VOC content limit for quick-dry sealers; (6) quick-dry primers, sealers, and undercoaters are not required to meet the VOC content limit for primers and undercoaters; (7) nonferrous ornamental metal lacquers and surface protectants are not required

to meet the VOC content limit for lacquers; and (8) antenna coatings are not required to meet the VOC content limit for industrial maintenance coatings or primers. These exceptions are discussed more fully in section 2.2.3.14 of the Architectural Coatings BID (see ADDRESSES section of this preamble).

G. Low Volume/Tonnage Exemption

In the preamble to the proposed rule, the EPA presented the concept of an exemption for coatings produced in low volumes and requested comment on this potential provision. The EPA described this exemption as a compliance option under which, "any manufacturer or importer may request an exemption from the VOC levels in table 1 of this subpart for specialized coating products that are manufactured or imported in quantities less than a specified number of gallons per year." Twenty-one commenters provided comments on an exemption for coatings produced in low volumes.

In general, commenters in favor of the exemption pointed out that it would mitigate the impact of the rule on small manufacturers for which costs of reformulation would be more significant, and would prevent the elimination of specialty products for niche markets that could not easily be reformulated. Commenters opposed to the concept of a low-volume exemption generally argued that it would create a loophole allowing continued manufacture of noncompliant coatings and that in the aggregate such emissions would be significant.

The EPA considered these comments and concluded that some type of exemption is needed to help ensure the continued availability of niche products, to mitigate potential impacts on small manufacturers, and to enhance the economic feasibility of the rule. The exemption in the final rule is based on VOC tonnage rather than on production volume, the concept presented at proposal. This approach continues to accommodate the needs of small manufacturers, niche markets, and specialty products, as did the proposed low-volume exemptions, but it more effectively limits the VOC emissions resulting from the exemption in response to comments received on the proposal.

Under the tonnage exemption, each manufacturer can exempt a volume of coatings that contains no more than a specified total mass of VOC for all coatings included in the exemption (see table 2 in section II.B, Summary of Standards). The EPA has designed the tonnage limits to exempt no more than

1.5 to 2 percent of the total expected emission reductions from all architectural coatings. In addition, the EPA has structured the tonnage exemption to decrease over time, thereby decreasing the aggregate VOC emissions in a staggered fashion to provide additional compliance flexibility. The EPA believes that it is appropriate to provide the exemption in this manner for the dual purpose of preserving niche products and of providing greater initial assistance to manufacturers as they reformulate their products. The EPA believes that limiting the exemption in this fashion will address the concerns of commenters who viewed the low-volume exemption as a potential loophole that would allow significant aggregate excess VOC emissions. The EPA expects that the 9

Mg/yr (10 tpy) exemption that goes into effect in the third year will help to preserve niche products and to provide adequate flexibility for unforeseen future needs while effectively limiting emissions due to the exemption. In addition, the EPA expects that the initial tonnage exemption of 23 Mg (25 tons) for the time period from September 13, 1999 through December 31, 2000, will allow manufacturers to exempt one to three 27,000 liter (7,100 gallon) product lines, depending on the VOC content, thereby meeting the functional intent of the originally proposed low-volume exemption.

The rule provides that the manufacturer or importer will calculate emissions from exempt coatings by multiplying the total sales volume in liters by the "in the can" VOC content

of the coating in grams of VOC per liter of coating, including any water or exempt compounds. The "in the can" VOC content must include consideration of the maximum thinning recommended by the manufacturer. The manufacturer or importer may exempt any combination of different coatings as long as the total VOC tonnage from these coatings does not exceed the limit for the tonnage exemption. In addition, the manufacturer or importer may choose to combine the exceedance fee provision and the VOC tonnage exemption for one or more coatings.

For example, under this exemption, in the time period from September 13, 1999 through December 31, 2000, a manufacturer could exempt 38,300 liters (10,000 gallons) of a 600 g/l [5 pounds per gallon (lb/gal)] coating.

$$\left(\frac{600 \text{ g VOC}}{1} \times 38,300 \text{ l} \right) \div \frac{1 \times 10^6 \text{ g}}{\text{mg}} = 23 \text{ mg VOC}$$

Alternatively, a manufacturer could exempt 18,939 liters (5,000 gallons) of an 800 g/l (6.67 lb/gal) coating plus

13,731 liters (3,625 gallons) of a 550 g/l (4.58 lb/gal) coating.

$$\left[\left(\frac{800 \text{ g VOC}}{1} \times 18,939 \text{ l} \right) + \left(\frac{550 \text{ g VOC}}{1} \times 13,731 \text{ l} \right) \right] \div \frac{1 \times 10^6 \text{ g}}{\text{mg}} = 23 \text{ mg VOC}$$

This exemption differs from the low-volume exemption in the proposal preamble in three ways. First, the exemption is on a "per manufacturer" basis rather than a "per product" basis. This change was necessary due to the difficulty in defining a "product" and the potential for abuse in designating products for exemption. Second, the exemption level is based on megagrams of VOC rather than liters of coating. Using VOC tonnage as the basis for the exemption places an upper bound on the emission reductions that are lost through this exemption while still accommodating the needs for which it was intended. Third, the total quantity of the exemption reduces over time. The EPA intends for the ratcheting down of the tonnage exemption over time to encourage regulated entities using the exemption to continue to reduce the VOC content of their coatings.

The EPA has concluded that the exemption, as structured in the final rule, provides benefits in terms of flexibility, mitigation of impacts for small manufacturers, and continuation of specialized niche products that justify the EPA in foregoing the small percentage of overall potential VOC

reduction lost through the exemption. Furthermore, the EPA has concluded that the creation of the tonnage exemption is consistent with the EPA's explicit discretion and authority to create the appropriate system or systems of regulation in accordance with section 183(e)(4) of the Act.

H. Compliance Variance Provisions

In the proposed rule, the EPA included a variance provision allowing manufacturers and importers of architectural coatings to obtain additional time to comply. To obtain a variance, applicants would have had to demonstrate that, for reasons beyond their reasonable control, they could not comply with the requirements of the rule. The EPA envisioned the proposed variance provision as a benefit primarily for small businesses that might need extra time to develop new technologies.

Several commenters addressed the variance provisions. Those who supported the provisions noted that a variance would provide the needed extra time to come into compliance. Those opposed to the variance generally argued that it was not sufficiently protective of the environment. In

addition, even the commenters in favor of the variance provision stated that the requirements for applying for a variance were too burdensome, and that small businesses would be particularly impacted by the burden associated with the application process. Many of these commenters stated that exceedance fee provisions are a more effective way to accommodate the need for compliance flexibility yet still encourage reductions of VOC emissions.

Based upon the comments received, the EPA has not included the variance provision in the final rule. It is evident to the EPA that a variance process may not provide the intended compliance flexibility, especially for small manufacturers. Even though the EPA intended the proposed variance requirements to be the minimum necessary to justify and approve a coating variance, the EPA recognizes that the requirements may have been burdensome, particularly for small manufacturers with limited or no regulatory compliance staff. It is also possible that the variance provision could create an uneven playing field because small businesses would not have the resources needed to pursue

this option, thereby putting small businesses at a disadvantage compared to large businesses.

Moreover, with the tonnage exemption and exceedance fee provisions included in the final rule, the EPA has concluded that a compliance date variance is not necessary. The EPA believes that these alternative provisions provide even greater flexibility than the variance provision and are less burdensome to regulated entities. Both of these compliance options are automatically available to all regulated entities and, therefore, do not involve complex application and approval processes. These compliance options require only the limited recordkeeping and reporting necessary for the EPA to ensure compliance.

The EPA anticipates that regulated entities will use the tonnage exemption for low-volume products that require 2 to 3 years to reformulate, or for extremely low-volume products that cannot be reformulated in the foreseeable future. The exceedance fee option, described more fully below, is also designed to give manufacturers additional time to develop lower VOC technologies, which are already used for similar coatings by other manufacturers, where necessary. This compliance option allows regulated entities to continue to sell coatings that exceed the VOC content limits, provided that they pay an exceedance fee.

Need for Long-term, Universal Variance Procedure

Several commenters, including a national trade association, recommended a provision in the rule for a long-term variance procedure for new products. The commenters expressed concern that new and innovative products may not fit into the coating categories that define particular coating technologies, and will therefore, by default, be subject to the VOC content limits for the general flat or nonflat categories. Since the VOC content limits for these default categories are among the most stringent, the commenters suggested provisions that would allow manufacturers up to 5 years to develop and commercialize innovative coating technologies under an extended variance. The commenters argued that a long-term variance would protect manufacturers who operate mainly in unique or niche markets and whose access to newer technologies may be limited.

The EPA has determined that such a variance procedure is not warranted, given the other provisions in the final architectural coatings rule. The EPA has included compliance provisions in the

final rule that it believes will allow for the development of new technology. The tonnage exemption and exceedance fee option in the final rule create such additional compliance flexibility. In the event that coatings manufacturers in the future develop specialized categories of coatings for uses not now foreseeable, they could notify the EPA if they believe a new coating category is needed. The EPA could then assess the appropriateness of such a category.

I. Exceedance Fee Option

The EPA received a total of 27 comments on the exceedance fee provision presented in the proposal preamble. About half of the commenters supported this option and half opposed it. Under this provision, manufacturers and importers have the option of paying a fee, based on the extent to which a coating's VOC content exceeds the applicable VOC content limit instead of meeting the limit listed in table 1 of this subpart. The fee is calculated by: (1) determining the difference between the coating's actual VOC content and the allowed VOC content (in grams of VOC per liter of coating), (2) multiplying this difference by the fee rate of \$0.0028 per gram of excess VOC per liter of coating, and (3) multiplying the resulting product by the volume of the coating manufactured or imported during the reporting period. The resulting dollar amount is owed by the manufacturer or importer as a fee. After careful evaluation of all of the comments and discussions with the Small Business Administration, the Administrator has decided to include this compliance option in the final rule for several reasons. First, the exceedance fee provision will provide transition time over and above the tonnage exemption provision for those manufacturers that may need additional time to obtain or develop lower VOC technologies. The exceedance fee provision is significantly less burdensome than the proposed compliance variance provision, which the EPA has not retained in the final rule (see discussion in section V.H of this preamble). Second, the exceedance fee provides long-term flexibility and a less costly compliance option for manufacturers who sell very low volume, specialty coatings where the cost of reformulation may be prohibitive compared to the potential profit on low volume products. Thus, these important specialty products will continue to be available to consumers. Third, contrary to some comments received, the EPA believes that the higher costs resulting from the exceedance fees can encourage the development of innovative technology, such as high-performance

products with lower VOC content, thus reducing VOC content to the limits in table 1 for many coatings.

With regard to some commenters' concerns about enforcement of the exceedance fee, the recordkeeping and reporting requirements in the rule will ensure compliance with this option. The final rule requires manufacturers and importers to maintain records and submit annual reports to the EPA if they wish to exercise their option to use the exceedance fee. Any violations of the recordkeeping and reporting or any other requirements of the rule could result in enforcement actions and the possibility of penalties.

There were various questions and opinions from several commenters regarding the level of the fee. The EPA considered several factors in setting the fee level. Specifically, the EPA has set the fee level so that it would not be advantageous for most manufacturers and importers merely to opt for the fee in lieu of reformulating large volume products, which generate a disproportionately large share of emissions. At the same time, the EPA has sought to set the fee at a level that will provide flexibility for producers of small volume or specialty products to keep products on the market. Clearly, these are competing considerations, but they are not mutually exclusive. In fact, the EIA conducted by the EPA suggests that manufacturers of a large number of coatings may opt for the fee (as a lower-cost compliance option to reformulation or product withdrawal). However, the total sales volumes of these products are uniformly small and, thus, their contribution to total market output (and emission reductions) is relatively small. The fee level also provides incentive for fee-paying firms to reduce VOC content on the margin, as this will reduce the amount of fee they must pay. The EPA has concluded that imposition of the fee is an appropriate mechanism to encourage development of lower-VOC content products while at the same time preserving specialty niche products and mitigating the impact on small regulated entities. The level of the fee reflects the EPA's attempt to balance the intent to encourage reformulation without mandating that products be priced out of the market. The EPA believes that this is consistent with its authority to use economic incentives as part of the system of regulation as contemplated by section 183(e)(4) of the Act.

J. Labeling, Recordkeeping, and Reporting

A number of commenters requested more flexible labeling requirements to reduce the compliance burden. After

consideration of these comments, the EPA has determined that several labeling requirements can be adjusted to provide more flexibility without adversely affecting their usefulness. First, the EPA has provided greater flexibility by allowing the date of manufacture or date code to appear either on the bottom of cans or on the labels or lids. Second, the EPA has clarified the VOC content labeling requirement. These provisions allow manufacturers two options; they may label the coating with either: (1) the VOC content of the coating, including recommended thinning and considering fluctuations in VOC content that may occur in the manufacturing process, or (2) the applicable VOC content limit for the type coating as listed in table 1 of the rule. The second option is allowed only if the VOC content of the coating does not exceed the applicable VOC content limit (i.e., it is not available for coatings complying by exercise of the exceedance fee or tonnage exemption provisions). Third, the final rule includes a more flexible labeling requirement for industrial maintenance coatings. Manufacturers may choose from the following phrases for labeling industrial maintenance coatings:

- (1) For industrial use only;
- (2) For professional use only;
- (3) Not for residential use;
- (4) Not intended for residential use; or
- (5) This product is intended for use under the following condition(s): (list of each condition from the definition of industrial maintenance coating that applies.)

The proposal preamble requested comment on the inclusion of labeling requirements for coating coverage information and an educational statement about the role of VOC emissions from coatings in ozone formation. Based on comments received concerning coverage information, the EPA determined that coating coverage is so variable, depending on the coating and the substrate being coated, that the information would be of minimal benefit. Upon consideration of comments regarding the educational statement, the EPA concluded that an outreach program would just as effectively educate consumers on the role of VOC emissions in the formation of ozone and on the reasons why ground-level ozone is undesirable. Thus, the final rule does not require the proposed coverage information and educational statements.

K. Determination of Volatile Organic Compound Content

Four commenters expressed concern that Method 24 (40 CFR part 60,

appendix A) would not provide reliable results in certain circumstances, such as for waterborne coatings, and requested that the EPA allow the use of alternative tests in lieu of Method 24. The requests included methods to test for acetone content, acid content, water content, and for testing coatings that cure via chemical reactions that are quenched by the dilution solvent used in Method 24. Two commenters also requested that the EPA accept compliance demonstrations based on theoretical formula calculations or formula batch card loading information and documentation.

The EPA believes that Method 24 provides consistent, reliable results when determining the VOC content of architectural coatings. Specifically regarding concerns about Method 24's reliability for determining the VOC content of waterborne coatings, the EPA believes that Method 24 is the best currently available compliance method for low-VOC solvent content (high water content or waterborne) coatings. For waterborne coatings, VOC content is determined indirectly using methods that determine nonvolatile matter content and water content. The VOC content is assumed to be what is unaccounted for by these two fractions. The EPA acknowledges that the inherent imprecision of indirectly determining the VOC content of such coatings by this method necessitates an adjustment of the analytical results. Such adjustments must be based on confidence limits calculated from the precision statement established for Method 24. The precision adjustment procedure is incorporated in Method 24. Therefore, the final rule specifies that Method 24 is to be used for determining the VOC content of coatings subject to the rule. However, in response to comments received and consistent with other coating regulations established by the EPA in the past, the final rule does provide that other means may be used to determine VOC content.

Nevertheless, the rule also provides that the Administrator may request at any time that the coating manufacturer or importer conduct a Method 24 test for the purpose of demonstrating compliance with the rule. If there are any inconsistencies between Method 24 test results and other means of determining VOC content, the Method 24 results will govern. The rule also provides an option for the Administrator to approve, on a case-by-case basis, alternative methods of determining the VOC content of coatings if they are demonstrated to the Administrator's satisfaction to provide results satisfactory for determining

compliance. Such alternative methods could include procedures for testing for acetone, acid content, and water content, procedures for coatings that are chemically-cured, and procedures for using formulations and batch processing data for adjusting or determining VOC content.

L. Compliance Date

At proposal, the EPA requested comment on the appropriate compliance deadline for the rule. Commenters expressed a range of opinions regarding the appropriate compliance date. Commenters who supported a compliance period of up to 12 months stated that this amount of time was necessary to adjust formulations, reprint labels, adjust inventories, use up existing label stock, and conduct research and development. Some commenters stated that the compliance period should be greater than 1 year to allow adequate time for developing, performance testing, and marketing new products. Some State Agencies requested no further delay in the compliance date, since States are depending upon the architectural coatings rule for VOC reduction credit under their SIP. The latter commenters stated that extending the compliance date would have an adverse impact on the environment, would lead to additional State regulations, and is unnecessary given the current state of technology.

The EPA supports making the architectural coatings rule effective and applicable as quickly as possible, but in a time frame within which regulated entities may reasonably comply. The EPA believes that the 12-month compliance period in the final rule allows the industry appropriate time to achieve compliance with the rule. The EPA believes that coating technologies currently exist to meet all of the rule's VOC content limits. In limited cases where manufacturers or importers need additional time to comply, the tonnage exemption and the exceedance fee option already provide additional compliance flexibility and offset any need for additional compliance time.

At proposal, the EPA requested comment on whether the final rule should include a compliance extension for small manufacturers. Three-quarters of the commenters providing comments on this provision were against special treatment for small manufacturers. After careful evaluation of the comments, the EPA has decided not to include a compliance extension specifically restricted to small manufacturers. Instead, the EPA has extended the compliance period for all manufacturers

and importers to 12 months. The EPA has concluded that the information provided by commenters demonstrates that the 12-month compliance period allows adequate time for all regulated entities to comply. The EPA believes that other mechanisms such as the tonnage exemption and the exceedance fee will also help alleviate concerns regarding the compliance period for small entities.

M. Cost/Economic Impacts

At proposal, the EPA solicited comment regarding the size and nature of reformulation costs to gauge the reasonableness of the estimate used in the EPA's EIA. The estimate the EPA used at proposal (\$250,000 per product reformulation) was based on an estimate presented to the Regulatory Negotiation Committee in 1993 (Docket# II-E-52). The EPA received several public comments in response to this request and categorized the estimates provided based on the following dimensions: technical staff training, prioritization of products needing reformulation, survey of available materials, reformulation to desired properties, performance tests, field tests, marketing costs, production costs (labels), sales training, and executive expenses. Eleven of the comments received provided comparable information for gauging reformulation costs per product. Other comments provided less complete information that the EPA has taken into account, but did not include the specific information necessary to assess the reasonableness of the EPA's estimate. The EPA combined the estimates from these eleven comments with the original cost estimate and found that reformulation cost per product ranged in value from \$576 to \$272,000 (1991 dollars), with a mean value of approximately \$87,000. This gives an indication that the EPA's estimate at proposal significantly overstated the average cost to reformulate a product. Because the mean value from these comments represents a wide variety of conditions for reformulation (in comparison to the one scenario described to the Regulatory Negotiation Committee), the EPA revised the EIA using \$87,000 as the average cost to reformulate a product. Appendix B of the EIA and the architectural coatings BID provides a full discussion of the review of these cost estimates.

Several commenters indicated that they thought that the estimate of total social cost was too low because the EPA underestimated or omitted several cost factors. Some of the factors cited by commenters that costs are underestimated are listed below:

(1) The estimate did not consider every reformulation such as the recalibration and reformulation of every color in a tint base system when the base is reformulated,

(2) The survey used to estimate costs excluded 400 small paint manufacturing companies,

(3) Only the costs of laboratory personnel are included in the estimate,

(4) The estimate did not consider the cost of foregone new product development when expending scarce technical effort to reformulate existing products, and

(5) Aggregation of 50 product categories into 13 market segments reduces the impact presented.

Commenters also cited several cost categories that potentially were omitted from the total cost estimate, including:

(6) Costs for preparing product literature, including material safety data sheets, sales aids, color brochures, and technical data bulletins;

(7) Costs for manufacturer education;

(8) Costs to consumers from increased surface preparation, application, and drying time;

(9) Costs associated with warranty claims and complaints about poor performance of compliant coatings;

(10) Litigation costs due to increased safety hazards from using acetone formulations;

(11) Increased costs to retailers, contractors, and other consumers;

(12) Additional job losses in the paint industry and the socioeconomic impact on low income workers; and

(13) Impacts of product bans on the nation.

Two of these commenters (a manufacturer and its legal counsel) stated that if the EPA included all cost factors in the total cost estimate, then the impacts of the rule would exceed \$100 million and would necessitate additional analyses under Executive Order 12866 and the Unfunded Mandates Reform Act. Some commenters also believed that the method of calculating the national cost was flawed in that costs are calculated on an annualized basis. A commenter also stated that expressing the cost in 1991 dollars did not represent real costs today and that assuming an interest rate of 7 percent was not a valid assumption for small businesses.

The EPA has carefully considered the comments regarding the economic impact of the rule, especially in light of the EPA's overestimate of the costs of reformulation in the proposal. The EPA believes the total social cost estimate provided at proposal was significantly above the actual cost of the regulation because of several conservative

assumptions that were adopted in the analysis, and the evidence that the per-product reformulation cost was nearly three times greater than the average estimate obtained by public comments.

The method of calculating national cost for the final rule adheres to the EPA policy and Office of Management and Budget (OMB) guidance (OMB Circular A-94). It is a well-established tenet of benefit-cost analysis and cost-effectiveness analysis that benefits and costs need to be placed on a time-consistent basis for direct comparison. Therefore, the costs of the action must be computed on an annualized basis through discounting to be time consistent with the annual stream of emission reductions achieved. For the architectural coatings rule, the costs of reformulation and its VOC reduction benefits occur in different time periods. The reformulation of current noncompliant products is a "one-time event," but the emission reductions of the new formula and the knowledge gained from developing the reformulation continue over the life of the product, which is an infinite period of time unless the product is permanently removed from the market. In other words, once a formulation is developed to comply with the regulation, manufacturers will have some knowledge to carry forward to all future modifications of the product (i.e., if they adjust the formula to improve certain attributes or characteristics of the product). However, the EPA recognizes that a case can be made for treating each product formula as having a finite service life, requiring periodic reformulation. Under this alternative assumption, the regulation is viewed as accelerating each product's next round of reformulation, an event that would have occurred anyway. For example, if a product is usually reformulated every 8 years, the rule's implementation may cause a manufacturer to investigate the reformulation 4 years earlier, thus accelerating the reformulation schedule for all future years. In response to this issue, the EIA for the final rule presents a calculation of annualized costs for both a finite and an infinite product life. Because the finite product life results in a higher annualized value, the EPA uses this estimate for the economic analysis of the final rule to produce a conservative estimate of impacts associated with the rule.

Also, because the survey of architectural coating producers was conducted in 1992 with information on products through the end of 1991, the EPA has set 1991 as the baseline year for the analysis. All market data are in 1991 dollars, and so for the purpose of

modeling, the costs are expressed in 1991 dollars. However, in response to comments, values for the final rule are expressed in both 1991 (the base year of analysis) and 1996 dollars. The EPA's conclusions regarding the impacts of the final rule are the same, whether expressed in 1991 or 1996 dollars.

In addition, OMB (OMB Circular A-94) stipulates that the discount rate used for economic analyses of Federal regulations is 7 percent. This is based on an assessment of a wide range of private and public investment returns. The 7-percent rate is a real discount rate (adjusting out inflation). In contrast, the market interest rates paid by firms are in nominal terms (i.e., they include a component for inflation). If inflation is 3 percent, then a real rate of 7 percent is equivalent to a nominal rate of 10 percent. All dollar values in the economic analysis are expressed in real terms, thus the discount rate used is a real discount rate.

Using the stated method for calculating the per-product costs of reformulation, the EPA conducted an in-depth analysis of national cost and economic impact to support both the proposed and final rules. More specifically, the estimate of net social cost is based on the average cost to reformulate products that exceed the limits set by the standard. These costs are applied to specific products identified by the survey. For these products, costs are applied to two-thirds of the population of non-compliant products because one-third of these products are similar enough in characteristics to other "over-the-limit" products that a separate reformulation effort is not likely to be necessary. Although the survey was unable to capture all products produced by small businesses as one commenter states, the EPA assumed (for an upper bound estimate) that all product volume in the non-survey population was produced by small businesses. Thus, costs are extrapolated to the nation using conservative assumptions of the total number of products requiring reformulation nationally. The analysis then considers influences in a competitive market on product price and output, along with the consideration of lower-cost compliance options such as the exceedance fee provision or product withdrawal from the market. The analysis not only measures the cost to producers that must comply with the regulation, but also to all consumers impacted by the changes in the market resulting from the regulation. The analysis also identifies gains in revenues to producers that are not constrained by the rule (thus, not

incurring costs), but who gain an advantage of higher market prices for their products. Thus, the EPA believes that the analysis reasonably captures all capital and social costs for surveyed as well as non-surveyed products.

The original product reformulation cost estimate included several components beyond the cost of the laboratory personnel, which are itemized in the EIA. Although some of the items listed by commenters as improperly omitted may not have been included in the per-product reformulation cost estimate at proposal, several of the estimates from public comments that were used for the final rule included these components, and therefore, they are included in the estimate used for the final rule. The EPA also considered the influence (positive and negative) of other factors that are not possible to quantify, and presented these biases in a table of the EIA at proposal and for the final rule. Most of the biases are variable and case specific. For example, product quality changes were found to have both positive and negative effects on cost depending on the product. The EPA found no link between product quality and VOC content since quality, high-performing products are available in a wide range of VOC content levels in many product categories. Given this finding, the EPA does not consider warranty claims and complaints for poor performance to be typical or quantifiable for a reformulated product. The EPA also found examples of increased and decreased time utilized for surface preparation, application, and drying of compliant coatings. The use of acetone formulations is also not considered a necessity to comply with the rule since there are other raw material substitutes available to manufacturers. Thus, incurring increased safety hazards by choosing an acetone formulation is a decision that should be made by a manufacturer based on benefit/cost considerations, rather than as a result of the rule. Other categories of influence on the cost estimate are also discussed qualitatively in the EIA.

The cost of foregone new product development is an aspect of opportunity cost that is implicitly included in the EPA's estimate of economic impacts. The amortized cost of reformulation reflects both the payment of principal and the cost of capital. The cost of capital directly reflects the value of opportunities foregone by investing funds in a particular activity, in this case, reformulation. Thus, if investing in reformulation diverts funds from investing in other product enhancements, the foregone value of

those investments is captured in the discount rate used in the analysis.

The aggregation of 50 categories into 13 market segments is the result of cross-referencing the emissions inventory data from the industry survey with the coding system set by the Census of Manufacturers, a large source of economic data. The methodology to link survey categories with the Census data is described in an appendix to the EIA. The EPA's objective was to specify as many market categories as the data would allow. Using this method, the largest possible number of meaningful market categories was 13. The aggregation process presents an appropriate way to analyze the cost and economic impacts and does not in any way diminish the estimates of the absolute impact of the regulation. However, the aggregation process may make it difficult to detect relatively large impacts within one subgroup of a market category, if these impacts are offset by relatively small impacts in other subgroups of that market. In other words, a product may be more likely to be withdrawn from the market than is indicated in the 13 market segments of the analysis since multiple product niches would be lumped within the same market segment. On the other hand, this aggregation may increase the estimated effect on manufacturers by over-stating the degree to which products within the market segment can substitute for products affected by the regulation.

While the EPA did not directly measure impacts on the retailing sector, contractors, and other consumers, the indirect impacts to these entities and other users of coatings products are captured in the market analysis by the estimated change in "consumer surplus," along with all other downstream effects beyond the manufacturer. Consumer surplus measures the distribution of the burden of the regulation to all consumers. Since the impact on consumers calculated for proposal was less than one-third of the manufacturers' burden, and contractors and retailers are a small subset of this effect, the EPA saw no indication of a need for an in-depth analysis of secondary (indirect) impacts.

It should be recognized that retail outlets have the ability to substitute between compliant and noncompliant coatings offered for sale. While the EPA projects the number of withdrawn products to be small, if a manufacturer does choose to discontinue a product, retailers will presumably replace this product with other compliant products in that category. Thus, although foregone profits are "lost" for the

manufacturer withdrawing a product, the retailer offsets any lost profits from selling the withdrawn product with profits obtained by selling substitutes within that category. As indicated above, the number and volume of product withdrawals is projected to be quite small (less than 1-percent nationally), thus suggesting retailing effects, if they exist at all, are also likely to be quite small.

The job loss and other substantial economic impacts that are referred to by a commenter are the result of assuming that every reformulation required by the standards is not feasible, thus the products would be removed from the market causing manufacturers, contractors, retailers, and other consumers to be economically impacted. Because there are a very limited number of products that are expected to be withdrawn from the market, most products will be reformulated or produced with current formulations (with manufacturers using the tonnage exemption provision or paying a fee for emissions in excess of the standards).

Likewise, this regulatory action cannot be considered a "product ban" because the EPA believes that it is technologically feasible to reformulate all product categories to meet the standards. The expected level of product withdrawal is calculated based upon the aggregate impact on numerous varieties of products across 13 different market segments, so it is unlikely to eliminate (or ban) an entire product category. In addition, the rule contains limits for 61 categories of products, many of which were created to preserve specialty, niche market sectors within the industry. Also, the tonnage exemption and exceedance fee provisions in the rule are expected to provide further compliance flexibility which will allow manufacturers to maintain product lines with VOC contents that exceed the applicable VOC content limits in appropriate circumstances.

In conclusion, based on the data and information provided to the EPA prior to proposal and through public comments, the revised national annualized cost estimate of the final rule of \$25.6 million in 1991 dollars (or \$29 million in 1996 dollars) is representative of all costs to producers and consumers. This cost and its effect on the industry do not meet the minimum criteria set forth by Executive Order 12866 or the Unfunded Mandates Reform Act to require additional analyses, as some commenters have suggested.

N. Small Business Issues

The EPA received several comments that small businesses would be disproportionately impacted by the regulation because: (1) they manufacture products with higher VOC content in comparison to the large companies; (2) due to the lack of resources, it would take longer for small firms to reformulate all affected products; and (3) the rule would discourage niche market products that support many regional and local manufacturers. Some commenters also claimed that the proposed regulation provided a competitive advantage to large national and international companies because a uniform national rule simplifies marketing, production, and compliance activities of these firms.

During development of the rule, the EPA was aware of the above concerns of small manufacturers and designed the architectural coatings rule to minimize any potential adverse impacts on small manufacturers. In fact, special consideration was given to economic feasibility of VOC levels for coating categories where small manufacturers have a disproportionate presence. The small entity analysis confirmed that small producers that were included in the survey of manufacturers do tend to produce higher VOC content products (75 percent higher than the average of all surveyed manufacturers), partly because of a specialization of products and partly because of choice of technology. They produced 20 percent of the number of products in the survey, but only account for 4 percent of total volume of coatings produced, and 4 percent of total revenue of surveyed manufacturers. Thus, the revenues and production levels are generally lower than the average of all manufacturers. Because the costs to reformulate are fixed for all levels of production, the costs to reformulate the products that exceed the VOC content limits have the potential to comprise a greater share of baseline costs and revenues for small producers, which gives some indication that a disproportionate impact on small businesses could occur if reformulation were the only compliance option available. The EPA considered this finding and has taken several steps in the final rule to mitigate this impact, provide flexibility and additional compliance time, and preserve niche markets, including:

- The creation of new product categories where warranted,
- An increased compliance time (12 months),
- A tonnage exemption provision, and

- An exceedance fee provision.

All of these provisions were considered in part to address niche markets and small business burdens; however, the provisions will be available to all producers regardless of size. The EPA's analysis of the impacts of the final rule shows that small businesses are likely to utilize these provisions and that the impact on a typical small firm is reduced without significant deterioration of the rule's effectiveness (i.e., the foregone emission reductions are limited). See section VI.E of this preamble for a summary of findings from the analysis.

The EPA disagrees that the proposed architectural coatings rule favors larger businesses to the detriment of smaller businesses. As the EIA indicates, estimated market effects from the architectural coatings rule are relatively slight. Approximately one-tenth of 1 percent of industry product volume is projected to withdraw from the market, and price effects in each market are expected to range from no effect to an increase of less than 2 cents per liter, which is still less than a 1-percent increase of the baseline price. The expected level of product withdrawal discussed above is based upon the aggregate of numerous varieties of products across 13 different market segments, so it is unlikely to eliminate an entire product category. Compared to other industries, the coatings industry is highly competitive due to the numerous manufacturers in the industry. Therefore, a relatively small product withdrawal effect on a very competitive industry suggests that significant degradation of market competition is unlikely.

The EPA also does not agree that a uniform national regulation would have negative implications for competition with respect to antitrust laws and would reduce market efficiency. In fact, the existence of nonuniform standards across States tends to favor one sector of the industry (local manufacturers) at the expense of another (non-local manufacturers), thereby limiting competition in those markets. Some public commenters supported a national rule because they believe nonuniform standards harmed small manufacturers. As one commenter testified at the public hearing, small companies lack the resources to deal with a large number of different State regulations and labeling requirements and a regulatory climate that changes frequently. Another commenter pointed out that these conditions hinder small companies' ability to plan for new products, production, expansion, and marketing. All of these activities require the

investment of time and money that can easily be expended if a county, district, or State implements a new VOC rule. The EPA considers a national VOC rule an important element in promoting consistency among architectural coating standards. The EPA also recognizes that a national rule for architectural coatings sets minimum national requirements, and that some States may need to adopt requirements for architectural coatings more stringent than those in this rule.

The EPA also received comments on the definition of a small entity that the EPA adopted for the regulatory flexibility analysis. One commenter supported the definition, while several others argued that the definition was too restrictive and suggested it be revised to include more firms (i.e., firms with architectural coatings sales between \$20 and \$30 million, or firms with less than \$50 million, or firms with less than \$100 million in sales). Because the coating manufacturing industry is not labor-intensive, a revenue value cut-off rather than a number-of-employees cut-off appeared to be a better measure to reflect the ability of a manufacturer to devote time as well as research and development resources to meet regulatory requirements. Based on input from stakeholders during the regulatory negotiation process (II-E-62), the EPA has defined small manufacturers as those having less than \$10 million in annual architectural coating sales and less than \$50 million in total annual sales from all products. Using this definition, between 70 and 85 percent of the architectural coatings industry would be classified as small. This definition does not change the requirements of the Regulatory Flexibility Act (RFA); it is used for analysis purposes only. If the definition were changed to include more firms at sales levels greater than \$10 million, the impacts on this sector of the industry may appear lower on average because the impacts on a company with sales around \$30 million may offset impacts on a \$5 million company. In such a case, the EPA may have been less likely to consider special provisions such as the exceedance fee or tonnage exemption. The EPA believes the current definition is representative of the industry and has not revised it for the final rule.

O. Cost-Effectiveness

In the preamble to the proposed rule (61 FR 32735, June 25, 1996), the EPA solicited comments on alternative approaches to the cost-effectiveness calculation for the proposed rule. As distinct from EPA's consideration of cost in the BAC analysis, the discussion

in this section did not form a basis for EPA's selection of BAC for the categories of products regulated by the rule.

Cost-effectiveness is a measure used to compare alternative strategies for reducing pollutant emissions, or to provide a comparison of a new strategy with historical strategies. The EPA's established method of calculating the cost-effectiveness of a rule with nationwide applicability is to divide the total cost of the rule by total emission reductions. At proposal, the EPA requested comment on two alternative ways of calculating cost-effectiveness for the architectural coatings rule: (1) cost-effectiveness considering total emission reductions in ozone nonattainment areas only, and (2) cost-effectiveness considering emission reductions in ozone nonattainment areas during the ozone season only.

Before discussing the comments received on this cost-effectiveness methodology issue, it is important to note that the provisions and rationale for today's rule are not dependent upon the disposition of this issue. The EPA nonetheless took comment on the issue because this rule was among the first to be proposed under section 183(e) of the Act and presented an opportunity to receive public input early in the program.

In regard to cost-effectiveness methodologies, the EPA received comments from three commenters, all of whom favored the EPA's traditional measure of cost-effectiveness. One commenter stated that it is important to characterize cost-effectiveness in a consistent manner so that various control strategies can be compared on equal footing and that calculating cost-effectiveness based solely on nonattainment areas unfairly biases the calculation by ignoring the benefit of reducing the transport of ozone and its precursors. Another commenter advised the EPA to maintain the traditional measure since it is commonly used and will continue to provide meaningful comparisons. The latter commenter opposed more narrow measures of cost-effectiveness, such as exclusively measuring the effect on ozone concentrations or VOC reductions in ozone nonattainment areas only. The third commenter considered cost-effectiveness based on VOC reductions solely in ozone nonattainment areas to be impractical, because the manufacturer has little control over where coatings will be used. Such control would necessitate additional recordkeeping to track intended and actual locations of product use.

After considering these comments, the EPA does not plan to adopt these alternative approaches to calculating cost-effectiveness for rules with nationwide control requirements, for reasons that are presented below.

One issue raised by the comments is whether the EPA's traditional measure creates a bias against strategies that apply in a limited geographic area (e.g., in nonattainment areas) relative to nationwide strategies, or against seasonal strategies relative to year-round strategies. This issue would arise if the EPA used cost-effectiveness figures to compare the desirability of these dissimilar types of strategies. In fact, the EPA did not use cost-effectiveness estimates in this way in developing the architectural coatings rule. In the case of the architectural coatings rule, the EPA considered applying restrictions to architectural coatings only in nonattainment areas (either by rule or through a CTG). The EPA believes that such geographically targeted restrictions for these nationally distributed architectural coatings would pose substantial implementation difficulties for government and would impose substantial compliance burdens on a large number of regulated entities. The EPA also believes that such geographically targeted restrictions for these nationally distributed products would be less effective at reducing emissions than a national rule (see section V.A of this preamble for further discussion). Because the EPA determined that a strategy applicable only to nonattainment areas would be less desirable than a national rule for architectural coatings, the EPA did not see a need to invest resources to pursue that strategy and calculate its cost-effectiveness.

The EPA considered whether use of one of the alternative cost-effectiveness methodologies would enable the EPA to make valid cost-effectiveness comparisons between nationwide and targeted geographic strategies, or year-round and seasonal strategies, for reducing ozone pollution. The EPA has not chosen these alternatives because it has the following concerns about the two alternative approaches:

First, VOC emission reductions have benefits other than reducing ozone levels in nonattainment areas. As a result, the EPA believes the cost-effectiveness calculation for a nationwide, year-round rule should not exclude VOC emission reductions in attainment areas or outside the ozone season. The EPA recognizes that a primary objective of section 183(e) of the Act is to reduce VOC emissions in ozone nonattainment areas. However, as

previously explained, in the development of the architectural coatings rule, the EPA believes that the best policy alternative is to implement a nationwide rule. Therefore, emission reductions from this rule will not only be realized in ozone nonattainment areas, but also in all other parts of the country in which architectural coatings are distributed and consumed.

In general, the benefits of VOC reductions in ozone attainment areas include reductions in emissions of VOC air toxics, reductions in the contribution from VOC emissions to the formation of fine particulate matter, and reductions in damage to agricultural crops, forests, and ecosystems from ozone exposure. Emission reductions in attainment areas help to maintain clean air as the economy grows and new pollution sources come into existence. Also, ozone health benefits can result from reductions in attainment areas, although the most certain health effects from ozone exposure below the NAAQS appear to be both transient and reversible. The closure letter from the Clean Air Science Advisory Committee (CASAC) for the recent review of the ozone NAAQS states that there is no apparent threshold for biological responses to ozone exposure [See U.S. EPA; Review of NAAQS for Ozone, Assessment of Scientific and Technical Information, Office of Air Quality Planning and Standards Staff Paper; document number: EPA-452/R-96-007].

Second, under either alternative approach, emission reductions in ozone attainment areas would not be included in the calculation. This appears to imply that emissions reductions in attainment areas do not contribute to cleaner air in nonattainment areas. VOC sources in regions adjacent to nonattainment areas may contribute to ozone levels in nonattainment areas. As a result, a cost-effectiveness comparison based on the alternative approaches sometimes could create a bias against a nationwide rule relative to a strategy that applies in nonattainment areas only.

In light of the transport issue, it has been suggested that the EPA apply a weighting factor to account for differences in the extent to which emissions inside and outside nonattainment areas contribute to ozone formation in nonattainment areas. The EPA is concerned that in order to calculate cost-effectiveness using this concept, the EPA would have to conduct extensive and costly air quality modeling to estimate ozone reductions resulting from each candidate control strategy and that this would require extensive data on the location of emissions. Such detailed analysis is

appropriate for some policy decisions, but not for all. As a result, the EPA is skeptical that this weighting approach would represent a generally useful analytical tool for decision making.

The EPA, of course, agrees that differences in the location and timing of emission reductions are a significant consideration in choosing among alternative strategies. The extent of ozone reductions and other benefits resulting from VOC emission reductions varies, partly based on location and season. In considering nationwide vs. geographically targeted controls, and year-round vs. seasonal controls, the EPA considers available information on the effectiveness of those strategies in reducing ozone—as well as other health and environmental considerations, economic considerations, and other relevant factors—in making a holistic assessment of which strategy is most desirable from an overall public policy standpoint.

There are instances where the EPA does provide an estimate of cost-effectiveness of a control strategy during the ozone season, i.e., generally, when a control strategy is feasible to apply on a seasonal basis, or when limits are set on a seasonal basis. Although these figures are useful for comparing different seasonal strategies, the EPA does not plan to use cost-effectiveness figures for inappropriate (i.e., apple to orange) comparisons between seasonal and year-round strategies for the 183(e) program for the reasons presented above. In regard to today's rule, the EPA notes that the nature of architectural coatings emissions does not allow for control strategies that reduce emissions only during the ozone season to be an objective for consideration. One reason is that the shelf life and consumption rate of architectural coatings varies greatly and one cannot predict that a certain percentage of a product made with a specified formulation will be consumed and, thus, result in VOC emitted during the ozone season. Because the Agency has concluded that an ozone season-based approach is not a viable control strategy for architectural coatings, the EPA did not believe it was appropriate to develop a seasonal-based approach to measuring cost-effectiveness for the architectural coatings rule.

P. Future Study and Future Limits

The EPA has determined to regulate architectural coatings based upon the study and Report to Congress required by Section 183(e) of the Act. For the reasons discussed in the separate final listing decision published today in the **Federal Register**, the 183(e) study

established that the EPA should regulate architectural coatings to reduce VOC emissions, as directed by the Act. The final rule's VOC content limits, in combination with the exceedance fee and tonnage exemption provisions, reflect the EPA's determination of BAC for architectural coatings, based on the EPA's analysis of currently available information on coating technologies. However, the EPA recognizes that manufacturers are continuously developing new and innovative products in response to competitive markets as well as to regulatory pressures. The EPA has developed the final requirements for architectural coatings largely from data for coatings manufactured in the early 1990s, and the EPA believes, therefore, that VOC reductions beyond those reflected in table 1 of the rule may be technologically and economically feasible in the future. In the preamble for the proposed rule, the EPA discussed the idea of a joint study with the industry to investigate the cost and performance characteristics of coatings with VOC contents lower than the promulgated limits and to assess the environmental and economic impacts of requiring lower VOC contents. The EPA requested comments concerning such an EPA/industry study and any performance, cost, or reactivity considerations that should be included in such a study. The EPA also requested information on coating categories where recent progress in low-VOC resin systems has resulted in the introduction of new low-VOC coatings into the market since 1990. In addition, the EPA requested cost information and comments on the ability of coatings with VOC content limits lower than the proposed levels to meet the performance needs within the coating category.

A total of 27 commenters responded to the EPA's request for comments, representing a wide variety of positions. The comments generally addressed three issues: (1) the usefulness of the proposed joint study, (2) how the EPA should conduct the study, and (3) the merit of promulgating additional or more stringent standards for architectural coatings.

Based on these comments, the EPA has concluded that an additional study for this category may be warranted to determine the feasibility of additional reductions in VOC limits. However, contrary to some commenters' assertions, the EPA would not necessarily impose future requirements as a result of any study. A study could indicate that further regulation of architectural coatings is unwarranted.

The EPA appreciates the willingness expressed by many commenters to participate in a joint study. The effectiveness of any study is highly dependent on a spirit of openness and cooperation between all affected parties. In order to determine the potential for useful results from a second study, the EPA will solicit input from industry representatives and other interested parties on the timing, scope, and content of the study. Decisions concerning the additional study will be made on the basis of this input.

Some commenters questioned the EPA's authority to engage in any future regulatory initiatives involving architectural coatings. These commenters did not identify any statutory language in section 183(e) of the Act that supports this position. The EPA believes that section 183(e) explicitly authorizes the EPA to use "any system or systems of regulation" that are appropriate to achieve the goals of the statute, and the EPA's explicit directive is to require BAC. Nothing in section 183(e) explicitly or implicitly prohibits the EPA from updating or amending the regulations in the future, if appropriate. The EPA has striven to promulgate the appropriate regulations given the current state of technology. Future innovation in technology may justify reexamination of the regulations, and the EPA wishes to encourage such innovation in order to achieve the objectives of section 183(e).

Q. *Administrative Provisions*

Since proposal, the EPA has added several new sections to the regulation to aid in implementing the rule. These administrative provisions do not add any new compliance requirements to the rule, and pose no additional impacts on regulated entities. The EPA has added the new requirements to provide consistent procedures for implementation. The provisions that were added are as follows: (1) Addresses of the EPA Regional Offices, (2) State Authority, (3) Circumvention, (4) Incorporations by Reference, and (5) Availability of Information and Confidentiality.

The section on addresses specifies the mailing addresses of the EPA Regional Offices for the submittal of required reports. The States and territories served by the various Regional Offices are listed in this section as well. The appropriate Regional Office for purposes of reporting would be that Regional Office which serves the State or territory in which the regulated entity's corporate headquarters are physically located.

The section on State authority clarifies that this rule in no way

prevents States from adopting more stringent regulations. The section on circumvention prohibits regulated entities from doing anything to conceal what would otherwise be noncompliance, by such means as falsifying records of product formulation or VOC content. The section on incorporations by reference includes as part of the rule the ASTM methods and technical standards of the American Architectural Manufacturer's Association that are cited by reference. Finally, the section on availability of information and confidentiality clarifies the type of information that is available to the public, and provides for the confidential handling of any proprietary information that may be submitted to the EPA in response to the rule.

VI. *Administrative Requirements*

A. *Docket*

The docket is an organized and complete file of all the information considered by the EPA in the development of this rule. The docket is a dynamic file, since material is added throughout the rulemaking development. The docketing system is intended to allow members of the public to identify and locate documents so that they can effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated standards and the EPA responses to significant comments, the contents of the docket will serve as the record in case of judicial review [see 42 U.S.C. 7607(d)(7)(A)].

B. *Paperwork Reduction Act*

The information collection requirements in this rule have been submitted for approval to OMB under the *Paperwork Reduction Act*, 44 U.S.C. 3501, *et seq.* An Information Collection Request (ICR) document has been prepared by the EPA (ICR No. 1750.02) and a copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division, United States Environmental Protection Agency (2137), 401 M Street, SW, Washington, DC 20460, or by calling (202) 260-2740. The information requirements are not effective until OMB approves them.

The information collections required under this rule are needed as part of the overall compliance and enforcement program. The information will be used by the EPA to identify the regulated entities subject to the rule and to ensure their compliance with the rule. The recordkeeping, reporting, and labeling requirements are mandatory and are being established under sections 114

and 183(e) of the Act. All information submitted to the EPA for which a claim of confidentiality is made will be safeguarded according to the EPA policies set forth in Title 40, Chapter 1, Part 2, Subpart B-Confidentiality of Information (see 40 CFR part 2; 41 FR 36902, September 1, 1976, as amended by: 43 FR 39999, September 8, 1978; 43 FR 42251, September 28, 1978; and 44 FR 17674, March 23, 1979).

The total annual reporting and recordkeeping burden for this information collection averaged over the first 3 years is estimated to be 65,851 hours per year. The total annualized recordkeeping and reporting costs for this rule are estimated to be \$2,452,683. This is the estimated burden for the estimated 500 respondents (i.e., architectural coating manufacturers).

The average estimated burden, per respondent, is 132 hours per year. The total reporting and recordkeeping burden for an individual respondent will vary depending on the compliance option chosen. Respondents meeting the VOC content limits will have the lowest reporting and recordkeeping burden. Manufacturers and importers that choose the option of calculating an "adjusted-VOC content" (for recycled coatings), paying an exceedance fee, or exercising the tonnage exemption will have a higher reporting and recordkeeping burden. The final rule requires an initial one-time notification from each respondent. Respondents whose coating products have a VOC content that is less than or equal to the VOC content limits have no periodic reporting requirements. Respondents using the recycled coatings provision must keep records and submit annual reports. Respondents taking advantage of the tonnage exemption must file annual reports and must maintain records for the coatings being claimed under the exemption. Respondents paying an exceedance fee must submit reports on an annual basis. These manufacturers must also keep records for each coating product on which fees are paid.

Burden in this context means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. This includes the time needed to: (1) Review instructions; (2) develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; (3) adjust the existing ways to comply with any previously applicable instructions and

requirements; (4) train personnel to be able to respond to a collection of information; (5) search data sources; (6) complete and review the collection of information; and (7) transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

Send comments on the EPA's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the Director, OPPE Regulatory Information Division, United States Environmental Protection Agency (2137), 401 M Street, SW, Washington, DC 20460, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, N.W., Washington, DC 20503, marked "Attention: Desk Officer for EPA." Comments are requested within October 13, 1998. Include the ICR number in any correspondence.

C. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the EPA must determine whether a regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

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

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

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

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

Pursuant to the terms of the Executive Order, the EPA has determined that this final rule is a "significant regulatory action" under criterion (4) above, based on the novel use of economic incentives (an exceedance fee) for this industry. Therefore, the EPA submitted this action to OMB for review. Any changes

made in response to OMB suggestions or recommendations are documented in the public record.

D. Executive Order 12875

To reduce the burden of Federal regulations on States and small governments, the President issued Executive Order 12875 on October 26, 1993, entitled Enhancing the Intergovernmental Partnership. This Executive Order requires agencies to assess the effects of regulations that are not required by statute and that create mandates upon State, local, or tribal governments. In compliance with Executive Order 12875, the EPA has involved State and local governments in the development of this rule. State and local air pollution control agencies participated in the regulatory negotiation and have also submitted comments after proposal for consideration in developing the final rule.

E. Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act of 1996

The RFA of 1980 (5 U.S.C. 601, *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), requires the EPA to give special consideration to the effect of Federal regulations on small entities and to consider regulatory options that might mitigate any such impacts. The EPA is required to prepare a regulatory flexibility analysis, including consideration of regulatory options for reducing any significant impacts, unless the EPA determines that a rule will not have a significant economic impact on a substantial number of small entities.

The EPA prepared analyses to support both the proposed and final rules to meet the requirements of the RFA as modified by the SBREFA. The EPA undertook these analyses because of the large presence of small entities in the architectural coatings industry and because the EIA indicated that there could be a significant economic impact on a substantial number of small entities if mitigating regulatory options were not adopted for the rule. After evaluating public comment on the proposed mitigating options, the EPA made a number of changes to the proposed rule to further mitigate the rule's small business impacts. As a result, the EPA believes that it is highly unlikely that the rule will have a significant economic impact on a substantial number of small entities. However, in light of the EPA's inability to quantify the effect of all of the mitigating provisions included in the rule, the EPA has elected to conduct a regulatory

flexibility analysis and to prepare a SBREFA compliance guide to eliminate any potential dispute about whether the EPA has fulfilled SBREFA requirements. The EPA expects to complete the compliance guide by the end of 1998.

The analysis supporting the proposed rule was published in the report titled, "Economic Impact and Regulatory Flexibility Analysis of Air Pollution Regulations: Architectural and Industrial Maintenance Coatings," (June 1996). For the purpose of the analysis, the EPA considered small manufacturers to be firms with less than \$10 million of total gross annual revenues from the sale of architectural coatings and less than \$50 million in total gross annual revenues from all products. The EPA proposed this definition of small entity for the reasons stated in the September 3, 1996 **Federal Register** (61 FR 46411) and has determined that this definition is appropriate. The Small Business Administration has concurred on this definition of small entity.

Using this definition, one-third of the 116 firms for which the EPA has survey data are classified as small. There are approximately 500 total manufacturers. Since the EPA does not have data to indicate the total number of small firms producing architectural coatings, the EPA assumes as a conservative estimate that the unsurveyed manufacturer population (i.e., the remaining 384 manufacturers) are all small, and consequently, all product volume not captured by the 116 manufacturers surveyed is manufactured by small firms. Using this assumption, the EPA conducted an analysis that assumed 84 percent of the estimated 500 architectural coating producers, i.e., 420 firms, are small entities.

Based on an analysis of the survey data at proposal, the EPA recognized the fact that small businesses tend to produce products in specialized or niche markets and also to produce products that tend to have higher than industry-average VOC contents within less specialized markets. In addition, small manufacturers' revenue and production levels are generally lower than the average for all manufacturers. One benefit of their smaller production levels is that small manufacturers have a greater ability to adjust quickly to changes in markets. However, because the costs to reformulate are fixed for all levels of production, and small manufacturers have lower than average production levels, the costs for small manufacturers to reformulate represents a greater share of baseline costs and revenues. Without any rule provisions designed to mitigate impacts on small

manufacturers' niche markets and smaller production levels, there is some indication that a disproportionate impact on small businesses could occur.

At proposal, the EPA included categories and limits to preserve niche product markets. In addition, to evaluate whether further steps were still needed to accommodate niche market coatings, the EPA requested that commenters identify any additional specialty coatings which would not comply with VOC content requirements. The EPA also requested comment on whether to include an "exceedance fee" which would allow companies the option of paying a fee, based on the amount that VOC content limits are exceeded, instead of achieving the limit. In addition, the EPA requested comment on the concept of a low volume cut-off, under which a coating may be exempt from regulation. The analysis prepared to support the final rule builds upon the analysis performed for the proposal and takes into consideration compliance options the EPA has added to the final rule.

Due to confidentiality considerations associated with the survey data provided by the industry trade association, the EPA could not derive compliance cost as a percentage of revenues for each small manufacturer included in the survey population. This is because the aggregated information provided to the EPA did not have sales and VOC content information linked to any particular small manufacturer. The data compiled all responses for small manufacturers without any indication of firm name. Therefore, individual product VOC content information is available, and total revenues of all firms responding to the survey as a small business is available, but no method exists for the EPA to connect each response to an individual firm for a calculation of actual firm-level cost-to-revenues ratios. Absent exact information for each firm, the EPA performed the analysis based upon an average small business, using reasonable assumptions based upon the available data. In lieu of firm-level measures, the analysis presents an average cost/revenue ratio for a typical small firm based on the survey data.

The analysis has several other limitations. Although the EPA included specialty niche market categories in the rule, based on the data available to the EPA, there was no way to account for the extent to which these additional categories mitigated impacts. For example, the EPA's proposal included the following categories: "impacted immersion coatings", "flow coatings", and "nonferrous ornamental metal

lacquer and surface coatings" which likely would have been reported in the survey under the broader "industrial maintenance" category. The analysis would likely overestimate impacts on some of the markets represented in the survey due to the inability to account for the subset niche markets within these surveyed categories for which the EPA created additional categories. Additionally, the EPA's analysis assumes that manufacturers bear the full cost of each reformulation. Since the VOC content limits in the rule reflect available resin technologies, the EPA expects that the cost to comply for those manufacturers needing to reformulate their higher VOC content coatings will be partially reduced through the assistance of resin manufacturers/suppliers. Upon request, most resin suppliers are willing to share information and sample low VOC content formulations with interested paint manufacturers, both large and small. For this reason, the analysis may overestimate the impact of reformulation costs. A further consideration is that the EPA's analysis is based on 1990 data, and there has been much technological progress in the past 8 years in addition to new State regulations with requirements similar to the EPA's rule (e.g., Massachusetts, Kentucky, and Oregon).

In response to public comments, the EPA added 7 coating categories and increased the VOC content limits for 4 coating categories, as well as the exceedance fee provision and a provision which would enable each manufacturer to claim as exempt a specified amount of VOC (known as the tonnage exemption). The EPA also added an extended period of compliance after promulgation to allow additional time for reformulations. The EPA expects these provisions to mitigate rule impacts on small businesses' low production volumes and to allow for the preservation of several niche markets. However, based on the limited data available to the EPA, only the mitigating impact of exceedance fees can be quantified.

The EPA first conducted the analysis without incorporating the quantifiable mitigating impacts of compliance options available in the final rule. The analysis shows that when reformulation is the only option for compliance, the cost/revenue ratio is 2.5 percent on average. When the alternative compliance options of the exceedance fee or product withdrawal are considered, the ratio decreases to 2 percent. This ratio would likely decrease further if the cost effects of the additional niche product categories, use

of the tonnage exemption, and reduction in cost to reformulate due to resin supplier assistance could be specifically quantified.

The analysis in the EIA suggests that a large percentage of small firms will opt for one of the alternative compliance strategies in lieu of reformulation. For some of the products listed in the survey as produced by a small manufacturer, the EPA anticipates that it would be less costly for a firm to utilize the exemption provision, pay the exceedance fee, or withdraw a product (and forego profits on the product) rather than to reformulate. Although the lack of data at the firm level does not allow for an approximation of the use of the exemption, the analysis suggests that 35.5 percent of the small business products in the survey that exceed the standards will be maintained at current VOC content levels through the payment of the exceedance fee, 4 percent will be removed from the market, and 60.5 percent of the products will undergo reformulation. The availability of the alternative compliance strategies reduces the cost to small manufacturers by 23 percent (or more if the effect of the tonnage exemption and the portion of reformulation cost borne by resin manufacturers/suppliers could be quantified).

Based on the findings of the analysis and consideration of additional provisions which are designed to mitigate impacts, the EPA believes that it is highly unlikely that the rule will have a significant economic impact on a substantial number of small entities. The EPA believes that these measures adopted in the final rule will significantly mitigate the economic impacts on small businesses that might otherwise have occurred.

F. Unfunded Mandates Reform Act of 1995

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, the EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more in any one year. Under section 205, the EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires the EPA to establish a plan for informing and advising any small governments

that may be significantly or uniquely impacted by the rule.

Based upon the analysis presented in the EIA, the EPA has determined that the action promulgated today does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector, in any one year. Therefore, the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act do not apply to this action. The EPA has likewise determined that the final rule does not include regulatory requirements that would significantly or uniquely affect small governments. Thus, today's action is not subject to the requirements of section 203 of the Unfunded Mandates Act.

G. Submission to Congress and the General Accounting Office

The Congressional Review Act, 5 U.S.C. 801, *et seq.*, as added by the SBREFA of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the United States Senate, the United States 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 rule is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective September 11, 1998.

H. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (the NTTAA), Pub. L. No. 104-113, § 12(d) (15 U.S.C. 272 note), directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standard bodies. The NTTAA requires the EPA to provide Congress, through OMB, explanations when the EPA decides not to use available and applicable voluntary consensus standards.

In the case of this rule, the proposed rule required the use of Method 24 to

determine VOC content of coatings. This method is a compilation of existing voluntary consensus methods to determine the volatile matter content, water content, and density of coatings. In response to the proposed rule, the EPA received no comments pertaining to the use of additional voluntary consensus standards rather than the proposed Method 24, either during or after the comment period. In preparing the final rule, however, the EPA has investigated to determine the availability of any other existing voluntary consensus standards for use in lieu of Method 24.

The EPA has searched for additional voluntary consensus standards that might be applicable. The search included use of the National Standards System Network, an automated service provided by the American National Standards Institute for identifying available national and international standards. The EPA has not identified any voluntary consensus standards that are not presently included in Method 24 and that would result in equivalent results. The EPA did identify another voluntary consensus method (ASTM Method D 3960) that provides instructions for calculating VOC content in many different units. Because this other method does not specify which units to use, it may result in inconsistent applications of the procedure and could make the standard more difficult to enforce. Consequently, the EPA determined that this other voluntary consensus method would be impractical to adopt. In addition, the EPA believes that it is appropriate to use Method 24 both because it has proven reliable and practical to achieve the goals of reducing VOC and because the EPA wishes to foster uniformity in testing nationwide. Accordingly, the EPA has determined that Method 24 constitutes the appropriate method for determining product compliance under this final rule.

I. Executive Order 13045

Executive Order 13045 applies to any rule that the EPA determines (1) is economically significant as defined under Executive Order 12866, and (2) for which the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the EPA must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the EPA.

This final rule is not subject to Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), because it is not an economically significant regulatory action as defined by Executive Order 12866, and it does not address an environmental health or safety risk that would have a disproportionate effect on children.

Executive Order 13084

Under Executive Order 13084, the EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or the EPA provides to the Office of Management and Budget a description of the prior consultation and communications the agency has had with representatives of tribal governments and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires the EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." Information available to the Administrator does not indicate that this action will have any effect on Indian tribal governments.

List of Subjects in 40 CFR Part 59

Environmental protection, Air pollution control, Architectural coatings, Consumer and commercial products, Incorporation by reference, Ozone, volatile organic compound.

Dated: August 14, 1998.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, part 59 of title 40 of the Code of Federal Regulations is amended as follows:

PART 59—NATIONAL VOLATILE ORGANIC COMPOUND EMISSION STANDARDS FOR CONSUMER AND COMMERCIAL PRODUCTS

1. The authority citation for part 59 continues to read as follows:

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

2. Part 59 is amended by adding subpart D to read as follows:

Subpart D—National Volatile Organic Compound Emission Standards for Architectural Coatings

Secs.

- 59.400 Applicability and compliance dates.
- 59.401 Definitions.
- 59.402 VOC content limits.
- 59.403 Exceedance fees.
- 59.404 Tonnage exemption.
- 59.405 Container labeling requirements.
- 59.406 Compliance provisions.
- 59.407 Recordkeeping requirements.
- 59.408 Reporting requirements.
- 59.409 Addresses of EPA Regional Offices.
- 59.410 State authority.
- 59.411 Circumvention.
- 59.412 Incorporations by reference.
- 59.413 Availability of information and confidentiality.

Appendix A to subpart D—Determination of Volatile Matter Content of Methacrylate Multicomponent Coatings Used as Traffic Marking Coatings

Table 1 to Subpart D—Volatile Organic Compound (VOC) Content Limits for Architectural Coatings

Subpart D—National Volatile Organic Compound Emission Standards for Architectural Coatings

§ 59.400 Applicability and compliance dates.

(a) Except as provided in paragraphs (b) and (c) of this section, the provisions of this subpart apply to each architectural coating manufactured on or after September 13, 1999 for sale or distribution in the United States.

(b) For any architectural coating registered under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Section 136, *et seq.*), the provisions of this subpart apply to any such coating manufactured on or after March 13, 2000 for sale or distribution in the United States.

(c) The provisions of this subpart do not apply to any architectural coating described in paragraphs (c)(1) through (c)(5) of this section:

(1) A coating that is manufactured for sale or distribution to architectural coating markets outside the United States; such a coating must not be sold or distributed within the United States as an architectural coating.

(2) A coating that is manufactured prior to September 13, 1999.

(3) A coating that is sold in a nonrefillable aerosol container.

(4) A coating that is collected and redistributed at a paint exchange.

(5) A coating that is sold in a container with a volume of one liter or less.

§ 59.401 Definitions.

Act means the Clean Air Act (42 U.S.C. 7401, *et seq.*, as amended by Pub. L. 101-549, 104 Stat. 2399).

Adhesive means any chemical substance that is applied for the purpose of bonding two surfaces together other than by mechanical means. Under this subpart, adhesives are not considered coatings.

Administrator means the Administrator of the United States Environmental Protection Agency (U.S. EPA) or an authorized representative.

Antenna coating means a coating formulated and recommended for application to equipment and associated structural appurtenances that are used to receive or transmit electromagnetic signals.

Anti-fouling coating means a coating formulated and recommended for application to submerged stationary structures and their appurtenances to prevent or reduce the attachment of marine or freshwater biological organisms, including, but not limited to, coatings registered with the EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Section 136, *et seq.*) and nontoxic foul-release coatings.

Anti-graffiti coating means a clear or opaque high performance coating formulated and recommended for application to interior and exterior walls, doors, partitions, fences, signs, and murals to deter adhesion of graffiti and to resist repeated scrubbing and exposure to harsh solvents, cleansers, or scouring agents used to remove graffiti.

Appurtenance means any accessory to a stationary structure, whether installed or detached at the proximate site of installation, including but not limited to: bathroom and kitchen fixtures; cabinets; concrete forms; doors; elevators; fences; hand railings; heating equipment, air conditioning equipment, and other fixed mechanical equipment or stationary tools; lamp posts; partitions; pipes and piping systems; rain gutters and downspouts; stairways, fixed ladders, catwalks, and fire escapes; and window screens.

Architectural coating means a coating recommended for field application to stationary structures and their appurtenances, to portable buildings, to pavements, or to curbs. This definition excludes adhesives and coatings recommended by the manufacturer or importer solely for shop applications or solely for application to non-stationary structures, such as airplanes, ships, boats, and railcars.

Below-ground wood preservative means a coating that is formulated and recommended to protect below-ground wood from decay or insect attack and that is registered with the EPA under the Federal Insecticide, Fungicide, and

Rodenticide Act (7 U.S.C. Section 136, *et seq.*).

Bituminous coating and mastic means a coating or mastic formulated and recommended for roofing, pavement sealing, or waterproofing that incorporates bitumens. Bitumens are black or brown materials including, but not limited to, asphalt, tar, pitch, and asphaltite that are soluble in carbon disulfide, consist mainly of hydrocarbons, and are obtained from natural deposits of asphalt or as residues from the distillation of crude petroleum or coal.

Bond breaker means a coating formulated and recommended for application between layers of concrete to prevent a freshly poured top layer of concrete from bonding to the layer over which it is poured.

Calcimine recoater means a flat solventborne coating formulated and recommended specifically for recoating calcimine-painted ceilings and other calcimine-painted substrates.

Chalkboard resurfacer means a coating formulated and recommended for application to chalkboards to restore a suitable surface for writing with chalk.

Clear means allowing light to pass through, so that the substrate may be distinctly seen.

Coating means a material applied onto or impregnated into a substrate for protective, decorative, or functional purposes. Such materials include, but are not limited to, paints, varnishes, sealants, inks, maskants, and temporary coatings. Protective, decorative, or functional materials that consist only of solvents, acids, bases, or any combination of these substances are not considered coatings for the purposes of this subpart.

Colorant means a concentrated pigment dispersion of water, solvent, and/or binder that is added to an architectural coating in a paint store or at the site of application to produce the desired color.

Concrete curing compound means a coating formulated and recommended for application to freshly placed concrete to retard the evaporation of water.

Concrete curing and sealing compound means a liquid membrane-forming compound marketed and sold solely for application to concrete surfaces to reduce the loss of water during the hardening process and to seal old and new concrete providing resistance against alkalis, acids, and ultraviolet light, and provide adhesion promotion qualities. The coating must meet the requirements of American Society for Testing and Materials (ASTM) C 1315-95, Standard

Specification for Liquid Membrane-Forming Compounds Having Special Properties for Curing and Sealing Concrete (incorporated by reference—see § 59.412 of this subpart).

Concrete protective coating means a high-build coating, formulated and recommended, for application in a single coat over concrete, plaster, or other cementitious surfaces. These coatings are formulated to be primerless, one-coat systems that can be applied over form oils and/or uncured concrete. These coatings prevent spalling of concrete in freezing temperatures by providing long-term protection from water and chloride ion intrusion.

Concrete surface retarder means a mixture of retarding ingredients such as extender pigments, primary pigments, resin, and solvent that interact chemically with the cement to prevent hardening on the surface where the retarder is applied, allowing the retarded mix of cement and sand at the surface to be washed away to create an exposed aggregate finish.

Container means the individual receptacle that holds the coating for storage and/or sale or distribution.

Conversion varnish means a clear acid curing coating with an alkyd or other resin blended with amino resins and supplied as a single component or two-component product. Conversion varnishes produce a hard, durable, clear finish designed for professional application to wood flooring. The film formation is the result of an acid-catalyzed condensation reaction, affecting a transesterification at the reactive ethers of the amino resins.

Dry fog coating means a coating formulated and recommended only for spray application such that overspray droplets dry before subsequent contact with incidental surfaces in the vicinity of the surface coating activity.

Exempt compounds means specific organic compounds that are not considered volatile organic compounds (VOC) due to negligible photochemical reactivity. The exempt compounds are specified in 40 CFR 51.100.

Exterior coating means an architectural coating formulated and recommended for use in conditions exposed to the weather.

Extreme high durability coating means an air dry coating, including a fluoropolymer-based coating, that is formulated and recommended for touchup of precoated architectural aluminum extrusions and panels and to ensure the protection of architectural subsections, and that meets the weathering requirements of American Architectural Manufacturer's Association (AAMA) specification 605–

98, Voluntary Specification Performance Requirements and Test Procedures for High Performance Organic Coatings on Aluminum Extrusions and Panels, Section 7.9 (incorporated by reference—see § 59.412 of this subpart).

Faux-finishing/glazing means a coating used for wet-in-wet techniques, such as faux woodgrain, faux marble, and simulated aging, which require the finish to remain wet for an extended period of time.

Fire-retardant/resistive coating means a coating formulated and recommended to retard ignition and flame spread, or to delay melting or structural weakening due to high heat, that has been fire tested and rated by a certified laboratory for use in bringing buildings and construction materials into compliance with Federal, State, and local building code requirements.

Flat coating means a coating that is not defined under any other definition in this section and that registers gloss less than 15 on an 85-degree meter or less than 5 on a 60-degree meter according to ASTM Method D 523–89, Standard Test Method for Specular Gloss (incorporated by reference—see § 59.412 of this subpart).

Floor coating means an opaque coating with a high degree of abrasion resistance that is formulated and recommended for application to flooring including, but not limited to, decks, porches, and steps in a residential setting.

Flow coating means a coating that is used by electric power companies or their subcontractors to maintain the protective coating systems present on utility transformer units.

Form release compound means a coating formulated and recommended for application to a concrete form to prevent the freshly placed concrete from bonding to the form. The form may consist of wood, metal, or some material other than concrete.

Graphic arts coating or sign paint means a coating formulated and recommended for hand-application by artists using brush or roller techniques to indoor or outdoor signs (excluding structural components) and murals including lettering enamels, poster colors, copy blockers, and bulletin enamels.

Heat reactive coating means a high performance phenolic-based coating requiring a minimum temperature of 191 °C (375 °F) to 204 °C (400 °F) to obtain complete polymerization or cure. These coatings are formulated and recommended for commercial and industrial use to protect substrates from degradation and maintain product

purity in which one or more of the following extreme conditions exist:

(1) Continuous or repeated immersion exposure of 90 to 98 percent sulfuric acid, or oleum;

(2) Continuous or repeated immersion exposure to strong organic solvents;

(3) Continuous or repeated immersion exposure to petroleum processing at high temperatures and pressures; and

(4) Continuous or repeated immersion exposure to food or pharmaceutical products which may or may not require high temperature sterilization.

High temperature coating means a high performance coating formulated and recommended for application to substrates exposed continuously or intermittently to temperatures above 202°C (400°F).

Impacted immersion coating means a high performance maintenance coating formulated and recommended for application to steel structures subject to immersion in turbulent, debris-laden water. These coatings are specifically resistant to high-energy impact damage caused by floating ice or debris.

Imported means that a coating manufactured outside the United States has been brought into the United States for sale or distribution.

Importer means a person that brings architectural coatings into the United States for sale or distribution within the United States. This definition does not include any person that brings a coating into the United States and repackages the coating by transferring it from one container to another, provided the coating VOC content is not altered and the coating is not sold or distributed to another party. For purposes of applying this definition, divisions of a company, subsidiaries, and parent companies are considered to be a single importer.

Industrial maintenance coating means a high performance architectural coating, including primers, sealers, undercoaters, intermediate coats, and topcoats formulated and recommended for application to substrates exposed to one or more of the following extreme environmental conditions in an industrial, commercial, or institutional setting:

(1) Immersion in water, wastewater, or chemical solutions (aqueous and nonaqueous solutions), or chronic exposure of interior surfaces to moisture condensation;

(2) Acute or chronic exposure to corrosive, caustic, or acidic agents, or to chemicals, chemical fumes, or chemical mixtures or solutions;

(3) Repeated exposure to temperatures above 120 °C (250 °F);

(4) Repeated (frequent) heavy abrasion, including mechanical wear

and repeated (frequent) scrubbing with industrial solvents, cleansers, or scouring agents; or

(5) Exterior exposure of metal structures and structural components.

Interior clear wood sealer means a low viscosity coating formulated and recommended for sealing and preparing porous wood by penetrating the wood and creating a uniform smooth substrate for a finish coat of paint or varnish.

Interior coating means an architectural coating formulated and recommended for use in conditions not exposed to natural weathering.

Label means any written, printed, or graphic matter affixed to, applied to, attached to, blown into, formed, molded into, embossed on, or appearing upon any architectural coating container for purposes of branding, identifying, or giving information with respect to the product, use of the product, or contents of the container.

Lacquer means a clear or pigmented wood finish, including clear lacquer sanding sealers, formulated with cellulosic or synthetic resins to dry by evaporation without chemical reaction and to provide a solid, protective film. Lacquer stains are considered stains, not lacquers.

Low solids means containing 0.12 kilogram or less of solids per liter (1 pound or less of solids per gallon) of coating material and for which at least half of the volatile component is water.

Magnesite cement coating means a coating formulated and recommended for application to magnesite cement decking to protect the magnesite cement substrate from erosion by water.

Manufactured means that coating ingredients have been combined and put into containers that have been labeled and made available for sale or distribution.

Manufacturer means a person that produces, packages, or repackages architectural coatings for sale or distribution in the United States. A person that repackages architectural coatings as part of a paint exchange, and does not produce, package, or repackage any other architectural coatings for sale or distribution in the United States, is excluded from this definition. A person that repackages a coating by transferring it from one container to another is excluded from this definition, provided the coating VOC content is not altered and the coating is not sold or distributed to another party. For purposes of applying this definition, divisions of a company, subsidiaries, and parent companies are considered to be a single manufacturer.

Mastic texture coating means a coating formulated and recommended to

cover holes and minor cracks and to conceal surface irregularities, and is applied in a single coat of at least 10 mils (0.010 inch) dry film thickness.

Metallic pigmented coating means a nonbituminous coating containing at least 0.048 kilogram of metallic pigment per liter of coating (0.4 pound per gallon) including, but not limited to, zinc pigment.

Multi-colored coating means a coating that is packaged in a single container and exhibits more than one color when applied.

Nonferrous ornamental metal lacquers and surface protectant means a clear coating formulated and recommended for application to ornamental architectural metal substrates (bronze, stainless steel, copper, brass, and anodized aluminum) to prevent oxidation, corrosion, and surface degradation.

Nonflat coating means a coating that is not defined under any other definition in this section and that registers a gloss of 15 or greater on an 85-degree meter or 5 or greater on a 60-degree meter according to ASTM Method D 523-89, Standard Test Method for Specular Gloss (incorporated by reference—see § 59.412 of this subpart).

Nuclear coating means a protective coating formulated and recommended to seal porous surfaces such as steel (or concrete) that otherwise would be subject to intrusion by radioactive materials. These coatings must be resistant to long-term (service life) cumulative radiation exposure (ASTM Method D 4082-89, Standard Test Method for Effects of Gamma Radiation on Coatings for Use in Light-Water Nuclear Power Plants (incorporated by reference—see § 59.412 of this subpart)), relatively easy to decontaminate, and resistant to various chemicals to which the coatings are likely to be exposed (ASTM Method D 3912-80 (Reapproved 1989), Standard Test Method for Chemical Resistance of Coatings Used in Light-Water Nuclear Power Plants (incorporated by reference—see § 59.412 of this subpart)).

Opaque means not allowing light to pass through, so that the substrate is concealed from view.

Paint exchange means a program in which consumers, excluding architectural coating manufacturers and importers, may drop off and pick up usable post-consumer architectural coatings in order to reduce hazardous waste.

Person means an individual, corporation, partnership, association, State municipality, political subdivision of a State, and any agency, department,

or instrumentality of the United States and any officer, agent, or employee thereof.

Pigmented means containing finely ground insoluble powder used to provide one or more of the following properties: color; corrosion inhibition; conductivity; fouling resistance; opacity; or improved mechanical properties.

Post-consumer coating means an architectural coating that has previously been purchased by a consumer or distributed to a consumer but not applied, and reenters the marketplace to be purchased by or distributed to a consumer. Post-consumer coatings include, but are not limited to, coatings collected during hazardous waste collection programs for repackaging or blending with virgin coating materials.

Pretreatment wash primer means a primer that contains a minimum of 0.5 percent acid, by weight, that is formulated and recommended for application directly to bare metal surfaces in thin films to provide corrosion resistance and to promote adhesion of subsequent topcoats.

Primer means a coating formulated and recommended for application to a substrate to provide a firm bond between the substrate and subsequent coatings.

Quick-dry enamel means a nonflat coating that has the following characteristics:

(1) Is capable of being applied directly from the container under normal conditions with ambient temperatures between 16 and 27°C (60 and 80°F);

(2) When tested in accordance with ASTM Method D 1640-83 (Reapproved 1989), Standard Test Methods for Drying, Curing, or Film Formation of Organic Coatings at Room Temperature (incorporated by reference—see § 59.412), sets to touch in 2 hours or less, is tack free in 4 hours or less, and dries hard in 8 hours or less by the mechanical test method; and

(3) Has a dried film gloss of 70 or above on a 60 degree meter.

Quick-dry primer, sealer, and undercoater means a primer, sealer, or undercoater that is dry to the touch in a ½ hour and can be recoated in 2 hours when tested in accordance with ASTM Method D 1640-83 (Reapproved 1989), Standard Test Methods for Drying, Curing, or Film Formation of Organic Coatings at Room Temperature (incorporated by reference—see § 59.412 of this subpart).

Recycled coating means an architectural coating that contains some portion of post-consumer coating. Recycled architectural coatings include, but are not limited to, post-consumer

coatings that have been repackaged or blended with virgin coating materials.

Repackage means to transfer an architectural coating from one container to another.

Repair and maintenance thermoplastic coating means an industrial maintenance coating that has vinyl or chlorinated rubber as a primary resin and is recommended solely for the repair of existing vinyl or chlorinated rubber coatings without the full removal of the existing coating system.

Roof coating means a coating formulated and recommended for application to exterior roofs for the primary purpose of preventing penetration of the substrate by water or reflecting heat and reflecting ultraviolet radiation. This does not include thermoplastic rubber coatings.

Rust preventative coating means a coating formulated and recommended for use in preventing the corrosion of ferrous metal surfaces in residential situations.

Sanding sealer means a clear wood coating formulated and recommended for application to bare wood to seal the wood and to provide a coat that can be sanded to create a smooth surface. A sanding sealer that also meets the definition of a lacquer is not included in this category, but is included in the lacquer category.

Sealer means a coating formulated and recommended for application to a substrate for one or more of the following purposes: to prevent subsequent coatings from being absorbed by the substrate; to prevent harm to subsequent coatings by materials in the substrate; to block stains, odors, or efflorescence; to seal fire, smoke, or water damage; or to condition chalky surfaces.

Semitransparent means not completely concealing the surface of a substrate or its natural texture or grain pattern.

Shellac means a clear or pigmented coating formulated with natural resins (except nitrocellulose resins) soluble in alcohol (including, but not limited to, the resinous secretions of the lac beetle, *Lacifer lacca*). Shellacs dry by evaporation without chemical reaction and provide a quick-drying, solid protective film that may be used for blocking stains.

Shop application means that a coating is applied to a product or a component of a product in a factory, shop, or other structure as part of a manufacturing, production, or repairing process (e.g., original equipment manufacturing coatings).

Stain means a coating that produces a dry film with minimal coloring. This includes lacquer stains.

Stain controller means a conditioner or pretreatment coating formulated and recommended for application to wood prior to the application of a stain in order to prevent uneven penetration of the stain.

Swimming pool coating means a coating formulated and recommended to coat the interior of swimming pools and to resist swimming pool chemicals.

Thermoplastic rubber coating and mastic means a coating or mastic formulated and recommended for application to roofing or other structural surfaces and that incorporates no less than 40 percent by weight of thermoplastic rubbers in the total resin solids and may also contain other ingredients including, but not limited to, fillers, pigments, and modifying resins.

Tint base means a coating to which colorant is added in a paint store or at the site of application to produce a desired color.

Traffic marking coating means a coating formulated and recommended for marking and striping streets, highways, or other traffic surfaces including, but not limited to, curbs, berms, driveways, parking lots, sidewalks, and airport runways.

Undercoater means a coating formulated and recommended to provide a smooth surface for subsequent coatings.

United States means the United States of America, including the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Varnish means a clear or semi-transparent coating, excluding lacquers and shellacs, formulated and recommended to provide a durable, solid, protective film. Varnishes may contain small amounts of pigment to color a surface, or to control the final sheen or gloss of the finish.

Volatile organic compound or *VOC* means any organic compound that participates in atmospheric photochemical reactions, that is, any organic compound other than those which the Administrator designates as having negligible photochemical reactivity. For a list of compounds that the Administrator has designated as having negligible photochemical reactivity, also referred to as exempt compounds, refer to 40 CFR 51.100(s).

VOC content means the weight of VOC per volume of coating, calculated

according to the procedures in § 59.406(a) of this subpart.

Waterproofing sealer and treatment means a coating formulated and recommended for application to a porous substrate for the primary purpose of preventing the penetration of water.

Wood preservative means a coating formulated and recommended to protect exposed wood from decay or insect attack, registered with the EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Section 136, *et seq.*).

Zone marking coating means a coating formulated and recommended for marking and striping driveways, parking lots, sidewalks, curbs, or airport runways, and sold or distributed in a container with a volume of 19 liters (5 gallons) or less.

§ 59.402 VOC Content limits.

(a) Each manufacturer and importer of any architectural coating subject to this subpart shall ensure that the VOC content of the coating does not exceed the applicable limit in table 1 of this subpart, except as provided in §§ 59.403 and 59.404 of this subpart.

(b) Except as provided in paragraph (c) of this section, if anywhere on the container of any architectural coating, or any label or sticker affixed to the container, or in any sales, advertising, or technical literature supplied by a manufacturer or importer or anyone acting on their behalf, any representation is made that indicates that the coating meets the definition of more than one of the coating categories listed in table 1 of this subpart, then the most restrictive VOC content limit shall apply.

(c) The provision in paragraph (b) of this section does not apply to the coatings described in paragraphs (c)(1) through (c)(15) of this section.

(1) High temperature coatings that are also recommended for use as metallic pigmented coatings are subject only to the VOC content limit in table 1 of this subpart for high temperature coatings.

(2) Lacquer coatings (including lacquer sanding sealers) that are also recommended for use in other architectural coating applications to wood, except as stains, are subject only to the VOC content limit in table 1 of this subpart for lacquers.

(3) Metallic pigmented coatings that are also recommended for use as roof coatings, industrial maintenance coatings, or primers are subject only to the VOC content limit in table 1 of this subpart for metallic pigmented coatings.

(4) Shellacs that are also recommended for use as any other

architectural coating are subject only to the VOC content limit in table 1 of this subpart for shellacs.

(5) Fire-retardant/resistive coatings that are also recommended for use as any other architectural coating are subject only to the VOC content limit in table 1 of this subpart for fire-retardant/resistive coatings.

(6) Pretreatment wash primers that are also recommended for use as primers or that meet the definition for industrial maintenance coatings are subject only to the VOC content limit in table 1 of this subpart for pretreatment wash primers.

(7) Industrial maintenance coatings that are also recommended for use as primers, sealers, undercoaters, or mastic texture coatings are subject only to the VOC content limit in table 1 of this subpart for industrial maintenance coatings.

(8) Varnishes and conversion varnishes that are recommended for use as floor coatings are subject only to the VOC content limit in table 1 of this subpart for varnishes and conversion varnishes, respectively.

(9) Anti-graffiti coatings, high temperature coatings, impacted immersion coatings, thermoplastic rubber coatings and mastics, repair and

maintenance thermoplastic coatings, and flow coatings that also meet the definition for industrial maintenance coatings are subject only to the VOC content limit in table 1 of this subpart for their respective categories (i.e., they are not subject to the industrial maintenance coatings VOC content limit in table 1 of this subpart).

(10) Waterproofing sealers and treatments that also meet the definition for quick-dry sealers are subject only to the VOC content limit in table 1 of this subpart for waterproofing sealers and treatments.

(11) Sanding sealers that also meet the definition for quick-dry sealers are subject only to the VOC content limit in table 1 of this subpart for sanding sealers.

(12) Nonferrous ornamental metal lacquers and surface protectants that also meet the definition for lacquers are subject only to the VOC content limit in table 1 of this subpart for nonferrous ornamental metal lacquers and surface protectants.

(13) Quick-dry primers, sealers, and undercoaters that also meet the definition for primers and undercoaters are subject only to the VOC content

limit in table 1 of this subpart for quick-dry primers, sealers, and undercoaters.

(14) Antenna coatings that also meet the definition for industrial maintenance coatings or primers are subject only to the VOC content limit in table 1 of this subpart for antenna coatings.

(15) Bituminous coatings and mastics that are recommended for use as any other architectural coatings are subject only to the VOC content limit in table 1 of this subpart for bituminous coatings and mastics.

§ 59.403 Exceedance fees.

(a) Except as provided in § 59.404 of this subpart, each manufacturer and importer of any architectural coating subject to the provisions of this subpart may exceed the applicable VOC content limit in table 1 of this subpart for the coating if the manufacturer or importer pays an annual exceedance fee. The exceedance fee must be calculated using the procedures in paragraphs (b) and (c) of this section.

(b) The exceedance fee paid by a manufacturer or importer, which is equal to the sum of the applicable exceedance fees for all coatings, must be calculated using equation 1 as follows:

$$\text{Annual Exceedance Fee} = \sum_{c=1}^n \text{Coating Fee}_c \quad (1)$$

Where:

Annual Exceedance Fee=The total annual exceedance fee for a manufacturer or importer, in dollars.

Coating Fee_c=The annual exceedance fee for each coating (c), for which a fee applies, in dollars.
n=number of coatings to which a fee applies.

(c) The exceedance fee to be paid for each coating must be determined using equation 2 as follows:

$$\text{Coating Fee}_c = \text{Fee Rate} \times \text{Excess VOC} \times \text{Volume Manufactured or Imported} \quad (2)$$

Where:

Fee Rate = The rate of \$0.0028 per gram of excess VOC.

Excess VOC = The VOC content of the coating, or adjusted VOC content of a recycled coating (if applicable), in grams of VOC per liter of coating, minus the applicable VOC content limit from table 1 of this subpart (that is, VOC content of the coating minus VOC content limit).

Volume Manufactured or Imported = The volume of the coating manufactured or imported per year, in liters, excluding any volume for which a tonnage exemption is claimed under § 59.404 of this subpart.

(d) The exceedance fee shall be paid no later than 2 months after the end of

the calendar year in which the coatings are manufactured or imported, and shall be sent to the Regional Office of the U.S. Environmental Protection Agency, as listed in § 59.409 of this subpart, that serves the State or Territory in which the corporate headquarters of the manufacturer or importer is located.

§ 59.404 Tonnage exemption.

(a) Each manufacturer and importer of any architectural coating subject to the provisions of this subpart may designate a limited quantity of coatings to be exempt from the VOC content limits in table 1 of this subpart and the exceedance fee provisions of § 59.403 of this subpart, provided all of the requirements in paragraphs (a)(1) through (a)(4) of this section are met.

(1) The total amount of VOC contained in all the coatings selected for exemption must be equal to or less than 23 megagrams (25 tons) for the period of time from September 13, 1999 through December 31, 2000; 18 megagrams (20 tons) in the year 2001; and 9 megagrams (10 tons) per year in the year 2002 and each subsequent year. The amount of VOC contained in each coating shall be calculated using the procedure in paragraph (b) of this section.

(2) The container labeling requirements of § 59.405 of this subpart.

(3) The recordkeeping requirements of § 59.407(c) of this subpart.

(4) The reporting requirements of § 59.408(b), (e), and (f) of this subpart.

(b) Each manufacturer and importer choosing to use the exemption

described in paragraph (a) of this section must use equations 3 and 4 to calculate the total amount of VOC for each time period the exemption is elected.

$$\text{Total VOC} = \sum_{c=1}^n \text{VOC}_c \quad (3)$$

Where:

Total VOC = Total megagrams of VOC contained in all coatings being claimed under the exemption.

VOC_c = The amount of VOC, in megagrams, for each coating (c) claimed under the exemption, as computed by equation 4.

n = Number of coatings for which exemption is claimed.

$$\text{VOC}_c = (\text{Volume Manufactured or Imported}) * (\text{VOC Content}) / 1 \times 10^6 \quad (4)$$

Where:

Volume Manufactured or Imported = Volume of the coating manufactured or imported, in liters, for the time period the exemption is claimed.

VOC Content = VOC content of the coating in grams of VOC per liter of coating thinned to the manufacturer's maximum recommendation, including the volume of any water, exempt compounds, or colorant added to tint bases.

§ 59.405 Container labeling requirements.

(a) Each manufacturer and importer of any architectural coating subject to the provisions of this subpart shall provide the information listed in paragraphs (a)(1) through (a)(3) of this section on the coating container in which the coating is sold or distributed.

(1) The date the coating was manufactured, or a date code representing the date shall be indicated on the label, lid, or bottom of the container.

(2) A statement of the manufacturer's recommendation regarding thinning of the coating shall be indicated on the label or lid of the container. This requirement does not apply to the thinning of architectural coatings with water. If thinning of the coating prior to use is not necessary, the recommendation must specify that the coating is to be applied without thinning.

(3) The VOC content of the coating as described in paragraph (a)(3)(i) or (a)(3)(ii) of this section shall be indicated on the label or lid of the container.

(i) The VOC content of the coating, displayed in units of grams of VOC per liter of coating; or

(ii) The VOC content limit in table 1 of this subpart with which the coating is required to comply and does comply, displayed in units of grams of VOC per liter of coating.

(b) In addition to the information specified in paragraph (a) of this section, each manufacturer and importer of any industrial maintenance coating

subject to the provisions of this subpart shall display on the label or lid of the container in which the coating is sold or distributed one or more of the descriptions listed in paragraphs (b)(1) through (b)(4) of this section.

(1) "For industrial use only."

(2) "For professional use only."

(3) "Not for residential use" or "Not intended for residential use."

(4) "This coating is intended for use under the following condition(s):" (Include each condition in paragraphs (b)(4)(i) through (b)(4)(v) of this section that applies to the coating.)

(i) Immersion in water, wastewater, or chemical solutions (aqueous and nonaqueous solutions), or chronic exposure of interior surfaces to moisture condensation;

(ii) Acute or chronic exposure to corrosive, caustic, or acidic agents, or to chemicals, chemical fumes, or chemical mixtures or solutions;

(iii) Repeated exposure to temperatures above 120° C (250° F);

(iv) Repeated (frequent) heavy abrasion, including mechanical wear and repeated (frequent) scrubbing with industrial solvents, cleansers, or scouring agents; or

(v) Exterior exposure of metal structures and structural components.

(c) In addition to the information specified in paragraph (a) of this section, each manufacturer and importer of any recycled coating who calculates the VOC content using equations 7 and 8 in § 59.406(a)(3) of this subpart shall include the following statement indicating the post-consumer coating content on the label or lid of the container in which the coating is sold or distributed: "CONTAINS NOT LESS THAN X PERCENT BY VOLUME POST-CONSUMER COATING," where "X" is replaced by the percent by volume of post-consumer architectural coating.

§ 59.406 Compliance provisions.

(a) For the purpose of determining compliance with the VOC content limits in table 1 of this subpart, each manufacturer and importer shall determine the VOC content of a coating using the procedures described in paragraph (a)(1), (a)(2), or (a)(3) of this

section, as appropriate. The VOC content of a tint base shall be determined without colorant that is added after the tint base is manufactured or imported.

(1) With the exception of low solids stains and low solids wood preservatives, determine the VOC content in grams of VOC per liter of coating thinned to the manufacturer's maximum recommendation, excluding the volume of any water and exempt compounds. Calculate the VOC content using equation 5 as follows:

$$\text{VOC Content} = \frac{(W_s - W_w - W_{ec})}{(V_m - V_w - V_{ec})} \quad (5)$$

Where:

VOC content = grams of VOC per liter of coating

W_s = weight of volatiles, in grams

W_w = weight of water, in grams

W_{ec} = weight of exempt compounds, in grams

V_m = volume of coating, in liters

V_w = volume of water, in liters

V_{ec} = volume of exempt compounds, in liters

(2) For low solids stains and low solids wood preservatives, determine the VOC content in units of grams of VOC per liter of coating thinned to the manufacturer's maximum recommendation, including the volume of any water and exempt compounds. Calculate the VOC content using equation 6 as follows:

$$\text{VOC Content}_{1s} = \frac{(W_s - W_w - W_{ec})}{(V_m)} \quad (6)$$

Where:

VOC content_{1s} = the VOC content of a low solids coating in grams of VOC per liter of coating

W_s = weight of volatiles, in grams

W_w = weight of water, in grams

W_{ec} = weight of exempt compounds, in grams

V_m = volume of coating, in liters

(3) For recycled coatings, the manufacturer or importer has the option of calculating an adjusted VOC content to account for the post-consumer

coating content. If this option is used, the manufacturer or importer shall

determine the adjusted VOC content using equations 7 and 8 as follows:

Where:

$$\text{Adjusted VOC Content} = \text{Actual VOC Content} - \left(\text{Actual VOC Content} \left(\frac{\text{Percent Post-consumer Coating}}{100} \right) \right) \quad (7)$$

Adjusted VOC content = The VOC content assigned to the recycled coating for purposes of complying with the VOC content limits in table 1 of this subpart.

Actual VOC content = The VOC content of the coating as determined using equation 5 in paragraph (a)(1) of this section.

Percent Post-consumer Coating = The volume percent of a recycled coating that is post-consumer coating materials (as determined in equation 8)

$$\text{Percent Post-consumer Coating} = \frac{\text{Volume of Post-consumer Coating}}{(\text{Volume of Post-consumer Coating} + \text{Volume of Virgin Materials})} \times 100 \text{ Percent} \quad (8)$$

Where:

Percent Post-consumer Coating = The volume percent of a recycled coating that is post-consumer coating materials.

Volume of Post-consumer Coating = The volume, in liters, of post-consumer coating materials used in the production of a recycled coating.

Volume of Virgin Materials = The volume, in liters, of virgin coating materials used in the production of a recycled coating.

(b) To determine the composition of a coating in order to perform the calculations in paragraph (a) of this section, the reference method for VOC content is Method 24 of appendix A of 40 CFR part 60, except as provided in paragraphs (c) and (d) of this section. To determine the VOC content of a coating, the manufacturer or importer may use Method 24 of appendix A of 40 CFR part 60, an alternative method as provided in paragraph (c) of this section, formulation data, or any other reasonable means for predicting that the coating has been formulated as intended (e.g., quality assurance checks, recordkeeping). However, if there are any inconsistencies between the results of a Method 24 test and any other means for determining VOC content, the Method 24 test results will govern, except as provided in paragraph (c) of this section. The Administrator may require the manufacturer or importer to conduct a Method 24 analysis.

(c) The Administrator may approve, on a case-by-case basis, a manufacturer's or importer's use of an alternative method in lieu of Method 24 for determining the VOC content of coatings if the alternative method is demonstrated to the Administrator's satisfaction to provide results that are acceptable for purposes of determining compliance with this subpart.

(d) Analysis of methacrylate multicomponent coatings used as traffic marking coatings shall be conducted according to the procedures specified in appendix A to this subpart. Appendix A to this subpart is a modification of Method 24 of appendix A of 40 CFR part 60. The modification of Method 24 provided in appendix A to this subpart has not been approved for methacrylate multicomponent coatings used for other purposes than as traffic marking coatings or for other classes of multicomponent coatings.

(e) The Administrator may determine a manufacturer's or importer's compliance with the provisions of this subpart based on information required by this subpart (including the records and reports required by §§ 59.407 and 59.408 of this subpart) or any other information available to the Administrator.

§ 59.407 Recordkeeping requirements.

(a) Each manufacturer and importer using the provisions of § 59.406(a)(3) of this subpart to determine the VOC content of a recycled coating shall maintain in written or electronic form records of the information specified in paragraphs (a)(1) through (a)(6) of this section for a period of 3 years.

(1) The minimum volume percent post-consumer coating content for each recycled coating.

(2) The volume of post-consumer coating received for recycling.

(3) The volume of post-consumer coating received that was unusable.

(4) The volume of virgin materials.

(5) The volume of the final recycled coating manufactured or imported.

(6) Calculations of the adjusted VOC content as determined using equation 7 in § 59.406(a)(3) of this subpart for each recycled coating.

(b) Each manufacturer and importer using the exceedance fee provisions in

§ 59.403 of this subpart, as an alternative to achieving the VOC content limits in table 1 of this subpart, shall maintain in written or electronic form the records specified in paragraphs (b)(1) through (b)(7) of this section for a period of 3 years.

(1) A list of the coatings and the associated coating categories in table 1 of this subpart for which the exceedance fee is used.

(2) Calculations of the annual fee for each coating and the total annual fee for all coatings using the procedure in § 59.403 (b) and (c) of this subpart.

(3) The VOC content of each coating in grams of VOC per liter of coating.

(4) The excess VOC content of each coating in grams of VOC per liter of coating.

(5) The total volume of each coating manufactured or imported per calendar year in liters of coating, excluding the volume of any water and exempt compounds.

(6) The annual fee for each coating.

(7) The total annual fee for all coatings.

(c) Each manufacturer and importer claiming the tonnage exemption in § 59.404 of this subpart shall maintain in written or electronic form the records specified in paragraphs (c)(1) through (c)(4) of this section for a period of 3 years.

(1) A list of all coatings and associated coating categories in table 1 of this subpart for which the exemption is claimed.

(2) The VOC content, in grams of VOC per liter of coating, including water, of each coating for which the exemption is claimed.

(3) The planned and actual sales, in liters, for each coating for which the exemption is claimed for the time period the exemption is claimed.

(4) The total megagrams of VOC contained in each coating for which the

exemption is claimed, and for all coatings combined for which the exemption is claimed, for the time period the exemption is claimed, as calculated in § 59.404(b) of this subpart.

§ 59.408 Reporting requirements.

(a) Each manufacturer and importer of any architectural coating subject to the provisions of this subpart shall submit reports and exceedance fees specified in this section to the appropriate address as listed in § 59.409 of this subpart.

(b) Each manufacturer and importer of any architectural coating subject to the provisions of this subpart shall submit an initial notification report no later than September 13, 1999 or within 180 days after the date that the first architectural coating is manufactured or imported, whichever is later. The initial report must include the information in paragraphs (b)(1) through (b)(3) of this section.

(1) The name and mailing address of the manufacturer or importer.

(2) The street address of each one of the manufacturer's or importer's facilities in the United States that is producing, packaging, or repackaging any architectural coating subject to the provisions of this subpart.

(3) A list of the categories from table 1 of this subpart for which the manufacturer's or importer's coatings meet the definitions in § 59.401 of this subpart.

(4) If a date code is used on a coating container to represent the date a coating was manufactured, as allowed in § 59.405(a)(1) of this subpart, the manufacturer or importer of the coating shall include an explanation of each date code in the initial notification report and shall submit an explanation of any new date code no later than 30 days after the new date code is first used on the container for a coating.

(c) Each manufacturer and importer of a recycled coating that chooses to determine the adjusted VOC content according to the provisions of § 59.406(a)(3) to demonstrate compliance with the applicable VOC content limit in table 1 of this subpart shall submit a report containing the information in paragraphs (c)(1) through (c)(5) of this section. The report must be submitted for each coating for which the adjusted VOC content is used to demonstrate compliance. This report must be submitted by March 1 of the year following any calendar year in which the adjusted VOC content provision is used.

(1) The minimum volume percent post-consumer coating content for each recycled coating.

(2) The volume of post-consumer coating received for recycling.

(3) The volume of post-consumer coating received that was unusable.

(4) The volume of virgin materials used.

(5) The volume of the final recycled coating manufactured or imported.

(d) Each manufacturer and importer that uses the exceedance fee provisions of § 59.403 of this subpart shall report the information in paragraphs (d)(1) through (d)(7) of this section for each coating for which the exceedance fee provisions are used. This report and the exceedance fee payment must be submitted by March 1 following the calendar year in which the coating is manufactured or imported.

(1) Manufacturer's or importer's name and mailing address.

(2) A list of all coatings and the associated coating categories in table 1 of this subpart for which the exceedance fee provision is being used.

(3) The VOC content of each coating that exceeds the applicable VOC content limit in table 1 of this subpart.

(4) The excess VOC content of each coating in grams of VOC per liter of coating.

(5) The total volume of each coating manufactured or imported per calendar year, in liters.

(6) The annual fee for each coating.

(7) The total annual fee for all coatings.

(e) Each manufacturer and importer of architectural coatings for which a tonnage exemption under § 59.404 of this subpart is claimed shall submit a report no later than March 1 of the year following the calendar year in which the exemption was claimed. The report must include the information in paragraphs (f)(1) through (f)(4) of this section.

(1) A list of all coatings and the associated coating categories in table 1 of this subpart for which the exemption was claimed.

(2) The VOC content, in grams of VOC per liter of coating, including water, of each coating for which the exemption was claimed.

(3) The actual sales, in liters, for each coating for which the exemption was claimed for the time period the exemption was claimed.

(4) The total megagrams of VOC contained in all coatings for which the exemption was claimed for the time period the exemption was claimed, as calculated in § 59.404(b) of this subpart.

§ 59.409 Addresses of EPA Regional Offices.

Each manufacturer and importer of any architectural coating subject to the

provisions of this subpart shall submit all requests, reports, submittals, exceedance fee payments, and other communications to the Administrator pursuant to this regulation to the Regional Office of the U.S. Environmental Protection Agency that serves the State or Territory in which the corporate headquarters of the manufacturer or importer resides. These areas are indicated in the following list of EPA Regional Offices:

EPA Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), Director, Office of Environmental Stewardship, Mailcode: SAA, J.F.K. Federal Building, Boston, MA 02203-2211.

EPA Region II (New Jersey, New York, Puerto Rico, Virgin Islands), Director, Division of Environmental Planning and Protection, 290 Broadway, New York, NY 10007-1866.

EPA Region III (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia), Director, Air Protection Division, 1650 Arch Street, Philadelphia, PA 19103.

EPA Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee), Director, Air, Pesticides, and Toxics Management Division, 61 Forsyth Street, Atlanta, GA 30303.

EPA Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin), Director, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, IL 60604-3507.

EPA Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, Texas), Director, Multimedia Planning and Permitting Division, 1445 Ross Avenue, Dallas, TX 75202-2733.

EPA Region VII (Iowa, Kansas, Missouri, Nebraska), Director, Air, RCRA, and Toxics Division, 726 Minnesota Avenue, Kansas City, KS 66101.

EPA Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming), Director, Office of Partnerships and Regulatory Assistance, 999 18th Street, Suite 500, Denver, Colorado 80202-2466.

EPA Region IX (American Samoa, Arizona, California, Guam, Hawaii, Nevada), Director, Air Division, 75 Hawthorne Street, San Francisco, CA 94105.

EPA Region X (Alaska, Oregon, Idaho, Washington), Director, Office of Air Quality, 1200 Sixth Avenue, Seattle, WA 98101.

§ 59.410 State authority.

The provisions of this subpart must not be construed in any manner to preclude any State or political subdivision thereof from:

(a) Adopting and enforcing any emissions standard or limitation applicable to a manufacturer or importer of architectural coatings; or

(b) Requiring the manufacturer or importer of architectural coatings to obtain permits, licenses, or approvals prior to initiating construction,

modification, or operation of a facility for manufacturing an architectural coating.

§ 59.411 Circumvention.

Each manufacturer and importer of any architectural coating subject to the provisions of this subpart must not alter, destroy, or falsify any record or report, to conceal what would otherwise be noncompliance with this subpart. Such concealment includes, but is not limited to, refusing to provide the Administrator access to all required records and date-coding information, altering the VOC content of a coating batch, or altering the results of any required tests to determine VOC content.

§ 59.412 Incorporations by reference.

(a) The materials listed in this section are incorporated by reference in the paragraphs noted in § 59.401. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they exist on the date of the approval, and notice of any changes in these materials will be published in the **Federal Register**. The materials are available for purchase at the corresponding addresses noted below, and all are available for inspection at the Office of the Federal Register, 800 North Capitol Street, NW, Suite 700, Washington, DC; at the Air and Radiation Docket and Information Center, U.S. EPA, 401 M Street, SW, Washington, DC 20460; and at the EPA Library (MD-35), U.S. EPA, Research Triangle Park, North Carolina.

(b) The materials listed below are available for purchase at the following address: American Society for Testing and Materials (ASTM), 100 Barr Harbor Drive, West Conshohocken, PA 19428-2959.

(1) ASTM Method C 1315-95, Standard Specification for Liquid Membrane-Forming Compounds Having Special Properties for Curing and Sealing Concrete, incorporation by reference approved for § 59.401, *Concrete curing and sealing compound*.

(2) ASTM Method D 523-89, Standard Test Method for Specular Gloss, incorporation by reference approved for § 59.401, *Flat coating and Nonflat coating*.

(3) ASTM Method D 1640-83 (Reapproved 1989), Standard Test Methods for Drying, Curing, or Film Formation of Organic Coatings at Room Temperature, incorporation by reference approved for § 59.401, *Quick-dry enamel and Quick-dry primer, sealer, and undercoater*.

(4) ASTM Method D 3912-80 (Reapproved 1989), Standard Test Method for Chemical Resistance of Coatings Used in Light-Water Nuclear Power Plants, incorporation by reference approved for § 59.401, *Nuclear coating*.

(5) ASTM Method D 4082-89, Standard Test Method for Effects of Gamma Radiation on Coatings for Use in Light-Water Nuclear Power Plants, incorporation by reference approved for § 59.401, *Nuclear coating*.

(c) The following material is available from the AAMA, 1827 Walden Office Square, Suite 104, Schaumburg, IL 60173.

(1) AAMA 605-98, Voluntary Specification Requirements and Test Procedures for High Performance Organic Coatings on Aluminum Extrusions and Panels, incorporation by reference approved for § 59.401, *Extreme high durability coating*.

(2) [Reserved]

§ 59.413 Availability of information and confidentiality.

(a) *Availability of information.* The availability to the public of information provided to or otherwise obtained by the Administrator under this part shall be governed by part 2 of this chapter.

(b) *Confidentiality.* All confidential business information entitled to protection under section 114(c) of the Act that must be submitted or maintained by each manufacturer or importer of architectural coatings pursuant to this section shall be treated in accordance with 40 CFR part 2, subpart B.

Appendix A to Subpart D— Determination of Volatile Matter Content of Methacrylate Multicomponent Coatings Used as Traffic Marking Coatings

1.0 Principle and Applicability

1.1 *Applicability.* This modification to Method 24 of appendix A of 40 CFR part 60 applies to the determination of volatile matter content of methacrylate multicomponent coatings used as traffic marking coatings.

1.2 *Principle.* A known amount of methacrylate multicomponent coating is dispersed in a weighing dish using a stirring device before the volatile matter is removed by heating in an oven.

2.0 Procedure

2.1 Prepare about 100 milliliters (mL) of sample by mixing the components in a storage container, such as a glass jar with a screw top or a metal can with a cap. The storage container should be just large enough to hold the mixture. Combine the components (by weight or volume) in the ratio recommended by the manufacturer. Tightly close the container between additions

and during mixing to prevent loss of volatile materials. Most manufacturers' mixing instructions are by volume. Because of possible error caused by expansion of the liquid when measuring the volume, it is recommended that the components be combined by weight. When weight is used to combine the components and the manufacturer's recommended ratio is by volume, the density must be determined by section 3.5 of Method 24 of appendix A of 40 CFR part 60.

2.2 Immediately after mixing, take aliquots from this 100 mL sample for determination of the total volatile content, water content, and density. To determine water content, follow section 3.4 of Method 24 of appendix A of 40 CFR part 60. To determine density, follow section 3.5 of Method 24. To determine total volatile content, use the apparatus and reagents described in section 3.8.2 of Method 24 and the following procedures:

2.2.1 Weigh and record the weight of an aluminum foil weighing dish and a metal paper clip. Using a syringe as specified in section 3.8.2.1 of Method 24, weigh to 1 milligram (mg), by difference, a sample of coating into the weighing dish. For methacrylate multicomponent coatings used for traffic marking use 3.0 ± 0.1 g.

2.2.2 Add the specimen and use the metal paper clip to disperse the specimen over the surface of the weighing dish. If the material forms a lump that cannot be dispersed, discard the specimen and prepare a new one. Similarly, prepare a duplicate. The sample shall stand for a minimum of 1 hour, but no more than 24 hours before being oven dried at 110 ± 5 degrees Celsius for 1 hour.

2.2.3 Heat the aluminum foil dishes containing the dispersed specimens in the forced draft oven for 60 minutes at 110 ± 5 degrees Celsius. Caution—provide adequate ventilation, consistent with accepted laboratory practice, to prevent solvent vapors from accumulating to a dangerous level.

2.2.4 Remove the dishes from the oven, place immediately in a desiccator, cool to ambient temperature, and weigh to within 1 mg. After weighing, break up the film of the coating using the metal paper clip. Weigh dish to within 1 mg. Return to forced draft oven for an additional 60 minutes at 110 ± 5 degrees Celsius.

2.2.5 Remove the dishes from the oven, place immediately in a desiccator, cool to ambient temperature, and weigh to within 1 mg.

2.2.6 Run analyses in pairs (duplicate sets for each coating mixture until the criterion in section 4.3 of Method 24 of appendix A of 40 CFR part 60 is met. Calculate the weight of volatile matter for each heating period following Equation 24-2 of Method 24 and record the arithmetic average. Add the arithmetic average for the two heating periods to obtain the weight fraction of the volatile matter.

3.0 Data Validation Procedure

3.1 Follow the procedures in Section 4 of Method 24 of appendix A to 40 CFR part 60.

3.2 If more than 10 percent of the sample is lost when the sample is being broken up in 2.2.4, the sample is invalid.

4.0 Calculations

Follow the calculation procedures in Section 5 of Method 24 of appendix A of 40 CFR part 60.

TABLE 1 TO SUBPART D.—VOLATILE ORGANIC COMPOUND (VOC), CONTENT LIMITS FOR ARCHITECTURAL COATINGS
 [Unless otherwise specified, limits are expressed in grams of VOC per liter of coating thinned to the manufacturer's maximum recommendation excluding the volume of any water, exempt compounds, or colorant added to tint bases.]

Coating category	Grams VOC per liter	Pounds VOC per gallon ^a
Antenna coatings	530	4.4
Anti-fouling coatings	450	3.3
Anti-graffiti coatings	600	5.0
Bituminous coatings and mastics	500	4.2
Bond breakers	600	5.0
Calcimine recoater	475	4.0
Chalkboard resurfacers	450	3.8
Concrete curing compounds	350	2.9
Concrete curing and sealing compounds	700	5.8
Concrete protective coatings	400	3.3
Concrete surface retarders	780	6.5
Conversion varnish	725	6.0
Dry fog coatings	400	3.3
Extreme high durability coatings	800	6.7
Faux finishing/glazing	700	5.8
Fire-retardant/resistive coatings:		
Clear	850	7.1
Opaque	450	3.8
Flat coatings:		
Exterior coatings	250	2.1
Interior coatings	250	2.1
Floor coatings	400	3.3
Flow coatings	650	5.4
Form release compounds	450	3.8
Graphic arts coatings (sign paints)	500	4.2
Heat reactive coatings	420	3.5
High temperature coatings	650	5.4
Impacted immersion coatings	780	6.5
Industrial maintenance coatings	450	3.8
Lacquers (including lacquer sanding sealers)	680	5.7
Magnesite cement coatings	600	5.0
Mastic texture coatings	300	2.5
Metallic pigmented coatings	500	4.2
Multi-colored coatings	580	4.8
Nonferrous ornamental metal lacquers and surface protectants	870	7.3
Nonflat coatings:		
Exterior coatings	380	3.2
Interior coatings	380	3.2
Nuclear coatings	450	3.8
Pretreatment wash primers	780	6.5
Primers and undercoaters	350	2.9
Quick-dry coatings:		
Enamels	450	3.8
Primers, sealers, and undercoaters	450	3.8
Repair and maintenance thermoplastic coatings	650	5.4
Roof coatings	250	2.1
Rust preventative coatings	400	3.3
Sanding sealers (other than lacquer sanding sealers)	550	4.6
Sealers (including interior clear wood sealers)	400	3.3
Shellacs:		
Clear	730	6.1
Opaque	550	4.6
Stains:		
Clear and semitransparent	550	4.6
Opaque	350	2.9
Low solids	^b 120	^b 1.0
Stain controllers	720	6.0
Swimming pool coatings	600	5.0
Thermoplastic rubber coatings and mastics	550	4.6
Traffic marking coatings	150	1.3
Varnishes	450	3.8
Waterproofing sealers and treatments	600	5.0
Wood preservatives:		
Below ground wood preservatives	550	4.6

TABLE 1 TO SUBPART D.—VOLATILE ORGANIC COMPOUND (VOC), CONTENT LIMITS FOR ARCHITECTURAL COATINGS—
Continued

[Unless otherwise specified, limits are expressed in grams of VOC per liter of coating thinned to the manufacturer's maximum recommendation excluding the volume of any water, exempt compounds, or colorant added to tint bases.]

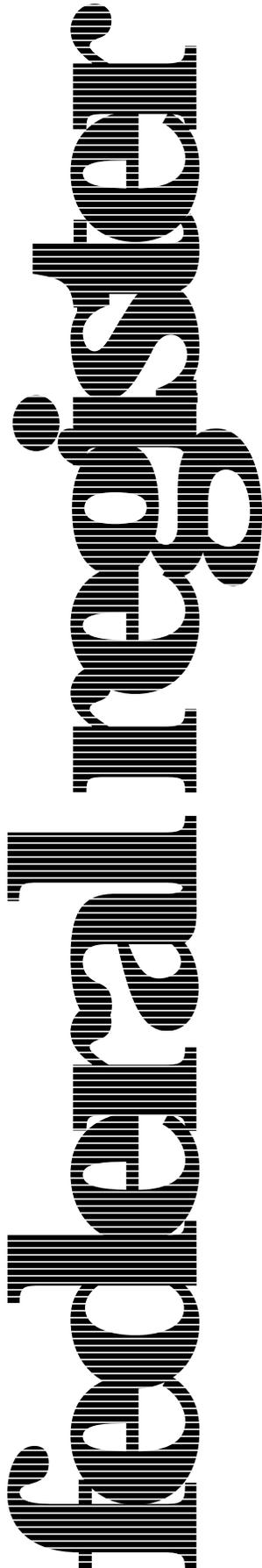
Coating category	Grams VOC per liter	Pounds VOC per gallon ^a
Clear and semitransparent	550	4.6
Opaque	350	2.9
Low solids	^b 120	^b 1.0
Zone marking coatings	450	3.8

^a English units are provided for information only. Compliance will be determined based on the VOC content limit, as expressed in metric units.

^b Units are grams of VOC per liter (pounds of VOC per gallon) of coating, including water and exempt compounds, thinned to the maximum thinning recommended by the manufacturer.

[FR Doc. 98-22659 Filed 9-10-98; 8:45 am]

BILLING CODE 6560-50-p



Friday
September 11, 1998

Part III

**Environmental
Protection Agency**

**40 CFR Part 63
National Emission Standards for
Hazardous Air Pollutants for Source
Categories; National Emission Standards
for Hazardous Air Pollutants From
Petroleum Refineries—Catalytic Cracking
(Fluid and Other) Units, Catalytic
Reforming Units, and Sulfur Plant Units;
Proposed Rule**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[IL-64-2-5807; FRL-6154-3]

RIN 2060-AF28

National Emission Standards for Hazardous Air Pollutants for Source Categories; National Emission Standards for Hazardous Air Pollutants from Petroleum Refineries—Catalytic Cracking (Fluid and Other) Units, Catalytic Reforming Units, and Sulfur Plant Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule and notice of public hearing.

SUMMARY: This action proposes national emission standards for hazardous air pollutants (NESHAP) from process vents associated with certain new and existing affected sources at petroleum refineries. Hazardous air pollutants (HAP) that would be reduced by this proposed rule include organics (acetaldehyde, benzene, formaldehyde, hexane, phenol, dioxins, furans, toluene, and xylene) and reduced sulfur compounds (carbonyl sulfide, carbon disulfide); inorganics (hydrogen chloride, chlorine); and particulate metals (antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, and nickel). The health effects of exposure to these HAP can include cancer, respiratory irritation, and damage to the nervous system.

The standards are proposed under the authority of section 112(d) of the Clean Air Act (the Act) as amended and are based on the Administrator's determination that petroleum refinery catalytic cracking units (CCU), catalytic reforming units (CRU), and sulfur plant units (SRU) may reasonably be anticipated to emit one or more of the HAP listed in section 112(b) of the Act from the various process vents found within these petroleum refinery process units. The proposed NESHAP would protect the public health and environment by requiring all petroleum refineries that are major sources to meet emission standards reflecting application of the maximum available control technology (MACT).

DATES: *Comments.* Comments on the proposed rule must be received on or before November 10, 1998.

Public Hearing. If anyone contacts the EPA requesting to speak at a public hearing by October 2, 1998, a public hearing will be held on October 13, 1998, beginning at 10 a.m. For more

information, see section VII.B of **SUPPLEMENTARY INFORMATION.**

ADDRESSES: *Comments.* Interested parties may submit written comments (in duplicate, if possible) to Docket No. A-97-36 at the following address: Air and Radiation Docket and Information Center (6102), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. The EPA requests that a separate copy of the comments also be sent to the contact person listed below. The docket is located at the above address in Room M-1500, Waterside Mall (ground floor).

A copy of today's document, technical background information, and other materials related to this rulemaking are available for review in the docket. Copies of this information may be obtained by request from the Air Docket by calling (202) 260-7548. A reasonable fee may be charged for copying docket materials.

Public Hearing. If anyone contacts the EPA requesting a public hearing by the required date (see **DATES**), the public hearing will be held at the EPA Office of Administration Auditorium, Research Triangle Park, NC. Persons interested in presenting oral testimony should notify Ms. Jolynn Collins, Waste and Chemical Process Group, Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone number (919) 547-5671.

FOR FURTHER INFORMATION CONTACT: For information concerning the proposed regulation, contact Robert B. Lucas, Waste and Chemical Process Group, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone number (919) 541-0884, facsimile number (919) 541-0246, electronic mail address, "lucas.bob@epamail.epa.gov."

SUPPLEMENTARY INFORMATION:

Regulated Entities. Entities potentially regulated by this action are facilities (i.e., petroleum refineries) that utilize fluid or other CCU, CRU, or SRU in their refining processes. Regulated categories and entities include:

Category	Examples of regulated entities
Industry	Petroleum Refineries (SIC 2911).
Federal government.	Not affected.
State/local/tribal government.	Not affected.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be

regulated by this action. This table lists the types of entities that the Agency is now aware could potentially be regulated by this action. Other types of entities not listed in the table also could be regulated. To determine whether your facility or company is regulated by this action, you should carefully examine the applicability criteria in section III.A of this document and in § 63.1560 of the proposed rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Internet. The text of today's document also is available on the EPA's web site on the Internet under recently signed rules at the following address: <http://www.epa.gov/ttn/oarpg/rules.html>. The EPA's Office of Air and Radiation (OAR) homepage on the Internet also contains a wide range of information on the air toxics program and many other air pollution programs and issues. The OAR's homepage address is: <http://www.epa.gov/oar/>.

Electronic Access and Filing Addresses. The official record for this rulemaking, as well as the public version, has been established for this rulemaking under Docket No. A-97-36 (including comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as confidential business information (CBI), is available for inspection from 8 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays. The official rulemaking record is located at the address in **ADDRESSES** at the beginning of this document.

Electronic comments can be sent directly to the EPA's Air and Radiation Docket and Information Center at: "A-and-R-Docket@epamail.epa.gov." Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect in 5.1 file format or ASCII file format. All comments and data in electronic form must be identified by the docket number (A-97-36). No CBI should be submitted through electronic mail. Electronic comments on this proposed rule may be filed online at many Federal Depository Libraries.

Outline. The information in this preamble is organized as shown below.

- I. Statutory Authority
- II. Introduction
 - A. Background
 - B. NESHAP for Source Categories
 - C. Health Effects of Pollutants

- D. Petroleum Refining Industry
 - 1. Catalytic Cracking Units
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 - 3. Sulfur Plant Units
- III. Summary of the Proposed Rule
 - A. Applicability
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 - A. Non-fluidized Catalytic Cracking Units and Non-Claus Sulfur Recovery Units
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 - F. Monitoring of Catalytic Reforming Units with Internal Scrubbing Systems
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 - A. Docket
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 - J. National Technology Transfer and Advancement Act
 - K. Clean Air Act
 - L. Executive Order 13084

I. Statutory Authority

The statutory authority for this proposal is provided by sections 101, 112, 114, 116, and 301 of the Clean Air Act, as amended (42 U.S.C. 7401, 7412, 7414, 7416, and 7601).

II. Introduction

A. Background

Section 112 of the Act lists HAP and directs the EPA to develop rules to control all major and some area sources emitting HAP. On July 16, 1992 (57 FR 31576), the EPA published a list of major and area source categories for which NESHAP are to be promulgated. Petroleum refineries were listed under two source categories. On December 3, 1993 (58 FR 83941), the EPA published a schedule for promulgating standards for the listed major and area sources. Standards for the first source category, "Other Sources Not Distinctly Listed," were scheduled for promulgation on November 15, 1994. The EPA promulgated those standards under a July 28, 1995, court-ordered deadline; the regulations, "National Emission Standards for Hazardous Air Pollutants: Petroleum Refineries," were published on August 18, 1995 (60 FR 43244). Those standards, however, did not address three process unit vents which are the subject of today's proposed rulemaking. "Petroleum Refineries: Catalytic Cracking (Fluid and Other) Units, Catalytic Reforming Units, and Sulfur Plant Units" is the second listed source category and the published schedule requires the EPA to promulgate standards for this source category by November 15, 1997.

The proposed NESHAP was developed by the EPA in concert with State regulators, industry representatives, individual States (California, Louisiana, Texas, and Illinois) and associated groups including STAPPA/ALAPCO (State and Territorial Air Pollution Program Administrators Association/Association of Local Air Pollution Control Officials). The rule development process included a cooperative effort in identifying data needs; collecting additional data; conducting emission testing with shared funding from the EPA and the California Air Resources Board (CARB); and meeting with representatives of the various stakeholders to share technical information.

Refineries affected by the standards could achieve the proposed requirements by upgrading existing emission controls, installing new control devices, or implementing source reduction measures, depending on site-specific characteristics of the source and the associated refinery operation. Alternative compliance options also are included to provide operational flexibility and to encourage pollution prevention. For example, facilities which hydrotreat to remove metals from the feed can meet the alternative nickel

(Ni) standard with a less effective control device. Similarly, sulfur plants which recover additional sulfur with effective tail gas treatment can meet performance levels equivalent to facilities with a vapor incinerator.

The EPA estimates nationwide HAP emissions from the process vents on these three unit operations at about 7,270 megagrams per year (Mg/yr) (8,000 tons per year (tpy)) at current levels of control. Raising the control performance of affected petroleum refinery process units with MACT-level standards would reduce nationwide HAP emissions from process vents on the three affected unit operations by about 82 percent from the current level, with higher reductions achieved at particular sites. Other benefits of this action would include a significant decrease in nationwide emissions of non-HAP pollutants (over 132,000 tpy) and lowered occupational exposure levels for employees.

This emission reduction would be achieved with no adverse economic effects on the industry or small refineries. The nationwide total capital and annualized costs of control equipment are estimated at \$173 million and \$43.7 million/yr, respectively. An additional \$6.5 million in total capital investment with a total annual cost of \$9.8 million/yr is estimated for monitoring/implementation costs.

B. NESHAP for Source Categories

Section 112 of the Act requires that the EPA promulgate regulations for the control of HAP emissions from both new and existing major sources. The regulations must reflect the maximum degree of reduction in emissions of HAP that is achievable taking into consideration the cost of achieving the emission reduction, any non-air quality health and environmental impacts, and energy requirements. This level of control is commonly referred to as maximum achievable control technology (MACT). For new sources, MACT standards cannot be less stringent than the emission control that is achieved in practice by the best-controlled similar source. (See CAA section 112(d)(3).) The MACT standards for existing sources cannot be less stringent than the average emission limitation achieved by the best-performing 12 percent of existing sources for categories and subcategories with 30 or more sources, or the best-performing 5 sources for categories or subcategories with fewer than 30 sources.

The control of HAP is achieved through the promulgation of either technology-based emission standards

under sections 112(d) and 112(f) or work practice standards under 112(h) for categories of sources that emit HAP. Emission reductions may be accomplished through the application of measures, processes, methods, systems, or techniques including, but not limited to: (1) Reducing the volume of, or eliminating emissions of, such pollutants through process changes, substitution of materials, or other modifications; (2) enclosing systems or processes to eliminate emissions; (3) collecting, capturing, or treating such pollutants when released from a process, stack, storage or fugitive emissions point; (4) design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in section (h); or (5) a combination of the above. (See CAA section 112(d)(2).)

C. Health Effects of Pollutants

The Clean Air Act was created in part to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population. (See CAA section 101(b)(1).) Section 112(b) of the Act lists HAP believed to cause adverse health or environmental effects. Section 112(d) of the Act requires that emission standards be promulgated for all categories and subcategories of major sources of these HAP and for many smaller "area" sources listed for regulation under section 112(c) in accordance with the schedules established under sections 112(c) and 112(e). Major sources are defined as those that emit or have the potential to emit at least 10 tpy of any single HAP or 25 tpy of any combination of HAP.

As previously explained, in the 1990 Amendments to the CAA, Congress specified that each standard for major sources must require the maximum reduction in emissions of HAP that the EPA determines is achievable considering cost, health and environmental impacts, and energy impacts. In essence, these MACT standards would ensure that all major sources of air toxic emissions achieve the level of control already being achieved by the better controlled and lower emitting sources in each category. This approach provides assurance to citizens that each major source of toxic air pollution will be required to effectively control its emissions. At the same time, this approach provides a level economic playing field, ensuring that facilities that employ cleaner processes and good emissions control are not at an economic disadvantage

relative to competitors with poorer controls.

Emission data collected during development of the proposed NESHAP show that pollutants that are listed in section 112(b)(1) and are emitted from vents on CCU, CRU, and SRU include both inorganic HAP (including metal HAP) and organic HAP. Hazardous air pollutants from CCU include acetaldehyde, antimony, arsenic compounds, beryllium, benzene, 1,3-butadiene, cadmium, chromium, cobalt compounds, 2,3,7,8-TCDD, formaldehyde, hexane, lead compounds, mercury compounds, manganese, nickel compounds, phenol, polycyclic organic matter, toluene, and xylene. Catalytic reforming units emit benzene, chlorine, organic chlorides, naphthalene, dibenzo furans and 2,3,7,8-TCDD, polycyclic organic matter, toluene, xylene, hexane, and hydrogen chloride. Sulfur recovery plants release emissions of benzene, toluene, carbonyl sulfide, carbon disulfide, and formaldehyde. The majority of these pollutants will be reduced by implementation of the proposed emission limits. Following is a summary of the potential health and environmental effects associated with exposures, at some level, to emitted pollutants that would be reduced by the standard.

Several metals appearing on the section 112(b) list of HAP are emitted from CCU, CRU, and SRU at petroleum refineries. The nonvolatile metals of greatest concern that would be reduced by the standard are antimony, cadmium, chromium, nickel, beryllium, and manganese. These metals can cause effects such as mucous membrane irritation (e.g., bronchitis, decreased lung capacity), gastrointestinal effects, nervous system disorders (from loss of function to tremor and numbness), skin irritation, and reproductive and developmental disorders. Additionally, several of the metals accumulate in the environment and in the human body. Cadmium, for example, is a cumulative pollutant, which can cause kidney effects even after the cessation of exposure. Similarly, the onset of effects from beryllium exposure may be delayed 3 months to 15 years. Many of the metals also are known (arsenic, chromium VI, and certain nickel compounds) or probable (cadmium, lead, and beryllium) human carcinogens.

Organic compounds that would be reduced by this standard include benzene, formaldehyde, and phenol, among others. Some of the effects of these pollutants are similar to those caused by metal HAP and include irritation from short-term exposures to

eye, nose, and throat; respiratory effects (expressed as labored breathing, impaired lung function); and reproductive and developmental effects. Developmental and kidney effects and cardiac effects have been reported for phenol, which is considered to be quite toxic to humans via oral exposure. In addition to these noncancer effects, formaldehyde has been classified as a probable human carcinogen. Benzene, a class A or known human carcinogen, is a concern because long-term exposure causes an increased risk of cancer in humans, and is also associated with aplastic anemia, pancytopenia, chromosomal breakages, and weakening of the bone marrow.

Emissions of carbonyl sulfide (COS) also would be reduced by the standard. Information as to the potential health effects of COS are limited. Short-term inhalation of a high concentration of COS may cause narcotic central nervous system effects and skin and eye irritation in humans. No information is available on reproductive or developmental effects from COS exposure, and the EPA has not classified this pollutant with respect to its potential carcinogenicity.

Adverse health effects from exposure to hydrogen chloride (HCl) also have been documented. Chronic occupational exposure to HCl has been reported to cause gastritis, chronic bronchitis, dermatitis, and photosensitization in workers. Acute inhalation exposure may cause coughing, hoarseness, inflammation and ulceration of the respiratory tract, chest pain, and pulmonary edema in humans. No information is available on any potential carcinogenic effects of HCl in humans and the EPA has not classified this chemical with respect to potential carcinogenicity. Only limited data are available on the reproductive and developmental effects of HCl.

In addition to HAP, the proposed standard also would reduce some of the pollutants whose emissions are controlled to meet National Ambient Air Quality Standards (NAAQS). These pollutants include particulate matter (PM), carbon monoxide (CO), volatile organic compounds (VOC), and lead. The effects of PM, CO, ozone (derived, in part, from VOC) and lead that would be reduced by this standard are described in the EPA's Criteria Documents, which support the NAAQS. Briefly, PM emissions have been associated with aggravation of existing respiratory and cardiovascular disease and increased risk of premature death. Volatile organic compounds (e.g., formaldehyde) are precursors to the formation of ozone in the ambient air.

At elevated levels, ozone has been shown in human laboratory and/or community studies to be responsible for the reduction of lung function, respiratory symptoms (e.g., cough, chest pain, throat and nose irritation), increased hospital admissions for respiratory causes, and increased lung inflammation. Animal studies have shown increased susceptibility to respiratory infection and lung structure changes. Ambient ozone also has been linked to adverse effects on agricultural crops and forests. Carbon monoxide enters the blood stream and reduces oxygen delivery to the body's organs and tissues. Exposure to CO has been associated with reduced time to onset of angina pain, impairment of visual perception, work capacity, manual dexterity, learning ability, and performance of complex tasks. Depending on the degree of exposure, lead can cause subtle effects on behavior and cognition, increased blood pressure, reproductive effects, seizures, and even death.

The EPA recognizes that the degree of adverse effects to health can range from mild to severe. The extent and degree to which the health effects may be experienced is dependent upon: (1) The ambient concentrations observed in the area, (e.g., as influenced by emission rates, meteorological conditions, and terrain); (2) the frequency of and duration of exposures; (3) characteristics of exposed individuals (e.g., genetics, age, pre-existing health conditions, and lifestyle) which vary significantly with the population; and (4) pollution specific characteristics (e.g., toxicity, half-life in the environment, bioaccumulation, and persistence).

D. Petroleum Refining Industry

The petroleum refining industry in 1997 consisted of 162 petroleum refineries operated by 90 firms in 33 States nationwide that refined approximately 15 million barrels of crude oil daily. Of the total number of U.S. refineries, 71 were located in three States (i.e., California, Texas, and Louisiana) and accounted for about 54 percent of the crude capacity. The three types of process units (CCU, CRU, and SRU) classified within the source category regulated in today's proposed rule are commonly found at petroleum refineries throughout the U.S. The processes are described below.

1. Catalytic Cracking Units

Catalytic cracking is a decomposition process whereby heavier weight, higher boiling hydrocarbons such as gas oil are broken down by heat in the presence of a catalyst to lighter weight, lower

boiling, higher value hydrocarbons such as gasoline blend stocks and heating fuels. Technological developments have allowed catalytic cracking units to accept a wide range of feedstocks varying from naphtha to heavy crude residues. Current cracking catalysts incorporate zeolites (molecular sieves) with alumina-silica matrix.

Fluidized-bed or moving bed reactors are used by 101 petroleum refineries for catalytic cracking. The fluidized-bed processes are predominant but some moving bed units are still in operation. Non-fluidized CCU, which account for only 2.9 percent of the total catalytic cracking process charge rate, were operated by 7 refineries in 1997.

Fluid catalytic cracking has gained dominance in the catalytic cracking industry because these units are typically more versatile and flexible than other (non-fluid) CCU, i.e., they have improved control of process variables to maximize desired product yields. In January 1997, catalytic cracking (fluid or other) charge capacity was 5.2 million barrels per calendar day. Catalytic cracking charge capacities of less than 10,000 barrels per calendar day were reported by 9 refineries. Charge capacities of greater than 100,000 barrels per calendar day were reported by 8 refineries. About one-half of the refineries with large charge capacities have more than one CCU.

Several proprietary fluidized-bed catalytic cracking processes are available from various engineering construction companies and oil refining research and development groups. In addition, each fluidized-bed CCU operation is customized based on refinery specific process, feedstock, and product mix requirements. Catalyst and feedstock are introduced to the reactor through a vertical tube leading to the reactor, i.e., the riser; the feedstock undergoes a cracking reaction (typically in the riser) and some reaction products are deposited on the catalyst; as the mixture of catalyst and products enter the reactor vessel, steam is injected to strip products from the catalyst. With use, the catalyst in an fluidized-bed CCU unit loses activity; coke and some metals remain deposited on the catalyst. To restore catalyst activity, the used or spent catalyst is routed continuously from the reactor to a regenerator vessel; the catalyst activity is restored substantially by burning off the coke in a controlled combustion reaction; burning the coke also provides process heat necessary for the proper functioning of the fluidized-bed CCU. The source of emissions from both fluidized-bed units and moving-bed units is the regenerator flue gas stream.

There are two basic types of fluidized-bed CCU regenerators: complete burn/combustion regenerators and partial burn/combustion regenerators. In partial burn/combustion regenerators, the controlled burn involves addition of less than stoichiometric amounts of air, and thus CO is generated rather than carbon dioxide (CO₂). In complete burn/combustion (also called high temperature) regenerators, the regenerator is operated with a slight excess of oxygen (1 to 2 percent) to ensure complete combustion of the coke to CO₂; newer units are typically designed for complete combustion. The CO content of the flue gas from a high temperature, complete burn/combustion regenerator is about 0.4 percent by weight as compared to the uncontrolled CO content of about 9.3 percent from a partial burn/combustion regenerator system.

2. Catalytic Reforming Units

A CRU is designed to reform (i.e., change the chemical structure) of naphtha into higher octane aromatics. This is accomplished by passing naphtha through a reactor containing a catalyst at elevated pressure and temperature to promote dehydrogenation, isomerization, and hydrogenolysis reactions. The reforming process uses a platinum or bimetal (e.g., platinum and rhenium) catalyst material. Halides (chlorine and fluorine) promote the activity of the platinum-alumina catalyst and are stripped from the surface of the catalyst as HCl or hydrogen fluoride (HF) during the reforming reactions, thus reducing catalyst activity.

Dehydrogenation reactions are favored by low pressure and high temperature; however, coke (carbon) is also formed at low pressure which tends to deactivate the catalyst and reduce yields. Coke formation can be reduced by operating under high hydrogen pressure; other important variables in dehydrogenation activity include temperature, space velocity, recycle gas rate, and particle size of the catalyst used. The desired product quality (octane number) may be obtained by balancing the system pressure, temperature, space velocity, and recycle gas rate even as catalyst activity decreases. When yields can no longer be obtained, the catalyst must be regenerated.

In January 1997, catalytic reforming charge capacity was 3.65 million barrels per calendar day. Some form of CRU was operated by 124 refineries. The three major types of catalytic reforming processes are semi-regenerative, cyclic, and continuous. Semi-regenerative,

used by 111 refineries with 49 percent of reforming capacity, is characterized by the shutdown of the entire reforming unit (which employs three to four separate reactors) at specified intervals or at the operator's convenience, for in situ catalyst regeneration. Cyclic regeneration, used by 23 refineries with 24 percent of reforming capacity, is characterized by batch regeneration of catalyst in situ in any one of several reactors (four or five separate reactors) that can be isolated from and returned to the reforming operation, while maintaining continuous reforming process operations (i.e., feedstock continues flowing through the remaining reactors). Continuous regeneration, used by 32 refineries with 27 percent of reforming capacity, is characterized by continuous flow of catalyst material through a reactor where it mixes with feedstock in counter-current direction, and a portion of the catalyst is continuously removed and sent to a special regenerator where it is regenerated and recycled back to the reactor.

3. Sulfur Plant Units

Sulfur compounds present in crude oil are converted to hydrogen sulfide (H_2S) in the cracking and hydro treating processes. The H_2S or "acid gas" is removed from the process vapors using amine scrubbers. Amine scrubbers also remove CO_2 , COS , carbon disulfide (CS_2), nitrogen (N_2) and water (H_2O). The H_2S "rich" amine solution is subsequently heated to release the H_2S and other absorbed components, which is then treated in the SRU to yield high purity elemental sulfur that is sold as product. Sour water [water that contains ammonia (NH_3) and H_2S] gases are also commonly fed to the SRU. The NH_3 is oxidized to nitrogen dioxide (NO_2) and H_2O , and the H_2S is converted to elemental sulfur in the SRU.

Sulfur recovery (the conversion of H_2S to elemental sulfur) is typically accomplished using the modified-Claus process, which consists of a thermal reactor and multi-stage catalytic reactors in series. First, one-third of the H_2S is burned with air in a thermal reactor furnace to yield sulfur dioxide (SO_2). The SO_2 then reacts reversibly with H_2S in the presence of a catalyst to produce sulfur, water, and heat. Since the reaction is reversible, the reaction occurs in a series of catalytic reactors (or stages), and the vapors are cooled to condense the sulfur between each reactor to drive the reaction towards completion. The Claus gas is then reheated prior to introduction to the next catalytic reactor (or stage). The conversion efficiencies of SRU range

from 92 percent for a two-stage to 97 percent for a three-stage unit.

The gas from the final condenser of the SRU (referred to as the "tail gas") typically consists primarily of inert gases with less than two percent sulfur compounds, which may include H_2S , SO_2 , CS_2 , and COS . There are numerous Claus tail gas desulfurization systems in commercial operation in the U.S. Tail gas treatment processes fall mainly into two categories: low-temperature processes and single compound processes (e.g., SCOT™, Beavon™, and Wellman-Lord™. SCOT™ tail gas treatment includes: Catalytic reduction to convert the tail gas sulfur compounds to H_2S ; amine adsorption to recover and recycle any H_2S present in the tail gas; and incineration to convert the remaining tail gas sulfur compounds to SO_2 . Sulfur recovery efficiencies of catalytic reduction followed by amine recovery typically range from 92 to 97 percent; therefore, the combined efficiency of the SRU and tail gas recovery systems can exceed 99.5 percent. After incineration, the treated tail gas consists primarily of inert gases with an SO_2 concentration of between 200 and 500 parts per million (ppm) with trace amounts of H_2S , COS , and CS_2 .

In 1985, production of sulfur from petroleum refineries was reported at 2.9 million Mg compared to 4.2 million Mg in 1990. In 1992, 130 U.S. refineries reported operating some form of SRU with a production capacity of approximately 20,500 Mg/day. Capacities of less than 50 Mg/day were reported by 52 refineries. Capacities of greater than 300 Mg/day were reported by 24 refineries and 5 refineries reported capacities of greater than 500 Mg/day. Of the 130 refineries, 88 provided the number of SRU or Claus trains at the facility. The total number of SRU reported was 144; 38 refineries reported multiple trains with 13 refineries reporting 3 or more SRU.

A new source performance standard (NSPS) for petroleum refineries (40 CFR part 60, subpart J) limits PM and CO from fluidized-bed CCU catalyst regeneration vents, H_2S from fuel gas combustion devices, and SO_2 from SRU vents on Claus plants of greater than 20 long tons per day. This rule affects fluidized-bed CCU constructed or modified after June 11, 1973, and Claus SRU constructed or modified after October 4, 1976. Any fluidized-bed CCU, constructed or modified before January 17, 1984, in which a contact material reacts with petroleum derivatives to improve feedstock quality and in which the contact material is

regenerated by burning-off coke and/or other deposits is exempt from the NSPS.

III. Summary of the Proposed Rule

A. Applicability

The proposed standard would apply to emissions of HAP from process vents on each affected source at any petroleum refinery that is a major source of HAP emissions as defined in § 63.2 of 40 CFR part 63. All of the nation's 162 petroleum refineries are believed to be major sources of HAP.

New and existing sources subject to the proposed NESHAP are: (1) The process vent or group of process vents on each fluidized-bed and other (i.e., non-fluid) CCU that is associated with regeneration of the catalyst used in the unit (i.e., the catalyst regeneration flue gas vent); (2) the process vent or group of process vents on each semi-regenerative, cyclic, or continuous CRU that is associated with regeneration of the catalyst used in the unit; and (3) the process vent or group of process vents that vent from each Claus or other (i.e., non-Claus) SRU or the tail gas treatment unit serving the sulfur recovery plant, that is associated with sulfur recovery. Processes which do not recover elemental sulfur do not meet the definition of a SRU, and therefore, are not subject to the proposed standards. Gaseous streams routed to a fuel gas system also are not subject to the proposed standards.

The proposed standard would prevent facilities subject to the NSPS control requirements for CCU and SRU from having to do a second compliance demonstration for the MACT standard. The owner or operator of a fluidized-bed CCU catalyst regenerator subject to and demonstrating compliance with the NSPS PM and CO standards and all associated requirements (e.g., performance test, monitoring, recordkeeping, and reporting) is considered to be in compliance with the MACT standard and associated requirements for CCU. The owner or operator of a Claus SRU subject to and demonstrating compliance with the NSPS sulfur oxides standard and associated requirements is considered to be in compliance with the MACT standard and associated requirements for SRU. Any CCU or SRU not subject to the NSPS that is subject to this MACT standard must comply with the requirements of this subpart. For example, an existing CCU not subject to the NSPS must demonstrate compliance in accordance with the requirements of this subpart. This approach is intended to reduce burden by minimizing duplication without affecting the NSPS

requirements and related requirements such as new source review, prevention of significant deterioration, and other Title I requirements. The EPA requests comments on this regulatory approach or other approaches that minimize duplication without reducing or changing the NSPS standards.

B. Subcategories

Section 112(d) of the Act requires the EPA to establish emission standards for each category or subcategory of major and area sources. Section 112(d)(1) of the Act provides that the Administrator may distinguish among classes, types, and sizes of sources within a category in establishing the standards. In establishing subcategories, the EPA has considered factors such as air pollution control engineering differences, process operations (including differences between batch and continuous operations), emission characteristics, control device applicability, and opportunities for pollution prevention.

The EPA's analysis of existing CRU resulted in the designation of two subcategories for the proposed emission standard for HCl during the coke burn-off step that are based primarily on differences in the process operations, process equipment, and emissions. One subcategory is for existing units using the semi-regenerative regeneration process, and the other is a separate subcategory for units using either continuous or cyclic regeneration. The composition, quantity, and frequency of HCl emissions as well as the level of control achieved from the semi-regenerative process are quite different from those associated with the other processes. In the semi-regenerative process, emissions occur at a much lower frequency and duration because the regeneration is performed infrequently at specified intervals, which in turn affects the short-term emission rate as well as the performance and effectiveness of emission control techniques. No separate subcategories were developed for the depressurization or purge cycle because the emissions and applicable controls are similar for all three types of CRU regeneration processes. However, the proposed control requirements for CRU do not apply to depressuring and purging operations at a differential pressure between the reactor vent and the gas transfer system to the control device of less than 1 pound per square inch gauge (psig) or if the reactor vent pressure is 1 psig or less.

No subcategories were developed for the CCU catalyst regeneration vent or process vents associated with sulfur recovery plants. The MACT emission

control technologies for these sources were found to be generally applicable for all of these units. However, the EPA is collecting additional information to evaluate whether additional subcategories may be warranted due to process variations and is requesting comments on this topic as discussed in section VI.D of this document. (Additional discussion of subcategorization for this source category is contained in section IV.C.1 of this document.)

C. Emission Control Technology

No additional control technology options were identified that had been demonstrated to be more effective than the MACT floor technologies that would achieve significant additional reductions in HAP emissions. Consequently, the technologies associated with the MACT floor were also determined to represent the MACT technology from this source category.

The MACT control option for emissions of metal HAP from the CCU catalyst regeneration vent during the coke burn-off is the control of PM or Ni by a wet scrubber or electrostatic precipitator (ESP), which were found to provide equivalent levels of emission control for metal HAP. The MACT control option for organic HAP from the regeneration vents for CCUs and for CRUs is complete combustion to destroy the organic compounds using complete burn/combustion regeneration process for the CCU, or venting either type of unit to a boiler, process heater, flare, or other combustion device. The MACT emission control technology for the coke burn-off during catalytic reforming regeneration is the use of a wet scrubber to remove HCl. For sulfur recovery plants, the MACT control option for organic HAP, which are reduced sulfur compounds (COS and CS₂), is oxidation to SO₂ using a vapor incinerator.

D. Emission Limits

Analysis of available information and data led the EPA to conclude that the MACT level of control for metal HAP from each new, existing, and reconstructed CCU is a PM limit for the catalyst regeneration vent of 1.0 kilogram (kg) per 1,000 kg (1.0 lb per 1,000 lb) of coke burn-off, where PM is a surrogate for total metal HAP. The proposed limit is in the same format as the NSPS (40 CFR part 60, subpart J)—kg of PM per 1,000 kg of coke burn-off. To provide flexibility in compliance and to encourage pollution prevention (such as the use of feedstocks with lower metal content), an alternative limit of 13,000 milligrams per hour (mg/hr) (0.029 lb/hr) of Ni for the catalyst

regenerator vent on each CCU also is proposed.

For organic HAP from each new, existing, or reconstructed CCU, the MACT control for the catalyst regeneration vent is complete combustion, which is characterized as an emission limit of 500 parts per million by volume (ppmv) for CO as an indicator of combustion efficiency. This also is the NSPS level used to characterize complete combustion of a fluidized-bed CCU catalyst regeneration vent stream.

Proposed standards also were developed for HCl emissions from the catalyst regeneration vent on each new, existing, or reconstructed CRU. For an existing semi-regenerative unit, uncontrolled HCl emissions during coke burn-off and catalyst regeneration must be reduced by at least 92 percent or to an outlet concentration of 30 ppmv or less. For an existing unit using cyclic or continuous regeneration or a new or reconstructed unit using a semi-regenerative, cyclic, or continuous process, HCl emissions must be reduced by at least 97 percent or to an outlet concentration of 10 ppmv or less.

Organic emissions from the catalyst regeneration vent on each new, existing, or reconstructed CRU must be controlled by combustion. The owner or operator may vent emissions to a flare that meets the EPA's design and operation requirements, or use a control device to reduce uncontrolled emissions by at least 98 percent or to an outlet concentration of 20 ppmv or less.

Emissions of HAP from each new, existing, or reconstructed SRU, expressed as total reduced sulfur (TRS) compounds to represent COS and CS₂, cannot exceed a concentration of 300 ppmv.

E. Emission Monitoring and Compliance Provisions

The proposed standard requires an initial performance test to demonstrate compliance with the emission limits for vents on each CCU, CRU, and SRU. The proposed rule allows 150 days following the compliance test date to conduct the tests and report the results in the notification of compliance status report. The initial performance test for a semi-regenerative CRU may be conducted at the first regeneration cycle following the compliance date. The initial performance test, and all subsequent performance tests, are to be conducted according to the provisions in the NESHAP general provisions in 40 CFR part 63, subpart A and in the proposed rule.

For CCU, Methods 5B or 5F (40 CFR part 60, appendix A) are used to

determine PM emissions, and Method 29 (40 CFR part 60, appendix A) is used to determine Ni emissions. The proposed rule includes calculation procedures to demonstrate compliance with the proposed PM limit in the kg/1,000 kg (lb/1,000 lb) of coke burn-off format and the Ni limit in the mg/hr (lb/hr) format.

The proposed rule requires a performance test by Method 10 (40 CFR part 60, appendix A) to demonstrate compliance with the CO limit for CCU catalyst regeneration vents. To determine compliance with the requirements for 98 percent removal or an outlet concentration of 20 ppmv for organic emissions from the CCU catalyst regeneration vent, either Methods 18 or 25A (40 CFR part 60, appendix A) can be used. The proposed rule contains calculation procedures and equations.

Emissions of HCl from the CRU catalyst regeneration vent are measured using Method 26A (40 CFR part 60, appendix A) to establish reduction efficiency or outlet concentration. Method 15 (40 CFR part 60, appendix A) is used to determine the concentration of TRS compounds from SRU.

Performance tests to show 98 percent destruction of organic compounds or an outlet concentration of 20 ppmv or less are not required when any of three types of control devices are used: (1) A boiler or process heater with a design heat input capacity of 44 megawatts (MW) or greater; (2) a boiler or process heater in which all vent streams are introduced into the flame zone; or (3) a flare that complies with the requirements for the proper design and operation of flares in * 63.11(b) of the NESHAP general provisions. Flares must also meet the requirements in 40 CFR 60.11(b), including the standard for visible emissions as determined using Method 22 in appendix A to 40 CFR part 60.

The owner or operator of an existing affected source has up to 3 years from the promulgation date of the final rule to demonstrate compliance. The owner or operator may request an additional year (resulting in a compliance date up to 4 years following the promulgation date of the final rule) under section 112(i)(3)(B) of the Act. A new or reconstructed source must demonstrate compliance upon startup or by the date of promulgation of this subpart, whichever is later.

The proposed standard requires the owner or operator to establish a maximum or minimum value, as appropriate, for the process and control device parameters being monitored that ensures the process or control device is operating properly so that the emission limit is not exceeded. The proposed

standard allows the owner or operator to measure and record process or operating parameters on a daily average or hourly average basis, depending on the type of control device. Daily averages would be calculated as the average of all values for a monitored parameter recorded during the operating day. The average will cover a 24-hour period if the operation is continuous or the number of hours of operation per day if operation is not continuous. Monitoring data recorded during periods of unavoidable monitoring system breakdowns, repairs, calibration checks, and zero (low-level) and high-level adjustments; startup, shutdowns, and malfunctions; and periods of nonoperating of the process unit resulting in cessation of the emissions to which the monitoring applies would not be included in monitoring averages. As discussed in section VI.C of this document, the EPA requests comments on whether the monitoring averages also should exclude periods of excess emissions resulting from non-operation of a CCU control device during planned routine maintenance approved by the applicable permitting authority.

If a thermal incinerator is used, the proposed standard requires the owner or operator to monitor the daily average combustion zone temperature. Monitoring of the daily average combustion temperature also would be required for any facility using a boiler or process heater less than 44 MW design heat input capacity where the vent stream is not introduced into the flame zone. For a catalytic incinerator, the owner or operator will monitor the daily average upstream temperature and temperature difference across the catalyst bed. When a flare is used, a device capable of detecting the presence of a pilot flame is required, and the owner or operator will be required to record, for each 1-hour period, whether the monitor was continuously operating and whether the pilot flame was continuously present.

Where the owner or operator elects to use an ESP to comply with the emission limits for CCU, the average hourly voltage and secondary current to the control device or the average hourly total power input must be monitored. If the owner or operator uses a wet scrubber to comply with the requirements for either a CCU or CRU, the parameters to be monitored include the average daily pressure drop across the scrubber and the daily average flow rates of gas and water to the scrubber from which the liquid-to-gas ratio would be calculated.

For facilities complying with the CO limit of 500 ppmv for catalytic cracking

regeneration, the owner or operator has a variety of monitoring options. If a combustion control device is not used to control emissions from a CCU, the average hourly temperature of the regeneration process and the oxygen content of the regeneration vent gas must be monitored. The owner or operator is not required to further monitor the process or control device if he/she demonstrates that CO emissions are less than 50 ppmv based on 30 days of continuous monitoring. Alternatively, the owner or operator could install and operate a CEM in accordance with the requirements of the NESHAP general provisions (40 CFR part 63, subpart A), Performance Specification 4A in appendix A to 40 CFR part 60, and the quality control requirements in 40 CFR part 60, appendix F.

The proposed standard would require monitoring of the daily average coke burn-off rate for each fluidized-bed CCU catalyst regeneration vent. The owner or operator would calculate and record the burn-off rate using the equation in the proposed rule.

An owner or operator using a vent system that contains a bypass line that could divert a vent stream away from the control device would be required to install a flow indicator that determines, at least once an hour, whether a vent stream flow is present or to secure the bypass line valve in a closed position with a car-seal or a lock and key configuration. If a flow indicator is used, a visual inspection must be conducted at least once every hour to demonstrate that the monitor is operating properly and that gas flow or vapor is not present. If a car-seal or lock-and-key mechanism is used, a visual inspection must be conducted at least once a month to ensure that the valve is maintained in the closed position and that no gas or vapor are present. For all bypass lines, the proposed rule also requires the owner or operator to record the times and durations of any period when the vent stream is diverted through a bypass line.

Following the performance test, more than one exceedance or excursion during a semi-annual reporting period would be a violation of the standard. As discussed in section VI.I of this document, EPA requests comment on this proposed provision. An exceedance or excursion may include: (1) An operating day when the daily average value of the monitored parameter or any period when the average hourly value of the monitored parameter, as applicable, falls below the minimum value (or exceeds the maximum value) established for the monitored parameter; (2) the average hourly CO concentration

measured by a CEM exceeds 500 ppmv; (3) an operating day when all pilot flames of a flare are absent; (4) an operating day when monitoring data are available for less than 75 percent of the operating hours (or less than 18 values are recorded if an alternative data compression system is used). For a control device where more than one parameter is monitored, an excursion by more than one parameter would be considered a single violation.

The proposed NESHAP contains provisions that would allow the owner or operator to change control device and process parameter values from those established, for example, during an initial performance test, by conducting additional emission tests to verify and document compliance. A new performance test also is required to establish a revised value for the monitored parameter if there has been any change to process or operating conditions that could result in a change in control system performance since the last performance test. The owner or operator also may request to monitor other parameters. Provisions are included for the use of alternative monitoring systems such as an automated data compression system.

F. Notification, Reporting, and Recordkeeping Requirements

General notification, reporting, and recordkeeping requirements for all MACT standards are established in § 63.10(b) of the NESHAP general provisions (40 CFR part 63, subpart A). The proposed standard incorporates most of these provisions, except that minor changes were made to the notification and reporting requirements. Many initial notifications are not required or are included in the notification of compliance status report to reduce the burden and to streamline the reporting requirements. The EPA believes that these provisions will provide sufficient information to determine compliance or operating problems at the source. At the same time, the provisions are not labor intensive, do not require expensive, complex equipment, and are not burdensome in terms of recordkeeping.

1. Notifications

The proposed requirements include one-time initial written notifications of applicability for an area source that subsequently becomes a major source and for a new or reconstructed source that has an initial startup after the effective date and for which an application for approval of construction or reconstruction is not required. Notifications of intent to construct or

reconstruct, the date construction or reconstruction commenced, the anticipated startup date, and the actual startup date are required for a new or reconstructed major source that has an initial startup after the effective date and for which an application for approval of construction or reconstruction is required. The owner or operator who intends to construct a new affected source or reconstruct an affected source subject to the rule, or reconstruct an affected source such that it becomes subject to the rule also must provide written notification. The application for approval of construction or reconstruction may be used to fulfill this requirement. This application must be submitted as far in advance of startup as practicable, but not later than 90 days prior to startup for a newly constructed or reconstructed source that has not started-up before the effective date. The proposed NESHAP also requires written notification of the expected date for conducting performance tests and visible emission observations for flares.

Within 150 days of the effective date, the owner or operator of an existing, new, or reconstructed affected source is required to submit a notification of compliance status report to the applicable permitting authority. In a State with an approved permit program which has not been delegated authority under section 112(l) of the Act, a duplicate report must be provided to the applicable Regional Administrator. The owner or operator may submit the information in a permit application or amendment, in a separate submittal, or in any combination. If the information has already been submitted, a separate notification is not required. The notification of compliance status report would include information on applicability; affected sources; exempted sources; control equipment or method of compliance; methods used to determine compliance (e.g., performance test results, engineering assessments, monitoring parameter values); and monitoring, maintenance, and quality assurance/quality control.

To ensure continued proper operation of the control devices, the proposed rule requires the owner or operator to include a maintenance program for control devices in the notification of compliance status report. Examples of the elements likely to be included in a maintenance plan for wet scrubbers are shown below; similar elements would be included in the plan for other types of control devices:

(1) Perform the manufacturer's recommended maintenance at the recommended intervals on fresh solvent pumps, recirculating pumps, discharge

pumps, and other liquid pumps, and exhaust system and scrubber fans and motors associated with pumps and fans;

(2) Clean the scrubber internals and mist eliminators at intervals sufficient to prevent buildup of solids or other fouling that degrades performance below emission limits or standards;

(3) Conduct a periodic inspection of each scrubber and: (a) Clean or replace any plugged spray nozzles or other liquid delivery devices, (b) repair or replace missing, damaged, or misaligned baffles, trays, and other internal components, (c) repair or replace droplet eliminator elements as needed, (d) repair or replace any heat exchanger elements used for temperature control of fluids entering or leaving the scrubber, and (e) check damper settings for consistency with the air flow level used to maintain compliance and adjust as required;

(4) Initiate appropriate repair, replacement, or other corrective action when detected; and,

(5) Maintain a record (i.e., checklist), signed by a responsible plant official, showing the date of each inspection, any problems detected, a description of the repair, replacement, or other action taken, and the date of repair or replacement.

In addition to correcting defects, the owner or operator is required to ensure that the equipment is being operated at an appropriate level of reliability, i.e., without the need for continual or unusually frequent repairs or alterations that require down time. Frequent excursions of control device operating parameters would indicate that some aspect of the maintenance program or procedures is flawed.

2. Periodic Reports

The proposed NESHAP requires the owner or operator to develop and implement a written plan containing specific procedures for operating and maintaining the source during periods of startup, shutdown, and malfunctions and a program of corrective action for malfunctioning process and control systems. Each plan must contain corrective action procedures to be followed in the event any periods of excess emissions occur, including procedures to determine the cause of the problem, the time the exceedance began and ended, and for recording the actions taken to correct the cause of the exceedance or deviation. Examples of corrective action procedures that might be included in the plan for incinerators include: (1) Inspection of burner assemblies and pilot sensing devices for proper operation and cleaning; (2) adjusting primary and secondary

chamber combustion air; (3) inspecting dampers, fans, blowers, and motors for proper operation; and (4) shutdown procedures.

Streamlined recordkeeping and reporting requirements also are included in the proposed rule. If actions taken during a startup, shutdown, or malfunction are consistent with the plan, no reporting would be required but a record of the event must be kept. If the actions during such an event are not consistent with the plan, the report of this occurrence must be made in the next semi-annual startup, shutdown, and malfunction report (which may be included in the semi-annual excess emissions report).

The owner or operator must submit a semi-annual report within 60 calendar days after the end of each 6-month period if any period of excess emissions occurs during the reporting period. Reports required by other regulations may be used in place or as part of the excess emissions report if the report(s) contain the required information. A report would not be required if no exceedances or excursions occurred during the reporting period. The report also would include any request for changing selection of the CCU emission standard (e.g., the PM or Ni limit) or the applicability of emission standards and requirements for CCU or SRU under the NSPS in 40 CFR part 60, subpart J or subpart UUU.

Permitting regulations in 40 CFR parts 70 and 71 require the owner or operator to make annual certifications of compliance. To aid the permitting process, the proposed NESHAP establishes conditions that must be met for the compliance certification.

3. Recordkeeping

Records required under the proposed rule are streamlined to include the minimal amount of information needed by the EPA to confirm compliance. These requirements are described in § 63.1567(e)(4) of this proposed rule. The major requirements include:

- All documentation supporting notification of compliance status;
- Startup, shutdown, and malfunction plan with supporting documentation;
- Monitoring records required by § 63.10(c) of the NESHAP general provisions;
- Each period when a monitoring system or device was inoperative or malfunctioning;
- All maintenance, corrective action, and quality assurance/quality control actions and documentation;
- Any changes to a regulated process;

- Hourly or monthly inspections of bypass line valves and bypasses;
- Hourly inspections of flare pilot flame; and
- Daily average coke burn-off rate for fluidized-bed CCU catalyst regeneration vent with supporting documentation.

All records must be retained for at least 5 years following the date of each occurrence, measurement, maintenance, corrective action, report, or record. The records for the most recent 2 years must be retained on site; records for the remaining 3 years may be retained off site but still must be readily available for review. The files may be retained on microfilm, on microfiche, on a computer, or on computer or magnetic disks.

IV. Selection of Proposed Standards

A. Selection of Source Category

Section 112(c) of the Act directs the EPA to list each category of major and area sources as appropriate emitting one or more of the HAP listed in section 112(b) of the Act. "Petroleum Refineries—Catalytic Cracking (Fluid and Other) Units, Catalytic Reforming Units, and Sulfur Plant Units" is one of the 174 categories of sources included on the initial list of source categories (57 FR 31576, July 16, 1992).

According to the EPA's schedule for rule development for these source categories (58 FR 83841, December 3, 1993), MACT standards for these petroleum refinery process unit vents must be promulgated no later than November 15, 1997. If standards are not promulgated by May 15, 1999 (18 months following the promulgation deadline), section 112(j) of the Act requires States or local agencies with approved permit programs to issue new or revised permits containing either an emission limitation that is equivalent to the limitation that would apply if the MACT standard had been promulgated in a timely manner or an alternate emission limitation for HAP control.

Section 112(c)(3) of the Act directs the Agency to list each category of area sources that the Agency finds presents a threat of adverse effects to human health or the environment warranting regulation. Based on information and data collected during development of the proposed standard, the EPA estimates that all process units within this source category are located at major sources of HAP emission (60 FR 43245, August 18, 1995).

B. Selection of Emission Sources and Pollutants

The petroleum refinery source category, defined in the EPA report,

"Documentation for Developing the Initial Source Category List," (Docket Item II-A-1) specifies these three petroleum refinery process units as a source category for regulation. Because little or no HAP emission data for this source category were available at the beginning of this study, the EPA collected information and data through review of existing literature. Section 114 questionnaires were sent to nine corporations (representing 27 refineries) and information collection requests (ICRs) were sent to the remainder of existing U.S. refineries to obtain information and data on refineries during development of the initial MACT rule for petroleum refineries (60 FR 43244, August 18, 1995). Site surveys were conducted by the EPA at 20 petroleum refineries as part of the refinery process vent rule development. Also, as part of the information and data collection process, a series of meetings were held with State representatives and industry trade associations (i.e., the American Petroleum Institute (API) and the National Petroleum Refiners Association (NPRA)) to first inform the industry of the EPA's intentions to develop a MACT for this source category and also to solicit their input. As a result, the trade associations conducted surveys of their member companies to collect additional information and data relative to the three process unit operations which would be regulated by today's proposed rule. Based on this information and data, and for the reasons described below, the EPA is regulating these three vents as emission sources under the proposed rule.

C. Selection of Proposed Standards for Existing and New Sources

1. Background

After the EPA has identified the specific source category or subcategories of major sources for regulation under section 112, MACT standards must be established for each category or subcategory. Section 112 of the Act sets a minimum level or floor for the standards. For new sources, standards for a source category or subcategory cannot be less stringent than the emission control that is achieved in practice by the best-controlled similar source. (See CAA section 112(d)(3).) The standards for existing sources can be less stringent than the standards for new sources, but they cannot be less stringent than the average emission limitation achieved by the best-performing 12 percent of existing sources for categories or subcategories with 30 or more total sources, or the

best performing 5 sources for categories or subcategories with fewer than 30 sources. These minimum requirements for the MACT emission limitation(s) for new and existing sources are termed the "MACT floor."

After the floor has been determined for a new or existing source in a source category or subcategory, the Administrator must set MACT standards that are technically achievable and no less stringent than the floor. Such standards must be met by all sources within the category or subcategory. In establishing the standards, the EPA may distinguish among classes, types, and sizes of sources within a category or subcategory. (See CAA section 112(d)(1).)

The next step in establishing MACT standards is traditionally the investigation of regulatory alternatives. With MACT standards, only alternatives at least as stringent as the floor may be selected. Information about the industry is analyzed to develop model plants for projecting national impacts, including HAP emission reduction levels and cost, energy, and secondary impacts. Regulatory alternatives, which may be different levels of emissions control equal to or more stringent than the floor levels, are then evaluated to select the regulatory alternative that best reflects the appropriate MACT level. The selected alternative may be more stringent than the MACT floor, but the control level selected must be technically achievable. The regulatory alternatives and emission limits selected for new and existing sources may be different because of different MACT floors.

When the EPA considers an alternative which is beyond-the-floor, the EPA examines the achievable emission reductions of HAP (and possibly other pollutants that are co-controlled), cost and economic impacts, energy impacts, and other non-air environmental impacts. The objective is to achieve the maximum degree of emissions reduction without unreasonable economic or other impacts. (See CAA section 112(d)(2).)

Under the Act, subcategorization within a source category may be considered when there is enough evidence to demonstrate clearly that there are significant differences among the subcategories. The criteria to consider include process operations (including differences between batch and continuous operations), emission characteristics, control device applicability, safety, and opportunities for pollution prevention.

The EPA examined the three process unit operations, the operating

characteristics of these units, and other relevant factors to determine if separate classes of units, operations, or other criteria have an effect on air emissions from any of the three process unit operations in this source category. For SRU, no basis was established to subcategorize or develop separate standards within these unit operations. For CCU, the EPA requests additional information and data needed to address the potential need for subcategorization due to process variations (e.g., the differences between fluidized-bed and non-fluidized bed CCU). However, for CRU, an analysis of the information and data in the EPA refinery database indicated significant differences in both the operating processes and emission controls associated with semi-regenerative CRU during the catalyst regeneration coke burn-off step. Therefore, the EPA established a subcategory for semi-regenerative CRU based on the operating differences and control device performance during the coke burn-off step; a separate performance standard was established for this subcategory. Cyclic and continuous CRU were grouped together and have a different performance standard for the coke burn-off step. Subcategorization of semi-regenerative CRU is further discussed in sections III.B and IV.C.2.b of this document.

2. MACT Floor Technology and Emission Limits

In establishing the MACT floor for existing sources, sections 112(d)(3) (A) and (B) of the Act directs the EPA to set standards that are no less stringent than the "average" emission limitation achieved by the best performing 12 percent (for which there are emissions data) where there are more than 30 sources in the category or subcategory or the best performing five sources (for which there are emissions data) where there are fewer than 30 sources. Among the possible meanings for the word "average" as the term is used in the Act, the EPA considered two of the most common.

First, "average" could be interpreted as the arithmetic mean. The arithmetic mean of a set of measurements is the sum of the measurements divided by the number of measurements in the set. The EPA has determined that the arithmetic mean of the emission limitations achieved by the best performing 12 percent of existing sources (or best five sources where there are fewer than 30 sources) in some cases would yield an emission limitation that fails to correspond to the emission limitation achieved by any particular technology. In such cases, the EPA would not select

this approach. The word "average" could also be interpreted as the median emission limitation value. The median is the value in a set of measurements below and above which there are an equal number of values (when the measurements are arranged in order of magnitude). This approach identifies the emission limitation achieved by those sources within the top 12 percent (or top five where there are fewer than 30 sources), arranges those emissions limitations in order of magnitude, and the control level achieved by the median source is selected. Either of these two approaches could be used in developing standards for different source categories.

A "technology" approach also was used in developing these proposed standards. For each source type, the control technologies were ranked in the database by performance and the median technology represented by the best-controlled sources was selected as the MACT floor. Sources having control technology representative of the MACT floor were then evaluated and analyzed in order to determine an appropriate emission limitation to characterize performance of the MACT floor technology.

As previously noted, data related to operating procedures and emissions for the three process unit operations were obtained through a combination of literature sources, site visits, ICR, discussions with industry and State Agency representatives, and information surveys conducted by industry trade associations. These data were then compiled into a comprehensive database that was used for the floor analysis.

a. MACT floor for catalytic cracking units. Catalytic cracking (fluid and other) units emit a variety of HAP during catalyst regeneration; these HAP can be broadly categorized into two groups: metallic HAP (e.g., antimony, beryllium, mercury, and nickel) and organic HAP (e.g., benzene, formaldehyde, hexane, and xylene). While not exclusively so, the metallic HAP emitted from CCU catalyst regeneration vents are primarily emitted as PM. Mercury is the one metallic HAP that is expected to be emitted in both solid and gaseous forms. The organic HAP emitted from CCU catalyst regeneration vents are in the vapor phase. These two HAP emission forms require significantly different control technologies.

The EPA database for CCU contains a considerable amount of information on control device types as well as process information, but very limited information on vent stream composition

or HAP concentration for either the metallic HAP or the organic HAP. The amount of constituent data currently available is not adequate to establish a MACT floor for each individual HAP; the limited data on individual HAP cannot be considered representative of the entire industry in all but a few cases. Therefore, the floor for CCU (both fluidized bed and non-fluidized bed) catalyst regeneration vent HAP emissions is being established for the broad classes of HAP that are grouped as either metallic HAP or organic HAP.

The EPA is aware that there are significant process differences between the fluidized-bed and non-fluidized bed CCU. These process differences include such things as catalyst size and composition, as well as reactor operation (e.g., plug downflow versus fluidized riser processes). At this time, the EPA does not have adequate data to characterize the HAP emissions from the non-fluidized CCU, but preliminary data currently available indicate, based on the EPA's current understanding, that these units are likely operating at emission levels that meet the MACT floor criteria. However, the EPA is gathering additional information and data on these processes and, based on the new information, will reexamine the possible need to set a separate standard for these few non-fluidized CCU.

(1) *Organic HAP MACT floor.*

(a) *Existing catalytic cracking units.*

Available emission data have been reviewed to identify the best performing 12 percent of existing sources. The available emissions data that relate to organic HAP control performance are presented in the database in terms of VOC, THC, and CO with only minimal data on individual HAP constituents. The performance level formats available in the database that relate to organic HAP are an emission rate normalized to coke burn, an emission rate expressed in terms of an exit concentration, and a performance level expressed as a percent reduction achieved. The amount of individual constituent data currently available is not adequate to establish a MACT floor for each individual organic HAP; the limited data on individual organic HAP cannot be considered representative of the entire industry. Therefore, emissions data on VOC, THC, and CO were reviewed since these data are indicative of emissions of individual organic HAP.

The CCU catalyst regeneration step that generates the affected gas stream involves an initial combustion operation, and the catalyst regeneration step can be conducted either as a partial combustion operation or a complete combustion operation. A complete

burn/combustion CCU has a catalyst regeneration coke burn stage designed and operated with a residence time, temperature, and excess oxygen level to achieve complete oxidation of the coke or carbon to CO₂; a partial burn/combustion CCU has a catalyst regeneration coke burn stage designed and operated with less than stoichiometric oxygen, which results in incomplete combustion of the carbon and is characterized by high levels of CO.

The emission data for CCU catalyst regeneration vents indicate that: (1) Complete burn/combustion CCU and (2) partial burn/combustion CCU that are followed by a CO boiler or other combustion device achieve similar organic emission rates. Both of these configurations achieve complete combustion of the CCU catalyst regeneration vent gases and demonstrate similar emissions rates and as a result, both are considered types of "complete combustion." These complete combustion units have significantly less organic HAP emissions than partial burn/combustion CCU that are not followed by an additional combustion device.

The petroleum refinery NSPS (40 CFR part 60, subpart J) is a regulation that requires catalyst regeneration vent gases from new or reconstructed fluidized-bed CCU to have complete combustion by limiting the CO concentration to less than or equal to 500 ppmv (dry). Information gathered by the EPA indicates that more than 12 percent of the existing CCU are currently subject to the petroleum refinery NSPS. The NSPS thus represents the average emission limitation achieved, in terms of a regulatory requirement, by the best performing 12 percent of existing sources. Therefore, a complete burn/combustion CCU or partial burn/combustion CCU followed by a CO boiler or other combustion device that reduces the CO concentration in the catalyst regeneration vent gas to 500 ppmv or less is deemed to be meeting the MACT floor for existing CCU.

(b) *New catalytic cracking units.*

Based on the information and data available, the EPA concluded that the MACT floor determination for existing CCU sources of organic HAP (i.e., complete combustion of the vent gases) also represents the HAP emission control that is achieved in practice by the best-controlled similar source in the source category. Therefore, the MACT floor for new sources is the same as that for existing sources for organic HAP. This fact also leads to the conclusion that there is no technology that has been demonstrated in this industry to provide

a level of control more stringent than the MACT floor for organic HAP.

(2) *Metallic (or inorganic) HAP MACT floor.*

(a) *Existing catalytic cracking units.*

Along with low emissions, the best-performing existing sources are expected to have the best-performing control technologies; for metallic HAP that would involve either a modern ESP or a venturi scrubber. Available data shows these two devices, used by approximately 45 percent of the industry, provide similar control of PM and metallic HAP. However, some refineries with CCU controlled only by tertiary cyclones, control devices typically considered less effective, have told the EPA that their emissions are equivalent to those achieved by the more efficient control devices. This is in large part a function of the site-specific characteristics of the unit (e.g., a low Ni feed). Therefore, rather than set an equipment standard based on a control device, the EPA prefers to establish a performance standard associated with the best performing control technology.

The petroleum refinery NSPS (40 CFR part 60, subpart J) is a performance standard that requires new or reconstructed fluidized-bed CCU to reduce PM emissions from the catalyst regeneration vent to 1 kg/1,000 kg (1 lb/1,000 lb) of coke burn-off. As previously noted, the information gathered by the EPA and contained in the petroleum refinery database indicates that more than 12 percent of the existing CCU are currently subject to the petroleum refinery NSPS. The EPA reviewed this emission standard to determine its appropriateness as a performance standard to characterize the best-performing control technology for CCU metallic HAP emissions. The EPA concluded that for a variety of reasons, PM is considered a reasonable surrogate for total metallic HAP (excluding mercury):

(1) The metallic HAP emitted from CCU catalyst regenerator vents are primarily emitted as PM;

(2) In the EPA report, "Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units—Final Report" (Docket Item II-A-6), it was determined that for those combustion operation vent gases "the HAP metals that exist primarily in particulate form are readily controlled by PM control devices"; and

(3) There is a considerable amount of emission data available for PM emitted from CCU catalyst regeneration vents.

The performance level formats available in the data base for PM are an emission rate normalized to coke burn, an emission rate expressed in terms of

an exit concentration, and a performance level expressed as a percent reduction achieved. The EPA refinery database shows that CCU ESP achieve a PM emission rate that ranges from 0.0002 to 3.6 lb/1,000 lb coke; the 26 values reported have a median of 0.81 and a mean of 0.86 lb/1,000 lb. The NSPS value is 1.0. Nineteen of the 26 CCU have a catalyst regeneration PM emission rate of less than 1 lb/1,000 lb of coke burn-off. The five CCU that use a venturi scrubber and that have PM data show a range of emissions from 0.36 to 0.86 lb/1,000 lb of coke burn-off, which is within the range of performance shown by the ESP. Thus, the NSPS PM emission limit for the catalyst regeneration vent of 1 lb/1,000 lb of coke burn-off appears to a reasonable characterization of PM control device performance on a "not-to-be-exceeded" basis, based on the available data. As a result of this analysis, a PM emission limit of 1 lb/1,000 lb of coke burn-off is selected to characterize the MACT floor for catalyst regeneration vents on existing units.

In addition to characterizing the MACT floor performance in terms of a PM emission limit, it is possible to determine an alternative MACT floor technology emission limit in terms of the entire metal HAP population or an individual metal HAP (i.e., Ni) within that population. The reason for determining a MACT floor emission limit as an alternative to the PM level but formatted in a terms of total metal HAP or an individual metal HAP is to provide for increased operational flexibility and to allow opportunities for pollution prevention when complying with a MACT standard for this source category.

In developing a MACT floor emission level formatted in terms of the population of metal HAP emitted by CCU, the approach used involved analysis of the available metal HAP data. This is most readily done using Ni as a surrogate for total metal HAP. Nickel emissions data were used for this comparative analysis because of the relative abundance of measured Ni emissions data and the paucity of emissions data available for other metal HAP. Nickel emissions data (formatted in terms of mass per unit time) for catalyst regeneration vents are available for 23 CCUs. The available measured Ni emissions data from CCU catalyst regeneration vents in the EPA refinery database were examined and compared to determine the representativeness of these data.

In examining the database, EPA determined that the Ni emission data currently available for CCU catalyst

regeneration vents is representative of the best-performing units in the industry. The EPA based this conclusion on the following considerations. A primary factor that influences the Ni emissions from the CCU catalyst regeneration vent is the Ni content in the CCU feed. The Ni emission rates in the refinery database are for the most part from units with low Ni feed. There are 72 CCU that reported the Ni content in their CCU feed. Of these 72 CCU, 43 (or 60 percent) of the units had Ni feed concentrations of 1 ppmw or lower. However, 12 of 14 CCU (or 86 percent of the CCU) that reported both Ni emissions data and Ni feed content, had Ni feed concentrations of 1 ppmw or lower. In addition, the database reflects Ni emission rates of refineries that hydrotreat the CCU feed. Hydrotreating the CCU feed tends to lower the CCU feed Ni content. There are 98 CCU that reported the use or non-use of hydrotreating. Of these 98 CCU, 56 (or 57 percent) of the units hydrotreat. However, 13 of 17 CCU (or 76 percent of the CCU) that reported both Ni emissions data and hydrotreating information, hydrotreat their CCU feed.

A second factor that influences the Ni emissions from the CCU catalyst regeneration vent is the level of PM control on the unit. The EPA refinery database is comprised of units that are subject to stringent regulatory requirements that result in control of Ni emissions. For example, from the data collected by API and provided to the EPA as a part of the database, it appears that at least 36 percent of the CCU that reported Ni emissions data are subject to the NSPS, whereas the EPA estimates that there are approximately 17 percent of the CCU in the entire industry subject to the NSPS. In addition, approximately 41 percent of the Ni emissions data are from CCU at California refineries, where the State regulations on PM control are basically the same as the NSPS PM emission control requirements, whereas California refineries operate only about 10 percent of the total number of CCU in the U.S. Also, approximately 81 percent of the CCU in the database that reported Ni emissions data operate either an ESP or venturi wet scrubber on the CCU catalyst regeneration vent, whereas only 63 percent of the CCU nationwide operate either an ESP or venturi wet scrubber on the CCU catalyst regeneration vent.

For the reasons discussed above, the EPA considers the available Ni emissions data to be representative of the best-performing CCU sources, rather than the industry as a whole. Examination of the emission data shows

an emission rate for the top 12 percent to be 0.055 tpy. In conjunction with this, the available Ni source test data were analyzed to determine the variability of individual source test runs for a given CCU source test. Based on analysis of the relative standard deviation of the individual CCU source test data, the standard deviation for a unit with emissions of 0.055 tpy is 0.042. Using the upper 95th percentile of a normal distribution (i.e., a z-statistic equal to 1.645), the Ni emission limit determined to reflect the best performing 12 percent of existing sources is a Ni emission limit on a not-to-be-exceeded basis of 0.125 tpy (250 lb/yr) or 0.029 lb/hr (i.e., the mean + 1.645 standard deviations). Therefore, a metal HAP MACT floor emission limit of 13,000 mg/hr or 0.029 lb/hr of Ni also has been determined to characterize the performance of the MACT floor control technology for existing CCU catalyst regeneration vents.

(b) New catalytic cracking units. Based on the information and data available, the EPA concluded that the MACT floor determination for existing CCU sources of metallic HAP (i.e., use of a PM control device such as an ESP or venturi scrubber) also represents the HAP emission control that is achieved in practice by the best-controlled similar source in the source category. Therefore, the MACT floor for new sources is the same as that for existing sources for metallic HAP. This fact also leads to the conclusion that there is no technology that has been demonstrated in this industry to provide a level of control more stringent than the MACT floor for metallic HAP.

(3) Mercury MACT floor. Mercury (Hg) is not well controlled by PM air pollution control devices (ESPs as well as PM scrubbers). This situation would be expected because Hg is likely emitted in both a solid and gaseous or vapor-phase (elemental) form; the fact that "conventional (PM) controls are generally inconsistent in their effectiveness" with regard to Hg removal is documented in the EPA report, "Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units—Final Report". (See Docket Item II-A-6.) Combustion devices for control of organic vapor would also provide no control for Hg. There are a number of emerging technologies (such as activated carbon injection) but none have been shown to be applicable to CCU catalyst regeneration vents. Therefore, the MACT floor for Hg is determined to be no control for both new and existing units.

b. MACT floor for catalytic reforming units. Developing a MACT floor for CRU catalyst regeneration vents is complicated by the fact that there are three types of CRU (continuous, cyclic; and semi-regenerative), and there are different steps (times and locations) during which vent emissions may occur during CRU catalyst regeneration: (1) Initial depressurization/purge; (2) coke burn-off; (3) catalyst rejuvenation; and (4) final purge. The depressurization/purge vent gas contains primarily hydrocarbons from the CRU feedstock that remain on the reforming catalyst feed (e.g., benzene, toluene, hexane, and ethylbenzene). The predominant HAP emitted during coke burn-off are HCl and Cl₂. Chlorinated organic compounds used for catalyst rejuvenation (e.g., trichloromethane and perchloromethane) as well as residual HCl on the reforming catalyst may be emitted during catalyst rejuvenation and final purge.

The EPA database for CRU contains a considerable amount of information on control device types as well as process information for 177 CRU, but very limited information on vent stream composition or HAP concentration. There are some data available to characterize HCl emissions during coke burn-off; however, the limited data on HCl emissions cannot be considered representative of the entire industry as most HCl emissions data are from continuous or cyclic units. The available data on HAP emissions from CRU catalyst regeneration vents is inadequate to characterize the emission reductions achieved by the top-performing 12 percent of the units during the depressurization/purge, catalyst rejuvenation, and final purge cycles. Therefore, the MACT floor for CRU catalyst regeneration vent HAP emissions is established for each potential CRU vent based on current industry practices rather than HAP specific emissions data.

(1) *MACT floor determination for existing CRU catalyst regeneration vents.*

(a) *MACT floor for CRU depressurization/purge vent.* Given the limitations of the available data, the MACT floor determination for the CRU depressurization/purge vent is based on current practices in use and control equipment in place at CRU. Flares, process heaters or other combustion devices are used for 21 of the CRU catalyst regeneration vents. Based on current information in the EPA database, it is difficult to discern whether these control devices are used specifically for the depressurization/purge vent. However, all of the 20

refineries visited by either the EPA or CARB during information collection site visits to support the development of this rule vented the depressurization/purge gases to either the refinery fuel gas system or to a flare. Therefore, based on operational practices for over 12 percent of the CRU (and 100 percent of the units for which the EPA has firsthand information), the MACT floor for emissions vented during the depressurization/purge cycle is venting to a combustion device.

In the first petroleum refinery MACT rule (60 FR 43244, August 18, 1995), the EPA assigned a performance value for combustion units serving miscellaneous process vents. In that floor analysis, it was assumed that the various combustors were all well designed and operated and would achieve 98 percent destruction of total VOC (and HAP). (See Docket A-93-48, Docket Item IV-B-12.) This same performance level is therefore assumed for combustion devices that are used on CRU catalyst regeneration vents. Therefore, the MACT floor for emissions vented during the depressurization/purge cycle is venting to a combustion device that achieves a 98 percent destruction efficiency or reduces the total organic HAP or the TOC concentration to below 20 ppmv.

The 20 ppmv concentration format is included as an alternative in the proposed standard because the rule could apply to dilute process vent streams and the proposed standard for combustion devices is formatted in terms of a weight-percent reduction. The EPA believes the proposed standard for combustion devices needs to include the volume concentration alternative to account for the technological limitations of enclosed combustion devices treating dilute streams. (See 48 FR 48933, October 21, 1983.) Below a critical concentration level, the maximum achievable efficiency for enclosed combustion devices decreases as inlet concentration decreases. Consequently, for streams with low organic vapor concentrations, the 98-percent mass reduction may not be technologically achievable in all cases. Available data show that 20 ppmv is the lowest outlet concentration of total organic compounds achievable with control device inlet streams below approximately 2,000 ppmv total organics. Therefore, the concentration limit of 20 ppmv has been added as an alternative standard for incinerators, process heaters, and boilers to allow for the drop in achievable destruction efficiency with decreasing inlet organics concentration.

(b) *MACT floor for CRU catalyst regeneration coke burn-off vent.* The EPA examined the available HCl emissions data for catalyst regeneration vents on 22 CRU that reported HCl emissions during the coke burn-off cycle, along with the type of CRU and the control device used; 17 of these units operate with no emission controls (or unknown emission controls). With the limited data available, it is not possible to characterize these emissions data as either representative of the industry as a whole or representative of the top-performing CRU. For example, only 3 (or 14 percent) of the 22 units that reported HCl emissions are semi-regenerative CRU, while semi-regenerative CRU represent 61 percent of all CRU. It appears that due to the limited frequency and duration of the emissions from catalyst regeneration vents on semi-regenerative units, few emission source tests have been performed at semi-regenerative CRU. Therefore, a MACT floor determination cannot be based on the available HCl emissions data for the coke burn-off cycle. However, a determination based on control technology can be made.

From a review of the process equipment data, two classes of scrubbers were designated to characterize the general classes or groups of scrubbers being used to control emissions from CRU catalyst regeneration vents during the coke burn-off step: single theoretical stage scrubbers and multiple theoretical stage scrubbers. The single theoretical stage scrubber classification was used to reflect the following CRU scrubbing systems, most of which are considered internal to the process: Caustic injection, spray circulating solution, hydrocyclone, and once through spray scrubbers. Multiple theoretical stage scrubbers which are, for the most part, external to the process include: Packed tower, packed column, plate and spray, venturi, and otherwise unspecified absorbers or scrubbers. Although there are inadequate CRU emissions data to differentiate the removal efficiency between single stage scrubbers and multiple stage scrubbers, theoretical considerations suggest that multiple stage scrubbers will have a higher HCl removal efficiency than a single stage scrubber.

A summary of the numbers of each type of control device (single or multiple stage) for catalyst regeneration vents on each type of CRU (continuous, cyclic, or semi-regenerative) shows that for continuous CRU, 28 percent use multiple stage scrubbers while only 6 percent use single stage; for cyclic CRU, 36 percent use multiple stage while only

11 percent use single scrubbers; and for semi-regenerative CRU, only 3 percent use multiple while 72 percent use a single stage scrubber. Based on these data, the MACT floor for catalyst regeneration vents on continuous and cyclic CRU is the use of a multiple stage scrubber during the coke burn-off process. The MACT floor for catalyst regeneration vents on semi-regenerative CRU is the use of a single stage scrubber during the coke burn-off process. Subcategorizing semi-regenerative CRU is justified based on the operational differences of semi-regenerative units (i.e., primarily annual hours the system is regenerating). Based on the similarities of the types of controls used for catalyst regeneration vents on cyclic and continuous CRU and the annual operating hours in which regeneration occurs, it appear reasonable that cyclic and continuous CRU be grouped together.

The performance of CRU scrubbers can be characterized based on industry surveys and source test data on HCl scrubbers used in another industry—the steel pickling industry. Data from that industry contains a range of flow rates and HCl concentrations which span the flow rates and HCl concentrations expected for the CRU catalyst regeneration coke burn-off vent. The characteristics of the single and multiple stage scrubbers that constitute existing source and new source levels of control were determined in terms of both HCl reduction efficiency and maximum outlet concentration by evaluating the results of emissions tests conducted on units currently employed in the steel pickling industry. The data from these tests are presented and discussed in detail in the preamble to the proposed rule (62 FR 49052, September 18, 1997) and in the background information document for the proposed standard. (See Docket Items II-A-4.) While wet scrubber control devices are normally designed for a target emission reduction efficiency, the EPA is aware that high reduction efficiencies for process gases that contain low concentrations of HCl or HCl in aerosol or droplet form may not always be achievable. The EPA therefore has characterized scrubber performance in terms of a maximum exhaust gas concentration as well as reduction efficiency in recognition of the limitations of the technology.

Based on the median performance of the multiple stage type scrubbers tested, the EPA selected an HCl scrubber removal efficiency of 97 percent or an outlet concentration of 10 ppmv or less to characterize the performance of a multiple stage HCl scrubber. That is, the

EPA considers that a well-operated and well-maintained scrubber, i.e., those considered to be the MACT floor for catalyst regeneration vents on continuous and cyclic CRU, can achieve a 97 percent removal efficiency or reduce the outlet concentration to 10 ppmv or less. Therefore, the MACT floor for the coke burn-off vent for continuous and cyclic CRU is to operate a scrubber that achieves 97 percent or greater removal of HCl or achieves an outlet concentration of 10 ppmv or less.

As previously noted, there are few data to support the selection of emission limits or HCl control efficiency values for the MACT floor for catalyst regeneration vents on semi-regenerative CRU (i.e., single stage scrubbers). Examination of performance data of scrubbers used outside the source category shows that the lowest control efficiency of HCl scrubbers tested by the EPA in the steel pickling industry was approximately about 92 percent. (See Docket Item II-A-4.) Based on these available data and theoretical engineering design considerations of the various HCl single stage scrubber types, a single stage HCl scrubber can reasonably be expected to achieve a 92 percent HCl removal efficiency on an industry-wide basis for semi-regenerative CRU catalyst regeneration coke burn-off vents. This is equivalent to an outlet concentration limit of 30 ppmv, based on the 92 percent HCl removal efficiency. Therefore, the MACT floor for the catalyst regeneration coke burn-off vent for semi-regenerative CRU is to operate a scrubber that achieves 92 percent or greater removal of HCl or achieves an outlet concentration of 30 ppmv or less.

(c) *MACT floor for CRU catalyst regeneration rejuvenation vent.* As noted previously, there are very few data available to characterize emissions from the CRU catalyst regeneration rejuvenation/final purge vent. Additionally, from information gathered during site visits to petroleum refineries, there appear to be differences in how/when the rejuvenation process occurs. Some units dose the chlorination agent into the CRU reactors during the coke burn-off cycle ("coincidental rejuvenation"). In this instance, the rejuvenation and coke burn-off vent coincide, and the MACT floor for coke burn-off vents previously described would apply. Other units circulate the chloriding agent through the reactor(s) upon completion of the coke burn-off cycle ("sequential rejuvenation"). In this instance, the system is a closed recirculation loop with no atmospheric venting. If venting does occur during sequential

rejuvenation, then the MACT floor is venting to an HCl scrubber with the same efficiencies specified for the coke burn-off vent. The EPA requests specific comments regarding the prevalence, operations, and controls typically associated with this vent.

(d) *MACT floor for CRU catalyst regeneration final purge vent.* Upon completion of the rejuvenation/coke burn-off cycles, the CRU system is purged to remove oxygen from the system and to create a reducing atmosphere prior to bringing the unit or reactor back on-line for reforming (or returning the catalyst to the reforming reactor in the case of continuous units). This final purge vent may be scrubbed, released to the atmosphere, vented to the refineries fuel gas system, or vented to a flare or other combustion control device. Flares, process heaters or other combustion devices are used for catalyst regeneration vents on 21 of the CRU. Based on current information in the EPA database, it is not possible to discern whether these control devices are used specifically for the final purge vent. However, from information collected during the site visits to 20 refineries, it is known that approximately one-half of these refineries vented the final purge vent to a combustion control device. Using the control efficiency determined by the EPA for combustion devices (refer to the discussion for the depressurization/purge vent), the MACT floor for the final purge vent is to vent this stream to a combustion control device that achieves 98 percent destruction efficiency or reduces total organic HAP or TOC concentration to below 20 ppmv.

(2) *MACT floor determination for new CRU catalyst regeneration vents.* Except for the catalyst regeneration coke burn-off vent for semi-regenerative CRU, the MACT floor for catalyst regeneration vents on new CRU is the same as for catalyst regeneration vents on existing CRU for all CRU catalyst regeneration vents. This is because the catalyst regeneration vent on the best-controlled or top-performing CRU applies the same work practices or control devices as the top 12 percent of CRU catalyst regeneration vents employ (i.e., the MACT floor for existing sources). There are two semi-regenerative CRU that employ multiple stage type scrubbers to control catalyst regeneration coke burn vents. These represent the best-controlled sources for this vent. Therefore, the MACT floor for catalyst regeneration vents on new semi-regenerative CRU (as well as continuous and cyclic CRU) is the use of a multiple stage scrubber (i.e., a scrubber that achieves 97 percent or greater removal

of HCl or achieves an outlet concentration of 10 ppmv or less as specified in the MACT floor for catalyst regeneration vents on existing continuous and cyclic CRU).

c. MACT floor for sulfur recovery plants. Developing a MACT floor for SRU is complicated by the fact that there are different types of processes (although Claus units predominate the industry) and numerous types of emission control techniques (including different types of tail gas treatment units, thermal incineration, or a combination of a tail gas treatment unit and incineration). The EPA database for SRU contains information regarding the number and types of SRUs as well as the control device configuration for 144 units at 82 refineries. The database also has information regarding process capacities or sulfur production rates and information regarding applicability of the NSPS for approximately 60 percent of these SRU.

The predominant HAP emitted from SRU are COS and CS₂. There are very few data available regarding HAP emissions from SRUs. Consequently, the available data on HAP emissions from the SRU vents are inadequate to characterize the emission reductions achieved by the top performing 12 percent of the units. Additionally, there are inadequate data to determine and differentiate the emission reduction efficiencies achieved by the various types of emission control process configurations. Therefore, the floor for SRU vent HAP emissions is being established based on current industry regulations rather than emissions data or process equipment.

(1) MACT floor determination for existing SRU/sulfur plant vents. There are 144 units in the current data base for SRU; information regarding the applicability of the refinery NSPS was specifically requested for 91 of these units. Of the 91 SRU for which NSPS applicability information was requested, 38 units were subject to the NSPS, 47 units were not, and 6 units did not respond. Due to the lack of emissions data, a MACT floor determination cannot be made based on the emission reduction achieved by the top-performing 12 percent of the industry. Alternatively, the MACT floor determination can be made based on either the emission control equipment in-place for the SRU vent or the existing regulations limiting HAP emissions from these vents.

Although the database contains information regarding the types of equipment in-place at the SRU, due to the variety of different tail gas treatment units and process configurations and the

lack of emissions data, it is not possible to make a ranking of the tail gas treatment unit types and the process configurations that yield the greatest reduction in HAP emissions. On the other hand, the petroleum refinery NSPS (§ 60.104) specifies emission limits (some of which are primarily HAP emission limits) for Claus sulfur recovery plants. As Claus units represent 96 percent of the SRU in the EPA database (138 of the 144 SRU are Claus units), and approximately 40 percent of the SRU (for which NSPS applicability information is available) are subject to the NSPS, it is concluded that over 12 percent of all SRU are subject to the refinery NSPS. Therefore, the MACT floor for the control of HAP emission from the SRU vents is based on the emission reductions achieved by facilities subject to the NSPS for petroleum refineries.

The EPA is aware that there are significant process differences between the Claus sulfur units and the non-Claus units. At this time, the EPA does not have adequate data to characterize the HAP emissions from these non-Claus sulfur units but available data indicate that these units are likely operating at emission levels that meet the MACT floor criteria. The EPA is requesting comment on these processes and, based on the new information, will reexamine the possible need to set a separate standard for these few non-Claus SRU.

The refinery NSPS outlines two options for the control of emissions from SRU: (1) For oxidative control systems or reductive control systems followed by incineration, the emission limit is 250 ppmv of SO₂ at zero percent excess air; and (2) for reductive control systems not followed by incineration, the emission limit is 300 ppmv of reduced sulfur compounds and 10 ppmv of H₂S, each calculated as ppmv SO₂ at zero percent excess air. The second option translates well into a HAP emission limit because TRS compounds are defined as H₂S, COS, and CS₂. The fact that H₂S is a component of the TRS and cannot exceed 10 ppmv suggests that the COS and CS₂ (i.e., the HAP) are at least 290 ppmv and at most 300 ppmv. The first option is not easily translated into a HAP emission limit (i.e., there is no direct way to determine the contribution of H₂S, a non-HAP, to the total limit), but it suggests that use of an oxidation control system or incineration effectively controls emissions of TRS. Therefore, it is concluded that the MACT floor for the SRU vent is a combined HAP or TRS emission limit of 300 ppmv measured as ppmv SO₂ at zero percent excess air. It is important

to note that the EPA is still in the process of collecting and validating additional data for both the Claus and non-Claus SRU and will re-evaluate and possibly revise the floor determination based on the new data.

(2) MACT floor determination for new SRU/sulfur plant vents. Based on the limited information and data available, EPA concluded that the MACT floor determination for existing SRU sources of HAP (i.e., the 300 ppmv HAP emission limit derived from the refinery NSPS) also represents the HAP emission control that is achieved by the best-controlled similar source in the source category. Therefore, the MACT floor for new SRUs is the same as the MACT floor for existing SRUs. No options have been identified for this source that would provide a level of control more stringent than the MACT floor.

D. Selection of Monitoring Requirements

The EPA evaluated the hierarchy of monitoring options available for this source category. The EPA identified and analyzed several different monitoring options taking into consideration the various unit operations, the HAP emitted, and the proposed control equipment for each of the respective vents. This hierarchy includes measurement of HAP (e.g., HCl) by a CEMS, installation of measurement devices for continuous monitoring of process and/or control device operating parameters, and periodic or one-time performance tests. Each option was evaluated relative to its technical feasibility, cost, ease of implementation, and relevance to the process or control device.

A CEMS provides a direct measurement of emissions. For this source category, CEMS are commercially available for a number of the pollutants of concern, e.g., HCl, CO, metallic HAP/PM, and TRS compounds. However, it is important to note that for some of these systems the technical feasibility of monitoring the unit operations that comprise the source category has not yet been demonstrated. There also are other concerns. For example, the EPA believes that HCl monitors can be used for CRU catalyst regeneration vent applications and TRS monitors can be used for SRU vent COS and CS₂ emissions; but the nationwide capital cost of this option (CEMS for all reformer unit HCl scrubbers and sulfur plants) is estimated at \$18.5 million for the HCl monitors and \$6.1 million for the TRS monitors, with annual costs of \$14.2 million and \$4.3 million, respectively, for operation and maintenance, quality assurance and quality control performance evaluation,

and reporting/recordkeeping requirements. Because of the high cost of using CEMS compared with the costs of the emission control devices and the cost of monitoring control device and process parameters, the EPA is not requiring the blanket use of CEMS to demonstrate compliance for this source category. However, CEMS for CO are included as an alternative under the proposed rule for affected CCU. These devices are commonly used to monitor CCU process operations and are also required under the refinery NSPS. The cost associated with continuous CO monitors is considered reasonable. Although CEMS are not required, the proposed rule does provide the owner or operator a general option of installing and operating a CEMS and complying with most of the requirements in the general provisions that apply to a CEMS.

Another option for compliance assurance is monitoring process and/or control device operating parameters plus conducting routine (e.g., annual) emission tests. With the exception of complete burn/combustion CCUs, process parameters were not selected as indicators for HAP emissions for the unit operations in this source category because an adequate correlation does not exist between production or process parameters and emission rates. Control device operating parameters were selected instead because the EPA's experience has shown that measurements outside a specified range of values, for example established during an initial performance test, could be used to indicate the control device was not operating properly. The estimated nationwide capital costs of this option are \$7.4 million; annual costs are \$10.6 million for all three vents in the source category. Note that the periodic emission tests required for these vents (for example testing using Method 26A in appendix A to 40 CFR part 60 for HCl emissions from CRU) would not require a capital investment. The estimated cost assumes the use of a test contractor and includes time for participation by plant personnel.

The EPA believes that reasonable assurance of compliance is achieved through the combination of continuous emission monitoring, process and control device operating parameter monitoring, and the periodic emission testing required in the proposed rule. The proposed rule requires that each owner or operator of a CCU, CRU, or SRU using a combustion device to limit HAP emissions must monitor temperature as a control device operating parameter. The owner or operator of a CCU using an ESP for

control of metallic HAP emissions must monitor the voltage and secondary current of the control device or the total power input. If a wet scrubber is used to comply with the requirements for metallic HAP or HCl control, the owner or operator must monitor the pressure drop across the scrubber, the gas and water flow rate to the scrubber, and determine the liquid-to-gas ratio. If new information is obtained after proposal indicating the use or planned use of dry scrubbers, appropriate monitoring provisions will be included in the final rule. For CCU subject to the rule, such as complete burn/combustion CCU, that do not use add-on control devices, the owner or operator must continuously monitor the concentration of CO emissions from the unit or measure the regeneration process operating temperature and the oxygen content of the vent gas. An owner or operator may request approval to monitor parameters other than those listed above by submitting a request to the applicable permitting authority. The EPA is soliciting comment on appropriate monitoring parameters for CRU that do not use an external scrubber to control HCl emissions.

V. Summary of Impacts of Proposed Standards

A. Air Quality Impacts

The impacts presented in this section include the process vent emissions from all three of the unit operations listed in the source category. The EPA estimates nationwide HAP emissions from process vents on these unit operations at approximately 7,270 Mg/yr (8,000 tpy) at the current level of control. The proposed standards will reduce nationwide HAP emissions by about 5,960 Mg/yr (6,560 tpy), an 82 percent reduction. Emissions of VOC, CO, and PM (mainly from CCUs), and emissions of H₂S (mainly from SRUs) would be reduced by about 65 percent from the current level of about 185,900 Mg/yr (204,500 tpy). Little or no adverse secondary air impacts, water or solid waste impacts are anticipated from the implementation of these standards.

B. Cost Impacts

Nationwide capital and annualized costs of control equipment are estimated at \$179 million and \$35.5 million/yr, respectively. The implementation of this regulation is expected to result in an overall annual national cost of \$53.5 million. This includes a cost of \$43.7 million for operation/maintenance of control devices and a monitoring, recordkeeping, and reporting cost of \$9.8 million.

C. Economic Impacts

The economic impact analysis for the selected regulatory alternatives shows that the estimated price increase of refined petroleum products is 0.24 percent for the 127 refineries expected to incur compliance costs as a result of the rule. The estimated decrease in output is 0.17 percent of domestic refinery products. The decline in domestic production is due to higher imports and reduced quantity demanded due to higher prices. However, the value of domestic shipments is expected to increase by 0.07 percent because the estimated price increase more than offsets the lower production volume. Annual net exports (exports minus imports) are predicted to decrease by 0.76 percent. Employment in the industry is likely to decrease by 0.19 percent (136 jobs). No plant closures or significant regional impacts are expected. For more information on the economic impact analysis methodology and results, consult the "Economic Impact Analysis for the Petroleum Refinery NESHAP." (See Docket Item II-A-5.)

D. Non-air Health and Environmental Impacts

The proposed NESHAP are based on air pollution control systems which are currently in use in the industry. The proposed NESHAP would reduce emissions of HAP and ambient pollutants, and consequently, occupational exposure levels for plant employees may be lowered.

E. Energy Impacts

The national electric usage required to comply with the rule is expected to increase by about 114,000 MW/hr, primarily for CCU PM and CO controls and SRU incinerators. National natural gas usage, primarily for SRU incinerators, is expected to increase by about 1.5 billion cubic feet. Water usage for CRU scrubbers, is expected to increase by about 6.2 million gallons nationwide.

VI. Request for Comments

The EPA seeks full public participation in arriving at its final decisions and encourages comments on all aspects of this proposal from all interested parties. Full supporting data and detailed analysis should be submitted with comments to allow the EPA to make use of the comments. All comments should be directed to the Air and Radiation Docket and Information Center, Docket No. A-97-36 (see ADDRESSES). Comments on this document must be submitted on or before the date specified in DATES.

Commentors wishing to submit proprietary information for consideration should clearly distinguish such information from other comments and clearly label it "CBI." Submissions containing such proprietary information should be sent directly to the following address, and not to the public docket, to ensure that proprietary information is not inadvertently placed in the docket: Attention: Mr. Bob Lucas, c/o Ms. Melva Toomer, U.S. EPA Confidential Business Information Manager, OAQPS (MD-13), Research Triangle Park, NC 27711. Information covered by such a claim of confidentiality will be disclosed by the EPA only to the extent allowed and by the procedures set forth in 40 CFR part 2. If no claim of confidentiality accompanies the submission when it is received by the EPA, it may be made available to the public without further notice to the commentor.

The EPA specifically requests comments on seven topics where additional information is desired prior to promulgation. As discussed below, topics entail: Emission characteristics and operation of non-fluidized CCU and non-Claus SRU; HAP emissions from SRU sulfur pits; excess emissions from CCU resulting from maintenance/repair of the control device; potential subcategorization of CCU; selection of a cutoff value for CRU depressuring/purging operations; appropriate monitoring parameters for CRU with internal scrubbing systems; and consideration of an alternative format for the proposed Ni emission limit.

A. Non-fluidized Catalytic Cracking Units and Non-Claus Sulfur Recovery Units

As discussed in section II.D.1 of this document, non-fluidized CCU (accounting for only 2.9 percent of the total catalytic cracking process charge rate), were operated by 7 refineries in 1997. Although the exact number of non-Claus SRU is not known, Claus SRU represent 96 percent of the SRU in the EPA database. While the EPA observed a small number of non-fluid CCU and non-Claus SRU in operation, little or no test data are available to determine differences in emissions and operation as compared to fluidized-bed CCU or Claus SRU. The EPA requests information and data on control status, operating processes, and emission measurements using EPA methodology. Based on this information and data, the EPA will determine whether a separate emission limit is warranted for non-fluidized bed CCU or non-Claus SRU and analyze the associated impacts of control. Based on these analyses, the EPA may retain the proposed standard

with no distinction between the processes, include a separate standard in the final rule, or determine that no standard is warranted for one or both of these subcategories.

B. Potential Emission Sources

Process observations during plant site visits indicate that SRU sulfur recovery pits and certain types of tail gas treatment units may be potential HAP emission sources. Emissions from sulfur pits occur at each SRU reactor when elemental sulfur is condensed and removed from the SRU gas and the liquid sulfur is collected and stored in bins. Several refineries are known to purge the sulfur pits to prevent the buildup of explosive levels of gases. Emissions are controlled by combining the purged gases from the pits with the SRU or tail gas treatment unit off-gas and venting to an incinerator. Certain types of tail gas treatment units, such as "Stretford" units, employ a series of open vessels as part of the solution circulation loop and a direct air contact cooling tower to cool the solution. Limited data indicate that HAP emissions are released from the solution tank and direct air contact cooling towers. The EPA specifically requests information and data on these process operations, emissions, and control practices. Based on analyses of the information and data received, the EPA may consider regulation of these sources when developing the final rule.

C. Catalytic Cracking Unit Control Device Maintenance

The Agency requests comment on the need for allowing operation of CCU when control devices such as boilers or venturi scrubbers are out of service for maintenance overhauls. Information is specifically requested on the number of facilities which have this need, current maintenance practices for boilers and scrubbers, their frequency and length, safety considerations, and manufacturer's recommendations. Should monitoring by other methods be required during such a period? Should time limits be applied? Would more frequent, periodic preventative maintenance, such as that envisioned by the maintenance plan included in the proposed standard preclude or lessen the need for 2 year or 10-year overhauls? How should the EPA provide operational flexibility while ensuring that emissions are minimized and good air pollution control practices are followed? The EPA will use comments, information, and suggestions received to address this issue in the final rule.

D. Subcategorization of Catalytic Cracking Units

As discussed in section IV.C.1 of this document, the EPA recognizes the potential need for CCU subcategorization due to the wide variety of process variations. For this reason, additional information and data on CCU processes, emissions, and distinguishing characteristics that meet subcategorization criteria are requested. Based on the information and data received, the EPA will consider whether separate standards for different CCU processes are warranted.

E. Catalytic Reforming Unit Depressuring/Purging Cutoff Value

Under the proposed standards, CRU control requirements do not apply to depressuring or purging operations at a differential pressure between the gas transfer system to the control device of less than 1 psig. The EPA evaluated several different approaches to deriving the cutoff value, but selected an approach based on differential pressure due to the concern that an absolute value would not be appropriate for all plants due to process variations. Because differential pressure may be more difficult to monitor, EPA also included a cutoff of 1 psig, consistent with State rules, for the reactor vent pressure. Comments, information, and data on outlet unit pressures for depressuring/purging and the feasibility of establishing a differential value are requested. The EPA will evaluate the data and information received and address this issue in the final rule.

F. Monitoring of Catalytic Reforming Units with Internal Scrubbing Systems

As previously noted the MACT floor for CRU catalyst regeneration vents is established based on current industry practices in use and control equipment in place at CRU. Two classes of scrubbers were designated to characterize the groups of scrubbers used to control emissions from CRU catalyst regeneration vents during the coke burn-off step, single stage and multiple stage scrubbers. Each of these scrubber classes can be further categorized as either a scrubber that is internal to the process (e.g., caustic injection) or external to the process (e.g., a packed tower). Because the internal type scrubbers are contained within the process units itself, there is no convenient scrubber operating parameter that can be monitored as is the case with an external scrubber. The EPA is therefore requesting comment on identification of appropriate monitoring parameters for the internal type CRU

scrubbing systems. For example, would use of a simplified monitoring system (such as colorimetric tubes) be adequate to demonstrate that the acid gases in the unit are sufficiently controlled. Or, would monitoring of the recycle stream within the unit rather than the exhaust gas be adequate to characterize the scrubber performance.

G. Alternative CCU Standard

The EPA is considering the addition of a third alternative standard to reduce metal HAP emissions from the CCU regeneration vent. The current proposal requires compliance with either a PM limit of 1.0 lb/1,000 lbs of coke burn-off, or a Ni limit of 0.029 lb/hr. Industry representatives have requested inclusion of a metal HAP (or Ni) emission limit formatted in terms of lb of metal HAP (or Ni)/1,000 lbs of coke burn-off. The EPA requests comments on the need and benefits of a third alternative. The EPA will consider all regulatory formats. Commenters suggesting a particular emission limit should explain how the limit correlates to the MACT floor.

From the beginning of this project, the EPA has recognized that the format for the CCU standard was a significant issue. During initial discussions with stakeholders, including early site visits to refineries, EPA asked for thoughts on possible formats. Also, from the beginning, regulatory alternatives have included the use of PM as a surrogate for total metal HAP.

Using the PM format established by NSPS Subpart J, the MACT floor determination set the standard at 1.0 lb/1,000 lbs of coke burn-off as characterizing performance of the MACT floor technology. An early draft of the regulation included a second alternative that provided a Ni emission limit of 0.00047 lb Ni/1,000 lbs of coke burn-off. This second alternative was derived from the first alternative by using the average Ni concentration in the CCU catalyst regeneration fines to convert the PM mass to an equivalent Ni mass. These fines consist of the PM that is collected by the air pollution control device following the CCU regeneration vent.

Upon review of this draft regulation, representatives of small refineries commented that the format of both regulatory alternatives then under consideration was independent of unit size or throughput. Therefore, both alternatives, expressed in terms of coke burn-off, penalized small CCU. Representatives cited examples of small units with very low annual Ni emissions (in terms of tons per year) which would not be in compliance with either

regulatory alternative. In response, the EPA revised the draft regulation by changing the format of the Ni standard to a lb/hr format, while keeping the PM limit expressed in terms of coke burn-off. The second alternative in the current proposal provides a Ni limit of 0.029 lb/hr. Industry representatives supported the new format, while also requesting that the previous format be included as a third alternative.

Industry representatives have recommended that the third alternative be set at 0.007 lb of Ni/1,000 lbs of coke burn-off to account for the highest Ni concentrations found in CCU feed streams and to account for the variability in the crude oil. The API/NPRA recommended Ni standard is, in their view, technically equivalent to the floor. Documents relating to the API/NPRA recommendation are in the docket for this rulemaking.

Since the time of EPA's original suggestion for this format, EPA has continued to collect data on the Ni concentration in CCU fines. The current data base shows that an alternative based on average Ni fines concentration could be set at 0.0013 lb of Ni/1,000 lbs of coke burn-off. The EPA is continuing to evaluate the API/NPRA recommendation.

The EPA is requesting comments on providing a third regulatory alternative. The alternative could be based on metal HAP (or Ni) emissions in terms of lb/1,000 lbs of coke burn-off, or it could have a different format. The alternative must be technically equivalent to the MACT floor. Specifically, the Agency requests comments regarding: (1) The need for and usefulness of a third alternative for specific refineries, (2) the use of Ni concentrations as a surrogate for total metal HAP, and (3) the use of the arithmetic mean, median, geometric mean, 90th percentile value, 95th percentile value, or highest value as the representative concentration used in the factor for conversion of PM to Ni.

H. Overlap With New Source Performance Standard

As discussed in section III.A of this document, the EPA recognizes that some fluidized-bed CCU and SRU are subject to NSPS and related Title I requirements. To minimize the burden of duplicative rule requirements, the proposed MACT standard includes provisions allowing compliance demonstrations for the NSPS requirements (which govern criteria pollutants) to serve as compliance demonstrations for the HAP emission control requirements. The intent of these provisions is to minimize duplication without reducing or

changing the Title I requirements. The EPA requests comments on the adequacy of this approach, together with suggestions for other approaches that would achieve this goal.

I. Status of an Exceedance or Excursion

Section 63.1565(p) of the proposed standard provides that more than one exceedance or excursion by the same control device during a semi-annual reporting period is a violation. This provision is included in the proposed standard to maintain consistency with the earlier MACT standard for petroleum refineries in 40 CFR part 63, subpart CC. The EPA is further considering this proposed provision and its impacts. However, EPA currently does not have adequate information on the long-term performance of the MACT emission control technologies for the affected processes and their ability to continuously achieve compliance. For this reason, EPA requests additional information and data relative to control device performance. Based on the information received, EPA will decide whether to permit facilities to have an exceedance or excursion once per semi-annual reporting period.

VII. Administrative Requirements

A. Docket

The docket is an organized and complete file of all the information considered by the EPA in the development of this rulemaking. The docket is a dynamic file, because material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to readily identify and locate documents so that they can effectively participate in the rulemaking process. Along with the proposed and promulgated standards and their preambles, the contents of the docket will serve as the record in the case of judicial review. (See CAA section 307(d)(7)(A).)

B. Public Hearing

A public hearing will be held, if requested, to discuss the proposed standards in accordance with section 307(d)(5) of the Act. If a public hearing is requested and held, the EPA will ask clarifying questions during the oral presentation but will not respond to the presentations or comments. Written statements and supporting information will be considered with equivalent weight as any oral statement and supporting information subsequently presented at a public hearing. Persons wishing to attend or to make oral presentations or to inquire as to whether

a hearing is to be held should contact the EPA (see **FOR FURTHER INFORMATION CONTACT**). To provide an opportunity for all who may wish to speak, oral presentations will be limited to 15 minutes each.

Any member of the public may file a written statement on or before November 10, 1998. Written statements should be addressed to the Air and Radiation Docket and Information Center (see **ADDRESSES**), and refer to Docket A-97-36. A verbatim transcript of the hearing and written statements will be placed in the docket and be available for public inspection and copying, or be mailed upon request, at the Air and Radiation Docket and Information Center.

C. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the EPA must determine whether the regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB), and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligation of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this regulatory action is not "significant" because none of the listed criteria apply to this action. However, OMB has classified this rule as potentially significant and has requested review. Consequently, this action will be submitted to OMB for review under Executive Order 12866.

D. Enhancing the Intergovernmental Partnership Under Executive Order 12875

In compliance with Executive Orders 12875, the EPA involved State regulatory experts in the development of this proposed rule. No tribal governments are believed to be affected

by this proposed rule. State and local governments are not directly impacted by the rule, i.e., they are not required to purchase control systems to meet the requirements of the rule. However, they will be required to implement the rule; e.g., incorporate the rule into permits and enforce the rule. They will collect permit fees that will be used to offset the resources burden of implementing the rule. Comments have been solicited from States and have been carefully considered in the rule development process. In addition, all States and tribal governments are encouraged to comment on this proposed rule during the public comment period, and the EPA intends to fully consider these comments in the development of the final rule.

E. Unfunded Mandates Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires the EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows the EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before the EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed pursuant to section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising

small governments on compliance with the regulatory requirements.

The EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, or tribal governments, in the aggregate, or the private sector in any one year. Thus, today's rule is not subject to the requirements of sections 202 and 205 of UMRA. In addition, the EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments because it contains no requirements that apply to such governments or impose obligations upon them. Therefore, today's rule is not subject to the requirements of section 203 of the UMRA.

F. Executive Order 13045

Executive Order 13045, "Protection of Children from Environmental Health and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that EPA determines: (1) "Economically significant" as defined under E.O. 12866, and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonable feasible alternatives considered by the Agency. This proposed rule is not subject to E.O. 13045 because it does not involve decisions on environmental health risks or safety risks that may disproportionately affect children.

G. Regulatory Flexibility

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small business, small not-for-profit enterprises, and small governmental jurisdictions.

In developing these proposed standards, the EPA has worked with industry trade groups to identify the special concerns of small refineries. Site visits also were conducted to five small refineries where the EPA met with facility representatives and listened to their concerns. In response, the EPA has exercised the maximum degree of flexibility in minimizing impacts on small business through the alternative Ni standard and subcategorization of the

source category for CRU vents. Also, these proposed standards, which are based on MACT-floor level control technology, reflect the minimum level of control allowed under the Act.

The EPA economic analysis identified 16 small businesses that operate a total of 19 refineries. Two of these refineries operated by two different firms are expected to incur compliance costs and the remaining 17 refineries are not expected to incur any compliance costs as a result of the proposed NESHAP. Annual compliance costs for the two affected refineries would be less than one percent of estimated sales revenues. Additional information is included in chapter 6 of the economic impact analysis for the proposed standards. (See Docket Item II-A-5.)

Based on this information, the EPA has concluded that this proposed rule would not have a significant economic impact on a substantial number of small entities. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

H. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to OMB under the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1844.01), and a copy may be obtained from Sandy Farmer, OPPE Regulatory Division, U.S. Environmental Protection Agency (2137), 401 M Street SW, Washington, DC 20460, or by calling (202) 260-2740.

The proposed information requirements include mandatory notifications, records, and reports required by the NESHAP general provisions (40 CFR part 63, subpart A). These information requirements are needed to confirm the compliance status of major sources, to identify any nonmajor sources not subject to the standards and any new or reconstructed sources subject to the standards, to confirm that emission control devices are being properly operated and maintained, and to ensure that the standards are being achieved. Based on the recorded and reported information, the EPA can decide which plants, records, or processes should be inspected. These recordkeeping and reporting requirements are specifically authorized under section 114 of the Act (42 U.S.C. 7414). All information submitted to the EPA for which a claim of confidentiality is made will be safeguarded according to Agency policies in 40 CFR part 2, subpart B.

(See 41 FR 36902, September 1, 1976; 43 FR 39999, September 28, 1978; 43 FR 42251, September 28, 1978; and 44 FR 17674, March 23, 1979.)

The annual public reporting and recordkeeping burden for this collection of information (averaged over the first 3 years after the effective date of the rule) is estimated to total 18,581 labor hours per year at a total annual cost of \$597,007/yr. This estimate includes certain notifications which are streamlined to incorporate notifications of applicability for existing sources, results of initial performance tests (including repeat performance tests where needed), and monitoring information. The estimates also include one-time preparation of a startup, shutdown, and malfunction plan; semi-annual reports of any period of excess emissions; and recordkeeping. Reporting requirements have been streamlined to allow the owner or operator to report only those events where the procedures in the startup, shutdown, and malfunction plan were not followed in the semi-annual excess emissions report. Total capital costs associated with monitoring requirements over the 3-year period of the ICR is estimated at \$463,000/yr; this estimate includes the capital and startup costs associated with installation of monitoring equipment. The total operation and maintenance cost is estimated at \$4,418,500/yr.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information; process and maintain information and disclose and provide information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to respond to a collection of information; search existing data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15.

Comments are requested on the Agency's need for this information, the accuracy of the burden estimates, and any suggested methods for minimizing respondent burden, including through

the use of automated collection techniques. Send comments on the ICR to the Director, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2136), 401 M Street SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, marked "Attention: Desk Officer for EPA." Include the ICR number in any correspondence. Because OMB is required to make a decision concerning the ICR between 30 and 60 days after September 11, 1998, a comment to OMB is best assured of having its full effect if OMB receives it by October 13, 1998. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

I. Pollution Prevention Act

During the development of the proposed NESHAP, the EPA explored opportunities to eliminate or reduce emissions by substitution of non-HAP for HAP-generating materials. One potential approach is the use of a non-chlorinated catalyst material for CRUs. However, available information are insufficient to evaluate the feasibility or research status of this potential approach. The EPA will continue to work with the industry to collect information on the potential use of different CRU catalyst materials and encourage new research on this approach. The pollution prevention concept is incorporated in the proposed alternative Ni emission standard which encourages the use of feed with lower metallic HAP content. Also, facilities which hydrotreat to remove metals from the feed can meet the proposed standard with a less effective PM control device.

J. National Technology Transfer and Advancement Act

Under section 12(d) of the National Technology Transfer and Advancement Act (NTTA), Pub. L. 104-113 (March 7, 1996), the Agency is required to use voluntary consensus standards in its regulatory and procurement activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices, etc.) which are adopted by voluntary consensus standard bodies. Where available and potentially applicable voluntary consensus standards are not used by the Agency, the Act requires the Agency to provide Congress, through OMB, an explanation

of the reasons for not using such standards. This section summarizes the Agency's response to the requirements of the NTTA for the analytical test methods proposed as part of today's standards.

The proposed standard includes test methods and procedures for the purpose of emission tests needed to demonstrate initial compliance. Although a vast array of test methods and procedures applicable to petroleum content and material specifications are published by the American Society of Testing and Materials, these methods are not applicable to determining the volume and type of air emissions from the affected sources. To facilitate the emission testing process and associated costs, the proposed standards uses surrogates for the HAPs included in emissions from the affected sources. This approach allows use of the conventional test methods required by the existing NSPS which have been in use by EPA, States, and three-quarters of the industry for over 20 years. Alternative test methods also may be used subject to EPA approval. In addition, the EPA worked with industry experts to revise the NSPS procedure for determining the coke burn-off rate. The amended procedure utilizes common industry practice for determining the rate, corrects a technical equation error in the older NSPS, and reduces costs by allowing the use of existing data rather than daily stack tests to obtain needed data.

K. Clean Air Act

In accordance with section 117 of the Act, publication of this proposal was preceded by consultation with appropriate advisory committees, independent experts, and Federal departments and agencies. This regulation will be reviewed 8 years from the date of promulgation. This review will include an assessment of such factors as evaluation of the residual health risks, any overlap with other programs, the existence of alternative methods, enforceability, improvements in emission control technology and health data, and the recordkeeping and reporting requirements.

L. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal

governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities. Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Petroleum refineries, Reporting and recordkeeping requirements.

Dated: August 25, 1998.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, part 63 of title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

PART 63—[AMENDED]

1. The authority citation for part 63 continues to read as follows:

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

* * * * *

2. Part 63 is amended by adding subpart UUU to read as follows:

Subpart UUU—National Emission Standards for Hazardous Air Pollutants From Petroleum Refineries—Catalytic Cracking (Fluid and Other) Units, Catalytic Reforming Units, and Sulfur Plants

Sec.

- 63.1560 Applicability and designation of affected sources.
- 63.1561 Definitions.
- 63.1562 Emission standards for existing sources.
- 63.1563 Emission standards for new or reconstructed sources.
- 63.1564 Compliance dates and performance tests.
- 63.1565 Monitoring requirements.
- 63.1566 Test methods and procedures.
- 63.1567 Notification, reporting and recordkeeping requirements.
- 63.1568 Applicability of general provisions.
- 63.1569 Delegation of authority.
- 63.1570–63.1579 [Reserved]

Appendix A to Subpart UUU to Part 63—
Applicability of General Provisions (40 CFR Part 63, Subpart A) to Subpart UUU

Subpart UUU—National Emission Standards for Hazardous Air Pollutants From Petroleum Refineries—Catalytic Cracking (Fluid and Other) Units, Catalytic Reforming Units, and Sulfur Plants

§ 63.1560 Applicability and designation of affected sources.

(a) The provisions of this subpart apply to the owner or operator of each new and existing catalytic cracking unit, catalytic reforming unit, and sulfur recovery plant unit associated with a petroleum refinery and located at a major source of hazardous air pollutants (HAP) as defined in § 63.2 of this part.

(b) Affected sources at a facility subject to this subpart are:

(1) The process vent or group of process vents on each fluidized and other (i.e., non-fluidized) catalytic cracking unit, that is associated with regeneration of the catalyst used in the unit (i.e., the catalyst regeneration flue gas vent);

(2) The process vent or group of process vents, on each catalytic reforming unit (including but not limited to semi-regenerative, cyclic, or continuous processes), that is associated with regeneration of the catalyst used in the unit. This affected source includes vents that are used during the unit depressurization, purging, coke burn, catalyst rejuvenation, and reduction or activation purge; and

(3) The process vent or group of process vents, that vents from a Claus or other sulfur recovery plant unit or the tail gas treatment unit serving the sulfur recovery plant, that is associated with sulfur recovery.

(c) This subpart does not apply to gaseous streams routed to a fuel gas system.

(d) An owner or operator of a fluidized-bed catalytic cracking unit catalyst regenerator subject to and in compliance with the standard for particulate matter emissions in § 60.102 of this chapter and all associated requirements (including but not limited to testing, monitoring, recordkeeping, and reporting provisions) is considered to be in compliance with the standard in § 63.1562(a)(1) of this subpart and all associated requirements. An owner or operator of a fluidized-bed catalytic cracking unit catalyst regenerator subject to and in compliance with the standard for carbon monoxide in § 60.103 of this chapter and all associated requirements (including but not limited to testing, monitoring,

recordkeeping, and reporting provisions) is considered to be in compliance with the standard in § 63.1562(a)(2) of this subpart and all associated requirements. An owner or operator of a sulfur recovery unit subject to and in compliance with the standard for sulfur oxides in § 60.104 of this chapter and all associated requirements (including but not limited to testing, monitoring, recordkeeping, and reporting provisions) is considered to be in compliance with the standard in § 63.1562(c) of this subpart and all associated requirements.

§ 63.1561 Definitions.

All terms used in this subpart shall have the meaning given them in the Clean Air Act, in subpart A of this part, and in this section. If the same term is defined in subpart A and in this section, it shall have the meaning given in this section for purposes of this subpart.

Catalytic cracking unit means a refinery process unit in which petroleum derivatives are charged; hydrocarbon molecules in the presence of a catalyst are fractured into smaller molecules, or react with a contact material to improve feedstock quality for additional processing; and the catalyst or contact material is regenerated by burning off coke and other deposits. The unit includes, but is not limited to the riser, reactor, regenerator, air blowers, spent catalyst or contact material stripper, catalyst or contact material recovery equipment, and regenerator equipment for controlling air pollutant emissions and for heat recovery.

Catalytic cracking unit regenerator means one or more regenerators (multiple regenerators) which comprise that portion of the catalytic cracking unit in which coke burn-off and catalyst or contact material regeneration occurs, and includes the regenerator combustion air blower(s).

Catalytic reforming unit means a refinery process unit that reforms or changes the chemical structure of naphtha into higher octane aromatics through the use of a metal catalyst and chemical reactions that include dehydrogenation, isomerization, and hydrogenolysis. The catalytic reforming unit includes the reactor, regenerator (if separate), separators, catalyst isolation and transport vessels (e.g., lock and lift hoppers), recirculation equipment, scrubbers, and other ancillary equipment.

Catalytic reforming unit regenerator means one or more regenerators which comprise that portion of the catalytic reforming unit in which the following regeneration steps typically are

performed: Depressurization, purge, coke burn-off, catalyst rejuvenation with a chloride (or other halogenated) compound(s), and a final purge. The catalytic reforming unit catalyst regeneration process can be conducted either as a semi-regenerative, cyclic, or continuous regeneration process.

Coke burn-off means the coke removed from the surface of the catalytic cracking unit catalyst or the catalytic reforming unit catalyst by combustion in the catalyst regenerator. The rate of coke burn-off is calculated by the formula specified in § 63.1566 (Test methods and procedures) of this subpart.

Combustion device means an individual unit of equipment such as a flare, incinerator, process heater, or boiler used for the destruction of organic hazardous air pollutants or volatile organic compounds.

Combustion zone means the space in an enclosed combustion device (e.g., vapor incinerator, boiler, furnace, or process heater) occupied by the organic HAP and any supplemental fuel while burning. The combustion zone includes any flame that is visible or luminous as well as that space outside the flame envelope in which the organic HAP continues to be oxidized to form the combustion products.

Contact material means any substance formulated to remove metals, sulfur, nitrogen, or any other contaminants from petroleum derivatives.

Continuous regeneration reforming means a catalytic reforming process characterized by continuous flow of catalyst material through a reactor where it mixes with feedstock in a counter-current direction, and a portion of the catalyst is continuously removed and sent to a special regenerator where it is regenerated and continuously recycled back to the reactor.

Control device means any equipment used for recovering, removing, or oxidizing HAP in either gaseous or solid form. Such equipment includes, but is not limited to, condensers, scrubbers, electrostatic precipitators, incinerators, flares, boilers, and process heaters.

Cyclic regeneration reforming means a catalytic reforming process characterized by continual batch regeneration of catalyst in situ in any one of several reactors (e.g., four or five separate reactors) that can be isolated from and returned to the reforming operation, while maintaining continuous reforming process operations (i.e., feedstock continues flowing through the remaining reactors without change in feed rate or product octane).

Flame zone means the portion of a combustion chamber of a boiler or process heater occupied by the flame envelope created by the primary fuel.

Flow indicator means a device that indicates whether gas is flowing, or whether the valve position would allow gas to flow, in a line.

HCl means, for the purposes of this subpart, gaseous emissions of hydrogen chloride that serve as a surrogate measure for total emissions of hydrogen chloride and chlorine as measured by Method 26A in appendix A to part 60 of this chapter or an approved alternative method.

Incinerator means an enclosed combustion device that is used for destroying organic compounds, with or without heat recovery. Auxiliary fuel may be used to heat waste gas to combustion temperatures.

Ni means, for the purposes of this subpart, particulate emissions of nickel that serve as a surrogate measure for total emissions of metal HAPs, including but not limited to: Antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, nickel, and selenium as measured by Method 29 in appendix A to part 60 of this chapter or by an approved alternative method.

Petroleum refinery means an establishment/installation primarily engaged in petroleum refining as defined in the Standard Industrial Classification (SIC) code for petroleum refining (SIC 2911), and used primarily for:

(1) Producing transportation fuels (such as gasoline, diesel fuels, and jet fuels), heating fuels (such as kerosene, fuel gas distillate, and fuel oils), or lubricants;

(2) Separating petroleum; or

(3) Separating, cracking, reacting, or reforming an intermediate petroleum stream, or recovering a by-product(s) from the intermediate petroleum stream (e.g., sulfur recovery).

PM means, for the purposes of this subpart, emissions of particulate matter that serve as a surrogate measure of the total emissions of particulate matter and metal HAPs contained in the particulate matter, including but not limited to: Antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, nickel, and selenium as measured by Methods 5B or 5F in appendix A to part 60 of this chapter or by an approved alternative method.

Process heater means an enclosed combustion device that primarily transfers heat liberated by burning fuel directly to process streams or to heat transfer liquids other than water.

Semi-regenerative reforming means a catalytic reforming process characterized by shutdown of the entire reforming unit (e.g., which may employ three to four separate reactors) at specified intervals or at the owner's or operator's convenience for in situ catalyst regeneration.

Sulfur recovery unit means a process unit that recovers elemental sulfur from gases that contain reduced sulfur compounds and other pollutants, usually by a vapor-phase catalytic reaction of sulfur dioxide and hydrogen sulfide. This definition does not include a unit where the modified reaction is carried out in a water solution which contains a metal ion capable of oxidizing the sulfide ion to sulfur, e.g., the LO-CAT II process.

TRS means, for the purposes of this subpart, emissions of total reduced sulfur compounds, expressed as an equivalent sulfur dioxide concentration, that serve as a surrogate measure of the total emissions of sulfide HAPs carbonyl sulfide and carbon disulfide as measured by Method 15 in appendix A to part 60 of this chapter or by an approved alternative method.

TOC means, for the purposes of this subpart, emissions of total organic compounds excluding methane and ethane that serve as a surrogate measure of the total emissions of organic HAP compounds, including but not limited to acetaldehyde, benzene, hexane, phenol, toluene, and xylenes and non-HAP volatile organic compounds as measured by Method 18 or Method 25A in appendix A to part 60 of this chapter or an approved alternative method.

§ 63.1562 Emission standards for existing sources.

(a) *Catalytic cracking unit regeneration.* The owner or operator of a catalytic cracking unit shall comply with the standards in paragraphs (a)(1)(i) or (a)(1)(ii) of this section and the standard in paragraph (a)(2) of this section.

(1) The owner or operator shall identify the standard selected in the notification of compliance status report as required by § 63.1567(a)(6) of this subpart. Following any 6-month reporting period, the owner or operator may change the standard selected for compliance by submitting a request to the applicable permitting authority containing the information specified in § 63.1567(b)(7) of this subpart.

(i) Emissions of PM shall not exceed 1.0 kilogram (kg)/1,000 kg [1.0 pound (lb)/1,000 lb] of coke burn-off in the catalyst regenerator; or

(ii) Emissions of nickel (Ni) from the catalyst regenerator vent on each

catalytic cracking unit shall not exceed 13,000 milligrams/hour (mg/hr) [0.029 pound per hour (lb/hr)].

(2) The concentration of carbon monoxide (CO) exiting the catalyst regenerator vent or CO boiler (if a CO boiler is used as the combustion device) shall not exceed 500 parts per million (ppm) by volume (dry basis).

(b) *Catalytic reforming unit regeneration.* The owner or operator of a catalytic reforming unit shall comply with paragraphs (b)(1) through (b)(3) of this section.

(1) During depressurization and purging, comply with the requirements in paragraphs (b)(1)(i) or (b)(1)(ii) of this section.

(i) The owner or operator shall vent TOC emissions from the regenerator to a flare that meets the requirements for control devices in § 63.11(b) of this part; or

(ii) The owner or operator shall reduce uncontrolled emissions of TOC using a control device, by 98 percent by weight or to a concentration of 20 ppm by volume, on a dry basis, corrected to 3 percent oxygen, whichever is less stringent. If a boiler or process heater is used to comply with the percent reduction requirement or concentration limit, the vent stream shall be introduced into the flame zone, or any other location that will achieve the required percent reduction or concentration.

(iii) The control device requirements of paragraphs (b)(1)(i) and (b)(1)(ii) of this section do not apply to depressuring and purging operations at a differential pressure between the reactor vent and the gas transfer system to the control device of less than 1 pound per square inch gauge (psig) or if the reactor vent pressure is 1 psig or less.

(2) During coke burn-off and catalyst regeneration, the owner or operator of a semi-regenerative catalytic reforming unit shall reduce uncontrolled emissions of HCl by 92 percent by weight using a control device, or to a concentration of 30 ppm by volume, on a dry basis, corrected to 3 percent oxygen; and

(3) During coke burn-off and catalyst regeneration, the owner or operator of a cyclic or continuous catalytic reforming unit shall reduce uncontrolled emissions of HCl by 97 percent by weight using a control device, or to a concentration of 10 ppm by volume, on a dry basis, corrected to 3 percent oxygen.

(c) *Sulfur recovery units.* The owner or operator of a sulfur recovery unit shall not discharge or cause to be discharged into the atmosphere any

emissions of total reduced sulfur (TRS) compounds, expressed as an equivalent sulfur dioxide (SO₂) concentration, in excess of 300 ppm by volume, on a dry basis, at zero percent oxygen.

§ 63.1563 Emission standards for new or reconstructed sources.

(a) *Catalytic cracking unit regeneration.* The owner or operator of a catalytic cracking unit shall comply with the standards for existing affected sources in § 63.1562(a) of this subpart.

(b) *Catalytic reforming unit regeneration.* The owner or operator of a catalytic reforming unit shall comply with the standards in paragraphs (b)(1) and (b)(2) of this section.

(1) During depressurization and purging from semi-regenerative processes, comply with the standards for existing affected sources in §§ 63.1562(b)(1)(i) or (b)(1)(ii) of this subpart; and

(2) During coke burn-off and catalyst regeneration, reduce uncontrolled emissions of HCl from semi-regenerative, cyclic, or continuous processes by 97 percent by weight using a control device, or to a concentration of 10 ppm by volume, on a dry basis, corrected to 3 percent oxygen.

(c) *Sulfur recovery units.* The owner or operator shall comply with the standard for existing affected sources in § 63.1562(c) of this subpart.

§ 63.1564 Compliance dates and performance tests.

(a) *Compliance dates.* The owner or operator of a catalytic cracking unit, catalytic reforming unit, or sulfur recovery unit shall demonstrate initial compliance with the requirements of this subpart by the following dates:

(1) [Insert date 3 years following the date of publication date of the final rule in the **Federal Register**] for an existing source unless an extension has been granted by the Administrator as provided in § 63.6(i) of this part.

(2) [Insert date of publication of final rule in the **Federal Register**] or upon initial startup, whichever is later, for a new source that commences construction or reconstruction after September 11, 1998.

(b) *Performance tests—catalytic cracking units.* (1) During the first 150 days following the compliance date, the owner or operator shall conduct a performance test for each new or existing catalytic cracking unit to determine and demonstrate compliance with the PM or Ni emission standard using the test methods and procedures in § 63.1566 of this subpart.

(2) During the first 150 days following the compliance date, the owner or

operator of a new or existing catalytic cracking unit that does not use a combustion device to comply with the CO emission standard and elects to comply with the continuous emission monitoring requirements of § 63.1565(d)(1) of this subpart shall determine and demonstrate compliance according to the following procedures:

(i) The owner or operator shall conduct a performance evaluation of the CO continuous emission monitoring system to determine and demonstrate compliance with the requirements of Performance Specification 4A in appendix B to part 60 of this chapter. The span value shall be 1,000 ppm CO. The performance evaluation shall be conducted according to the procedures in § 63.8(e) of this part.

(ii) Using the continuous emission monitoring system, the owner or operator shall measure and record the average hourly concentration of CO emissions from each catalytic cracking unit during 7 consecutive operating days. The data shall be reduced to 1-hour averages computed from four or more data points equally spaced over each 1-hour period. Compliance is demonstrated where the average hourly concentration is less than or equal to 500 ppm by volume (dry basis).

(3) During the first 150 days following the compliance date, the owner or operator of a catalytic cracking unit that does not use a combustion control device and elects to comply with the operating parameter monitoring requirements of § 63.1565(d)(2) of this subpart, shall conduct a performance test for each unit to determine and demonstrate compliance with the CO emission standard using the test methods and procedures in § 63.1566 of this subpart.

(4) During the first 150 days following the compliance date, the owner or operator of a new or existing catalytic cracking unit that uses a boiler or process heater with a design heat capacity less than 44 megawatts (MW) where the vent stream is not introduced into the flame zone shall conduct a performance test for each unit to determine and demonstrate compliance with the TOC emission standard using the test methods and procedures in § 63.1566 of this subpart.

(c) *Performance tests—catalytic reforming units.* (1) During the first 150 days following the compliance date, the owner or operator of a new or existing cyclic or continuous catalytic reforming unit shall conduct a performance test for each unit to determine and demonstrate compliance with applicable TOC and HCl emission standards using the test

methods and procedures in § 63.1566 of this subpart.

(2) At the first regeneration cycle following the compliance date, the owner or operator of a new or existing semi-regenerative catalytic reforming unit shall conduct an initial performance test for each unit to determine and demonstrate compliance with applicable TOC and HCl emission standards using the test methods and procedures in § 63.1566 of this subpart.

(3) The owner or operator of a new or existing catalytic reforming unit is not required to conduct a performance test to demonstrate compliance with the TOC percent reduction or concentration emission standards in § 63.1562(b)(1)(ii) of this subpart when any of the following control devices are used:

(i) Any boiler or process heater with a design heat input capacity of 44 MW or greater;

(ii) Any boiler or process heater in which all vent streams are introduced into the flame zone; or

(iii) Any flare that complies with the control device requirements in § 63.11(b) of this part.

(d) *Performance tests—sulfur recovery units.* During the first 150 days following the compliance date, the owner or operator of a new or existing sulfur recovery unit shall conduct a performance test for each unit to determine and demonstrate compliance with the applicable emission standard for TRS compounds using the test methods and procedures in § 63.1566 of this subpart.

(e) *Test conditions.* Each performance test shall be conducted according to the requirements of § 63.7(e) of this part except that performance tests shall be conducted at maximum representative operating capacity for the process. The owner or operator shall conduct the test while operating the control device at conditions which result in lowest emission reduction.

(1) Each performance test shall consist of three separate runs. Compliance is demonstrated when the average of three runs is less than or equal to the applicable standard.

(2) Data shall be reduced in accordance with the EPA-approved methods specified in § 63.1566 of this subpart or, if other test methods are used, the data and methods shall be validated in accordance with the protocol in Method 301 of appendix A to this part.

(f) *Process/operating parameter range.* The owner or operator of a new or existing catalytic cracking unit, catalytic reforming unit, or sulfur recovery unit shall establish a minimum and/or maximum operating value or procedure

for each parameter to be monitored as required by § 63.1565 of this subpart that ensures compliance with the applicable emission standard. To establish the minimum and/or maximum value, the owner or operator shall use the procedures in paragraphs (f)(1) through (f)(9) of this section, as applicable to the control device, and submit the information required by § 63.1567(a)(6) in the notification of compliance status report.

(1) For a thermal incinerator, the owner or operator shall measure and record the combustion zone temperature over the full period of the performance test, record each hourly or 1-hour block average value, and determine the minimum and average combustion zone temperature.

(2) For a catalytic incinerator, the owner or operator shall measure the upstream and downstream temperatures and temperature difference across the catalyst bed over the full period of the performance test, record each hourly or 1-hour block average value, and determine the minimum and average upstream temperature and temperature difference across the catalyst bed.

(3) For a boiler or process heater with a design heat capacity less than 44 MW where the vent stream is not introduced into the flame zone, the owner or operator shall measure the combustion zone temperature over the full period of the performance test, record each hourly or 1-hour block average value, and determine the minimum and average combustion zone temperature.

(4) For a flare, the owner or operator shall record the presence of a flame at the pilot light over the full period of the compliance determination.

(5) For an electrostatic precipitator, the owner or operator shall measure the voltage and secondary current or the total power input over the full period of the performance test, record each hourly or 1-hour block average value, and determine the minimum and average hourly voltage and secondary current or total power input.

(6) For a wet scrubber, the owner or operator shall measure the pressure drop across the scrubber, the gas flow rate, and the total water (or scrubbing liquid) flow rate to the scrubber over the full period of the performance test, record each hourly or 1-hour block average value, and determine the minimum and average pressure drop, the maximum and average gas flow rate, the minimum and average total water (or scrubbing liquid) flow rate, and the minimum and average liquid-to-gas ratio.

(7) For a catalytic cracking unit that does not use a combustion device where

the owner or operator elects to monitor operating parameters under § 63.1565(d)(2) of this subpart, the owner or operator shall measure the temperature of the catalytic cracking unit and the oxygen content of the regenerator exhaust gas over the full period of the performance test, record each hourly or 1-hour block average value, and determine the minimum and average hourly temperature and oxygen content.

(8) The owner or operator of a catalytic cracking unit catalyst regenerator subject to the PM emission standard in § 63.1562(a)(1)(i) of this subpart shall determine and record the average coke burn-off rate (thousands of kg/hr) and the hours of operation for the unit.

(9) For all control devices, the owner or operator shall record whether the flow indicator, if required, was operating and whether flow was detected at any time during each hour of the full period of the performance test.

§ 63.1565 Monitoring requirements.

(a) *Combustion control device.* Except as provided in paragraph (a)(4) of this section, the owner or operator of a new or existing catalytic cracking unit, catalytic reforming unit, or sulfur recovery unit that uses a combustion control device to comply with the emission standards of this subpart shall install, operate, and maintain the monitoring equipment specified in paragraph (a)(1), (a)(2), or (a)(3) of this section, depending on the type of combustion control device used.

(1) Where an incinerator is used:

(i) For each thermal incinerator, a measurement device equipped with a continuous recorder to measure and record the daily average combustion zone temperature. The measurement device shall be installed in the combustion zone or in the ductwork immediately downstream of the combustion zone in a position before any substantial heat exchange occurs; or

(ii) For each catalytic incinerator, a measurement device equipped with a continuous recorder to measure and record the daily average upstream temperature and temperature difference across the catalyst bed. The measurement devices shall be installed in the gas stream immediately before and after the catalyst bed.

(iii) The accuracy of the temperature measurement device shall be ± 1 percent of the temperature being measured, expressed in degrees Celsius (C) or $\pm 0.5^\circ\text{C}$, whichever is greater.

(iv) The owner or operator shall verify the calibration of the temperature measurement device every 3 months.

(2) Where a flare is used, a device (including but not limited to a thermocouple, an ultraviolet beam sensor, or an infrared sensor) that continuously detects the presence of a pilot flame. The owner or operator shall record, for each 1-hour period, whether the monitor was continuously operating and whether a pilot flame was continuously present during each hour.

(3) Where a boiler or process heater with a design heat capacity less than 44 MW where the vent stream is not introduced into the flame zone is used, a measurement device equipped with a continuous recorder to measure and record the daily average combustion zone temperature.

(i) The accuracy of the temperature measurement device shall be ± 1 percent of the temperature being measured, expressed in degrees C or $\pm 0.5^\circ\text{C}$, whichever is greater.

(ii) The owner or operator shall verify the calibration of the temperature measurement device every 3 months.

(4) Any boiler or process heater with a design heat capacity greater than or equal to 44 MW or any boiler or process heater in which all vent streams are introduced into the flame zone is exempt from the monitoring requirements in this paragraph.

(b) *Catalytic cracking unit—electrostatic precipitator.* The owner or operator of a new or existing catalytic cracking unit that uses an electrostatic precipitator to comply with the emission standards of this subpart shall install, operate, and maintain a measurement device equipped with a continuous recorder to measure and record the average hourly voltage and secondary current or the average hourly total power input.

(c) *Catalytic cracking unit/catalytic reforming unit—scrubber.* The owner or operator of a new or existing catalytic cracking unit or catalytic reforming unit that uses a wet scrubber to comply with the emission standards of this subpart shall install, calibrate, operate, and maintain:

(1) A measurement device equipped with a continuous recorder to measure and record the average daily pressure drop across the scrubber, the average daily gas flow rate to the scrubber, and the average daily total water (or scrubbing liquid) flow rate to the scrubber.

(i) The pressure drop monitor is to be certified by the manufacturer to be accurate within ± 250 pascals (± 1 inch water gauge) over its operating range. The flow rate monitors are to be

certified by their manufacturers to be accurate within ± 5 percent over their operating ranges.

(ii) The owner or operator shall verify the calibration of the pressure drop and flow rate monitors every 3 months.

(2) The owner or operator shall calculate and record the daily average liquid-to-gas ratio.

(d) *Catalytic cracking unit—no combustion device.* Each owner or operator of a new or existing catalytic cracking unit regenerator that does not use a combustion device to comply with the CO emission standard in § 63.1562(a)(2) of this subpart shall install, calibrate, operate, and maintain a continuous emission monitoring system as described in paragraph (d)(1) of this section or a continuous parameter monitoring system as described in paragraph (d)(2) of this section.

(1) The owner or operator shall install, operate, calibrate, and maintain a continuous emission monitoring system to measure and record the concentration of CO in the exhaust gases of each catalytic cracking unit regenerator vent and determine the hourly average concentration in ppm by volume (dry basis) of CO emissions into the atmosphere.

(i) The continuous emission monitoring system shall meet the requirements of Performance Specification 4A in part 60 of this chapter. The span value for this system is 1,000 ppm CO.

(ii) Each continuous emission monitoring system shall complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute period.

(iii) The owner or operator shall operate and maintain each continuous emission monitoring system in accordance with the requirements of § 63.8 of this part and the quality assurance procedures in appendix F to part 60 of this chapter.

(2) The owner or operator shall install, calibrate, operate, and maintain:

(i) A measurement device equipped with a continuous recorder to measure and record the average hourly temperature of the catalytic cracking unit regeneration unit exhaust gas; and

(ii) A measurement device equipped with a continuous recorder to measure and record the average hourly oxygen content of the regenerator exhaust gas.

(iii) The accuracy of the temperature measurement device shall be ± 1 percent of the temperature being measured, expressed in degrees C or $\pm 0.5^\circ\text{C}$, whichever is greater. The accuracy of the oxygen sensor shall be ± 1 percent over its operating range.

(iv) The owner or operator shall verify the calibration of the temperature and oxygen measurement devices every 3 months.

(3) The monitoring requirements in paragraphs (d)(1) and (d)(2) of this section do not apply if the owner or operator demonstrates that the average CO emissions are less than 50 ppm by volume (dry basis) and also files a written request for exemption with the applicable permitting authority and receives such an exemption. The demonstration shall consist of continuously monitoring CO emissions for 30 days using an instrument that meets the requirements of Performance Specification 4A of appendix B to part 60 of this chapter. The span value shall be 100 ppm CO instead of 1,000 ppm, and the relative accuracy limit shall be 10 percent of the average CO emissions or 5 ppm CO, whichever is greater. For instruments that are identical to Method 10 in appendix A to part 60 of this chapter and employ the sample conditioning system of Method 10A in appendix A to part 60 of this chapter, the alternative relative accuracy test procedure in section 10.1 of Performance Specification 2 of appendix B to part 60 of this chapter may be used in place of the relative accuracy test.

(e) *Catalytic cracking unit catalyst regenerator.* The owner or operator of a catalytic cracking unit catalyst regenerator subject to the PM emission standard in § 63.1562(a)(1)(i) of this subpart shall calculate the daily average coke burn-off rate (thousands of kg/hr) using the calculation procedure in § 63.1566(a)(3) of this subpart (Test methods and procedures) and record the information specified in § 63.1567(e)(4)(xii) of this subpart (Notification, reporting, and recordkeeping requirements). For purposes of daily average coke burn-off calculations, the exhaust gas flow can be calculated from process data.

(f) *Catalytic cracking unit—no electrostatic precipitator or scrubber.* An owner or operator of a new or existing catalytic cracking unit that does not use an electrostatic precipitator or scrubber to comply with the PM or Ni emission standards in § 63.1562(a)(1) of this subpart shall include, subject to approval of the applicable permitting authority, a recommended continuous parameter monitoring system for each affected source in the part 70 or part 71 permit application. Each application shall include the information required in § 63.1567(a)(6)(v)(B) of this subpart (Notification, reporting, and recordkeeping requirements).

(g) *Sulfur recovery unit—no combustion device.* The owner or operator of a new or existing sulfur recovery unit that does not use a combustion device to comply with the TRS emission standard in § 63.1562(c) of this subpart shall include, subject to approval by the applicable permitting authority, a recommended continuous parameter monitoring system for each affected source in the part 70 or part 71 permit application. Each application shall include the information required in § 63.1567(a)(6)(v)(B) of this subpart (Notification, reporting, and recordkeeping requirements).

(h) *Bypass line.* The owner or operator of a new or existing catalytic cracking unit, catalytic reforming unit, or sulfur recovery unit using a vent system that contains a bypass line that could divert a vent stream away from the control device used to comply with the emission limits in this subpart shall comply with the requirements of either paragraph (h)(1) or (h)(2) of this section. Equipment such as low leg drains, high point bleed, analyzer vents, open-ended valves or lines, or pressure relief valves needed for safety reasons are not subject to the requirements of this paragraph.

(1) Install, calibrate, operate, and maintain a flow indicator. The device shall be installed at the entrance to any bypass line that could divert the vent stream away from the control device to the atmosphere. The owner or operator shall visually inspect the flow indicator at least once every hour to determine that the flow indicator is operating properly and whether gas or vapor are present in the bypass line and record the information specified in § 63.1567(e)(4)(x) of this subpart (Notification, reporting, and recordkeeping requirements); or

(2) Secure the bypass line valve in the closed position with a car-seal or a lock-and-key type configuration. The device shall be placed on the mechanism by which the bypass device position is controlled (e.g., valve handle, damper level) when the bypass device is in the closed position such that the bypass line valve cannot be opened without breaking the seal or removing the device. The owner or operator shall visually inspect the seal or closure mechanism at least once every month to ensure that the valve is maintained in the closed position and the vent stream is not diverted through the bypass line, and record the information specified in § 63.1567(e)(4)(x) of this subpart (Notification, reporting, and recordkeeping requirements).

(i) *Installation, calibration, operation, and maintenance of monitoring systems and devices.* All continuous parameter

monitoring systems and devices required or allowed by this section shall be installed, calibrated, maintained, and operated according to manufacturer's specifications or according to other written procedures that provide adequate assurance that the equipment will monitor accurately.

(j) *Averaging times for continuous parameter monitoring systems.* Each continuous parameter monitoring system shall measure data values at least once every hour and record either:

(1) Each measured data value; or
(2) Block average values for each 1-hour period or shorter periods calculated from all measured data values during each period. If values are measured more frequently than once per minute, a single value for each minute may be used to calculate the hourly (or shorter period) block average instead of all measured values.

(3) Daily averages shall be calculated as the average of all values for a monitored parameter recorded during the operating day. The average shall cover a 24-hour period if operation is continuous or the number of hours of operation per day if operation is not continuous.

(4) Monitoring data recorded during periods of unavoidable monitoring system breakdowns, repairs, calibration checks, and zero (low-level) and high-level adjustments; startup, shutdowns, and malfunctions; and periods of nonoperation of the process unit resulting in cessation of the emissions to which the monitoring applies shall not be included in any average computed under this subpart.

(k) *Operation of control device.* The owner or operator of a new or existing affected source equipped with a control device subject to the monitoring provisions of this section shall operate the control device above or below, as appropriate, the minimum or maximum value specified in the notification of compliance status report.

(l) *Parameter changes.* (1) The owner or operator may change the established level of control device or process operating parameters by conducting additional performance tests to verify that, at the new control device or process parameter level, the owner or operator is in compliance with the applicable emission standard in §§ 63.1562 or 63.1563 of this subpart.

(2) The owner or operator shall conduct a new performance test to establish a revised minimum or maximum value for the monitored process or operating parameter to determine and demonstrate compliance under the new operating conditions if any change to the process or operating

conditions (including but not limited to feedstock, capacity, control device or capture system) that could result in a change in the control system performance or designated conditions has been made since the last performance or compliance tests were conducted.

(m) *Alternative parameters.* (1) The owner or operator of a catalytic cracking unit, catalytic reforming unit, or sulfur recovery unit may request approval to monitor parameters other than those listed in paragraphs (a) through (d) of this section. The request shall be submitted according to the procedures specified in paragraph (m)(2) of this section. Approval shall be requested if the owner or operator:

(i) Uses a control device other than an incinerator, boiler, process heater, flare, electrostatic precipitator, or scrubber;

(ii) Uses one of the control devices listed in paragraphs (a) through (c) of this section, but seeks to monitor a parameter other than those specified in paragraphs (a) through (d) of this section; or

(iii) Uses no control device or a control method, such as pretreatment, rather than an add-on control device.

(2) To apply for use of alternative monitoring parameters, the owner or operator shall submit a request for review and approval or disapproval by the applicable permitting authority. The submittal shall include:

(i) A description of each affected source and the parameter(s) to be monitored to determine whether periods of excess emissions occur, as defined in paragraph (o) of this section, and an explanation of the criteria used to select the parameter(s);

(ii) A description of the methods and procedures that will be used to demonstrate that the parameter can be used to determine excess emissions and the schedule for this demonstration. The owner or operator must certify that he/she will establish a minimum and/or maximum value, as applicable, for the monitored parameter(s) that represents the conditions in existence when the control device is being properly operated and maintained; and

(iii) The frequency and content of monitoring, recording, and reporting, if monitoring and recording are not continuous. The rationale for the proposed monitoring, recording, and reporting system shall be included.

(n) *Automated data compression system.* The owner or operator may request approval to use an automated data compression system that does not record monitored operating parameter values at a set frequency (e.g., once every hour) but records all values that

meet set criteria for variation from previously recorded values.

(1) The requested system shall be designed to:

(i) Measure the operating parameter value at least once every hour;

(ii) Record at least 24 values each day during periods of operation;

(iii) Record the date and time when monitors are turned off or on;

(iv) Recognize unchanging data that may indicate the monitor is not functioning properly, alert the operator, and record the incident; and

(v) Compute daily average values of the monitored operating parameter based on recorded data.

(2) The request shall contain a description of the monitoring system and data recording system including the criteria used to determine which monitored values are recorded and retained, the method for calculating daily averages, and a demonstration that the system meets all criteria of paragraph (j)(1) of this section.

(o) *Excess emissions.* (1) Period of excess emissions means any of the following conditions:

(i) For a thermal incinerator, an operating day when the daily average temperature falls below the minimum value specified in the notification of compliance status report;

(ii) For a catalytic incinerator, an operating day when the daily average upstream temperature or the daily average temperature difference across the catalyst bed falls below the minimum value specified in the notification of compliance status report;

(iii) For a boiler or process heater with a design heat capacity less than 44 MW where the vent stream is not introduced into a flame zone, an operating day when the daily average temperature falls below the minimum value specified in the notification of compliance status report;

(iv) For an electrostatic precipitator, any period when the average hourly voltage or secondary current or the average hourly total power input falls below the minimum value specified in the notification of compliance status report;

(v) For a wet scrubber, an operating day when the daily average pressure drop or daily average liquid-to-gas ratio falls below the minimum value specified in the notification of compliance status report;

(vi) For a catalytic cracking unit with no combustion device, any period when the average hourly CO concentration measured by the CO continuous emission monitoring system required by paragraph (d)(1) of this section exceeds 500 ppmv or any period when the

average hourly temperature or oxygen content falls below the minimum value specified in the notification of compliance status report;

(vii) For a catalytic cracking unit catalyst regenerator subject to the PM emission standard in § 63.1562(a)(1)(i) of this subpart, an operating day when the daily average coke burn-off rate exceeds the value specified in the notification of compliance status report;

(viii) An operating day when all pilot flames of a flare are absent;

(ix) An operating day when monitoring data are available for less than 75 percent of the operating hours;

(x) For data compression systems approved under paragraph (n) of this section, an operating day when the monitor operated for less than 75 percent of the operating hours or a day when less than 18 monitoring values were recorded; or

(xi) A period when flow to the control device is diverted or otherwise bypassed.

(2) Multiple excursions from the same control device during the applicable averaging period (e.g. 1-hour, 24-hours) constitutes a single excursion.

(p) *Violation.* Monitoring data under this subpart are directly enforceable to determine compliance with the required operating conditions for the monitored control devices. For each period of excess emissions, as defined in paragraph (o) of this section, the owner or operator shall be deemed to have failed to have applied the control in a manner that achieves the required operating conditions. More than one exceedance or excursion by the same control device during a semi-annual reporting period is a violation of this subpart.

§ 63.1566 Test methods and procedures.

(a) The owner or operator of a catalytic cracking unit shall determine compliance with the PM emission standard in § 63.1562(a)(1)(i) of this subpart as follows:

(1) The emission rate (E) of PM shall be computed for each run using Equation 1:

$$E = \frac{K \times C_s \times Q_{sd}}{R_c} \quad (\text{Eq. 1})$$

where,

E = Emission rate of PM, kg/1,000 kg (lb/1,000 lb) of coke burn-off;

C_s = Concentration of PM, g/dscm (lb/dscf);

Q_{sd} = Volumetric flow rate of effluent gas, dscm/hr (dscf/hr);

R_c = Coke burn-off rate, kg coke/hr (1,000 lb coke/hr); and

K = Conversion factor, 1.0 (kg²/g)/(1,000 kg [1,000 lb/(1,000 lb)]).

(2) Method 5B or 5F in appendix A to part 60 of this chapter is to be used to determine PM emissions and associated moisture content from affected facilities without wet flue gas desulfurization (FGD) systems; only Method 5B in appendix A to part 60 of this chapter is

to be used after wet FGD systems. The sampling time for each run shall be at least 60 minutes and the sampling rate shall be at least 0.015 dscm/min (0.53 dscf/min), except that shorter sampling times may be approved by the permitting authority when process

variables or other factors preclude sampling for at least 60 minutes.

(3) The coke burn-off rate (R_c) shall be computed for each run using Equation 2:

$$R_c = K_1 Q_r (\%CO_2 + \%CO) + K_2 Q_a - K_3 Q_r [(\%CO/2) + \%CO_2 + \%O_2] + K_3 Q_{oxy} (\%O_{xy}) \quad (\text{Eq. 2})$$

Where,

R_c = Coke burn-off rate, kg/hr (lb/hr);

Q_r = Volumetric flow rate of exhaust gas from catalyst regenerator before additional air or gas streams are added (e.g., measurements may be made after an ESP, but must be made before a CO boiler), dscm/min (dscf/min);

Q_a = Volumetric flow rate of air to regenerator, as determined from the catalytic cracking unit control room instrumentation, dscm/min (dscf/min);

$\%CO_2$ = Carbon dioxide concentration in regenerator exhaust, percent by volume (dry basis);

$\%CO$ = Carbon monoxide concentration in regenerator exhaust, percent by volume (dry basis);

$\%O_2$ = Oxygen concentration in regenerator exhaust, percent by volume (dry basis);

K_1 = Material balance and conversion factor, 0.2982 (kg-min)/(hr-dscm-%) [0.0186 (lb-min)/(hr-dscf-%)];

K_2 = Material balance and conversion factor, 2.088 (kg-min)/(hr-dscm-%) [0.1303 (lb-min)/(hr-dscf-%)];

K_3 = Material balance and conversion factor, 0.0994 (kg-min)/(hr-dscm-%) [(0.0062 (lb-min)/(hr-dscf-%)];

Q_{oxy} = Volumetric flow rate of oxygen-enriched air stream to regenerator, as determined from the catalytic cracking unit control room instrumentation, dscm/min (dscf/min); and

$\%O_{xy}$ = Oxygen concentration in oxygen-enriched air stream, percent by volume (dry basis).

(i) Method 2 in appendix A to part 60 of this chapter shall be used to determine the volumetric flow rate (Q_r) for a performance test; for daily calculations, the volumetric flow rate can be determined using process data.

(ii) The emission correction factor, integrated sampling and analysis procedure of Method 3 in appendix A to part 60 of this chapter shall be used to determine CO_2 , CO , and O_2 concentrations.

(b) The owner or operator shall determine compliance with the Ni standard in § 63.1562(a)(1)(ii) of this

subpart using the procedures in paragraphs (b)(1) through (b)(3) of this section.

(1) Method 29 in appendix A to part 60 of this chapter shall be used to determine the concentration of Ni in the catalytic cracking unit catalyst regenerator flue gas. The sampling time for each run shall be at least 60 minutes and the sampling rate shall be at least 0.014 dscm/min (0.5 dscf/min).

(2) Method 2 in appendix A to part 60 of this chapter shall be used to determine volumetric flow rate (Q_{sd}).

(3) The mass emission rate (E_{Ni}) shall be computed for each run using Equation 3:

$$E_{Ni} = C_{Ni} \times Q_{sd} \quad (\text{Eq. 3})$$

Where,

E_{Ni} = Mass emission rate of Ni, mg/hr (lb/hr);

C_{Ni} = Ni concentration in the catalytic cracking unit catalyst regenerator flue gas as measured by Method 29 in appendix A to part 60 of this chapter, mg/dscm (lbs/dscf); and

Q_{sd} = Volumetric flow rate of the catalytic cracking unit catalyst regenerator flue gas as measured by Method 2 in appendix A to part 60 of this chapter, dscm/hr (dscf/hr).

(c) The owner or operator shall determine compliance with the CO emission standard in § 63.1562(a)(2) of this subpart by using the integrated sampling technique of Method 10 in appendix A to part 60 of this chapter to determine the CO concentration (dry basis). The sampling time for each run shall be 60 minutes.

(d) The owner or operator of a catalytic reforming unit using a flare to comply with the TOC emission standard in § 63.1562(b)(1) of this subpart shall determine compliance with the visible emission standard as required by § 63.11(b)(4) of this part using Method 22 in appendix A to part 60 of this chapter.

(e) Except as provided in the performance test provisions for catalytic reforming units in § 63.1564(c)(3) of this subpart and in paragraph (i) of this

section, the owner or operator shall determine compliance with the 98 percent reduction standard for TOC in § 63.1562(b)(1)(ii) of this subpart by measuring emissions at the inlet and at the outlet of the control device to determine percent reduction using the following test methods and procedures:

(1) Methods 1 or 1A in appendix A to part 60 of this chapter shall be used for selection of the sampling site.

(2) No traverse site selection method is needed for vents smaller than 0.10 meter in diameter.

(3) The gas volumetric flow rate shall be determined using Methods 2, 2A, 2C, or 2D in appendix A to part 60 of this chapter, as appropriate.

(4) Method 18 or Method 25A in appendix A to part 60 of this chapter shall be used to measure TOC concentration. Alternatively, any other method or data that has been validated according to the protocol in Method 301 of appendix A of this part may be used. The following procedures shall be used to calculate ppm by volume concentration:

(i) The minimum sampling time for each run shall be 1 hour in which either an integrated sample or four grab samples shall be taken. If grab sampling is used, then the samples shall be taken at approximately equal intervals in time, such as 15-minute intervals during the run;

(ii) The TOC concentration (C_{TOC}) is the sum of the concentrations of the individual components and shall be computed for each run using Equation 4 if Method 18 is used:

$$C_{TOC} = \frac{\sum_{i=1}^x \left(\sum_{j=1}^n C_{ji} \right)}{X} \quad (\text{Eq. 4})$$

Where,

C_{TOC} = Concentration of TOC (minus methane and ethane), dry basis, parts per million by volume;

C_{ji} = Concentration of sample component j of the sample i, dry basis, parts per million by volume;

n = Number of components in the sample; and

x = Number of samples in the sample run.

(5) The emission rate of TOC minus methane and ethane (E_{TOC}) shall be calculated using Equation 5 if Method 18 in appendix A to part 60 of this chapter is used:

$$E = K_2 \left[\sum_{j=1}^n C_j M_j \right] Q_s \quad (\text{Eq. 5})$$

Where,

E = Emission rate of TOC (minus methane and ethane) in the sample, kilograms per hour;

K_2 = Constant, 2.494×10^{-6} (parts per million)⁻¹ (gram-mole per standard cubic meter) (kilogram per gram) (minutes per hour), where the standard temperature (standard cubic meter) is at 20°C;

C_j = Concentration on a dry basis of organic compound j in ppm as measured by Method 18 in appendix A to part 60 of this chapter. C_j includes all organic compounds measured minus methane and ethane;

M_j = Molecular weight of organic compound j , gram per gram-mole; and

Q_s = Vent stream flow rate, dry standard cubic meters per minute, at a temperature of 20 °C.

(6) If Method 25A in appendix A to part 60 of this chapter is used the emission rate of TOC (E_{TOC}) shall be calculated using Equation 6:

$$E = K_3 C_{\text{TOC}} Q_s \quad (\text{Eq. 6})$$

Where,

E = Emission rate of TOC (minus methane and ethane) in the sample, kilograms per hour;

K_3 = Constant, 2.64×10^{-3} (parts per million)⁻¹ (gram-mole per standard cubic meter) (gram per gram-mole) (kilogram per gram) (minutes per hour), where the standard temperature (standard cubic meter) is at 20°C;

C_{TOC} = Concentration of TOC on a dry basis in ppm by volume as propane as measured by Method 25A in appendix A to part 60 of this chapter, as indicated in paragraph (f)(4) of this section; and

Q_s = Vent stream flow rate, dry standard cubic meters per minute, at a temperature of 20 °C.

(f) Except as provided in the performance test provisions for a catalytic reforming unit in § 63.1564(c)(3) of this subpart and paragraph (i) of this section, the owner or operator shall determine compliance with the requirements for a TOC limit

of 20 ppm in § 63.1562(b)(1)(ii) of this subpart by sampling at the outlet of the control device using Methods 18 or 25A in appendix A to part 60 of this chapter and the procedures in paragraph (e)(4) of this section to determine concentration.

(g) The owner or operator shall determine compliance with the TRS standards in §§ 63.1562(c) and 63.1563(c) of this subpart as follows:

(1) Method 15 of appendix A to part 60 of this chapter shall be used to determine the concentration of TRS. Each run shall consist of 16 samples taken over a minimum 3 hours. The sampling point in the duct shall be the centroid of the cross section if the cross-sectional area is less than 5 square meters (m²) or 54 square feet (ft²) or at a point no closer to the walls than 1 meter (m) or 39 inches (in) if the cross-sectional area is 5 m² or more and the centroid is more than 1 m from the wall. To ensure minimum residence time for the sample inside the sample lines, the sampling rate shall be at least 3 liters per minute (lpm) or 0.10 cubic feet per minute (cfm). The SO₂ equivalent for each run shall be calculated after being corrected for moisture and oxygen as the arithmetic average of the SO₂ equivalent for each sample during the run.

(2) Method 4 of appendix A to part 60 of this chapter shall be used to determine the moisture content of the gases. The sampling time for each sample shall be equal to the time it takes for four Method 15 samples.

(3) The oxygen concentration used to correct the emission rate for excess air shall be obtained by the integrated sampling and analysis procedure of Method 3 in appendix A to part 60 of this chapter. The samples shall be taken simultaneously with reduced sulfur or moisture samples. The reduced sulfur samples shall be corrected to zero percent excess air using Equation 7:

$$C_{\text{adj}} = C_{\text{meas}} \left[\frac{20.9_c}{(20.9 - \%O_2)} \right] \quad (\text{Eq. 7})$$

Where,

C_{adj} = pollutant concentration adjusted to zero percent oxygen, ppm or g/dscm;

C_{meas} = pollutant concentration measured on a dry basis, ppm or g/dscm;

20.9_c = 20.9 percent oxygen—0.0 percent oxygen (defined oxygen correction basis), percent;

20.9 = oxygen concentration in air, percent; and

$\%O_2$ = oxygen concentration measured on a dry basis, percent.

(h) The owner or operator shall determine compliance with the HCl emission standards in §§ 63.1562(b)(2)

and (b)(3) and § 63.1563(b)(2) of this subpart using Method 26A in appendix A to part 60 of this chapter. To determine percent reduction, sampling shall be performed at the inlet and at the outlet of the control device. The sampling time for each run shall be at least 60 minutes and the sampling rate shall be at least 0.021 dscm/min (0.74 dscf/min).

(i) Engineering assessment may be used to determine the emission reduction or outlet concentration for the representative operating condition expected to yield the highest daily emission rate. Engineering assessment includes, but is not limited to, the following:

(1) Previous test results provided the tests are representative of current operating practices at the process unit;

(2) Bench-scale or pilot-scale test data representative of the process under representative operating conditions;

(3) TOC emission rate specified or implied within a permit limit applicable to the process vent;

(4) Design analysis based on accepted chemical engineering principles, measurable process parameters, or physical or chemical laws or properties. Examples of analytical methods include, but are not limited to:

(i) Use of material balances based on process stoichiometry to estimate maximum TOC concentrations;

(ii) Estimation of maximum flow rate based on physical equipment design such as pump or blower capacities; and

(iii) Estimation of TOC concentrations based on saturation conditions.

(5) Engineering assessments based on approaches other than those listed above shall be subject to review and approval by the applicable permitting authority.

(6) All data, assumptions, and procedures used in the engineering assessment shall be documented to the satisfaction of the applicable permitting authority.

(j) The owner or operator may use an alternative test method subject to approval by the Administrator.

§ 63.1567 Notification, reporting, and recordkeeping requirements.

(a) *Notifications.* The owner or operator shall submit written initial notifications to the applicable permitting authority as described in paragraphs (a)(1) through (a)(7) of this paragraph:

(1) As required by § 63.9(b)(1) of this part, the owner or operator shall provide notification for an area source that subsequently increases its emissions such that the source is a major source subject to the standard.

(2) As required by § 63.9(b)(3) of this part, the owner or operator of a new or reconstructed affected source, or a source that has been reconstructed such that it is an affected source, that has an initial startup after the effective date of this subpart and for which an application for approval or construction or reconstruction is not required under § 63.5(d) of this part, shall provide notification that the source is subject to the standard. The notification shall contain the general information required for the notification of compliance status in paragraph (a)(6)(i) of this section.

(3) As required by § 63.9(b)(4) of this part, the owner or operator of a new or reconstructed major affected source that has an initial startup after the effective date of this subpart and for which an application for approval of construction or reconstruction is required by § 63.5(d) of this part shall provide the following notifications:

(i) Notification of intention to construct a new major affected source, reconstruct a major source, or reconstruct a major source such that the source becomes a major affected source;

(ii) Notification of the date when construction or reconstruction was commenced (submitted simultaneously with the application for approval of construction or reconstruction if construction or reconstruction was commenced before the effective date of this subpart or no later than 30 days of the date construction or reconstruction commenced if construction or reconstruction commenced after the effective date of this subpart);

(iii) Notification of the anticipated date of startup; and

(iv) Notification of the actual date of startup.

(4) As required by § 63.9(b)(5) of this part, after the effective date of this subpart, an owner or operator who intends to construct a new affected source or reconstruct an affected source subject to this subpart, or reconstruct a source such that it becomes an affected source subject to this subpart shall provide notification of the intended construction or reconstruction. The notification shall include all the information required for an application for approval of construction or reconstruction as required by § 63.5(d) of this part. For major sources, the application for approval of construction or reconstruction may be used to fulfill these requirements.

(i) The application shall be submitted as soon as practicable before the construction or reconstruction is planned to commence (but no sooner than the effective date) if the construction or reconstruction

commences after the effective date of this subpart; or

(ii) The application shall be submitted as soon as practicable before startup but no later than 90 days after the effective date of this subpart if the construction or reconstruction had commenced and initial startup had not occurred before the effective date.

(5) As required by §§ 63.9(e) and 63.9(f) of this part, the owner or operator shall provide notification of the anticipated date for conducting performance tests and visible emission observations for flares. The owner or operator shall notify the Administrator of the intent to conduct a performance test or perform visible emission observations to determine compliance with flare requirements at least 30 days before the test is scheduled.

(6) Each owner or operator of a source subject to this subpart shall submit a notification of compliance status report within 150 days after the compliance dates specified in § 63.1564(a) of this subpart. The notification shall be signed by the responsible official who shall certify its accuracy. A complete notification compliance status report shall include the information in paragraphs (a)(6)(i) through (a)(6)(vii) of this section. This information may be submitted in an operating permit application, in an amendment to an operating permit application, in a separate submittal, or in any combination. In a State with an approved operating permit program where delegation of authority under section 112(l) of the Act has not been requested or approved, the owner or operator shall provide a duplicate notification to the applicable Regional Administrator. If the required information has been submitted before the date 150 days after the compliance date specified in § 63.1564(a) of this subpart, a separate notification of compliance status report is not required. If an owner or operator submits the information specified in paragraphs (a)(6)(i) through (a)(6)(vii) of this section at different times or in different submittals, later submittals may refer to earlier submittals instead of duplicating and resubmitting the previously submitted information.

(i) General information:

(A) The name and address of the owner or operator;

(B) The address (i.e., physical location) of the affected source;

(C) An identification of the relevant standard, or other requirement, that is the basis of the notification and the source's compliance date; and

(D) A statement of whether the source is a major source or an area source. If

the facility is an area source, the remaining informational requirements in this paragraph are not applicable.

(ii) A brief description of each affected source, including:

(A) The nature, size, design, and method of operation;

(B) Operating design capacity; and
(C) Identification of each point of emission for each HAP, or if a definitive identification is not yet possible, a preliminary identification of each point of emission for each HAP.

(iii) A brief description of each affected source not subject to the monitoring requirements of this subpart, including:

(A) Identification of any boiler or process heater with a design heat input capacity greater than or equal to 44 MW or any boiler or process heater in which all vent streams are introduced into the flame zone for which monitoring is not required;

(B) Identification of any catalytic cracking unit regenerator that does not use a combustion device to comply with CO emission standard in § 63.1562(a)(2) of this subpart for which monitoring is not required, including CO emission monitoring data and quality assurance test results as described in § 63.1564(b)(2) of this subpart, a copy of the exemption approved by the applicable permitting authority, and information and data demonstrating that the average CO emissions are less than 50 ppm by volume as required by § 63.1565(d)(3) of this subpart; and

(C) Identification of each catalytic reforming unit for which control device requirements do not apply due to depressuring and purging operations at a differential pressure between the reactor vent and the gas transfer system to the control device of less than 1 psig or when the reactor vent pressure is 1 psig or less.

(iv) A description of the air pollution control equipment or method of compliance for each affected source, including the PM or Ni emission standard selected under § 63.1562(a) and the catalytic cracking unit and sulfur recovery unit emission standards and requirements selected under § 63.1560(d) of this subpart (Applicability and designation of sources).

(v) The methods used to determine compliance for each affected source, including:

(A) The engineering assessment specified in § 63.1566(i) of this subpart or the results of the performance test specified in § 63.1564 of this subpart. Performance test results shall include operating ranges of key process and control parameters during the

performance test; the value, averaged over the period of the performance test, of each parameter identified in the operating permit as being monitored in accordance with § 63.1565 of this subpart; and applicable supporting calculations;

(B) The minimum and/or maximum parameter value, as applicable for each monitored parameter for each emission point and the data and rationale used to develop the range, including any data and calculations used to develop the value and a description of why the value indicates proper operation of the control device. For any recommended continuous parameter monitoring system for a catalytic cracking unit that does not use an electrostatic precipitator or scrubber to comply with the PM or Ni emission standard in § 63.1562(a)(1) of this subpart or a sulfur recovery unit that does not use a combustion device to comply with the TRS emission standard in § 63.1562(c) of this subpart, the owner or operator shall provide data and rationale for the recommended system. Following approval of the recommended system by the permitting authority, the owner or operator shall provide the information described in this paragraph for each monitored parameter;

(C) The definition of "operating day" for each incinerator, flare, boiler or process heater with a design input capacity less than 44 MW where the vent stream is not introduced into the flame zone, and catalytic cracking unit or catalytic reforming unit using a scrubber for the purpose of determining daily average values of monitored parameters. The definition, subject to approval by the applicable permitting authority, shall specify the times at which an operating day begins and ends; it may be from midnight to midnight or another daily period; and

(D) If a flare is used to comply with the TOC standards in § 63.1562(b)(1) of this subpart, the flare design (e.g., steam-assisted, air-assisted, or non-assisted), all visible emission readings, heat content determinations, flow rate measurements, and exit velocity determinations made during the compliance determination and all periods when the pilot flame is absent.

(vi) Operation, maintenance, and monitoring information, including:

(A) A description of the method that will be used for determining continuing compliance for each affected source, including a description of the monitoring and reporting requirements and test methods;

(B) A monitoring schedule, including identification of those time periods when control device or process

parameter monitoring would be conducted and when monitoring would not be conducted (e.g., monitoring of emissions from catalytic reforming unit regeneration vents is required only when the regeneration process is performed);

(C) A maintenance schedule for each process and control device consistent with the manufacturer's instructions and recommendations for routine and long-term maintenance; and

(D) Quality control program for continuous parameter monitoring systems and continuous emission monitoring systems, including procedures (as applicable) for initial and subsequent calibrations, preventative maintenance, accuracy audit procedures; corrective action; and data recording, calculation, reporting, and recordkeeping procedures to document conformance.

(vii) A statement by the owner or operator as to whether the existing, new, or reconstructed source is in compliance with the requirements of this subpart.

(b) *Reports—periodic.* The owner or operator of a source subject to this subpart shall submit semi-annual reports no later than 60 calendar days after the end of each 6-month period if any period of excess emissions, as defined in § 63.1565(o) of this subpart, occurs during the reporting period. The first 6-month period shall begin on the date the notification of compliance status report is required to be submitted. An owner or operator may submit reports required by other regulations in place of or as part of the periodic report required by this paragraph if the reports contain the information required by paragraphs (b)(1) through (b)(7) of this section. A periodic report is not required if none of the exceptions specified in paragraphs (b)(1) through (b)(5) of this section occur during a 6-month period:

(1) Monitoring results for an operating day when:

(i) For a thermal incinerator, the daily average temperature falls below the minimum value specified in the notification of compliance status report;

(ii) For a catalytic incinerator, the daily average upstream temperature or the daily average temperature difference across the catalyst bed falls below the minimum value specified in the notification of compliance status report;

(iii) For a boiler or process heater with a design heat capacity less than 44 MW where the vent stream is not introduced into a flame zone, the daily average temperature falls below the minimum value specified in the notification of compliance status report;

(iv) For an electrostatic precipitator, the average hourly voltage or secondary current or average hourly total power input falls below the minimum value specified in the notification of compliance status report;

(v) For a wet scrubber, the daily average pressure drop or daily average liquid-to-gas ratio falls below the minimum value specified in the notification of compliance status report;

(vi) For a catalytic cracking unit with no combustion device, the average hourly CO concentration measured by the CO continuous emission monitoring system required by § 63.1565(d)(1) of this subpart exceeds 500 ppmv or any period when the average hourly temperature or oxygen content falls below the minimum value specified in the notification of compliance status report; or

(vii) For a catalytic cracking unit catalyst regenerator subject to the PM emission standard in § 63.1562(a)(1)(i) of this subpart, the daily average coke burn-off rate (thousands kg/hr) exceeds the maximum value specified in the notification of compliance status report.

(2) The duration of a period during an operating day when monitoring data were not available for 75 percent of the operating hours;

(3) The duration of a period during an operating day when all pilot flames of a flare are absent;

(4) The time and duration of any period a vent stream is diverted through a bypass line; or

(5) For data compression systems approved under § 63.1565(n) of this subpart, an operating day when the monitor operated for less than 75 percent of the operating hours or a day when less than 18 monitoring values were recorded.

(6) The owner or operator shall submit the results of any performance test conducted during the reporting period including one complete report for each test method used for a particular kind of emission point tested. For additional tests performed for a similar emission point using the same method, results and any other information required shall be submitted, but a complete test report is not required. A complete test report shall contain a brief process description, sampling site data, description of sampling and analysis procedures and any modifications to standard procedures, quality assurance procedures, record of operating conditions during the test, record of preparation of standards, record of calibrations, raw data sheets for field sampling, raw data sheets for field and laboratory analyses, documentation of

calculations, and any other information required by the test method.

(7) A request for changing applicability of the PM or Ni emission standard in § 63.1562(a) of this subpart or for changing the applicability of emission standards in this subpart to/ from the new source performance standard in subpart J to part 60 of this chapter as allowed under § 63.1560(d) of this subpart (Applicability and designation of affected sources) shall be included in a periodic report. The request must be accompanied by all information and data necessary to demonstrate compliance with the emission standard and associated requirements of this subpart.

(c) *Reports—startup, shutdown, and malfunctions.* The owner or operator shall develop and implement a written plan containing specific procedures to be followed for operating the source and maintaining the source during periods of startup, shutdown, and malfunction and a program of corrective action for malfunctioning process and control systems used to comply with the standard in accordance with the operation and maintenance requirements in § 63.6(e)(3) of this part. The duty to develop and implement the plan shall be incorporated in the facility's part 70 or part 71 operating permit. Each plan shall contain corrective action procedures to be followed if any of the events in paragraphs (b)(1) through (b)(3) of this section occur during the 6-month reporting period, including procedures to determine the cause of the exceedance or deviation, the time the exceedance or deviation began and ended, and for recording the actions taken to correct the cause of the exceedance or deviation. The following reporting and recordkeeping requirements apply to startups, shutdowns, and malfunctions:

(1) When the actions taken to respond are consistent with the plan, keep records to document the event and the response as required in § 63.6(e)(3)(iii) of this part. The owner or operator is not required to report these events in the semi-annual startup, shutdown, and malfunction report required under § 63.10(d)(1) of this part when the actions are consistent with the plan, and the reporting requirements in § 63.6(e)(3)(iii) and § 63.10(d)(5) of this part do not apply.

(2) When the actions taken to respond are not consistent with the plan, keep records to document the event and the response as required in § 63.6(e)(3)(iv) of this part. The owner or operator shall report these events and the response taken in the semi-annual startup,

shutdown, and malfunction report required under § 63.10(d)(1) of this part. In this case, the reporting requirements in § 63.6(e)(3)(iv) and § 63.10(d)(5) of this part do not apply.

(3) The owner or operator may include the semi-annual startup, shutdown, and malfunction report required under § 63.10(d)(1) of this part in the periodic report required by paragraph (b) of this section.

(d) *Annual compliance certification.* For the purpose of annual certifications of compliance required by the permitting regulations in parts 70 or 71 of this chapter, the owner or operator shall certify continuing compliance based upon the following conditions:

(1) All periods of excess emissions, including exceedances or excursions, that occurred during the year have been reported as required by this subpart; and

(2) All monitoring, recordkeeping, and reporting requirements were met during the year.

(e) *Recordkeeping.* (1) The owner or operator must retain each record required by this subpart for at least 5 years following the date of each occurrence, measurement, maintenance activity, corrective action, report, or record. The most recent 2 years of records must be retained at the facility. The remaining 3 years of records may be retained off site;

(2) The owner or operator may retain records on microfilm, on a computer, on computer disks, on magnetic tape, or on microfiche;

(3) The owner or operator may report required information on paper or on a labeled computer disc using commonly available and compatible computer software; and

(4) The owner or operator shall maintain records of the following information:

(i) A copy of the startup, shutdown, and malfunction plan;

(ii) Records documenting the actions taken when a startup, shutdown, or malfunction occurred and information to demonstrate that such actions were consistent with the plan;

(iii) All maintenance performed on air pollution control equipment;

(iv) Each period when a continuous monitoring system or continuous emission monitor was inoperative or malfunctioning;

(v) All measurements, test results (including a complete performance test report for each affected source), and any other information needed to demonstrate compliance with the standards in this subpart;

(vi) All documentation supporting notifications of compliance status;

(vii) All documentation supporting conformance with appendix F of part 60 of this chapter for each continuous emission monitoring system, including calibration checks and relative accuracy test audits;

(viii) For owners or operators using continuous monitoring systems or continuous emission monitoring systems to demonstrate compliance, records for such systems as required by § 63.10(c) of this part;

(ix) Records of any changes to a regulated process, including a record of any changes in the location at which the vent stream is introduced into the flame zone for a boiler or process heater;

(x) Where a bypass line is equipped with a flow indicator, records of each hourly inspection demonstrating whether the flow indicator was operating properly and whether gas or vapor flow was detected or where a bypass line is secured with a car-seal or a lock-and-key type device, records of each monthly inspection demonstrating that the bypass line valve is maintained in the closed position and whether gas or vapor flow was detected; and for all bypass line valves, records of the times and durations of all periods when the vent stream is diverted through a bypass line;

(xi) Records of hourly inspections of flare pilot flame; and

(xii) For each catalytic cracking unit catalytic regenerator subject to the PM emission standard in § 63.1562(a)(1)(i) of this subpart, records of the daily average coke burn-off rate, the hours of operation for each unit, and process data used to determine the volumetric flow rate of exhaust gas.

§ 63.1568 Applicability of general provisions.

The requirements of the general provisions in subpart A of this part that are applicable to the owner or operator subject to the requirements of this subpart are shown in appendix A to this subpart.

§ 63.1569 Delegation of authority.

In delegating implementation and enforcement authority to a State under section 112(l) of the Act, all authorities are transferred to the State.

§ 63.1570–63.1579 [Reserved]

Appendix A to Subpart UUU to Part 63—Applicability of General Provisions (40 CFR Part 63, Subpart A) to Subpart UUU

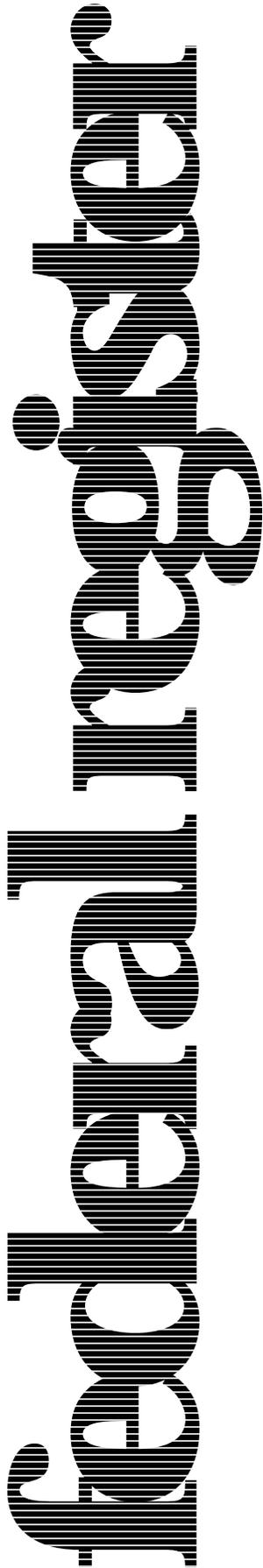
Citation	Applies to subpart UUU	Comment
63.1(a)(1)–63.1(a)(3)	Yes	General Applicability.
63.1(a)(4)	No	This table specifies applicability of General Provisions to Subpart UUU.
63.1(a)(5)	No	[Reserved].
63.1(a)(6)–63.1(a)(8)	No	
63.1(a)(9)	No	[Reserved].
63.1(a)(10)	No	Subpart UUU specifies calendar or operating day.
63.1(a)(11)–63.1(a)(14)	Yes	
63.1(b)(1)	No	Initial Applicability Determination Subpart UUU specifies applicability.
63.1(b)(2)	Yes	
63.1(b)(3)	No	
63.1(c)(1)	No	Subpart UUU specifies requirements.
63.1(c)(2)	No	Area sources are not subject to subpart UU.
63.1(c)(3)	No	[Reserved].
63.1(c)(4)	Yes	
63.1(c)(5)	Yes	Except that notification requirements in subpart UUU apply.
63.1(d)	No	[Reserved].
63.1(e)	Yes	Applicability of Permit Program.
63.2	Yes	Definitions § 63.1561 specifies that if the same term is defined in Subparts A and UUU, it shall have the meaning given in Subpart UUU.
63.3	Yes	Units and Abbreviations.
63.4(a)(1)–63.4(a)(4)	Yes	[Reserved].
63.4(a)(5)	Yes	
63.4(b)–63.4(c)	Yes	Circumvention/Severability.
63.5(a)(1)	Yes	Construction and Reconstruction—Applicability Replace term “source” and “stationary source” in § 63.5(a)(1) with “affected source”.
63.5(a)(2)	Yes	
63.5(b)(1)	Yes	Existing, New, Reconstructed Sources—Requirements.
63.5(b)(2)	No	[Reserved].
63.5(b)(3)	Yes	
63.5(b)(4)	Yes	Replace the reference to § 63.9 with § 63.9(b)(4) and (b)(5).
63.5(b)(5)–(6)	Yes	
63.5(c)	No	[Reserved].
63.5(d)(1)(i)	Yes	Application for Approval of Construction or Reconstruction Except Subpart UUU specifies the application is submitted as soon as practicable before startup but no later than 90 days (rather than 60) after the promulgation date where construction or reconstruction had commenced and initial startup had not occurred before promulgation.
63.5(d)(1)(ii)	Yes	Except that emission estimates specified in § 63.5(d)(1)(ii)(H) are not required.
63.5(d)(1)(iii)	No	§ 63.1567(b) specifies submission of notification of compliance status report.
63.5(d)(2)	No	
63.5(d)(3)	Yes	Except § 63.5(d)(3)(ii) does not apply.
63.5(d)(4)	Yes	
63.5(e)	Yes	Approval of Construction or Reconstruction.
63.5(f)(1)	Yes	Approval of Construction or Reconstruction Based on State Review.
63.5(f)(2)	Yes	Except that 60 days is changed to 90 days and cross-reference to (b)(2) does not apply.
63.6(a)	Yes	Compliance with Standards and Maintenance—Applicability.
63.6(b)(1)	No	New and Reconstructed Sources—Dates Subpart UUU specifies compliance dates.
63.6(b)(2)	No	
63.6(b)(3)	Yes	
63.6(b)(4)	No	May apply to standards under section 112(f).
63.6(b)(5)	No	Subpart UUU specifies notification requirements.
63.6(b)(6)	No	[Reserved].
63.6(b)(7)	No	
63.6(c)(1)	No	Existing Sources—Dates Subpart UUU specifies compliance dates.
63.6(c)(2)–63.6(c)(3)	No	
63.6(c)(4)	No	[Reserved].
63.6(c)(5)	Yes	
63.6(d)	No	[Reserved].
63.6(e)(1)–(2)	Yes	Operation and Maintenance Requirements.
63.6(e)(3)(i)–(ii)	Yes	Startup, Shutdown, and Malfunction Plan.
63.6(e)(3)(iii)	Yes	
63.6(e)(3)(iv)	Yes	Except that reports of actions not consistent with plan are not required within 2 and 7 days of action but rather must be included in next periodic report.
63.6(e)(3)(v)–(viii)	Yes	
63.6(f)(1)	Yes	Compliance with Emission Standards.
63.6(f)(2)(i)	Yes	
63.6(f)(2)(ii)	Yes	Subpart UUU specifies use of monitoring data in determining compliance.
63.6(f)(2)(iii)(A)–63.6(f)(2)(iii)(C)	Yes	
63.6(f)(2)(iii)(D)	No	
63.6(f)(2)(iv)–(v)	Yes	
63.6(f)(3)	Yes	
63.6(g)	Yes	Alternative Standard.

Citation	Applies to subpart UUU	Comment
63.6(h)	No	Compliance with Opacity/VE Standards Subpart UUU does not include opacity/VE standards.
63.6(i)(1)–63.6(i)(14)	Yes	Extension of Compliance.
63.6(i)(15)	No	[Reserved].
63.6(i)(16)	Yes.	
63.6(j)	Yes	Exemption from Compliance.
63.7(a)(1)	No	Performance Test Requirements—Applicability and Dates Subpart UUU specifies the applicable test and demonstration procedures.
63.7(a)(2)	No	Test results must be submitted in the notification of compliance status report due 150 days after the compliance date.
63.7(a)(3)	Yes.	
63.7(b)	Yes	Notifications Except Subpart UUU specifies notification at least 30 days prior to the scheduled test date rather than 60 days.
63.7(c)	Yes	Quality Assurance/Test Plan § 63.1564(b)(2) requires a Q/A plan for CO continuous emission monitoring systems.
63.7(d)	Yes	Testing Facilities.
63.7(e)(1)	Yes	Conduct of Tests.
63.7(e)(2)–63.7(e)(3)	No	Subpart UUU specifies the applicable methods and procedures.
63.7(e)(4)	Yes.	
63.7(f)	No	Alternative Test Method Subpart UUU specifies the applicable methods and provides alternatives.
63.7(g)	No	Data Analysis, Recordkeeping, Reporting Subpart UUU specifies performance test reports and requires additional records for continuous emission monitoring systems.
63.7(h)(1)	Yes	Waiver of Tests.
63.7(h)(3)–63.7(h)(4)	No.	
63.7(h)(5)	Yes.	
63.8(a)	No	Monitoring Requirements Applicability.
63.8(b)(1)	Yes	Conduct of Monitoring.
63.8(b)(2)	No	Subpart UUU specifies the required monitoring locations.
63.8(b)(3)	Yes.	
63.8(c)(1)(i)	Yes	CMS Operation and Maintenance.
63.8(c)(1)(ii)	No	Addressed by periodic reports in § 63.1567(b) of Subpart UUU.
63.8(c)(1)(iii)	Yes.	
63.8(c)(2)	Yes.	
63.8(c)(3)	Yes	Except that operational status verification includes completion of manufacturer written specifications or installation operation, and calibration of the system or other written procedures that provide adequate assurance that the equipment will monitor accurately.
63.8(c)(4)	No	Monitoring frequency is specified in § 63.1565 of Subpart UUU.
63.8(c)(5)	No.	
63.8(c)(8)–63.8(d)	Yes	Quality Control.
63.8(e)	Yes	CMS Performance Evaluation May be required by Administrator.
63.8(f)(1)	Yes	Alternative Monitoring Method.
63.8(f)(2)	Yes.	
63.8(f)(3)	Yes.	
63.8(f)(4)(i)	No	§ 63.1565(f) specifies procedure.
63.8(f)(4)(ii)	Yes.	
63.8(f)(4)(iii)	No.	
63.8(f)(5)(i)	Yes.	
63.8(f)(5)(ii)	No.	
63.8(f)(5)(iii)	Yes.	
63.8(f)(6)	Yes	Applicable to CO continuous emission monitoring system.
63.8(g)	Yes	Data Reduction Applicable to CO continuous emission monitoring system; Subpart UUU specifies data reduction for CMS.
63.9(a)	Yes	Notification Requirements—Applicability Duplicate notification of compliance status report to RA may be required.
63.9(b)(1)(i)	Yes	Initial Notifications.
63.9(b)(1)(ii)	Yes.	
63.9(b)(1)(iii)	Yes.	
63.9(b)(2)	Yes.	
63.9(b)(3)	Yes.	
63.9(b)(4)	Yes	Except that notification is to be submitted within 150 days as part of the compliance status report.
63.9(b)(5)	Yes	Except that notification is to be submitted within 150 days as part of the compliance status report.
63.9(c)	Yes	Request for Compliance Extension.
63.9(d)	Yes	New Source Notification for Special Compliance Requirements.
63.9(e)	Yes	Except notification is required at least 30 days before test.
63.9(f)	Yes	Notification of VE/Opacity Test.
63.9(g)	No.	
63.9(h)	No	Notification of Compliance Status § 63.1567 specifies the applicable requirements.
63.9(i)	Yes	Adjustment of Deadlines.

Citation	Applies to subpart UUU	Comment
63.9(j)	No	Change in Previous Information.
63.10(a)	Yes	Recordkeeping/Reporting—Applicability.
63.10(b)(1)	No	General Requirements Subpart UUU specifies applicable record retention requirements.
63.10(b)(2)(i)–(xiv)	Yes.	
63.10(b)(3)	No.	
63.10(c)	Yes	Additional CMS Recordkeeping.
63.10(d)(1)	No	General Reporting Requirements.
63.10(d)(2)	No	Performance Test Results §63.1567 specifies performance test reporting requirements.
63.10(d)(3)	Yes	Opacity or VE Observations.
63.10(d)(4)	Yes	Progress Reports.
63.10(d)(5)(i)	Yes	Startup, Shutdown, and Malfunction Reports. Except that reports are not required if actions are consistent with SSM plan, unless requested by permitting authority.
63.10(d)(5)(ii)	Yes	Except that reports of actions not consistent with the plan are not required within 2 and 7 days of action but must be included in next periodic report.
63.10(e)(1)	Yes	Additional CMS Reports.
63.10(e)(2)	No.	
63.10(e)(3)	No	Excess Emissions/CMS Performance Reports Subpart UUU specifies the applicable requirements.
63.10(e)(4)	No	COMS Data Reports.
63.10(f)	Yes	Recordkeeping/Reporting Waiver.
63.11	Yes	Control Device Requirements Applicable to flares.
63.12	Yes	State Authority and Delegations.
63.13	Yes	Addresses.
63.14	No	Incorporation by Reference.
63.15	Yes	Availability of Information/Confidentiality.

[FR Doc. 98–23508 Filed 9–10–98; 8:45 am]

BILLING CODE 6560–50–P



Friday
September 11, 1998

Part IV

**Department of
Housing and Urban
Development**

**24 CFR Parts 401 and 402
Multifamily Housing Mortgage and
Housing Assistance Restructuring
Program and Renewal of Expiring Section
8 Project-Based Assistance Contracts;
Interim Rule**

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Parts 401 and 402

[Docket No. FR-4298-I-01]

RIN 2502-AH09

**Multifamily Housing Mortgage and
Housing Assistance Restructuring
Program (Mark-to-Market) and Renewal
of Expiring Section 8 Project-Based
Assistance Contracts**

AGENCY: Office of the Secretary, HUD.

ACTION: Interim rule.

SUMMARY: This interim rule implements recently-enacted legislation that created a Mark-to-Market Program through which section 8 rents for multifamily projects with HUD-insured or HUD-held mortgages will be reduced. The purpose of the program is to preserve low-income rental housing affordability while reducing the long-term costs of Federal rental assistance, including project-based assistance, and minimizing the adverse effect on the FHA insurance funds. The Mark-to-Market Program will be implemented through Mortgage Restructuring and Rental Assistance Sufficiency Plans to be developed for individual projects by Participating Administrative Entities selected by HUD. The interim rule also implements legislation for renewal of section 8 project-based assistance contracts for projects outside of the Mark-to-Market Program.

DATES: *Effective Date:* October 13, 1998.

Comment Due Date: October 26, 1998.

ADDRESSES: Interested persons are invited to submit comments regarding this interim rule to the Office of the General Counsel, Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, DC 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying during regular business hours (7:30 a.m.-5:30 p.m. eastern time) at the above address. HUD will not accept comments sent by facsimile (FAX). (In addition, see the Paperwork Reduction Act heading under the Findings and Certifications section of this preamble regarding submission of comments on the information collection burden.) See **SUPPLEMENTARY INFORMATION** section for electronic access and filing information.

FOR FURTHER INFORMATION CONTACT: Dan Sullivan, Department of Housing and Urban Development, 451 7th St., Washington DC 20410. Telephone: 202-

708-0547. (This is not a toll-free number.) For hearing- and speech-impaired persons, this number may be accessed via TTY by calling the Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutes

The Multifamily Assisted Housing Reform and Affordability Act of 1997, title V of Pub. L. 105-65 (approved October 27, 1997), 42 U.S.C. 1437f note (MAHRA), was enacted to reduce the cost of Federal housing assistance, enhance HUD's administration of such assistance, and to ensure the continued affordability of units in certain multifamily housing projects. The projects involved are projects with: (1) HUD-insured or HUD-held mortgages; and (2) contracts for project-based rental assistance from HUD, primarily through the section 8 program, for which the average rents for assisted units exceed the rent of comparable properties. MAHRA authorizes a new Mark-to-Market Program designed to preserve low-income rental housing affordability while reducing the long-term costs of Federal rental assistance, including project-based assistance from HUD. This will be accomplished by (1) reducing project rents to no more than comparable market rents (with certain exceptions discussed below), (2) restructuring the HUD-insured or HUD-held financing so that the monthly payments on the first mortgage can be paid from the reduced rental levels, (3) performing any needed rehabilitation of the project, and (4) ensuring competent management of the project. The project will be subject to long-term use affordability restrictions.

MAHRA is intended to provide a long-term solution to the rapidly growing cost to the Federal Government of assisting affordable rental housing. Over 800,000 housing units in approximately 8,500 multifamily projects have been financed with FHA-insured mortgages and supported by project-based section 8 housing assistance payment (HAP) contracts. In many cases, these HAP contracts currently provide for rents for assisted units which substantially exceed the rents for comparable unassisted units in the local market. Starting in Fiscal Year 1996, those contracts began to expire, and Congress and the Administration have been providing one-year extensions of expiring contracts. While annual HAP contract extensions for these projects maintain an important housing resource, they come at great

expense. Every year more contracts expired, compounding the cost of annual extensions. In 1996, HUD estimated that in 10 years the annual cost of renewing the contracts on current terms would rise to approximately \$7 billion, or one-third of HUD's budget. If the section 8 assistance were simply reduced or eliminated, there would be an increased likelihood that these projects would be unable to meet their financial obligations including operating expenses, current and future capital needs, and debt service payments on FHA-insured or HUD-held mortgages.

To begin to address this growing problem, Congress authorized demonstration programs. The initial demonstration (the 1996 demonstration) was authorized by section 210 of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1996, as a demonstration for Fiscal Years 1996 and 1997 for 15,000 units in projects with insured mortgages and section 8 contracts with rents in excess of fair market rents. Section 210 authorized HUD to designate third parties to act on its behalf in connection with the demonstration. The Department published notices regarding the 1996 demonstration at 61 FR 34664 (July 2, 1996) and 61 FR 28757 (July 25, 1996).

Congress repealed the 1996 demonstration authority and replaced it with the demonstration authorized by sections 211 and 212 of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997 (the 1997 demonstration) for projects with insured mortgages and project-based assistance contracts expiring in Fiscal Year 1997 with aggregate rents in excess of 120 percent of fair market rents (see HUD's Guidelines published at 62 FR 3566, January 23, 1997). The 1997 demonstration was limited to 50,000 units. HUD relied on third-party designees to perform many important functions.

In section 522(b) of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, Congress extended the 1997 demonstration, without any volume limitation, to projects with contracts expiring in Fiscal Year 1998. The new 1998 demonstration is generally the same as the 1997 demonstration, with certain modifications, and is a transitional program to permit time for HUD to prepare this rule and take other necessary steps to implement a Mark-to-Market Program for projects with above-

market rents and contracts expiring in Fiscal Year 1999 and later (see HUD guidelines at 63 FR 36130, July 1, 1998).

MAHRA builds on the demonstration program with similar objectives and many similar provisions, but also some significant differences. Organizationally, MAHRA establishes a new Office of Multifamily Housing Assistance Restructuring (OMHAR) within HUD to develop and actively manage, administer, and oversee the Mark-to-Market Program through a decentralized structure of Participating Administrative Entities (PAEs). OMHAR will establish the framework of the Program through regulations and will manage the program by selecting and monitoring Participating Administrative Entities (PAEs). In recognition of limited HUD resources, MAHRA gives PAEs the role of negotiating with the owners of individual projects and developing the Mortgage Restructuring and Rental Sufficiency Plans ("Restructuring Plans") that will establish the future responsibilities of the owner, the PAE and HUD for projects that are marked-to-market. PAEs will be State housing finance agencies or local housing agencies, or nonprofit or for-profit entities in partnership with public entities. OMHAR may itself act as the PAE with respect to selected projects. OMHAR will prescribe the specific responsibilities of each PAE in Portfolio Restructuring Agreements to be negotiated.

MAHRA also contains substantive differences from the previous demonstrations. For example, it includes projects with HUD-held mortgages in addition to HUD-insured mortgages and requires (as does the 1998 demonstration) a second mortgage with deferred payment from net cash flow after accounting for all project expenses.

Section 524 of MAHRA authorizes renewal of section 8 project-based assistance contracts for projects without Restructuring Plans under the Mark-to-Market Program, including renewals that are not eligible for Plans and those for which the owner do not request Plans. Renewals must be at rents not exceeding comparable market rents except for certain exception projects.

B. Current Implementation of MAHRA

While determining the best way to implement MAHRA, HUD sought ideas from a wide variety of non-proprietary, nationally-based organizations with diverse viewpoints and interests. HUD received many "concept papers" from these organizations presenting many different perspectives of which HUD needed to be aware. These concept

papers do not represent HUD policy or any official advisory committee, but were useful in helping to focus HUD's attention on the most important issues to be decided in development of the Mark-to-Market Program. The concept papers are available to the public on the Mark-to-Market Internet web site identified below.

In February 1998, after review of the concept papers, HUD officials attended a series of meeting where they heard the views from members of a working group representing the organizations that had developed the concept papers. Although none of this interim rule is the product of the working group members, the views expressed to HUD were of great benefit in ensuring that HUD was exposed to the widest possible variety of viewpoints on issues and concerns of those to be affected by the Mark-to-Market Program. Notes from these working group sessions are also available on the web site.

HUD is drafting a Program Manual to give program participants operational guidance to supplement this interim rule and the final rule. The Manual will be made publicly available as soon as it is completed. This interim rule will take effect 30 days after publication and commenters should not delay submitting comments in anticipation of any additional material that may be in the Manual.

HUD has taken two other steps toward preliminary implementation of the Mark-to-Market Program. As part of HUD's "SuperNOFA" for Economic Development and Empowerment Program published on April 30, 1998 in the **Federal Register** (63 FR 23876), HUD announced the availability of funding for Intermediary Technical Assistance Grants (ITAG) and Outreach and Training Grants (OTAG). These programs will assist tenant and local community groups, State and local governments, and other groups with funding for technical assistance so they can participate meaningfully in the Mark-to-Market Program. State-or community-wide nonprofit or public entity intermediaries to distribute these funds are selected competitively.

HUD has also issued a Request for Qualifications (RFQ) for eligible entities interested in being Participating Administrative Entities, 63 FR 44102, August 17, 1998. When this interim rule takes effect, HUD expects to have made substantial progress toward having a PAE infrastructure in place and will begin assigning assets (eligible projects with expiring section 8 contracts) as soon as each PAE executes its Project Restructuring Agreement (PRA) with

HUD. HUD will provide training for PAEs.

Beginning in October 1998, HUD also expects to begin extending, on an interim basis as provided in the rule, contracts expiring in Fiscal Year 1999 for eligible projects pending either development of requested Restructuring Plans or full review of requests for renewal under section 524 of MAHRA.

On July 21, 1998, the Treasury Department issued Revenue Ruling 98-34 clarifying the tax impact of the mortgage restructuring required for the Mark-to-Market Program. This ruling (published in 1998-31 I.R.B. at page 12, August 3, 1998) reduces uncertainty and is expected to mitigate many concerns of owners who are eligible to participate in the Mark-to-Market Program.

MAHRA provides that before publication of final regulations HUD is to conduct at least three public forums at which organizations representing various groups identified in MAHRA may express views concerning HUD's proposed disposition of recommendations from those groups. The Department expects to conduct these forums within several weeks after publication of this interim rule, with tentative locations in New York, Chicago, and San Francisco. The exact location and date, and an information contact, will be posted on the Mark-to-Market web site (see below).

HUD will make additional information on the Mark-to-Market Program available on HUD's Internet web site, currently at <http://www.hud.gov/fha/mfh/pre/premenu.html>. Among other information, HUD will provide a list of addresses of HUD HUBs that have jurisdiction over the Program, a list of PAEs that have been selected, and a list of potentially-eligible projects.

MAHRA directs HUD to issue this interim rule, which (in addition to MAHRA) will serve as the legal authority for the Mark-to-Market Program and for extension of expiring section 8 project-based contracts until OMHAR issues the required final rule. HUD will not process contract renewals under this rule until October 1, 1998. HUD intends to issue one or more Notices with additional information on contract renewal procedures. OMHAR will develop and issue a final rule as required by MAHRA as soon as feasible after it has considered the public comments to be submitted regarding this interim rule. The Program will operate based on this interim rule until the final rule takes effect.

II. Content of Part 401

Two new parts are added to title 24 of the Code of Federal Regulations. Part 401 covers the new Mark-to-Market Program including renewals of section 8 contracts under the Program. Part 401 also covers the determination of whether an eligible project will be given a contract renewal without a Restructuring Plan. Part 402 covers section 8 contract renewals without a Restructuring Plan (i.e., outside of the Mark-to-Market Program).

Part 401 is divided into the following subparts:

- Subpart A—General Provisions; Eligibility
- Subpart B—Participating Administrative Entity (PAE) and Portfolio Restructuring Agreement (PRA)
- Subpart C—Restructuring Plan
- Subpart D—Implementation of the Restructuring Plan after Closing
- Subpart E—Section 8 Requirements for Restructured Projects
- Subpart F—Owner Dispute of Rejection and Administrative Appeal

Specific sections in these subparts are discussed below under the section headings.

Subpart A—General Provisions; Eligibility

Section 401.1 What is the Purpose of Part 401?

Section 401.1 explains that part 401 contains the regulations implementing the Mark-to-Market legislation, including the renewal of section 8 assistance for restructured projects. The section references sections 511(b) and 512(2) of MAHRA which detail the purpose and scope of the Mark-to-Market Program. In general, the Program is intended to enhance HUD's administration and oversight of projects with section 8 assisted housing through delegation of certain functions to State housing finance agencies and local housing agencies and other nonprofit and for-profit entities as Participating Administrative Entities (PAEs). Pursuant to Portfolio Restructuring Agreements (PRAs), PAEs will develop Restructuring Plans for assigned projects to ensure continued availability of affordable multifamily housing through reduction of rents, restructuring of mortgage obligations if required, needed rehabilitation, and assurance of competent management, with the objective of reducing the long-term costs to the Government for such housing and minimizing the adverse effect on the FHA insurance funds. The Program includes projects with HUD-insured and HUD-held mortgages, HUD-provided project-based rental assistance contracts that expire on October 1, 1998 or later,

and rents that are above comparable market rents (eligible projects) subject to exceptions described in § 401.100.

Section 401.2 What Special Definitions Apply to This Part?

Section 401.2 identifies the statute (MAHRA) which created the Mark-to-Market program. It also identifies the terms that are defined in MAHRA and used in the rule, and defines the following additional terms that are used in the rule: affiliate, applicable Federal rate, community-based nonprofit organization, comparable market rents, disabled family, elderly family, eligible project, HUD, NHA, owner, PAE, PCA, PRA, priority purchaser, Rental Assistance Assessment Plan, Restructured Rent, Restructuring Plan, section 541(b) claim, section 8, tenant organization, and unit of local government. In the definition of HUD, it is explained that HUD means the Director of OMHAR for matters that MAHRA specifically assigns to OMHAR. Otherwise, HUD means the Department of Housing and Urban Development generally, acting through the Secretary and other responsible organizations and officials of the Department. FHA mortgage insurance matters are the responsibility of the Assistant Secretary for Housing-Federal Housing Commissioner, who is also responsible for most section 8 project-based assistance. The Assistant Secretary for Public and Indian Housing is responsible for project-based moderate rehabilitation contracts and for tenant-based assistance (vouchers and certificates). HUD's new Real Estate Assessment Center and Enforcement Center are also likely to have a role in carrying out some HUD functions under the rule. The rule does not attempt to sort out these responsibilities within HUD, which are covered by internal delegations of authority.

Section 401.99 What Actions Must an Owner Take to Request a Section 8 Contract Renewal?

Section 401.99 explains three procedures to be followed by owners who request renewals of section 8 project-based assistance contracts. If the owner of an eligible project requests a Restructuring Plan the owner must, at least 3 months before the project-based assistance contract expires (or as soon as practicable if the contract will expire less than 3 months after the effective date of this interim rule), certify to HUD that, to the best of the owner's knowledge, project rents exceed comparable market rents and neither the owner nor any affiliate is suspended or debarred (or that the owner proposes a

voluntary sale of the project). HUD will assign the project to a PAE which will contact the owner. The owner will submit an application to the PAE with the information necessary to enable the PAE to begin development of a Restructuring Plan. The owner must also contact the mortgagee to determine the mortgagee's willingness to consider a modification of the first mortgage as part of the Restructuring Plan. Both the owner and the mortgagee are expected to cooperate with the PAE in the development of the Plan, as provided in § 401.402. The PAE will perform an underwriting analysis. After development of a Restructuring Plan and mutual execution of a Restructuring Commitment, the PAE will coordinate the closing using standard form documents (which will be made available to the owner for review at the beginning of the restructuring process.)

If the owner of an eligible project does not request a Restructuring Plan, the owner must submit to HUD the certification described above in the same time frame with the following additional items: a comparable market rent analysis indicating that the rents are above comparable market rents (using the approach described in § 401.410); the prior fiscal year's annual audited financial statement for the project; and the owner's evaluation of the physical condition of the project. The request will be considered in accordance with § 401.601. Finally, because part 401 is limited to projects eligible for a Restructuring Plan, this section refers the owner to § 402.5 if the project is not eligible for restructuring but the owner wants project-based assistance renewed.

Section 401.100 Which Projects are Eligible for a Restructuring Plan Under This Part?

Section 401.100 incorporates the statutory requirements in section 512(2) of MAHRA for an eligible project. The section explains that project rent exceeds the rent of comparable properties, as required by section 512(2)(A), if the gross potential rent revenue (i.e., at 100 percent occupancy) for the project-based assisted units in the project at current gross rents exceeds the gross potential rent for those units (at 100 percent occupancy) using comparable market rents.

Section 401.100 excludes projects identified in section 514(h) of MAHRA: (1) projects with primary financing or mortgage insurance from State or local governments or their agencies or instrumentalities; (2) projects for the elderly financed under the HUD section 202 program or the Department of

Agriculture's section 515 program; or (3) projects with section 8 moderate rehabilitation contracts for single room occupancy dwellings.

Because of the express prohibition in section 514(h)(1) of MAHRA, under current law the interim rule does not permit a Restructuring Plan for any project with State or local government primary financing. HUD is aware that Congress is considering amendment of section 514(h) to exclude only those projects with State or local primary financing that are identified in section 524(a)(2)(B) of MAHRA. If the law is so amended, the effect of that change would be automatically reflected in this section without the need for revision.

Section 401.101 Which Owners Are Ineligible for a Restructuring Plan?

Section 401.101 states that an owner's request for a Restructuring Plan will not be considered if the owner or an affiliate is debarred or suspended, unless a sale or transfer is proposed. (Section 401.480 discusses project sales or transfers.) The owner may follow the dispute and administrative appeal procedures in subpart F. The owner may dispute whether there is debarment or suspension, under procedures set forth in § 401.645, but may not reopen the question of whether a debarment or suspension was properly imposed. The owner's request may also be rejected later as provided in § 401.403.

Subpart B—Participating Administrative Entity (PAE) and Portfolio Restructuring Agreement (PRA)

Except for situations when HUD will itself undertake the functions of the PAE for a project due to lack of any other qualified PAE, HUD will select a PAE and enter into a Portfolio Restructuring Agreement with the PAE. The PAE obtains the necessary information about the project that will enable it to develop a viable Restructuring Plan for ensuring that the goals of MAHRA are met for a project, and becomes responsible for ensuring implementation of the Plan after HUD approval. The PAE maintains communications with all affected parties including the owner, tenants, the community, and HUD. The specific role of each PAE will be detailed in its PRA with HUD. HUD's Program Manual will contain detailed guidance on the information collection process, including the information needed and the respective roles of the PAE, owner, mortgagee/servicer and others.

Section 401.200 Who May Be a PAE?

Section 512(10) of MAHRA permits a public agency (including a State

housing finance agency or a local housing agency), a nonprofit organization, or a for-profit entity, to act as a PAE. The PAE may not have any outstanding violations of civil rights laws, determined in accordance with criteria in use by HUD. Section 513(b)(7)(A) of MAHRA requires that any for-profit entity serving as a PAE do so in partnership with a public entity, which may include HUD. Section 513(b)(6)(B) of MAHRA requires the prior approval of HUD for any delegation or transfer of responsibilities by a State housing finance agency or a local housing agency. Section 401.200 of the rule includes all of these provisions, with the additional requirements that a nonprofit PAE also partner with a public purpose entity and that all delegations be approved by HUD in the PRA. This section also clarifies that a partnership must meet all legal requirements for a partnership.

Section 401.201 How Does HUD Select PAEs?

Section 401.201 explains that HUD will select PAEs in accordance with the statutory selection criteria and additional selection criteria established by HUD. The selection method will be determined by HUD, and may be through a request for qualifications (RFQ). As discussed in Part I of this Supplementary Information, HUD's initial selections will be through an RFQ.

The rule gives a one-time priority to qualified State housing finance agencies and local housing agencies by giving them exclusive consideration for an initial period after HUD has received responses to the initial RFQ. During the initial period, HUD will consider other entities as PAEs only to the extent that HUD has been unable to identify qualified State housing finance agencies or local housing agencies who are interested in serving as PAEs, or that projects have not been assigned to a qualified agency. If more than one qualified agency responding to the initial RFQ expresses interest for projects in the same jurisdiction, HUD will provide the responding agencies an opportunity to agree on an allocation of responsibility between themselves before HUD will make a selection in accordance with section 513(b)(2) of MAHRA. If no PAE is selected for a project in the Mark-to-Market program due to lack of qualified interested entities, HUD will itself serve as PAE.

Section 401.300 What Is a PRA?

In accordance with section 513(a)(2) of MAHRA, § 401.300 describes the PRA as an agreement between HUD and the

PAE to define their respective rights and responsibilities in connection with development and implementation of Restructuring Plans. The PRA must contain the matters required by section 513(a)(2) of MAHRA. The following sections in this subpart B explain some of the statutory requirements for a PRA and other requirements of HUD.

Section 401.301 Business Arrangements

Section 401.301 lists some of the basic elements regarding business arrangements under the PRA. The PRA must specify: (a) the responsibilities of each partner of the PAE in carrying out the PRA; (b) the resources each partner will provide to accomplish its responsibilities; and (c) all compensation to each partner, direct or indirect.

Section 401.302 PRA Administrative Requirements

Section 513(a)(2)(A) of MAHRA characterizes the PRA as a "cooperative agreement". Generally, a cooperative agreement is used when

(1) The principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

(2) Substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

(31 U.S.C. 6306.) HUD has concluded that Congress did not intend the PRA to be a "cooperative agreement" within this strict definition so that certain legal provisions that ordinarily apply to such cooperative agreements are not directly applicable to PRAs. The primary purpose of the PAE lies not in using public funds to carry out the purposes of MAHRA, but in enlisting the resources and expertise that Congress felt were lacking at HUD. At the same time, the PAE is not a mere provider of services to HUD. It is performing an independent, statutorily-defined role. It appears that Congress used the term "cooperative agreement" in a general sense to emphasize that HUD was not simply procuring the services of a PAE, nor making a grant to a PAE, but that HUD should not otherwise be constrained by the ordinary consequences of designating a legal instrument as a cooperative agreement.

MAHRA itself is very specific on the purpose and contents of a Portfolio Restructuring Agreement and the unique relationship that it creates. Thus, HUD has concluded that it would be inappropriate to subject a PRA to 24 CFR parts 84 ("Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-profit Organizations") and 85 ("Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally-Recognized Indian Tribal Governments"). Similarly, the PRA is not subject to procurement contract requirements.

All PAEs are subject to recordkeeping and inspection and audit of records as provided in this section. Reporting requirements for the PAE will be contained in the PRA.

Section 401.303 PRA Indemnity Provisions for SHFAs and HAS

Section 401.303 implements section 513(a)(2)(G) of MAHRA, which requires the PRA to provide that HUD indemnify a PAE against lawsuits and penalties for action taken pursuant to the PRA (except for willful misconduct or negligence), but only if the PAE is a State housing finance agency or a local housing agency. HUD interprets the statutory indemnification as extending only to agencies that are named as the PAE in the PRA, and not to agencies that may have partnered with another public or private entity that is named as the PAE. The indemnification also does not extend to partners of agencies named as PAEs, even if the partners are agencies that would receive indemnification if named in the PRA as PAE. Section 401.303 makes clear that HUD's obligation to indemnify is contingent upon the availability of funds that may legally be used for this purpose.

Section 401.304 PRA Provisions on PAE Compensation

Section 401.304 provides that the PRA will contain provisions on compensation to the PAE regarding a base fee and reimbursement of expenses, and may provide for incentive fees. The function of the PAE is a unique one for which there is little experience in determining appropriate fees that will both attract competent entities and result in cost-effective performance. In the interim rule, HUD is deferring setting any limits on the actual amount or method of calculation of the base fee and incentive fee. The RFQ for prospective PAEs asks them to provide an estimate of the required fee. As a result of reviewing this information, negotiating the actual fee

arrangements for initial PAEs and refining the precise duties of PAEs in the initial PRA development process, and considering the information and ideas received through the public comment process on the interim rule, HUD intends to include in the final rule more specific provisions on the amount and method of calculation of the base fee and incentive fee. Fees may be different for the public body PAEs selected in "Phase I" of the RFQ process than for those selected for "Phase II".

Section 401.307 Ongoing Responsibility of PAE

Section 401.307 states that the PRA must provide for ongoing activities necessary to implement the Restructuring Plan. This may be accomplished through later amendments once the Plan is developed.

Section 401.309 PRA Term and Termination Provisions; Other Remedies

The PRA will have a term of 1 year, to be renewed for successive terms of 1 year with the mutual agreement of both parties subsequent to HUD review of performance. The PRA will provide for final compensation to the PAE and allocation of existing responsibilities if the PRA is not renewed. A PRA will be subject to termination by HUD at any time for cause, with any final compensation for matters performed by the PAE to that point to be paid by HUD as provided in the PRA, subject to HUD's right of set-off. If cause for termination exists, HUD may order an immediate transfer of some or all of the PAE's duties to another PAE designated by HUD, with a temporary waiver of termination pending satisfactory completion of an orderly transfer. During the term of a PRA, or notwithstanding any termination of a PRA, HUD may seek its actual, direct, and consequential damages from any PAE failure to comply with its obligations under the PRA. The remedies under § 401.309 are cumulative and in addition to any other remedies or rights HUD may have under the terms of the PRA, at law, or otherwise.

Section 401.310 Conflicts of Interest

Section 401.310 addresses conflicts of interest for a PAE and related persons included in the definition of "restricted person": a management official, controlling party or other party under common control, or employee, agent or contractor of the PAE performing services under the PRA. A conflict of interest exists when a PAE or restricted person either (1) has personal, business,

or financial interests or relationships that would lead a reasonable and knowledgeable person to question the integrity or impartiality of those acting for the PAE; or (2) in a lawsuit, is an adverse party either to HUD or to the owner of a project under the PAE's PRA. In general, HUD will avoid dealing with a PAE with a conflict of interest. The conflict may be eliminated by the PAE, or may be waived by HUD. Waiver will be reserved for situations when HUD's interest in the PAE's participation outweighs the concern that a reasonable person may question the integrity of HUD's operations.

This section sets forth procedures for addressing conflict of interest questions that arise before and after selection of a PAE. Conflicts of interest after selection may, if left uncorrected, lead to declaration of default under the PRA and termination, and other remedies described in § 401.313.

Section 401.311 Standards of Conduct

A PAE and restricted persons are subject to minimum ethical standards set forth in section 401.311. The standards prohibit matters such as solicitation by the PAE of items of value from a person with an interest in the performance of the PAE, improperly using property that is under the PAE's charge because of the PRA, using its status as PAE for the benefit of a third party except as contemplated by the PRA, or making unauthorized commitments on behalf of HUD. Section 401.311 cites relevant criminal provisions of the U.S. Code.

Section 401.312 Confidentiality of Information

Section 401.312 requires the PAE and restricted persons to protect avoid misuse of confidential information.

Section 401.313 Consequences of PAE Violations; Finality of HUD Decision

Section 401.313 makes clear the severe consequences that may follow from violation by a PAE or restricted persons of §§ 401.310-.312. As appropriate, HUD may declare a PAE in default under an existing PRA, terminate a PRA under the termination-for-cause provision of § 401.309(b), remove a PAE's eligibility for award of a PRA or to receive projects for restructuring, become liable for damages to HUD arising from termination, or exercise any other rights HUD may have. A HUD decision is final with no further administrative review available.

Section 401.314 Environmental Review Responsibilities

Section 401.314 states that HUD is legally required to retain any environmental review responsibilities under 24 CFR part 50, and that any required environmental review will occur before HUD executes a Restructuring Commitment (see § 401.405). Without delegating any decision-making authority to the PAE, HUD may include in the PRA a provision providing for PAE completion of forms/or and checklists to assist HUD in complying with its requirements under environmental regulations.

Subpart C—Restructuring Plan**Section 401.400 Required Elements of a Restructuring Plan**

Section 401.400 provides overall guidance on what a Restructuring Plan must contain. A Restructuring Plan is required for each project undergoing restructuring under the Mark-to-Market Program. The PAE develops the Plan. Subpart C provides detailed guidance for major elements of a Restructuring Plan in addition to those specifically mentioned in MAHRA.

Section 401.401 Consolidated Plans

Section 401.401 describes the circumstances under which HUD may consider a Consolidated Restructuring Plan for multiple projects.

Section 401.402 Cooperation with Owner and Qualified Mortgagee in Restructuring Plan Development

Section 401.402 provides guidance for implementation of the requirement in section 514(a)(2) of MAHRA for PAE cooperation with the project owner and qualified mortgagee in development of the Restructuring Plan. The owner is expected to submit a proposal to the PAE with the basic elements of a restructuring that the owner finds acceptable. The owner must actively work with the PAE and other necessary third parties to develop that restructuring, if acceptable to the PAE, or a modified or substitute restructuring proposed by the PAE. If the owner fails to cooperate to the satisfaction of the PAE, and HUD agrees, the PAE will refuse to continue with development of a Restructuring Plan. The PAE will ensure that the owner contacts the qualified mortgagee to obtain project history and to explore modification of the existing mortgage if feasible. If the qualified mortgagee does not cooperate in modifying the mortgage, the PAE and the owner may continue to develop a Plan to restructure the loan using alternative financing.

Section 401.403 Rejection of a Request for a Restructuring Plan Because of Actions or Omissions of the Owner or Affiliate or Project Condition

Section 401.403 implements part of section 516(a) of MAHRA. (Section 516(a) is also implemented by §§ 401.101 and 402.7.) Under § 401.403, the PAE is responsible for a further more complete and ongoing assessment of owner and project eligibility while a Restructuring Plan is developed. The PAE must advise HUD, and may elect not to continue with consideration of the Restructuring Plan or the closing on the Plan (see § 401.407), if at any time any of the following conditions exist: (1) the owner or an affiliate is debarred or suspended; (2) the owner or an affiliate has engaged in material adverse financial or managerial actions or omissions as described in section 516(a) of MAHRA, which may include actions that have resulted in imposition of a Limited Denial of Participation (LDP) or a proposed debarment under 24 CFR part 25, or outstanding violations of civil rights laws; or (3) the project does not meet the housing quality standards in § 401.453. HUD may reject an owner's request for a Restructuring Plan for any of these reasons.

An ineligible owner may agree to development of a Restructuring Plan involving sale or transfer of the project. In subpart F, the rule provides a procedure for owner dispute and administrative review of rejection under this section.

Section 401.404 Proposed Restructuring Commitment

Section 401.404 requires the PAE to submit a completed Restructuring Plan and proposed Restructuring Commitment to HUD for its review and approval before delivering it to the project owner. The proposed Commitment will incorporate the Restructuring Plan and include standard terms and the following project-specific information: (1) the lender, loan amount, interest rate and term of mortgages or any unsecured financing for the restructuring and rehabilitation, and any credit enhancement; (2) amount of any payment of a section 541(b) claim by HUD; (3) type of section 8 assistance and the restructured section 8 rents; (4) any required rehabilitation and the source of the owner contribution, and escrow arrangements; (5) the use of project accounts for other than rehabilitation; (6) terms of any sale or transfer of the project; (7) a schedule of sources and uses of funds and project account balances; and (8) other

conditions to the commitment required by HUD.

Section 401.405 Restructuring Commitment Review and Approval by HUD

Section 401.405 provides for HUD to approve the Plan as submitted, require changes as a condition for approval, or reject the Plan. HUD will inform the PAE of the reasons for rejection. The subpart F dispute and appeal procedure will apply. At a minimum, HUD review will address any provisions of the Plan and the proposed Restructuring Commitment involving the disposition of accounts of the Treasury of the United States, in according with various provisions of MAHRA that make clear that HUD retains control of such accounts. HUD review may be either technical or administrative depending on amount of payment of claim, rehabilitation cost and any other pertinent provisions of the PRA.

Section 401.406 Execution of Restructuring Commitment

The PAE will deliver to the owner for execution a proposed Restructuring Commitment as the final element of a HUD-approved Restructuring Plan. If the owner executes the HUD-approved Restructuring Commitment, the PAE will prepare for closing under § 401.407. An owner that does not execute a Restructuring Commitment has 10 days to appeal the terms of the Restructuring Commitment and seek a modification under subpart F.

Section 401.407 Closing Conducted by PAE

Section 401.407 provides that the PAE must arrange for the closing after the owner has executed the Restructuring Commitment. All necessary legal documents will be executed at the closing, using standard legal instruments acceptable to HUD with modifications only as necessary to comply with applicable State or local law or as approved by HUD. If the project will continue to have a mortgage insured or held by HUD, the regulatory agreement between HUD and the owner will be retained and any necessary amendments to reflect the Restructuring Plan will be executed at closing. HUD's Program Manual will provide detailed guidance on how a closing should be conducted and how closing documents should be distributed.

Section 401.408 Affordability and Use Restrictions Required

Section 401.408 implements section 514(e)(6) of MAHRA, which requires the Restructuring Plan to provide for

affordability and use restrictions on the project, for a term of at least 30 years, consistent with the long-term physical and financial viability and character of the project as affordable housing. These affordability restrictions will be reflected in recorded covenants (a Use Agreement) running with the land. The PAE has the discretion to require restrictions for a longer, but not a shorter, period. The project must continue to be used for residential use with no reduction in the number of residential units without HUD approval.

During a period when at least 20 percent of the units in a project receive project-based assistance, the affordability restrictions applicable to such assistance will apply. When the Restructuring Plan provides for continuation of project-based assistance, section 515 of MAHRA requires HUD (directly or through a PAE) to offer to renew or extend expiring contracts, subject to availability of appropriated funds. The owner is required to accept the offers.

At any time when fewer than 20 percent of the units in a project receive project-based assistance, the Use Agreement will require conformance to the rent and the tenant income profile used in the Low Income Housing Tax Credit Program (LIHTC) for any project that is restructured (i.e., either rents set for 20 percent of the units at 30 percent of 50 percent of median income or for 40 percent of the units at 30 percent of 60 percent of median income.) Where the LIHTC rent and income profile is more restrictive than the market rents at the time of restructuring, the underwriting analysis will take this into account. The type and size of units that satisfy the affordability requirements must be comparable to the entire project.

The Use Agreement will specify which interested parties in addition to HUD and the PAE will have rights of enforcement; they may include tenants, tenant organizations, and affected units of local government, but HUD will retain the right to approve amendments to the Use Agreement without requiring the consent of the other parties with enforcement rights. The Use Agreement will contain appropriate financial and other reporting requirements for the owner, as determined by HUD, to ensure that HUD and the PAE have adequate information to enforce compliance with the Agreement.

Section 401.410 Standards for Determining Comparable Market Rents

Section 401.410 provides guidance to the PAE for determining comparable market rents. An owner should also

follow this guidance when making a preliminary determination of eligibility under §§ 401.99(a)(1) and 402.6(b). The PAE uses comparable market rents both for purposes of confirming the eligibility of the project (because it cannot develop a Restructuring Plan for a project at or below comparable market rents) and for purposes of determining the initial rents under a section 8 contract renewal when rents must be reduced to comparable market rents. The determination of whether rents in a project are comparable to market rents considers only the rents for units in the project that receive project-based assistance.

Comparable market rents are defined (based on the definition of "comparable properties" in section 512(1) of MAHRA) as the rents charged for similar multifamily projects in the same market area, where practicable, that (1) are not receiving project-based assistance (for this purpose only, the term includes section 202/811 projects for the elderly and persons with disabilities in addition to the statutory definition) and (2) are determined by the PAE to be similar to the project as to neighborhood (including risk of crime), type of location, access, street appeal, age, property and unit amenities, utilities, and other characteristics including rent control and others considered relevant by the PAE (e.g., the impact of affordability restrictions which could constrain a project's net operating income.) If a project used as a comparable needs rehabilitation to meet the non-luxury standard that a Mark-to-Market project must meet after rehabilitation (see § 401.452), appropriate adjustments should be made. The PAE must define the market broadly enough to include a reasonable number of projects (at least three) that have a high degree of similarity using the factors identified in the rule. If necessary, the PAE should use non-comparable housing stock in the market, with appropriate adjustments, if necessary to identify an adequate number of comparable properties. If this is inadequate, comparable properties outside the market with appropriate adjustments may be considered. The PAE should set comparable market rent at 90 percent of section 8 Fair Market Rents only as a last resort if no meaningful comparison of projects is possible following the guidance in this section.

Section 401.411 Guidelines for Determining Exception Rents

Section 401.411 applies to cases where section 514(g)(2) of MAHRA permits the use of "exception rents" instead of comparable market rents.

Exception rents may be used in the Restructuring Plan only if the PAE has determined that the housing needs of the tenants and the community cannot be adequately addressed through a Restructuring Plan that provides for comparable market rents, and if comparable market rents would provide an income inadequate to operate the project (negative Net Operating Income or NOI projects).

Exception rents are those that exceed rent levels at comparable market rents but that do not exceed 120 percent of the fair market rent for the market area. For up to five percent of the units with contracts expiring in the fiscal year, HUD may waive the 120 percent requirement on a project-by-project basis upon on a PAE documented determination of special need. The PAE's determination of special need must address why the housing needs of the tenants and the community could not be adequately addressed through implementation of the comparable market rent limitation typical of projects undergoing a Restructuring Plan.

The PAE may approve exception rents only for negative NOI projects, which could not support all operating expenses if rents were based on the comparable market rent. In order to receive exception rents, these negative NOI projects must be determined by the PAE to be positive social assets in the community whose operating expense levels and lack of debt service capacity are not a function of bad management. They should be unique, appropriately situated, and affordable housing, with no other comparable housing alternatives available in the submarket. If they were not restructured at exception rents, the outcome would be displacement of those who would experience difficulty in finding comparable housing, such as the elderly, persons with disabilities and large families.

When exception rents are used, the rent is a budget-based rent based on the factors listed in section 514(g)(3) which include debt service (allowed only on the second mortgage under § 401.461 or to support a rehabilitation loan included in the Restructuring Plan), project operating expenses, a PAE-determined allowance for losses due to vacancies and uncollected rents, a PAE-determined allowance for a reasonable rate of return to the owner (which may be established to provide incentive for owners who meet the housing quality standards in § 401.453 and the property management standards in § 401.484), contributions to adequate reserves, and other necessary project operating expenses as determined by the PAE.

For each fiscal year, HUD approval of exception rents is limited to 20 percent of the units with contracts expiring in the fiscal year unless HUD grants a waiver based on a PAE documentation of special need.

Section 401.412 Adjustment of Rents With Operating Cost Adjustment Factor (OCAF)

Section 401.412 explains the adjustment of rents for contract renewals under a Restructuring Plan using an operating cost adjustment factor (OCAF) as required by section 514(e)(2) of MAHRA. The OCAF will be derived from an analysis of the change in operating expenses in various geographic areas, and will be published by HUD annually. An OCAF may be positive or negative. The OCAF methodology for determining adjusted rent levels is also applied to calculation of rent levels outside of Restructuring Plans under §§ 402.4 and 402.5 except when HUD determines to apply budget-based adjustments as permitted by those sections. Under § 401.412, adjusted rent levels are calculated by multiplying an adjusted base rent level for the project by the OCAF. The adjusted base rent level is the difference between the current aggregate project rents and the debt service.

For the section 8 moderate rehabilitation program (other than for single room occupancy dwellings under section 441 of the Stewart B. McKinney Homeless Assistance Act), rents for contracts renewed under § 402.5 will be adjusted by applying an OCAF to the base rent, minus any costs associated with debt service for the cost of property acquisition. The OCAF will be applied to rents for each unit size assisted under the renewal contracts.

Section 401.420 When Must the Restructuring Plan Require Project-based Assistance?

Section 401.420 implements section 515(c)(1) of MAHRA, which provides for mandatory renewal of project-based assistance in a Restructuring Plan for projects in tight rental markets, projects occupied predominantly (at least 50% of units) by elderly or disabled families, and cooperative housing projects. The rule provides that a tight rental market exists when the PAE determines that the market-wide vacancy rate is at or below 6 percent.

Section 401.421 Rental Assistance Assessment Plan

Consistent with section 515(c)(2) of MAHRA, § 401.421 requires the PAE to develop (after consultation with the owner) a Rental Assistance Assessment Plan for any project not covered by

§ 401.420 to determine whether assistance should be renewed for a project as project-based assistance or whether some or all of the assisted units should be converted to tenant-based assistance. Section 515(c)(2)(B) requires an assessment of the impact of converting to tenant-based assistance and the impact of extending project-based assistance on eight specific areas described in section 515(c)(2)(B). The PAE must consider the cost of providing assistance, comparing the applicable payment standard for tenant-based assistance to the project's adjusted rent levels determined under § 401.410 or § 401.411. In addition, the PAE must consider the other matters listed in section 515(c)(2)(B) of MAHRA to be assessed as part of the Plan, and the applicable Consolidated Plan developed under part 91 of this title. In addition to these statutory considerations, § 401.421 requires a PAE to consider the local Consolidated Plan under 24 CFR part 91. The PAE may allow up to 5 years for a conversion to tenant-based assistance if needed for the financial viability of the project. In accordance with section 515(c)(2)(C) of MAHRA, the PAE must report at least semi-annually to HUD on projects for which the Restructuring Plan either: (1) provides for renewal of project-based assistance even though tenants generally supported tenant-based assistance; or (2) provides for renewal with tenant-based assistance.

Section 401.450 Owner Evaluation of Physical Condition

The Restructuring Plan must provide for rehabilitation of the project necessary to achieve the property standards set forth in § 401.452. The first step in developing this part of the Plan is an evaluation by the owner of the physical condition and rehabilitation needs of the project, which is provided to the PAE as part of the PAE's initial data collection for the project. The evaluation must contain the following information:

- (1) All work items needed to bring the project to the property standard in § 401.452, including deferred maintenance and any needed repairs including work items likely to be needed in the next 12 months;
- (2) The capital repair or replacement items that will be necessary to maintain the long-term physical integrity of the property;
- (3) Plans for funding rehabilitation needs under the Restructuring Plan, including the source of required non-project funds to be contributed by the owner; and
- (4) An estimate of the initial deposit, if any, and the estimated monthly

deposit to the reserve for replacement account for the next 20 years.

Section 401.451 PAE Physical Condition Analysis (PCA)

Under § 401.451, the PAE is responsible for an independent evaluation of the rehabilitation needs (a Physical Condition Analysis, or PCA) of the project, and for reviewing and certifying to the accuracy of the owner's evaluation (which may be modified to address deficiencies identified by the PAE.) Both the project's immediate physical condition and rehabilitation needs, and its long term maintenance and replacement needs, must be evaluated and addressed in the PAE's review. The owner must immediately complete any work items needed to address physical needs that are immediate threats to health or safety. If this is not done, the PAE must evaluate the project's 35 eligibility for a Restructuring Plan under § 401.403, which permits rejection of certain projects in poor condition. The rule allows rejection of the request for a Restructuring Plan if the PAE cannot certify the owner's evaluation. Based on the completed PCA, the PAE also must consider rejecting a request for a Restructuring Plan even if there are no remaining immediate health and safety threats, if the PAE cannot determine that proceeding with a Restructuring Plan with necessary rehabilitation is more cost-effective in terms of Federal resources than rejecting the Request for a Restructuring Plan under § 401.403(b)(3) and providing tenant-based assistance for displaced tenants under § 401.602. HUD will provide guidance to PAEs for making the cost-effectiveness determination. The PAE must also advise HUD of the impact on tenants and the community of not proceeding with the Restructuring Plan. Rejections under this section may be disputed and appealed under subpart F.

Section 401.452 Property Standards for Rehabilitation

The standard for rehabilitation is a non-luxury standard adequate for the rental market intended at the original approval of the project-based assistance. The physical needs identified should be those necessary for the project to retain its original market position as an affordable project in decent, safe and sanitary condition (recognizing any evolution of standards appropriate for such a project). The rehabilitation should include those improvements the project requires to rent at all in the non-subsidized market, resulting in a marketable project that competes on

rent rather than on amenities. Rehabilitation must be in accordance with 24 CFR part 8, which contains requirements for accessibility to persons with disabilities, to the extent applicable. Where a range of options exists, the least costly options for rehabilitation should be chosen within that range, when both capital and operating costs are taken into consideration.

Section 401.453 Housing Quality Standards

Section 401.453 requires the owner to maintain the project in a decent safe and sanitary condition based on the housing quality standards identified in § 401.453. These standards apply as long as the Use Agreement under § 401.408 is in effect. Whenever the project is receiving project-based assistance, the applicable standards will be the physical condition standards for HUD housing under 24 CFR 5.703, published on September 1, 1998 (63 FR 46566). Otherwise, local codes will serve as the standards as long as local codes are as strict as HUD standards and do not severely restrict housing choice in the view of the PAE. In addition, any unit in which the tenant receives tenant-based assistance must comply with the housing quality standards of the section 8 tenant-based programs (24 CFR 982.401). Section 401.453 also requires the Restructuring Plan to provide for necessary replacement reserves.

Section 401.460 Modification or Refinancing of First Mortgage

Section 401.460 explains the standards for restructuring with a modified or refinanced first mortgage. This section provides for a variety of approaches to restructuring, which may include modification of the insured mortgage or refinancing with or without FHA insurance or other credit enhancement. The first mortgage will be a fully amortizing, level payment mortgage with a principal amount sustainable at rent levels that do not exceed the lower of section 8 rents allowed under the Mark-to-Market Program or rents permitted under the Use Agreement under § 401.408. Interest rates and other terms must be competitive in the market.

As part of sizing the first mortgage, the PAE should take into account any need for financing needed rehabilitation. The determination of the modified or refinanced first mortgage amount and the claim payment amount are directly related, and the claim payment under § 401.471 may be increased, in order to make proceeds from a refinanced first mortgage

available for rehabilitation. A similar adjustment in the first mortgage amount is permitted in the case of HUD-held mortgage debt although no claim payment is involved.

In the Program Manual, HUD will provide detailed guidance for PAE underwriting of the first and second mortgage. The PAE will be fully responsible for the second mortgage underwriting, while underwriting the first mortgage will also require the involvement of the mortgagee (and HUD, if refinancing involves FHA mortgage insurance or risk-sharing.) Due to the significant potential for conflicts of interest if the PAE provides the first mortgage financing, HUD will apply an exceptionally high level of review whenever this is proposed as part of the Restructuring Plan.

The monthly payment for the first mortgage under the Mark-to-Market Program will not exceed the current first mortgage payment. Interest rates and other terms must be competitive. Fees and costs above normal processing fees for a modification and refinancing will be paid by the owner from non-project funds and will not be financed through the first mortgage.

Credit enhancement for the refinanced mortgage may be provided for in the Restructuring Plan but is not required. If FHA continues to provide credit enhancement through mortgage insurance, any new insurance for a refinanced first mortgage will be provided under the usual FHA legal requirements but insurance for the refinanced mortgage will be documented through amendment of the existing insurance contract under section 517(b)(3) of MAHRA rather than through a new insurance contract. FHA will issue the commitment and endorse the mortgage for insurance, but may adapt its procedures to make appropriate use of the PAE.

If FHA credit enhancement for a refinanced first mortgage is provided through risk-sharing under 24 CFR part 266, the usual legal requirements under part 266 will apply but the PAE will need special HUD approval if it seeks to engage in risk-sharing for the project, and the conflict of interest provisions in § 401.700 will apply. This will involve, for example, more detailed HUD involvement in underwriting than would otherwise be applicable under part 266.

Credit enhancement may also be provided by a non-FHA party. The rule recognizes that there may be a conflict between the credit enhancer's usual requirements and the requirements of the interim rule. Although all non-statutory provisions in the interim rule

are subject to waiver under 24 CFR 5.110, the interim rule advises that HUD will consider waiver to accommodate a provider of credit enhancement only if the waiver will not materially impair achievement of the purposes of MAHRA and if the waiver is essential to meet the legitimate business or legal requirements of the provider of credit enhancement.

Some projects eligible for the Mark-to-Market Program are subject to more than one FHA-insured loan. A common combination is a section 236 first mortgage (often quite small) and a section 241(f) second mortgage. The feasibility of a Restructuring Plan for these projects will depend heavily on how the Plan deals with the junior insured mortgage. MAHRA does not deal expressly with this situation, but HUD has concluded that MAHRA permits restructuring of both insured mortgages. A section 541(b) claim might also be paid in connection with the existing insured second mortgage if needed, because section 517(b)(1) does not limit the payment of claim to a single insured mortgage. The modified or refinanced first mortgage required by § 401.460 would secure the debt that remained owing on the existing insured mortgages after payment of claims. Section 517(a)(1)(B) of MAHRA requires a second mortgage under a Restructuring Plan (discussed under § 401.461) in an amount that does not exceed the difference between the first mortgage under § 401.460 and the indebtedness under the existing insured debt. The result could be the replacement of both of the existing insured first and second mortgages with both a first mortgage with payments sustainable through the rents allowed by the Restructuring Plan and a second mortgage with deferred payments, with the sum of the two mortgage amounts not exceeding the sum of all insured mortgage amounts before restructuring.

There may be projects with multiple insured mortgages that can be successfully restructured without the need for full payment of claim on the existing insured first mortgage. In that case, the existing insured second mortgage could be left unchanged, modified, or refinanced, if subordinated to the new second mortgage required by MAHRA (see discussion under the next section.)

Section 401.461 HUD-Held Second Mortgage

Section 401.461 provides standards for the new second mortgage that must be given to HUD whenever the insured or HUD-held mortgage debt is written down through payment of a claim. The

new second mortgage is limited to an amount that the PAE reasonably expects to be repaid by the owner based on objective criteria such as the amount of anticipated net cash flow, trending assumptions, amortization provisions, and expected residual value of the project. It will bear simple interest of at least 1 percent but no more than the applicable Federal rate determined by the Department of the Treasury. The term will be concomitant with the term of the first mortgage under § 401.460 or, if there is none, the term will be set by HUD. The mortgage will become due and payable earlier in accordance with § 401.461(b)(3) if the first mortgage is terminated or paid in full (unless HUD provides otherwise in the case on a nominal first mortgage amount), if the mortgage is assumed by a purchaser of the project in violation of HUD guidelines, or if the owner fails to cure a statutory violation or a violation of a HUD requirement. Acceleration by HUD may be appealed under subpart F.

At least 75 percent of the project's net cash flow after payment of first mortgage debt service and operating expenses must be used to pay principal and interest on the second mortgage. The Restructuring Plan may provide for up to 25 percent of net cash flow to be paid to an owner who meets certain property management and housing quality standards.

HUD will consider modification or forgiveness of the second mortgage under the authority of section 517(a)(5) of MAHRA only if (1) the project has been sold or transferred to a priority purchaser under § 401.480, and (2) HUD determines that modification or forgiveness is necessary for recapitalization to preserve the project as affordable housing.

If the amount of a partial claim under § 401.471 exceeds the principal amount of the second mortgage, § 401.461(c) permits HUD to require the owner to give an additional subordinate mortgage on the project to HUD to secure repayment of the excess. This additional mortgage will be subordinate to other HUD-held mortgages, will bear interest at the same rate as the second mortgage under § 401.461(a), and will require no payments except payment in full when the second mortgage under § 401.461(a) is paid in full.

Section 401.471 HUD Payment of a Section 541(b) Claim

HUD payment of a section 541(b) claim is the means by which one or more FHA-insured or HUD-held mortgages will be paid down to the level of debt that can be supported at market rents. Section 541(b) of the National

Housing Act permits HUD to pay an insurance claim from the appropriate insurance fund for a mortgage that is not in default. In some cases, the debt than can be supported will remain in place through a modification and reamortization of the existing mortgage debt. In other cases it will be taken out by a new lender as a refinancing of the existing mortgage debt. All payments of claim will be made by HUD, from the appropriate insurance fund, to the mortgagee on behalf of the mortgagor. Section 517(b)(1) of MAHRA currently specifically directs that a partial payment of claim be made under section 541(b) of the National Housing Act, which authorizes partial payments on mortgages not in default in connection with the Mark-to-Market Program. Section 517(b)(1) also specifically includes a full payment of a claim as a possible restructuring tool, but there is no provision in the National Housing Act equivalent to section 541(b) that expressly authorizes full payment of claims for mortgages not in default. The ordinary authority for making full payments of claims on FHA-insured multifamily mortgages is section 207(g) of the National Housing Act, which applies only to mortgages in default. HUD will not approve any Restructuring Plan providing for a full payment of claim on a mortgage not in default unless HUD is satisfied that there is legal authority to use the appropriate FHA insurance fund to pay the claim. That may require a technical legislative amendment. Until HUD is able to make such full payments, any claim paid on a mortgage not in default would be a partial claim that leaves at least a nominal amount of the insured mortgage unpaid or paid from other sources, such as project accounts or owner contributions.

Section 401.472 Rehabilitation Funding

Section 517(b)(7) of MAHRA identifies some potential sources for funding needed rehabilitation of the project that are included in § 401.472. If project accounts (e.g., residual receipts, surplus cash and replacement reserve accounts) have amounts that exceed the initial deposit needed for the replacement reserve account, the excess must be used for rehabilitation before the other sources are used. Other potential sources include: (1) restructuring of the first mortgage debt to facilitate additional borrowing for rehabilitation (as discussed under § 401.460); (2) grants under the rehabilitation grant program under section 236(s) of the NHA (as discussed under § 401.473); and (3) increases in

section 8 budget authority for section 8 assistance contracts (to the extent HUD has determined that funding from this source is available). Rehabilitation funding will be disbursed through an escrow agent or other means determined by HUD.

HUD will implement section 517(b)(7)(B) of MAHRA by requiring the owner to contribute from non-project funds at least 20 percent of the total cost of rehabilitation. A reasonable proportion of the owner's contribution must come from non-governmental resources. HUD will provide further guidance in its Program Manual on the requirement for owner contribution from non-governmental resources. HUD estimates the requirement will be a minimum of 3 percent of the total cost of rehabilitation.

The PAE may require a larger owner contribution for a particular project. To the extent the owner voluntarily provides more than the required 20 percent, the PAE may consider allowing in the Restructuring Plan for more extensive rehabilitation and appropriate adjustments to the reserves for replacement analysis. The PAE may exempt housing cooperatives from the owner contribution requirement.

Section 401.473 HUD Grants for Rehabilitation Under Section 236(s) of NHA

This section authorizes rehabilitation grants under Restructuring Plans. HUD has concluded that rehabilitation grants under section 236(s) of the National Housing Act (NHA), as added by section 531 of MAHRA, may be made available under authority of this interim rule for Mark-to-Market projects. HUD's usual practice is to implement a new grant program through either a proposed/final rule procedure or, if that procedure allows insufficient time for obligation of appropriated funds before they lapse, through a Notice of Funding Availability (NOFA). However, by implementing the various requirements of the Mark-to-Market Program, this interim rule will ensure that any use of section 236(s) grant funds in connection with a Restructuring Plan, before separate grant regulations are issued, is in accord with statutory requirements as long as an appropriate grant agreement is used by HUD. There is no requirement for a competitive grant process using a NOFA under section 102 of the HUD Reform Act of 1989. HUD has concluded there would be no public benefit in delaying the availability of section 236(s) grant funds for Mark-to-Market projects until after a separate rulemaking procedure was completed. HUD expects to pursue a

separate rulemaking procedure before any use of the section 236(s) grant authority outside of the Mark-to-Market Program. Section 401.473 permits HUD to delegate grant administration of a section 236(s) rehabilitation grant to a PAE that is a government entity, as provided in section 236(s)(5) of the NHA (added by section 531 of MAHRA), and to pay for grant administration from grant funds if they are available for this purpose.

Section 401.474 Project Accounts

Section 401.474 permits the Restructuring Plan to provide for the use of project accounts. Accounts of one project may be used for other eligible projects if: (1) the projects are included in a consolidated Restructuring Plan under § 401.400(a)(2); and (2) the funds are used to fund project rehabilitation or to reduce the amount of a claim paid by HUD under § 401.471. The Restructuring Plan may provide for up to 10 percent of the excess project funds to be paid to the owner after completion of the rehabilitation required by the Restructuring Plan.

Section 401.480 Voluntary Sale or Transfer of Project

Section 401.480 covers the voluntary sale or transfer of a project as part of the Restructuring Plan. An eligible owner may request sale or transfer. If the owner is determined to be ineligible for a Restructuring Plan under § 401.101 or 401.403, a Restructuring Plan can be developed only if it involves sale or transfer.

The owner must notify HUD or the PAE of the owner's intent to transfer the property. If the owner is determined to be ineligible under § 401.101 or § 401.403, this notice must be received by HUD or the PAE within 30 days after the owner receives notice of rejection and all objection and appeals procedures have been concluded, if applicable. Otherwise, the owner should provide the notice as part of its initial request for a Restructuring Plan or at any later time when it is still feasible, in the determination of the PAE, to develop a Restructuring Plan involving sale or transfer.

An ineligible owner must inform the PAE of any intention to accept a purchase offer, subject to PAE approval and HUD approval of the Restructuring Plan. The owner must also prepare a notice to potential purchasers that describes the project and the procedure for submitting purchaser offers. The notice must be in a form acceptable to HUD and will be subject to review and approval by HUD or the PAE. The

owner must distribute and publish an approved notice as required by HUD.

This section gives a preference to certain "priority purchaser" groups, defined as tenant organizations, tenant-endorsed community-based nonprofit organizations, and tenant-endorsed public agency purchasers. HUD may also establish qualifications for priority purchasers. If an owner has been rejected, the PAE must not develop a Restructuring Plan involving a sale or transfer to a non-priority purchaser unless it determines that there is no interested qualified priority purchaser, or that no feasible Restructuring Plan can be developed involving a sale or transfer to a qualified priority purchaser.

All project sales are subject to PAE approval and HUD approval of the Restructuring Plan.

Section 401.481 Subsidy Layering Limitations on HUD Funds

Section 401.481 explains the subsidy layering certification that a PAE must make under section 514(e)(7) of MAHRA. The purpose of the subsidy layering certification procedure is to ensure that any HUD assistance provided to the owner of a project under the Restructuring Plan is no more than is necessary to permit the project to continue to house a tenant mix comparable in income to the tenant income mix of the project before the Restructuring Plan is implemented, after taking into account other Federal, State or local governmental assistance of any kind such as grants, loans, guarantees, or tax credits or other tax benefits.

HUD is generally required to make a subsidy layering certification under section 102(d) of the HUD Reform Act of 1989 when HUD assistance is provided. Section 911 of the Housing and Community Development Act of 1992 provided for HUD delegation of the subsidy layering certification requirements to certain State or local agencies (defined in section 42 of the Internal Revenue Code of 1986 as "housing credit agencies" or HCAs) for projects receiving a low-income housing tax credit (LIHTC). MAHRA does not explicitly provide for assumption of HUD's duties under section 102(d) by a PAE, but HUD does not consider it Congress' intention to require HUD to duplicate the PAE's efforts by performing separate section 102(d) subsidy layering certifications in connection with HUD assistance that was included in a Restructuring Plan approved by HUD with benefit of the PAE's subsidy layering certification. That would be inconsistent with the express MAHRA provision for a PAE

subsidy layering certification, and with the general approach of MAHRA in making the PAE responsible for the analysis and development of Restructuring Plans for individual projects. Therefore, HUD may rely on the PAE's certification and does not need to perform a separate subsidy layering analysis.

If the PAE is an HCA with delegated authority under section 911, it will perform the subsidy layering certification for MAHRA using procedures substantially similar to the published HUD guidelines for section 102(d) certifications under section 911. Such a PAE may, and any other PAE must, submit for HUD approval other subsidy layering certification procedures that follow the section 911 guidelines to the extent feasible and appropriate.

The PAE's subsidy layering analysis should not restrict the availability of HUD assistance solely because an owner is able to obtain public resources, such as grants, for use as some or all of the owner's required contribution toward rehabilitation costs (see § 401.472(b)) from public resources.

§ 401.483 Leasing Units to Certify and Voucher Holders

Section 514(e)(9) of the Act only prohibits refusal to lease a "reasonable number" of units to section 8 voucher or certificate holders because of their status as voucher or certificate holders. HUD has determined that for a project under the Mark-to-Market Program, the "reasonable number" of units that should be available to voucher or certificate holders is 100 percent of the units. Under § 401.483, the Restructuring Plan will not permit an owner to reject any prospective tenants solely because of their status as holders of vouchers or certificates.

§ 401.484 Property Management Standards

Section 401.484 implements part of section 518 of MAHRA, which requires a PAE to establish management standards for a project pursuant to HUD guidelines and consistent with industry standards. Section 401.484 also relates to implementation of sections 514(e)(4) and 517(a)(3) of MAHRA. HUD's guidelines set forth in this section require the property manager to, at a minimum:

(1) Protect the physical integrity of the property over the long term through appropriate requirements for preventative maintenance, repair or replacement (compliance with this standard would be evidenced by no unscheduled deferred maintenance,

complete maintenance records with work performed in a workmanlike manner at competitive costs, and "satisfactory" reviews by HUD;

(2) Ensure the routine cleaning of the building and grounds;

(3) Maintain good relations with the tenants;

(4) Protect the financial integrity of the project by operating with the budget provided by the owner, with competitive and reasonable operating expenses and appropriate insurance;

(5) Take measures to achieve physical safety and maintenance of insurance; and

(6) Comply with any other HUD management requirements including termination of the management agent for cause.

HUD will provide additional guidance on management standards in the program manual. The PAE's management standards must also conform to any HUD guidelines and industry standards on conflicts of interest between owners, managers and contractors.

Section 401.500 Required Notices to Third Parties; Section 401.501 Who Is Entitled To Receive Notices Under § 401.500?

Under §§ 401.500 and 401.501, a PAE must solicit and document the consideration of tenant and local community comments. These sections describe the procedures for ensuring that third parties affected by the restructuring of a project through the Mark-to-Market Program are kept informed and provided the opportunity to provide comments at crucial stages of the process. Section 401.500 describes two notices that will be used to keep interested third parties informed: (1) a notice of intent to restructure and of a consultation meeting in 20–60 days; and (2) a notice of the completed Restructuring Plan. Each notice is to be given by the owner to: (1) each project tenant, or a tenant association; (2) the Chief Executive Officer of the unit of general local government; and (3) the Director of the Public Housing Authority (PHA) with jurisdiction over the project. The PAE or HUD may also identify any neighborhood representatives and other affected parties that should receive one of more of these notices.

The PAE must also conduct a consultation meeting to receive oral presentations and comments on the desired contents of a Restructuring Plan, desired contents of a Rental Assistance Assessment Plan (if one is required), and on any proposed transfer of the project. The PAE will invite

participation by at least the parties entitled to receive notices.

Section 514(b) of MAHRA requires HUD to establish notice procedures and hearing requirements for tenants and owners concerning the dates for the expiration of project-based assistance contracts for any eligible multifamily housing project. For projects being restructured through the Mark-to-Market Program, HUD considers this provision satisfied through the notice and consultation meeting provisions of these sections. Specifically, § 401.500(b)(1)(iv) requires notice of the date of expiration for the contract (which may be a contract extended during Restructuring Plan development under § 401.600), and the consultation meeting will give all interested parties an adequate opportunity for a hearing on any concerns associated with expiring project-based assistance.

HUD does not interpret section 514(b) as applicable if an owner of an eligible project does not pursue restructuring under the Mark-to-Market Program, either by choice, because of the exceptions in section 514(h) of MAHRA, or because the owner or project is rejected under section 516. In particular, if a contract will not be renewed, HUD does not consider that Congress intended to impose additional notice requirements beyond the 180-day or 12-month notice of non-renewal required by section 8(c)(9) of the U.S. Housing Act of 1937 or section 514(d) of MAHRA, respectively, whichever applies, and the 90-day notice of rent increase under section 8(c)(8) of the 1937 Act (see § 401.602). If a contract is being renewed for a project not being restructured, there would be no apparent purpose for a notice requirement. In addition, HUD does not consider that Congress intended to require a hearing for tenants and owners concerning the expiration of contracts for projects not being restructured under the Mark-to-Market Program.

Subpart D—Implementation of the Restructuring Plan After Closing

Section 401.550 Monitoring and Compliance Agreement

Section 401.550 implements section 519 of MAHRA by providing for periodic monitoring (including onsite inspections) and by generally requiring PAEs to ensure that owners comply with approved Restructuring Plans, including execution and recording of a Use Agreement. As long as there is a PAE for the project that is qualified to be a section 8 administrator (i.e., a State or local housing agency), the PAE will be responsible for monitoring and

enforcement; if not, HUD will perform those functions. The onsite inspections under this section will be required to follow uniform inspection procedures of HUD in 24 CFR 5.705 published on September 1, 1998 (63 FR 46566). The GAO and HUD (including HUD's Office of Inspector General) also may audit a project with a Restructuring Plan pursuant to section 519(c) of MAHRA. HUD intends to include in the final rule more specific provisions regarding the means by which PAEs who are State or local housing agencies (i.e., "Phase I" applicants under the RFQ) will enforce compliance with the Restructuring Plans. HUD views the continuing involvement of the PAEs in the monitoring and compliance process as an important enhancement of HUD's own efforts. HUD welcomes the views of State and local housing agencies and others regarding the availability of effective enforcement tools that may be feasible and cost-effective means of ensuring long-term compliance by project owners, including enforcement tools that have been successfully used by the agencies.

Section 401.552 Servicing of Second Mortgage

HUD or its designee will be responsible for servicing the second mortgage including the determination of the amount of the net cash flow receivable by the owner. HUD may designate the PAE as servicer with its consent.

Section 401.554 Contract Administration

Section 401.554 requires HUD to offer to any PAE qualified to be the section 8 contract administrator the opportunity to serve as contract administrator. The term "qualified" is intended to indicate that a contract administrator must meet both statutory requirements of the United States Housing Act of 1937 (e.g., be a public housing agency) and any additional requirements of HUD established under the applicable section 8 program by the responsible HUD officials. As contract administrator, the PAE must offer to renew section 8 contracts in accordance with the Restructuring Plan as provided in section 515(a) of MAHRA.

A contract administrator for section 8 tenant-based assistance provided under this rule has a significantly different and expanded role far beyond the scope of a section 8 project-based administrator. For instance, the section 8 tenant-based contract administrator is responsible for administering the assistance throughout its jurisdiction, not just in the particular project. The PAE and any other

prospective tenant-based contract administrators are advised to carefully review the tenant-based program regulations at part 982, with particular emphasis on § 982.51 ("HA authority to administer program") and § 982.153 ("HA responsibilities"). Any PAE proposing to serve as contract administrator must understand that a section 8 tenant-based assistance administrator's duties may extend beyond the usual responsibilities of a contract administrator due the need to ensure appropriate treatment of displaced tenants in accordance with the "portability" provisions of MAHRA.

Subpart E—Section 8 Requirements for Restructured Projects

Section 401.595 Contract and Regulatory Provisions

Section 401.595 provides that the provisions of 24 CFR chapter VIII (i.e., other section 8 program regulations) will apply only to the extent, if any, provided in the contract. In accordance with section 515(c)(5) of MAHRA, 24 CFR part 983 will not apply.

Section 401.600 Will a Section 8 Contract be Extended if it Would Expire While an Owner's Request for a Restructuring Plan is Pending?

Under § 401.600, an owner that has requested development of a Restructuring Plan may receive a section 8 contract extension at current rents for the shortest reasonable period needed for the PAE to complete a Restructuring Plan for the project (generally, not more than 9 months). Any extension of the contract beyond 1 year pending closing on the Restructuring Plan would be at comparable market rents or exception rents, but would not affect the project's continued eligibility for the Mark-to-Market Program.

Although section 514(c) of MAHRA may be interpreted to require immediate reduction to comparable market rents, HUD has concluded that the provision is better reconciled with MAHRA as a whole if it is interpreted to permit an extension at current rents for a reasonable period, along the lines of the current Portfolio Reengineering demonstrations, with further extensions at comparable market rents (or exception rents, if applicable) if a Restructuring Plan is underway but has not been developed and approved expeditiously. This will avoid the abrupt disruption that section 514(c) appears designed to avoid when an eligible owner has requested a Restructuring Plan.

Section 401.601 Consideration of an Owner's Request to Renew an Expiring Contract Without a Restructuring Plan

Section 401.601 provides a procedure for considering an eligible owner's request for renewal of an expiring contract without requesting a Restructuring Plan. Because rents must exceed comparable market rents for § 401.100 to apply, this section of the interim rule does not apply to projects with rents at or below comparable market rents.

HUD or the PAE will determine whether renewal under § 402.4 at rents that do not exceed comparable market rents would be sufficient to maintain an adequate debt service coverage ratio on the first mortgage and necessary project reserves. If so, the contract renewal will be processed under new § 402.4. If not, a Restructuring Plan must be developed by a PAE before further consideration of the owner's request. HUD is not defining "adequate debt service" in this interim rule but intends to provide guidance to PAEs in the Program Manual.

Section 401.602 Tenant Protections if an Expiring Contract is not Renewed.

The rule does not require an owner who is eligible to apply for a Restructuring Plan under § 401.100 and has an expiring project-based contract to apply. The rule permits the owner not to request a Restructuring Plan and not to renew the contract if the owner provides the 180-day notice of non-renewal under section 8(c)(9) of the United States Housing Act of 1937 and the 90-day notice of any resulting rent increases under section 8(c)(8) of that Act. An owner who does not give the proper notices must continue to permit residents to stay in their units without increasing the tenant portion of the rent until a period equivalent to the required notice period (180 or 90 days, as applicable) has expired after the later of the date proper notice was given or the date the contract expired. The same obligation applies if the owner requested a Restructuring Plan but was rejected by HUD or the PAE under § 401.101 or 401.403.

An owner who has requested a Restructuring Plan and is not rejected may not fail to renew an expiring contract without giving the 12-month notice to HUD and tenants required by section 514(d) of MAHRA and the 90-day notice of any resulting rent increases under section 8(c)(8) of the United States Housing Act of 1937. If the notice is not given, the tenants have similar protections as discussed in the

preceding paragraph, except that 12 months applies instead of 180 days.

If a contract is not renewed, HUD will make tenant-based assistance available to tenants in two circumstances. As provided in section 514(d) of MAHRA, HUD will make such assistance available to all tenants residing in units assisted under the expiring contract if the owner does not renew project-based assistance. As provided in section 516(d) of MAHRA, HUD will make tenant-based assistance available to all tenants residing in a project at the time HUD or the PAE reject an owner or a project under §§ 401.102 or 401.403 if: (1) the tenant is a low-income family; or (2) the tenant is receiving tenant-based assistance. Both tenant-based assistance, and the availability of funds for moving expenses of displaced tenants, will depend on the availability of funds under future appropriations Acts.

Section 401.605 Project-Based Assistance Provisions

Section 401.605 indicates that the project-based assistance restructured rents will be determined under the Restructuring Plan.

Section 401.606 Tenant-Based Assistance Provisions

Section 401.606 complies with section 515(c)(3) of MAHRA by providing that, if the Restructuring Plan provides for tenant-based assistance, assistance under part 982 will be offered to each eligible family assisted under the section 8 project-based assistance contract on the date of expiration. The Department intends to revise as soon as possible, by interim rule, the section 8 tenant-based regulations at part 982 to incorporate the unique statutory provisions of section 515(c)(4) of MAHRA for the tenant-based assistance offered to families through a Restructuring Plan.

Section 401.607 Contract Term

Renewals will be for a term determined by HUD by the appropriate HUD office, but the owner is not required to accept a renewal beyond the 30-year term of the use and affordability restrictions required under the Mark-to-Market Program.

Subpart F—Owner Dispute of Rejection and Administrative Appeal

Section 401.645 How Does the Owner Dispute a Notice of Rejection?

Section 401.645 provides the owner an opportunity to dispute the following: (1) when a request for a Restructuring Plan is rejected; (2) when a request for a section 8 contract renewal is rejected; (3) when a PAE cannot continue with a

Restructuring Plan because of lack of owner cooperation under § 401.402; and (4) when HUD rejects a proposed Restructuring Commitment submitted by a PAE. HUD or the PAE will notify the owner of the reasons for a rejection and provide a 30-day period to submit written objections or cure the problem. If no objection is submitted, the rejection is not subject to judicial review under section 516(c) of MAHRA. If an objection is submitted, HUD or the PAE will send the owner a final decision affirming, modifying, or reversing the initial rejection with reasons for the decision. This final decision is appealable under § 401.650.

Section 401.650 When May the Owner Make an Administrative Appeal of a Final Decision Under This Subpart?

An owner may appeal a final decision under § 401.645(b) if written objection was made. In addition, an owner may appeal a decision of HUD to approve a Restructuring Commitment if the owner does not execute the Commitment, and a decision of HUD to accelerate the HUD-held second mortgage under § 401.461(a).

Section 401.651 Appeal Procedures

Section 401.651 provides a simple, expeditious means through which an owner may make a presentation (written, oral, and/or through a representative) at a conference with an official of HUD who was not involved in making the decision under appeal. The HUD or PAE official who issued the decision under appeal will also participate.

An owner must appeal any decision within 10 days of receiving notice of the decision. The appeal will be decided by a written decision issued within 20 days of the conference. Days will be computed as provided in 24 CFR 26.16, but the hearing procedures of part 26 of this title do not otherwise apply. Although representation by legal counsel is permitted, the appeal procedure under this part is intended to be informal, without rules of evidence or presentation of witnesses. Its purpose is to ensure that no pertinent facts have been overlooked and to avoid serious errors of judgment.

Section 401.652 No Judicial Review

Section 401.652 states that the decision of a reviewing official under § 401.651 is a final determination for purposes of section 516(c) of MAHRA, which forbids judicial review of a final determination.

III. Content of Part 402

Section 402.1 What is the Purpose of Part 402?

Section 402.1 explains that part 402 sets out the terms and conditions under which HUD will renew project-based assistance section 8 contracts under section 524(a)(1) or (2) of MAHRA. Part 402 deals exclusively with the renewal of section 8 contracts for projects without a Restructuring Plan under the Mark-to-Market Program under part 401. Therefore, either the Office of Housing or the Office of Public and Indian Housing is responsible for the contract extension. However, part 402 is included under the new CFR chapter for the Office of Multifamily Housing Assistance Restructuring (OMHAR) because of section 522(a)(1) of MAHRA, which provides that regulations implementing subtitle A of MAHRA (including section 524) are to be issued by the Director of OMHAR. Secretary Cuomo has signed this interim rule as provided in section 522(a)(1) because no Director has yet been appointed.

Section 402.2 Definitions

Section 402.2 applies the definitions in part 401 to part 402.

Section 402.3 Contract Provisions

Section 401.3 provides that the provisions of 24 CFR chapter VIII (i.e., other section 8 program regulations) will apply only to the extent, if any, provided in the contract. Part 983 of 24 CFR will not apply, in accordance with section 515(c)(5) of MAHRA.

Section 402.4 Contract Renewals Under Section 524(a)(1) of MAHRA

Section 402.4 sets out the basic rule on section 8 contract renewals for projects that are not involved in the Mark-to-Market Program under part 401. If the project is eligible for the Mark-to-Market Program under part 401, the owner's request for renewal will be processed under § 401.601 to determine whether a Restructuring Plan is needed before a renewal proceeds under this part 402. This section implements section 524(a)(1) of MAHRA by authorizing renewal at rents that do not exceed market comparable rents, with future rent adjustments using the operating cost adjustment factor (OCAF) as provided for the Mark-to-Market Program under § 401.412, except that rents may be redetermined using a budget-based rent adjustment from time-to-time at the discretion of HUD. OCAF and budget-based adjustments may be positive or negative. If the owner of a project so requests, § 402.4 will not apply to a project in certain classes of

“exception projects” identified in section 524(a)(2) of MAHRA, which are covered in the next section.

Section 402.5 Contract Renewals Under Section 524(a)(2) of MAHRA

Section 402.5 concerns renewals under section 524(a)(2) of MAHRA, only at the request of the owner, for the following classes of “exception projects”:

(1) A project for which the primary financing or mortgage insurance was provided by a unit of State government or a unit of general local government (or an agency or instrumentality of either) and was not insured under the NHA;

(2) A project for which the primary financing was provided by a unit of State government or a unit of general local government (or an agency or instrumentality of either) and the financing involved mortgage insurance under the NHA, such that the implementation of a Restructuring Plan is in conflict with applicable law or agreements governing such financing;

(3) A project for the elderly financed under section 202 of the Housing Act of 1959 or section 515 of the Housing Act of 1949;

(4) A project that has an expiring contract section 8 moderate rehabilitation contract for single room occupancy dwellings; or

(5) A project that does not qualify as an eligible project under part 401 of this chapter (i.e., because rents do not exceed comparable market rents or because there is no HUD-insured or HUD-held mortgage).

(The second class of projects is described in section 524(a)(2)(B) of MAHRA. Unless section 514(h) of MAHRA is amended, no projects will fall in that category, as explained in Part II of this Supplementary Information under § 401.100.)

The first four categories are included in § 402.5(b)(1); the last category is included in § 402.5(b)(2). The owner of an exception project identified in § 402.5(b) may request renewal under either § 402.4 or this § 402.5. The owner of a project identified in § 402.5(b)(2) that has a HUD-insured or HUD-held mortgage may proceed under this § 402.5 only if the HUD analysis confirms that project rents are below comparable market rents.

If the owner of an exception project requests renewal of project-based assistance under this section, HUD is required (subject to a right to reject under § 402.7, and confirmation of rents levels for a project under § 402.5(b)(2))) to renew the expiring contract with initial rents at the lesser of: (1) existing rents adjusted by an operating cost

adjustment factor (OCAF) established by HUD; (2) a budget-based rent determined in accordance with the statutory directions for determining budget-based rent under the Mark-to-Market Program (except that HUD rather than a PAE will determine operating expenses and HUD may adjust the debt service component to reflect competitive interest rates); or (3) in the case of a contract under the section 8 moderate rehabilitation program (other than for a single room occupancy dwelling), the base rent adjusted by applying an OCAF to the base rent, minus any costs associated with debt service, with the OCAF to be applied to rents for each unit size assisted under the renewal contracts.

Rent adjustments at contract renewal will use the same OCAF allowed under § 401.412 for the Mark-to-Market Program, except that rents may be redetermined using a budget-based rent adjustment from time-to-time at the discretion of HUD. OCAF and budget-based adjustments may be positive or negative. The HUD official responsible for the particular section 8 program involved will determine the term of any initial and subsequent renewals, subject to the availability of appropriated funds.

Section 402.6 What Actions Must an Owner Take to Request Section 8 Contract Renewal Under This Part?

Section 402.6 provides a procedure for requesting renewal under part 402 which is similar to § 401.99 for Mark-to-Market projects. At least 3 months before the expiration date of any project-based assistance on a project, or as soon as practicable if the contract expires less than 3 months after the effective date of this interim rule, the owner must submit to HUD (or the contract administrator for a contract under the moderate rehabilitation program): (1) a certification that neither the owner nor any affiliate is suspended or debarred; (2) a comparable market rent analysis indicating that project rents are above comparable market rents (using the same approach in § 401.410 for the Mark-to-Market Program) except for most exception projects; and (3) if the owner is seeking renewal under § 402.4, the most recent annual audited financial statement for the project, and the owner's evaluation of physical needs complying with § 401.450. Rent comparability is to be determined by an independent State-certified general appraiser hired by the owner, using the guidance given to the PAE under § 401.410. An interim contract extension may be provided when an owner's request for renewal under § 402.4 or § 402.5(b)(2) is pending.

These procedures do not apply to renewals of section 8 moderate rehabilitation contracts (other than contracts for single room occupancy dwellings under section 441 of the Stewart B. McKinney Homeless Assistance Act.) HUD's Assistant Secretary for Public and Indian Housing will issue separate procedures.

Section 402.7 Refusal to Consider an Owner's Request for a Section 8 Contract Renewal Because of Actions or Omissions of Owner or Affiliate

To ensure that contracts are not renewed for unacceptable owners, § 402.7 permits HUD to reject a renewal request in a manner similar to § 401.403 for projects eligible for Mark-to-Market restructuring. The dispute and administrative appeal provisions of subpart F of part 401 apply.

Section 402.8 Tenant Protections if an Expiring Contract is not Renewed

Section 402.8 is similar to § 401.602. If an owner fails to renew an expiring contract for section 8 project-based assistance, the owner must provide the 180-day advance notice of non-renewal under section 8(c)(9) of the United States Housing Act of 1937 and the 90-day notice of rent increase under section 8(c)(8) of that Act. An owner who does not give the proper notice must continue to permit residents to stay in their units without increasing the tenant portion of the rent until 180 days (or 90 days, depending on which notice was not given in a timely manner) after the later of the date proper notice was given or the date the contract expires.

Electronic Access and Filing Addresses

If you wish to comment on this interim rule, you may submit comments through HUD's Public Comment Webpage accessible through the Internet at <http://www.hud.gov/ogc/regcom2.htm/>. That webpage will enable you to create an e-mail message containing your comments. Your comments will be sent to the Rules Docket Clerk and will be available to any person. If you send your comment through the Public Comment Webpage, please DO NOT also send a paper copy of your comment.

Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in §§ 401.101, 401.102, 401.200, 401.202, 401.302, 401.403, 401.404, 401.405, 401.410, 401.421, 401.473, 401.480, 401.481, 401.500, 401.450, 401.451, 401.601, 401.602, 401.603, 401.651, 402.4 and 402.6 of this interim rule have been

submitted to the Office of Management and Budget (OMB) for emergency review and approval in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor and a person is not required to respond to, a collection of information unless the collection displays a valid control number. The OMB control number, when assigned, will be published in the **Federal Register**, together with any changes in the information collection requirements that may result from the approval process. The OMB approval number will be assigned before the rule takes effect.

In addition, HUD has submitted to OMB a request for non-emergency approval for the information collection requirements of this interim rule and for an extension of the approval of the information collection requirements contained in the Request for Qualifications (RFQ) published on August 17, 1998, at 63 FR 44102. (The information collection requirements in the RFQ were approved by OMB on an emergency basis through February 28, 1999 with OMB control no. 2502-0531.)

In accordance with 5 CFR 1320.5(a)(1)(iv), the Department is setting forth the following concerning the collections of information:

(1) Title of the information collection proposal:

Multifamily Housing Mortgage and Housing Assistance Restructuring Program (Mark-to-Market) Regulations and Request for Qualifications (RFQ)

(2) Summary of the collection of information:

The rule and the RFQ seek information from entities that may become participating administrative entities. The information concerns these entities' capacity and experience relating to their respective abilities to carry out the statutory functions of PAEs. The rule also contains collections of information from owners relating to mortgage restructurings.

(3) Description of the need for the information and its proposed use:

The information is needed to determine the qualifications of entities to become PAEs. It is also needed to develop statutorily required mortgage restructuring and rental assistance sufficiency plans. Finally, the information includes notices and related documents that implement various statutory procedures.

(4) Description of the likely respondents, including the estimated number of likely respondents, and proposed frequency of response to the collection of information:

Respondent will include entities applying for and that are PAEs, owners of projects HUD-insured or -held mortgages with expiring Section 8

contracts. The estimated number of respondents and frequency of response is included in paragraph (5), immediately below.

(5) Estimate of the total reporting and recordkeeping burden that will result from the collection of information:

Information collection	Number of respondents	Responses per respondent	Total annual responses	Hours per response	Total Hours	Regulatory reference
Owner Request for MRRAS Plan.	250	1	250	100	25,000	401.101
Owner cost/benefit analysis	235	1	235	1		401.480
Evaluation of rehabilitation needs.	235	1	235	35		401.451
Owner request to renew Section 8 without an MRRAS plan.	160	1	160	15	2,400	402.4
Owner submission in connection with 524(a) renewal.	140	1	140	40	5,600	402.6
Owner notice of non-renewal.	20	1	20	2	40	401.602
PAE notice to owner of refusal to consider request.	10	1	10	15	150	401.603
Owner appeal of a decision	27	1	27	16	432	401.651
Owner's notice of intent to sell.	25	1	25	1	25	401.481
Information needed to develop a HUD-approved MRRAS plan.	250	1	250	140	35,000	401.200 401.403 401.404
Third party notice	250	1	250	3	750	401.405
Market comparable rent determination.	250	1	250	40	10,000	401.410
Information needed to develop a rental assistance plan.	250	1	250	10	2,500	401.421
Physical needs assessment.	250	1	250	40	10,000	401.451
Third party notices	250	1	250	2	500	401.601
PAE subsidy layering certification.	250	1	250	20	5,000	401.500
PAE Notice of Refusal	25	1	25	10	250	401.102
Owner request for administrative review.	20	1	20	3	60	401.102
Response to RFQ	50	1	50	40	2,000	401.202
PAE Record Keeping	45			10		401.302
PAE reporting	45			10		401.302
PAE reports on projects subject to RAA plan.	45	1	45	30	1,350	401.450
Notice of rejection	10	1	10	10	100	401.473
Totals			3,002	101,157		

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning the collection of information in this interim rule and the Request for Qualifications published on August 17, 1998, at 63 FR 44102 to:

(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 the agency's estimate of the burden of the proposed collection of information;

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

(4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this interim rule. Comments must refer to this interim rule by name and docket number (FR-4298).

Comments on the emergency submission must be submitted by September 18, 1998. Comments on the regular non-emergency submission must be submitted by November 10, 1998.

Submit comments to: Joseph F. Lackey, Jr., HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; and

Reports Liaison Officer, Oliver Walker, Department of Housing and Urban Development, 451 7th Street, SW, Room 9116, Washington, DC 20410.

Justification for Interim Rule and Shortened Comment Period

It is the general practice of the Department to provide a 60-day public comment period on all rules in accordance with 24 CFR part 10. However, section 522(a)(1) of MAHRA requires that this rule be issued as an interim rule; i.e., as a rule that will take

effect without the benefit of public comments. Section 522(a)(2) requires subsequent issuance of a final rule by October 27, 1998 or, if later, 3 months after the Director of the Office of Multifamily Housing Assistance Restructuring is appointed. Hence, the Department invites public comment on the interim rule, but is providing a 45-day comment period instead of the usual 60-day period in order to minimize the period of operation under the interim rule as desired by Congress. The comments received within the 45-day comment period will be considered during development of a final rule that will supersede this interim rule as soon as feasible. In order to provide the fullest and most expedient access to the provisions of this interim rule, HUD will make it available on the World Wide Web at <http://www.hud.gov> on the date of publication in the **Federal Register**.

This interim rule also contains a partial implementation of the rehabilitation grant authority of section 236(s) of the National Housing Act, as added by section 531 of MAHRA. The interim rule authority in section 522(a)(1) of MAHRA directly applies only to subtitle A of MAHRA, and section 531 appears in subtitle B. However, the Department has concluded that section 522(a)(1) is authority for a limited implementation of section 236(s) through an interim rule as part of the Mark-to-Market Program because a rehabilitation grant included in a Restructuring Plan in compliance with part 401 will necessarily comply with the statutory and other desirable regulatory requirements for a section 236(s) grant. No public purpose would be served by a separate rule that duplicated many of the part 401 requirements in the context of a grant made as part of a Restructuring Plan, and HUD does not read the statute as requiring the separate rule.

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4223). The Finding is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 7th Street, SW, Washington, DC 20410.

Executive Order 12866

The Office of Management and Budget (OMB) reviewed this interim rule under Executive Order 12866, *Regulatory Planning and Review*, issued by the President on September 30, 1993. OMB determined that this rule is a "significant regulatory action," (but not economically significant) as defined in section 3(f) of the Order. The interim rule will have effects outside the government, such as rehabilitation costs and associated benefits of improved housing. Based on experience under earlier demonstration authority, HUD has estimated that these effects outside of the Government do not total more than \$100 million annually.

Any changes made in this rule subsequent to its submission to OMB are identified in the docket file. The docket file is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this interim rule before publication and by approving it certifies that this rule does not have a significant economic impact on a substantial number of small entities. The rule implements recently-enacted legislation that created a Mark-to-Market Program through which section 8 rents for multifamily projects with HUD-insured or HUD-held mortgages will be reduced in order to preserve low-income rental housing affordability while reducing the long-term costs of project-based rental assistance and minimizing the adverse effect on the FHA insurance funds. As the preamble to the rule explains, section 8 assistance is costly to the Federal Government and the cost is rising. To preserve affordable housing, the Congress determined that reduction of section 8 assistance was necessary. Reduction or elimination of section 8 assistance without some type of transition or conversion process may mean that current projects assisted by section 8 may be unable to meet their financial obligations including operating expenses, current and future capital needs, and debt service payments—particularly payments on FHA-insured mortgages. To avoid this situation, the authorizing legislation and this interim rule provides for a mortgage restructuring program.

In this interim rule, the Department strives to provide flexible requirements

in order to reduce any burden on small entities. Owners of eligible projects that are small entities, who might otherwise be unable to meet their monthly mortgage payments after HUD reduces section 8 rents to comparable market rents as mandated by law, are provided an opportunity to receive a reduction in monthly mortgage payments if they request a mortgage restructuring under the rule. As conditions of the mortgage restructuring the owners will be required to rehabilitate the project so that it meets minimum standards of housing quality and to provide for competent management. These are not new economic burdens on owners, but are project matters which owners already have a responsibility to address and should be addressing even without mortgage restructuring. The only actions required of the owner are those needed to ensure that a project provide decent and safe housing to those intended to benefit from the Federal programs involved (FHA mortgage insurance and section 8 housing assistance payments.) Again, under existing HUD regulations and contracts, owners are now subject to a decent, safe, and sanitary standard or a good repair standard. Owners choosing to request a mortgage restructuring under this interim rule will continue to serve the same tenant income mix as before and will not be required to provide additional affordable housing.

Some of the Participating Administrative Entities (PAEs) selected under the interim rule, such as nonprofit organizations and for-profit entities, may be small entities. In the interim rule HUD has chosen to preserve for the PAE substantial discretion, within the limits of the statute, to choose the most cost-effective way of undertaking the mortgage restructuring of projects assigned to the PAE. No more projects will be assigned to a PAE than a PAE is able and willing to deal with. Each nonprofit and for-profit PAEs will partner with a public entity to provide additional resources and reduce the burden of undertaking restructurings.

Nothing in the interim rule imposes an adverse or disproportionate burden on a small entity. Small entities are specifically invited, however, to comment on whether this interim rule will significantly affect them, in accordance with the instructions in the DATES and ADDRESSES sections in the preamble of this interim rule. Such comments will be considered when a final rule is developed.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this interim rule do not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the interim rule is not subject to review under the Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4; approved March 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and the private sector. This rule does not impose any Federal mandates on any State, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

List of Subjects*24 CFR Part 401*

Grant programs-housing and community development, Housing, Housing assistance payments, Housing standards, Insured loans, Loan programs-housing and community development, Low and moderate income housing, Mortgage insurance, Mortgages, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 402

Housing, Housing assistance payments, Low and moderate income housing, Rent subsidies.

For the reasons set forth in the preamble, 24 CFR is amended by adding a new Chapter IV, which consists of parts 401 and 402, to read as follows:

CHAPTER IV—OFFICE OF MULTIFAMILY HOUSING ASSISTANCE RESTRUCTURING, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**PART 401—MULTIFAMILY HOUSING MORTGAGE AND HOUSING ASSISTANCE RESTRUCTURING PROGRAM (MARK TO MARKET).****PART 402—PROJECT-BASED SECTION 8 CONTRACT RENEWAL WITHOUT RESTRUCTURING UNDER SECTION 524 (a) OF MAHRA.****PART 401—MULTIFAMILY HOUSING MORTGAGE AND HOUSING ASSISTANCE RESTRUCTURING PROGRAM (MARK-TO-MARKET)****Subpart A—General Provisions; Eligibility Sec.**

- 401.1 What is the purpose of part 401?
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- 401.99 What actions must an owner take to request a section 8 contract renewal?
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- 401.420 When must the Restructuring Plan require project-based assistance?
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- 401.471 HUD payment of a section 541(b) claim.
- 401.472 Rehabilitation funding.
- 401.473 HUD grants for rehabilitation under section 236(s) of NHA.
- 401.474 Project accounts.
- 401.480 Voluntary sale or transfer of project.
- 401.481 Subsidy layering limitations on HUD funds.
- 401.483 Leasing units to certificate and voucher holders.
- 401.484 Property management standards.
- 401.500 Required notices to third parties.
- 401.501 Who is entitled to receive notices under § 401.500?

Subpart D—Implementation of the Restructuring Plan After Closing

- 401.550 Monitoring and compliance agreements.
- 401.552 Servicing of second mortgage.
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- 401.595 Contract and regulatory provisions.
- 401.600 Will a section 8 contract be extended if it would expire while an owner's request for a Restructuring Plan is pending?
- 401.601 Consideration of an owner's request to renew an expiring contract without a Restructuring Plan.
- 401.602 Tenant protections if an expiring contract is not renewed.
- 401.605 Project-based assistance provisions.
- 401.606 Tenant-based assistance provisions.
- 401.607 Contract term.

Subpart F—Owner Dispute of Rejection and Administrative Appeal

- 401.645 How does the owner dispute a notice of rejection?
- 401.650 When may the owner make an administrative appeal of a final decision under this subpart?
- 401.651 Appeal procedures.
- 401.652 No judicial review.

Authority: 12 U.S.C. 1715z-1 and 1735f-19(b); 42 U.S.C. 1437f note and 3535(d).

Subpart A—General Provisions; Eligibility**§ 401.1 What is the purpose of part 401?**

This part contains the regulations implementing the authority in the

Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA) for the Mark-to-Market Program including the renewal of project-based assistance contracts for eligible projects without restructuring. Section 511(b) of MAHRA details the purposes, and section 512(2) details the scope, of the Program.

§ 401.2 What special definitions apply to this part?

(a) *MAHRA* means the Multifamily Assisted Housing Reform and Affordability Act of 1997, title V of Pub. L. 105-65, 42 U.S.C. 1437f note.

(b) *Statutory terms.* Terms defined in section 512 of MAHRA are used in this part in accordance with their statutory meaning. These terms are: comparable properties, expiring contract, expiration date, fair market rent, mortgage restructuring and rental assistance sufficiency plan, nonprofit organization, qualified mortgagee, portfolio restructuring agreement, participating administrative entity, project-based assistance, renewal, State, tenant-based assistance, and unit of general local government.

(c) *Other terms.* As used in this part, the term—

Affiliate means an affiliate of the owner or an affiliate of the purchaser, as such terms are defined in section 516(a) of MAHRA.

Applicable Federal rate has the meaning given in section 1274(d) of the Internal Revenue Code of 1986.

Community-based nonprofit organization means a non-profit organization that maintains at least one-third of its governing board's membership for low-income residents from the local community, or for elected representatives of community organizations that represent low-income residents.

Comparable market rents has the meaning given in § 401.410(b).

Disabled family has the meaning given in § 5.403(b) of this title.

Elderly family has the meaning given in § 5.403(b) of this title.

Eligible project means a project with a mortgage insured or held by HUD, project-based assistance expiring on or after October 1, 1998, and rents for assisted units exceeding comparable market rents; and otherwise meeting the definition of "eligible multifamily housing project" in section 512(2) of MAHRA.

HUD means the Director of the Office of Multifamily Housing Assistance Restructuring (OMHAR) or a HUD official authorized to act in lieu of the Director, when used in reference to provisions of MAHRA that give

responsibilities to the Director, and otherwise has the meaning given in § 5.100 of this title.

NHA means the National Housing Act, 12 U.S.C. 1702 *et seq.*

Owner means the owner of a project and any purchaser of the project.

PAE means a participating administrative entity as defined in section 512(10) of MAHRA, or HUD when appropriate in accordance with section 513(b)(4) of MAHRA.

PCA means a physical condition assessment of a project prepared by a PAE under § 401.451.

PRA means a portfolio restructuring agreement as defined in section 512(9) of MAHRA.

Priority purchaser means a purchaser meeting qualifications established by HUD that is:

(1) A tenant organization or

(2) A tenant-endorsed community-based nonprofit organization or public agency.

Rental Assistance Assessment Plan means the plan described in section 515(c)(2) of MAHRA.

Restructured rent means the rent determined at the time of restructuring in accordance with section 514(g) of MAHRA.

Restructuring Plan means the Mortgage Restructuring and Rental Assistance Sufficiency Plan described in section 514 of MAHRA.

Section 8 means section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f.

Section 541(b) claim means a claim paid by HUD under an insurance contract under authority of section 541(b) of the National Housing Act, 12 U.S.C. 1735f-19(b).

Tenant organization means an organization that meets regularly, whose officers are elected by a majority of heads of households of occupied units, and whose membership is open to all tenants of a project.

Unit of local government means the smallest unit of general local government in which the project is located.

§ 401.99 What actions must an owner take to request a section 8 contract renewal?

(a) *Requesting Restructuring Plan.* An owner may request a section 8 contract renewal as part of a Restructuring Plan by, at least 3 months before the expiration date of any project-based assistance or as soon as practicable if the contract will expire before January 13, 1999, certifying to HUD that to the best of the owner's knowledge:

(1) Project rents are above comparable market rents; and

(2) Neither the owner nor any affiliate is suspended or debarred, or, if so, a

voluntary sale transfer of the property is proposed in accordance with § 401.480.

(b) *Eligible but not requesting Restructuring Plan.* If an owner is eligible for a Restructuring Plan but requests a renewal of project-based assistance without a Plan, HUD will consider the request, in accordance with § 401.601 if, at least 3 months before the expiration date of any project-based assistance or as soon as practicable if the contract will expire before January 1, 1999, an owner provides to HUD the certification required in paragraph (a) of this section, and the following additional information:

(1) A comparable market rent analysis;

(2) The prior fiscal year's audited financial statement for the project;

(3) An owner's evaluation of physical condition as provided in § 401.450; and

(4) Such other documents as the PAE or HUD may require.

(c) *Not eligible for Restructuring Plan.* Section 402.5 of this chapter addresses renewal of project-based assistance for a project not eligible for a Restructuring Plan.

§ 401.100 Which projects are eligible for a Restructuring Plan under this part?

General eligibility. A Restructuring Plan may be requested by an owner of an eligible project that:

(a) Has project-based assistance with an expiration date of October 1, 1998, or later;

(b) Has current gross potential rent for the project-based assisted units that exceeds the gross potential rent for the project based assisted units using comparable market rents; and

(c) Is not described in section 514(h) of MAHRA.

§ 401.101 Which owners are ineligible for a Restructuring Plan?

The request of an owner of an eligible project for a Restructuring Plan will not be considered if the owner or an affiliate is debarred or suspended under part 24 of this title, unless a sale or transfer of the property is proposed in accordance with § 401.480.

Subpart B—Participating Administrative Entity (PAE) and Portfolio Restructuring Agreement (PRA)

§ 401.200 Who may be a PAE?

A PAE must qualify under the definition in section 512(10) of MAHRA. It must not have any outstanding violations of civil rights laws, determined in accordance with criteria in use by HUD. If the PAE is a private entity, whether nonprofit or for-profit, it must enter into a partnership

with a public purpose entity, which may include HUD. The formed entity must meet all legal requirements for a partnership. A PAE may delegate responsibilities only as stated in the PRA.

§ 401.201 How does HUD select PAEs?

(a) *Selection of PAE.* HUD will select qualified PAEs in accordance with the criteria established in 513(b) of MAHRA and criteria established by HUD. The selection method is within HUD's discretion, including but not limited to a request for qualifications.

(b) *Priority for public agencies.* HUD will provide a one-time priority period for State Housing Finance Agencies and local housing agencies to qualify as the PAEs for their jurisdictions. If more than one agency qualifies for the same jurisdiction, HUD will provide an opportunity for the agencies to allocate responsibility for projects in the jurisdiction. If the agencies are unable to agree, HUD will choose a PAE in accordance with section 513(b)(2) of MAHRA.

(c) *Qualification for PAE by nonprofit and for profit entities.* After the priority period expires, HUD will consider other eligible entities as PAEs for jurisdictions in which no public agency has qualified as the PAE, or for projects that have not been assigned to a qualified public agency.

(d) *No PAE for project.* If HUD does not select a PAE for a project, HUD may perform the functions of the PAE, or contract with other qualified entities to perform those functions.

§ 401.300 What is a PRA?

A PRA is an agreement between HUD and a PAE that delineates rights and responsibilities in connection with development and implementation of a Restructuring Plan. The PRA must contain the matters required by section 513(a)(2) of MAHRA, and §§ 401.301 through 401.309, as well as other terms and conditions required by HUD.

§ 401.301 Business arrangements.

If the PAE is in a partnership, the PRA must specify the following:

(a) The responsibilities of each partner regarding the Restructuring Plan;

(b) The resources each partner will provide to accomplish its designated responsibilities; and

(c) All compensation to each partner, whether direct or indirect.

§ 401.302 PRA administrative requirements.

(a) *Inapplicability of certain requirements.* Parts 84 and 85 of this

title and contract procurement requirements do not apply to a PRA.

(b) *Recordkeeping.* The PAE must keep complete and accurate records of all activities related to the PAE's performance under the PRA. The PAE must retain the records for at least 3 years after the PRA terminates.

(c) *Inspection of records and audit.* Upon reasonable notice, the PAE must permit the Comptroller General of the United States and HUD (including representatives of the HUD Office of Inspector General) to inspect, audit and copy any records required to be retained under this section.

401.303 PRA indemnity provisions for SHFAs and HAs.

When a PRA requires HUD to indemnify a PAE in accordance with section 513(a)(2)(G) of MAHRA, any payment under this indemnity is contingent upon the availability of funds that are permitted by law to be used for this purpose.

§ 401.304 PRA provisions on PAE compensation.

(a) *Base fee.* The PRA will provide for a base fee to be paid by HUD.

(b) *Incentives.* The PRA may provide for incentives to be paid by HUD for achievement of stated objectives.

(c) *Expenses.* The PRA will identify expenses incurred by the PAE that will qualify for reimbursement by HUD.

§ 401.307 On-going responsibility of PAE.

The PRA must provide for on-going activities necessary to implement the Restructuring Plan after the closing under § 401.407.

§ 401.309 PRA term and termination provisions; other remedies.

(a) *1-year term with renewals.* The PRA will have a term of 1 year, to be renewed for successive terms of 1 year with the mutual agreement of both parties. The PRA will provide for HUD to pay final compensation to the PAE and to assign responsibility for continuing activities if the PRA is not renewed.

(b) *Termination for cause.* A PRA will be subject to termination by HUD at any time for cause, with payment required by HUD as provided in the PRA only for matters performed by the PAE to the date of termination. When cause for termination exists, HUD may order an immediate transfer of some or all of the PAE's duties to another PAE designated by HUD. HUD may temporarily waive its right of immediate termination for cause in order to allow an orderly transfer of duties and responsibilities under a PRA, without waiving the right of termination after the transfer has been

completed to HUD's satisfaction. HUD will retain the right of set-off against any payments due as well as such other rights afforded at law and in equity.

(c) *Liability for damages.* During the term of a PRA, or notwithstanding any termination of a PRA, HUD may seek its actual, direct, and consequential damages from any PAE failure to comply with its obligations under the PRA.

(d) *Cumulative remedies.* The remedies under this section are cumulative and in addition to any other remedies or rights HUD may have under the terms of the PRA, at law, or otherwise.

§ 401.310 Conflicts of interest.

(a) *Definitions.* (1) *Conflict of interest.* A conflict of interest is a situation in which a PAE or other restricted person has:

(i) A financial interest in a matter relating to the PRA;

(ii) One or more personal, business, or financial interests or relationships which would cause a reasonable person with knowledge of the relevant facts to question the integrity or impartiality of those who are or will be acting under the PRA; or

(iii) Is taking an adverse position to HUD or to an owner whose project is covered by a PRA in a lawsuit, administrative proceeding or other contested matter.

(2) *Control* means the power to vote, directly or indirectly, 25 percent or more of any class of the voting stock of a company; the ability to direct in any manner the election of a majority of a company (or other entity's) directors or trustees; or the ability to exercise a controlling influence over the company or entity's management and policies. For purposes of this definition, a general partner of a limited partnership is presumed to be in control of that partnership.

(3) *Restricted person* means a PAE; any management official of the PAE; any legal entity that is under the control of the PAE, is in control of the PAE or is under common control with the PAE; or any employee, agent or contractor of the PAE, or employee of such agent or contractor, who will perform or has performed services under a PRA with HUD.

(b) *General prohibitions.* (1) The PAE may not permit conflicts of interest to exist without obtaining a waiver in accordance with this section.

(2) The PAE must establish procedures to identify conflicts of interest and to ensure that conflicts of interest do not arise or continue, subject

to waiver under paragraph (c) of this section.

(3) HUD will not enter into PRAs with potential PAEs who have conflicts of interest associated with a particular project, or permit PAEs to continue performance under existing PRAs when such PAEs have conflicts of interest, unless such conflicts have been eliminated to HUD's satisfaction by the PAE or potential PAE or are waived by HUD.

(4) The PAE has a continuing obligation to take all action necessary to identify whether it or any other restricted person has a conflict of interest.

(c) *Waivers.* HUD will waive conflicts of interest only when, in light of all relevant circumstances, the interests of HUD in the PAE's or another restricted persons's participation outweigh the concern that a reasonable person may question the integrity of HUD's operations.

(d) *Conflicts of interest arising prior to PAE selection.* (1) *Request for review of conflicts of interest.* (i) A potential PAE, with its request to HUD for consideration for selection as a PAE, must identify existing conflicts of interest and may make a written request for a determination as to the existence of a conflict of interest, may request that the conflict of interest, if any, be waived, or may propose how it could eliminate the conflict.

(ii) If, after submitting a request but prior to selection, a potential PAE discovers that it has a conflict, it must notify HUD in writing within 10 days of submitting the request or prior to selection, whichever is earlier. The potential PAE may, with its notices, request that the conflict be waived or may propose how it may eliminate the conflict. The potential PAE may also request a determination as to the existence of the conflict.

(2) *Review by HUD.* Subject to the restrictions set forth in this section, HUD in its sole discretion may determine whether a conflict of interest exists, may waive the conflict of interest, or may approve in writing a PAE's proposal to eliminate a conflict of interest.

(e) *Conflicts of interest that arise or are discovered after PAE selection.* (1) A PAE must notify HUD in writing within 10 days after discovering that it or another restricted person has a conflict of interest. Such notification must contain a detailed description of the conflict of interest and state how the PAE intends to eliminate the conflict. The PAE may also request a determination as to the existence of a conflict.

(2) HUD will, after receipt of such notification or other discovery of the PAE's conflict or potential conflict of interest, take such action as it determines is in its best interests, which may involve proceeding under § 401.313 or as provided in paragraph (e)(2) of this section. HUD may notify the PAE in writing of its findings as to whether a conflict of interest exists and the basis for such determination, whether or not a waiver will be granted, or whether corrective actions may be taken in order to eliminate the conflict of interest. Corrective action must be completed by the PAE not later than 30 days after notification is mailed by HUD unless HUD, at its sole discretion, determines that it is in its best interests to grant the PAE an extension in which to complete the corrective action.

(f) *Reconsideration of decisions.* Decisions issued pursuant to this section may be reconsidered by HUD upon application by the PAE. Such requests must be in writing and must contain the basis for the request. HUD may, at its discretion and after determining that it is in its best interests, stay any corrective or other actions previously ordered pending reconsideration of a decision.

§ 401.311 Standards of conduct.

(a) *Minimum ethical standards for PAEs.* In connection with the performance of any PRA and during the term of such PRA, a PAE or other restricted person (as defined in § 401.310) may not:

(1) Solicit for itself or others favors, gifts, or other items of monetary value from any person who is seeking official action from HUD or the PAE in connection with the PRA or has interests which may be substantially affected by the restricted person's performance or nonperformance of duties to HUD;

(2) Use improperly or allow the improper use of HUD property, or property over which the restricted person has supervision or charge by reason of the PRA;

(3) Use its status as PAE for its own benefit, or the financial or business benefit of a third party, except as contemplated by the PRA; or

(4) Make any unauthorized promise or commitment on behalf of HUD.

(b) *18 U.S.C. 201.* Pursuant to 18 U.S.C. 201, whoever acts for or on behalf of HUD in connection with the matters covered by this part is deemed to be a public official. Public officials are prohibited from soliciting or accepting anything of value in return for being influenced in the performance of

official actions. Violators are subject to criminal sanctions.

(c) *18 U.S.C. 1001.* Pursuant to 18 U.S.C. 1001, whoever knowingly and willingly falsifies a material fact, makes a false statement or utilizes a false writing in connection with a PRA is subject to criminal sanctions. Other Federal civil statutes also apply to making false statements to the United States.

(d) *18 U.S.C. 207.* Former government employees are subject to the prohibitions found at 18 U.S.C. 207.

§ 401.312 Confidentiality of information.

A PAE and every other restricted person (as defined in § 401.310) has a duty to protect confidential information and to prevent its use to further a private interest other than as contemplated by the PRA. As used in this section, confidential information means information that a PAE or other restricted person obtains from or on behalf of HUD or a third party in connection with a PRA but does not include information generally available to the public unless the information becomes available to the public as a result of unauthorized disclosure by the PAE or another restricted person.

§ 401.313 Consequences of PAE violations; finality of determination.

(a) *Effect on PRA.* If a PAE, potential PAE or other restricted person (as defined in § 401.310) violates §§ 401.310, 410.311, or 401.312, HUD may:

(1) Find the PAE unqualified to enter into a PRA, or unqualified to receive additional projects for restructuring under an existing PRA;

(2) Find the PAE in default under an existing PRA with the right of termination for cause under § 401.309; or

(3) Seek its actual, direct, and consequential damages from a PAE whose conflicts of interest, failure to comply with confidentiality requirements, or failure to comply with the minimum ethical standards for PAEs that were the basis for termination of a PRA.

(b) *Cumulative remedies.* The remedies under this section are cumulative and in addition to any other remedies or rights HUD may have under the terms of the PRA, at law, or otherwise.

(c) *Finality of determination.* Any determination made by HUD pursuant to this section is at HUD's sole discretion and is not subject to further administrative review.

§ 401.314 Environmental review responsibilities.

HUD will retain all responsibility for environmental review under part 50 of this title. Any required review will be completed before any HUD execution of the Restructuring Commitment under § 401.405.

Subpart C—Restructuring Plan**§ 401.400 Required elements of a Restructuring Plan.**

(a) *General.* A PAE is responsible for the development of a Restructuring Plan for each project included in its PRA.

(b) *Required elements.* The Restructuring Plan must contain a narrative that fully describes the restructure transaction. The Restructuring Plan must include the elements required at Section 514 of MAHRA. The Restructuring Plan must describe the use of any restructuring tools listed at section 517(a) and (b) of MAHRA, and must contain other requirements as determined by HUD.

§ 401.401 Consolidated Plans.

A PAE may request HUD to approve a Consolidated Restructuring Plan that presents an overall strategy for more than one project included in the PRA. HUD will consider approval of a Consolidated Restructuring Plan for projects having common ownership, geographic proximity, common mortgagee or servicer, or other factors that contribute to more efficient use of the PAE's resources. Notwithstanding the more efficient use of a PAE's resources, HUD will not approve any Consolidated Restructuring Plans that have a detrimental effect on tenants or the community, or a higher cost to the Federal government.

§ 401.402 Cooperation with owner and qualified mortgagee in Restructuring Plan development.

A PAE must comply with section 514(a)(2) of MAHRA by using its best efforts to seek the cooperation of the owner and qualified mortgagee or its designee in the development of the Restructuring Plan. If the owner fails to cooperate to the satisfaction of the PAE and HUD agrees, the PAE must notify the owner that the PAE will not develop a Restructuring Plan. This notice will be a final decision subject to dispute and administrative appeal under subpart F of this part. If the qualified mortgagee does not cooperate in modifying the mortgage, the PAE and owner may continue to develop a Restructuring Plan to restructure the loan using alternative financing.

§ 401.403 Rejection of a request for a Restructuring Plan because of actions or omissions of owner or affiliate or project condition.

(a) *Ongoing determination of owner and project eligibility.* Notwithstanding an initial determination to accept the owner's request for a Restructuring Plan, the PAE is responsible for a further more complete and ongoing assessment of the eligibility of the owner and project while the Restructuring Plan is developed. The PAE must advise HUD if at any time any of the grounds for rejection listed in paragraph (b) of this section exist.

(b) *Grounds for rejection.* HUD may elect not to permit continued consideration of the Restructuring Plan if at any time before closing under § 401.407:

(1) The owner or an affiliate is debarred or suspended under part 24 of this title;

(2) HUD or the PAE determines that the owner or an affiliate has engaged in material adverse financial or managerial actions or omissions as described at section 516(a) and (b) of MAHRA, including any outstanding violations of civil rights laws in connection any project of the owner or affiliate; or

(3) HUD or the PAE determines that the project does not meet the housing quality standards in § 401.453 and that the poor condition of the project is not likely to be remedied in a cost-effective manner through the Restructuring Plan.

(c) *Dispute and appeal.* An owner may dispute a rejection under this section and seek administrative review under the procedures in subpart F of this part.

§ 401.404 Proposed Restructuring Commitment.

A PAE must submit a Restructuring Plan and a proposed Restructuring Commitment to HUD for approval, prior to submitting the Commitment to the owner for execution. The proposed Restructuring Commitment must be in a form approved by HUD, incorporate the Restructuring Plan, and include the following:

(a) The lender, loan amount, interest rate, and term of any mortgages or unsecured financing for the mortgage restructuring and rehabilitation, and any credit enhancement;

(b) The amount of any payment of a section 541(b) claim;

(c) The type of section 8 assistance and the section 8 restructured rents;

(d) The rehabilitation required, the source of the owner contribution, and escrow arrangements;

(e) The uses for project accounts;

(f) The terms of any sale or transfer of the project; and

(g) A schedule setting forth all sources and uses of funds to implement the Restructuring Plan, including setting forth the balances of project accounts before and after restructuring; and

(h) Other terms and conditions prescribed by HUD.

§ 401.405 Restructuring Commitment review and approval by HUD.

HUD will either approve the Restructuring Commitment as submitted, require changes as a condition for approval, or reject the Plan. If the Plan is rejected, HUD will inform the PAE of the reasons for rejection. HUD's rejection of the Plan is subject to the dispute and administrative appeal provisions of subpart F of this part.

§ 401.406 Execution of Restructuring Commitment.

When HUD approves the Restructuring Commitment, the PAE will deliver the Restructuring Commitment to the owner for execution. The Restructuring Commitment becomes binding upon execution by the owner. An owner who does not execute the Restructuring Commitment may appeal its terms and seek modification under subpart F of this part.

§ 401.407 Closing conducted by PAE.

After the owner has executed the Restructuring Commitment, the PAE must arrange for a closing to execute all documents necessary for implementation of the Restructuring Plan. The PAE must use standard documents approved by HUD, with modifications only as necessary to comply with applicable State or local laws, or such other modifications as are approved in writing by HUD.

§ 401.408 Affordability and use restrictions required.

(a) *General.* The Restructuring Plan must provide that the project will be subject to affordability and use restrictions in a Use Agreement acceptable to HUD. The Use Agreement must be recorded and in effect for at least 30 years. It must include at least the provisions required by this section.

(b) *Use restriction.* The project must continue to be used for residential use with no reduction in the number of residential units without prior HUD approval.

(c) *Affordability restrictions.* Except during a period when at least 20 percent of the units in a project receive project-based assistance:

(1) At least 20 percent of the units in the project must be leased to families whose adjusted income does not exceed 50 percent of the area median income as

determined by HUD, with adjustments for household size, at rents no greater than 30 percent of 50 percent of the area median income; or

(2) At least 40 percent of the units in the project must be leased to families whose adjusted income does not exceed 60 percent of the area median income as determined by HUD, with adjustments for household size, at rents no greater than 30 percent of 60 percent of the area median income.

(d) *Comparable configuration.* The type and size of the units that satisfy the affordability restrictions of paragraph (c) of this section must be comparable to the type and size of the units for the project as a whole.

(e) *Owner obligation to accept assistance.* Subject to the availability of appropriated funds, the owner of the project must accept any offer of project-based or tenant-based assistance renewal or extension so long as the offer is in accordance with the terms and conditions specified in the Restructuring Plan.

(f) *Reporting.* The Use Agreement must contain appropriate financial and other reporting requirements for the owner.

(g) *Enforcement and amendment.* The Use Agreement will be enforceable by interested parties to be specified in the Agreement, which may include HUD, the PAE, project tenants, organizations representing project tenants, and the unit of local government.

(h) *Modifications.* HUD will retain the right to approve modifications of the Use Agreement agreed to by the owner without the consent of any other party, including those having the right of enforcement.

§ 401.410 Standards for determining comparable market rents.

(a) *When are comparable market rents required?* The Restructuring Plan must establish restructured rents at comparable market rents unless the PAE finds that exception rents are necessary under § 401.411.

(b) *Comparable market rents defined.* Comparable market rents are the rents charged for properties that the PAE determines to be comparable properties as defined in section 512(1) of MAHRA, except that projects assisted under part 891 of this title may not be taken into account. For purposes of section 512(1), other relevant characteristics include any applicable rent control and other characteristics determined by the PAE.

(c) *Methodology for determining comparable market rents.* If the PAE is unable to identify at least three comparable properties within the local market, the PAE may:

(1) Use non-comparable housing stock within that market from which adjustments can be made; or

(2) If necessary to go outside the market, use comparable properties as far outside the local market as it finds reasonable, from which adjustments can be made.

(d) *Using FMR as last resort.* If the PAE is unable to identify enough properties under paragraph (c) of this section, the rents must be set at 90 percent of the Fair Market Rents for the relevant market area.

§ 401.411 Guidelines for determining exception rents.

(a) *When do exception rents apply? (1)* The Restructuring Plan may provide for exception rents established under section 514(g) of MAHRA if the PAE determines that project income under the rent levels established under § 401.410 would be inadequate to meet the costs of operating the project as described in paragraph (b) of this section and that the housing needs of the tenants and the community could not be adequately addressed.

(2) In any fiscal year, the PAE may not request HUD to approve Restructuring Plans with exception rents for more than 20 percent of all units covered by the PRA, except that HUD may approve a waiver of this 20 percent limitation based on the PAE's narrative explanation of special need.

(b) *How are exception rents calculated?* Exception rents must be set at a level sufficient to support the costs of operating the project. The PAE must take into account the cost items listed in section 514(g)(3)(A) through (E) of MAHRA, except that debt service is limited to payment of the second mortgage under § 401.461(a) or a rehabilitation loan included in the Restructuring Plan. The exception rent must not exceed 120 percent of the Fair Market Rent for the market area, except that HUD may approve an exception rent greater than 120 percent of Fair Market Rent, based on a narrative explanation of special need submitted by the PAE, subject to the 5 percent limitation in section 514(g)(2)(A) of MAHRA.

§ 401.412 Adjustment of rents with operating cost adjustment factor (OCAF).

(a) *OCAF required for Restructuring Plan.* The Restructuring Plan must provide for annual adjustment of the restructured rents by an OCAF determined by HUD and applied as provided in this section. An OCAF may be positive or negative.

(b) *Application of OCAF.* HUD will apply the OCAF to the previous year's

contract rent less the portion of that rent paid for debt service. Paragraph (b) of this section applies to renewals of contracts in subsequent years which receive restructured rents under either section 514(g)(1) or (2) of MAHRA.

§ 401.420 When must the Restructuring Plan require project-based assistance?

(a) *Criteria in MAHRA.* The Restructuring Plan must provide for the section 8 contract to be renewed as project-based assistance, subject to the availability of funds for this purpose, if the PAE determines that one or more of the circumstances described in section 515(c)(1)(A), (B), or (C) of MAHRA exists.

(b) *Meaning of "predominant".* For purposes of section 515(c)(1)(B), project has a predominant number of units occupied by elderly families, disabled families, or elderly and disabled families if at least 50 percent of the units are occupied by these families.

(c) *Tight rental market.* The conditions of section 515(c)(1)(A) are met if the PAE determines that there is a market-wide vacancy rate of 6 percent or less.

§ 401.421 Rental Assistance Assessment Plan.

(a) *Plan required.* For any project not subject to mandatory project-based assistance under § 401.420, the PAE must develop a Rental Assistance Assessment Plan in accordance with section 515(c)(2) of MAHRA to determine whether assistance should be renewed as project-based assistance or whether some or all of the assisted units should be converted to tenant-based assistance.

(b) *Matters to be assessed.* The PAE must consider the cost of providing assistance, comparing the applicable payment standard for tenant-based assistance to the project's adjusted rent levels determined under § 401.410 or § 401.411. In addition, the PAE must consider the other matters listed in section 515(c)(2)(B) of MAHRA to be assessed as part of the Plan, and the applicable Consolidated Plan developed under part 91 of this title.

(c) *Conversion may be phased in.* Any conversion from project-based assistance to tenant-based assistance may occur over a period of not more than 5 years if the PAE decides the transition period is needed for the financial viability of the project.

(d) *Reports to HUD.* The PAE must report to HUD on the matters specified in section 515(c)(2)(C) of MAHRA at least semi-annually.

§ 401.450 Owner evaluation of physical condition.

(a) *Initial evaluation.* The owner must evaluate the physical condition of the project and provide the following information to the PAE in a form acceptable to the PAE:

(1) All work items required to bring the project to the standard in § 401.452;

(2) The capital repair or replacement items that will be necessary to maintain the long-term physical integrity of the property;

(3) A plan for funding the rehabilitation work included in paragraph (a)(1) of this section, which work must be completed in a timely manner after closing the restructuring transaction, that identifies the source of the required owner contribution of non-project funds; and

(4) An estimate of the initial deposit, if any, and the estimated monthly deposit to the reserve for replacement account for the next 20 years.

(b) *Reconsideration and modification of evaluation.* If the PAE, after its independent review under § 401.451, determines that the owner's evaluation either fails to address specific necessary work items or fails to propose a cost-effective approach to rehabilitation, the owner may modify its evaluation to satisfy the concerns of the PAE.

§ 401.451 PAE Physical Condition Analysis (PCA).

(a) *Review and certification of owner evaluation.* (1) The PAE must independently evaluate the physical condition of the project by means of a PCA. If the PAE finds any immediate threats to health and safety, the owner must complete those work items immediately, or the PAE must evaluate the project's eligibility in accordance with § 401.403(b)(3).

(2) After consultation with the owner and an opportunity for the owner to modify its evaluation performed under § 401.450, the PAE must certify to the accuracy and completeness of the owner's evaluation performed under § 401.450 for each project covered by the PRA or state that the evaluation fails to address certain items or does not propose a cost effective approach.

(b) *Rejection for inaccurate or incomplete owner evaluation.* If the PAE cannot certify to the accuracy and completeness of the owner's evaluation due to its failure to address specific work items or because it does not propose a cost effective approach, the PAE must notify HUD. If HUD agrees with the PAE's determination, the PAE must notify the owner that the request for a Restructuring Plan is rejected.

(c) *Rejection for lack of cost-effectiveness.* Based on the completed PCA, the PAE must determine whether proceeding with a Restructuring Plan with necessary rehabilitation is more cost-effective in terms of Federal resources than rejecting the Request for a Restructuring Plan under § 401.403(b)(3) and providing tenant-based assistance for displaced tenants under § 401.602. HUD will provide guidance to PAEs for making the cost-effectiveness determination. If the PAE concludes that a request for a Restructuring Plan should be rejected because of lack of cost-effectiveness, it must also consider the effect on tenants and the community and advise HUD of the effect.

(d) *Dispute and appeal of rejection.* The dispute and appeal provisions of subpart F of this part apply to rejections under paragraphs (b) and (c) of this section.

§ 401.452 Property standards for rehabilitation.

The Restructuring Plan must provide for the level of rehabilitation needed to restore the property to the non-luxury standard adequate for the rental market for which the project was originally approved. If the standard has changed over time, the rehabilitation may include improvements to meet current standards. The result of the rehabilitation should be a project that can attract non-subsidized tenants but competes on rent rather than on amenities. When a range of options exists for satisfying the rehabilitation standard or the plan for capital replacement, the PAE must choose the least costly option considering both capital and operating costs and taking into account the remaining useful life of all building systems. Nothing in this part exempts rehabilitation from the requirements of part 8 of this title concerning accessibility to persons with disabilities.

§ 401.453 Housing quality standards.

(a) *Standards.* The Restructuring Plan must require the owner to maintain the project, for the duration of the Use Agreement under § 401.408, in a decent and safe condition that meets the applicable standards under this section. As long as project-based assistance is provided, the applicable standards are the physical conditions standards for HUD housing in § 5.703 of this title. At any other time, the applicable standards are the local housing codes or codes adopted by the public housing agency if such codes meet or exceed the standards in § 5.703 of this title and do not severely restrict housing choice or, if

there are no such local housing codes or codes adopted by the public housing agency, the standards in § 5.703 will apply. In addition, any unit in which the tenant receives tenant-based assistance must comply with the housing quality standards of the section 8 tenant-based programs.

(b) *Reserves.* The Restructuring Plan must also provide for reserves for capital replacement sufficient to assure the property's long term structural integrity so that the property can be maintained as affordable housing in decent and safe condition meeting the standards of this section.

§ 401.460 Modification or refinancing of first mortgage.

(a) *Principal amount.* As part of the Restructuring Plan, the PAE will determine the size of the restructured first mortgage that will result from the modification or refinancing of the existing FHA-insured or HUD-held first mortgage. The restructured first mortgage must be in the amount that can be supported by net operating income based on the lower of the restructured section 8 rents or the rents allowed by the Use Agreement under § 401.408. Neither the outstanding principal balance of the existing first mortgage, nor the monthly principal and interest payments on that debt, may be increased through the Restructuring Plan. The debt service coverage used by the PAE must be adequate for purposes of the Restructuring Plan and for the requirements of any refinancing.

(b) *Fully amortizing.* The modified or refinanced first mortgage must be fully amortizing through level monthly payments.

(c) *Rates and other terms.* Interest rates and other terms of the modified or refinanced first mortgage must be competitive in the market.

(d) *Fees.* Any fees or costs associated with mortgage modification or refinancing determined by the PAE to be above normal processing fees must be paid by the owner from non-project funds and must not be included in the modified or refinanced first mortgage.

(e) *Refinancing.* (1) If the holder of the existing FHA-insured first mortgage does not agree to modify and re-amortize the outstanding loan, the loan must be refinanced.

(2) The refinancing may be either without credit enhancement or with credit enhancement under one of the following:

(i) *FHA mortgage insurance.* If the Restructuring Plan provides for FHA mortgage insurance for the refinanced first mortgage, the insurance will be provided in accordance with all usually

applicable FHA legal requirements except that insurance will be documented as provided in section 517(b)(2) of MAHRA. HUD will issue the commitment for mortgage insurance but may adapt its procedures as necessary to facilitate development and implementation of a Restructuring Plan.

(ii) *Other FHA credit enhancement.* If FHA credit enhancement, including risk-sharing, is provided under part 266 of this title, the credit enhancement will be provided in accordance with all usually-applicable FHA legal requirements under part 266 of this title, except that special approval from HUD will be required before the PAE engages in risk-sharing with FHA under part 266 of this title.

(iii) *Credit enhancement from non-FHA sources.* If credit enhancement is to be provided by a non-FHA source under section 517(b)(4) of MAHRA, HUD will consider waiver of any non-statutory provision in this part only if the waiver will not materially impair achievement of the purposes of MAHRA and if the waiver is essential to meet the legitimate business or legal requirements of the provider of credit enhancement.

§ 401.461 HUD-held second mortgage.

(a) *Amount.* If the Restructuring Plan provides for payment of a section 541(b) claim, the Plan must also provide for a second mortgage to HUD in an amount that does not exceed the amount that the PAE reasonably expects to be repaid based on objective criteria such as the amount of anticipated net cash flow, trending assumptions, amortization provisions, and expected residual value of the project. The second mortgage also must not exceed the difference between the unpaid principal balance on the first mortgage immediately before and after restructuring.

(b) *Terms and conditions.* (1) The second mortgage must have an interest rate of at least 1 percent, but not more than the applicable Federal rate. Interest will accrue but not compound.

(2) The second mortgage must have a term concomitant with the modified or refinanced first mortgage. HUD may provide that if the first mortgage of a nominal amount is satisfied, the second mortgage may continue for a term established by HUD.

(3)(i) Principal and interest on the second mortgage is payable only out of net cash flow during its term. "Net cash flow" means that portion of project income that remains after the payment of all required debt service payments on the modified or refinanced first mortgage, if any, including payment of any past due principal or interest, and payment of all reasonable and necessary

operating expenses (including deposits to the reserve for replacement account) and any other expenditure approved by HUD.

(ii) The priority and distribution of net cash flow is as follows:

(A) HUD or the PAE may approve the payment to the owner of up to 25 percent of net cash flow based on consideration of relevant conditions and circumstances including, but not limited to, the project management meeting the management standards prescribed in § 401.484 and the project meeting the housing quality standards prescribed in § 401.453; and

(B) All remaining net cash flow will be applied to the principal and interest on the second mortgage, until paid in full, and then to any additional subordinate mortgage under § 401.461(c).

(4) HUD may cause the second mortgage to be immediately due and payable on the grounds provided in section 517(a)(4) of MAHRA, including an assumption of the mortgage in violation of HUD standards for approval of transfers of physical assets (if applicable), or the owner fails to comply with other HUD requirements after a reasonable opportunity for the owner to cure such failure. A decision by HUD in this regard is subject to the administrative appeals procedure in subpart F of this part.

(5) HUD will consider modification or forgiveness of all or part of the second mortgage only if the project has been sold or transferred to a priority purchaser under § 401.480 and HUD determines that modification or forgiveness is necessary to recapitalize the project in order to preserve it as affordable housing.

(c) *Additional mortgage to HUD.* If the amount of a section 541(b) claim under § 401.471 exceeds the principal amount of the second mortgage, a Restructuring Plan may require the owner to give an additional mortgage on the project to HUD to secure repayment of that portion of the claim that is not already secured. This additional mortgage must be junior in priority to the second mortgage required by paragraph (a) of this section, bear interest at the same rate which will accrue but not compound, and require no payments except payment in full when the second mortgage is satisfied.

§ 401.471 HUD payment of a section 541(b) claim.

HUD will pay a section 541(b) claim from the appropriate insurance fund to the insured mortgagee on behalf of the mortgagor to reduce the principal balance of the insured mortgage as

provided in the Restructuring Plan. All section 541(b) claims will be paid in cash. Part 207 of this title and sections 207(g) and 541(a) of the NHA do not apply to a section 541(b) claim.

§ 401.472 Rehabilitation funding.

(a) *Sources of funds.* (1) *Project accounts.* The Restructuring Plan for funding rehabilitation must include funds from the project's residual receipts account, surplus cash account, residual receipts account and other project accounts, to the extent the PAE determines that those accounts will not be needed for the initial deposit to the reserves.

(2) *Debt restructuring.* The Restructuring Plan may provide for funding of rehabilitation through a new first mortgage in conjunction with a payment of a section 541(b) claim. The payment of claim may be in an amount necessary to facilitate the funding of the rehabilitation, by reducing the existing first mortgage debt to make refinancing proceeds available to fund rehabilitation.

(3) *Section 236(s) rehabilitation grant.* The Restructuring Plan may include a direct grant from HUD under section 236(s) of the NHA to cover a portion of the rehabilitation cost, to the extent that HUD has determined that funding is available for such a grant.

(4) *Section 8 budget authority increase.* The Restructuring Plan may include funding of rehabilitation from budget authority provided to HUD for increases in section 8 contracts, to the extent that HUD has determined that funding from this source is available.

(b) *Statutory restrictions.* Any rehabilitation funded from the sources described in paragraph (a) of this section is subject to the requirements in section 517(b)(7) of MAHRA for an owner contribution. The required owner contribution will be calculated as 20 percent of the total cost of rehabilitation, unless it is determined that a higher percentage is required. The PAE may exempt housing cooperatives from the owner contribution requirement.

(c) *Escrow agent.* The Restructuring Plan must provide for progress payments for rehabilitation, which must be disbursed by an acceptable escrow agent subject to PAE oversight or as otherwise provided by HUD.

§ 401.473 HUD grants for rehabilitation under section 236(s) of NHA.

HUD will consider a direct grant for rehabilitation under section 236(s) of the NHA only if the owner provides an acceptable work schedule and cost-analysis that is consistent with the

owner's evaluation of physical condition under § 401.450, as certified by the PAE. The owner must execute a grant agreement with terms and conditions acceptable to HUD. If the PAE is a State or local government, or an agency or instrumentality of such a government, the PAE and HUD may agree that the PAE will be delegated the responsibility for the administration of any grant made under § 401.473, if HUD has determined that funding for the cost of grant administration is available.

§ 401.474 Project accounts.

(a) *Accounts from other projects.* The accounts listed in 401.472(a)(1) may be used for other eligible projects only if:

(1) The projects are included in a Consolidated Restructuring Plan under § 401.401; and

(2) The funds are used for rehabilitation or to reduce a section 541(b) claim paid by HUD under § 401.471.

(b) *Distribution to owner.* The Restructuring Plan may provide for a one-time distribution to the owner, not to exceed 10 percent of the excess funds in project accounts, after completion of the rehabilitation required by the Restructuring Plan.

§ 401.480 Voluntary sale or transfer of project.

(a) *May the owner request a Restructuring Plan that includes a sale or transfer of the property?* The owner may request a Restructuring Plan that includes a condition that the property be sold or transferred to a purchaser acceptable to HUD in a reasonable period to consummate the transaction. The failure to consummate a sale or transfer of the property requested under paragraph (a) of this section will neither adversely affect an owner's eligibility for a Restructuring Plan nor exempt the owner from the requirements of § 401.600.

(b) *When must the Restructuring Plan include a sale or transfer of the property?* If the owner is determined ineligible pursuant to § 401.101 or § 401.403, the Restructuring Plan must include a condition that the owner sell or transfer the property to a purchaser acceptable to HUD.

(c) *Owner's notice of intent to sell or transfer.* If a sale or transfer is required under paragraph (b) of this section:

(1) The owner must provide notice to the PAE affirming the owner's intent to sell or transfer the property. This notice must be received by the PAE no later than 30 days after a notice of rejection under § 401.101 or § 401.403 has become a final determination under subpart F of this part.

(2) The owner must cooperate in selling or transferring the property. Failure to do so will result in the PAE's determination to reject the owner's request for a Restructuring Plan. The owner must distribute and publish, in an appropriate publication, a notice to potential purchasers that describes the property, proposed terms of sale, and procedures for submitting a purchase offer. The notice in form and substance must be acceptable to HUD, and must inform potential offerors of a preference for priority purchasers.

(3) The PAE may develop a Restructuring Plan involving a sale or transfer to a non-priority purchaser only if the PAE determines that there is no interested qualified priority purchaser, or that a feasible Restructuring Plan involving a sale or transfer to a qualified priority purchaser cannot be developed.

(d) *Informing PAE; approval required.* The owner must inform the PAE of any offer to purchase the property and the owner must advise the PAE of the substance and on-going status of the owner's discussions with any prospective purchaser. The owner's acceptance of the offer must be subject to PAE approval, and HUD approval of the Restructuring Plan.

§ 401.481 Subsidy layering limitations on HUD funds.

(a) *PAE subsidy layering certification required for Restructuring Plan.* The PAE must certify to HUD that any Restructuring Plan for which it submits a proposed Restructuring Commitment meets the requirements of either paragraph (d) or (e) of this section.

(b) *Purpose of subsidy layering certification.* The purpose of the subsidy layering certification is to ensure that any HUD assistance provided to the owner of a project pursuant to a Restructuring Plan is no more than is necessary to permit the project to continue to house tenants with an income mix comparable to the income mix of the project before the Restructuring Plan is implemented, after taking into account other Government assistance described in section 102(b)(1) of the Department of Housing and Urban Development Act of 1989 (42 U.S.C. 3545(b)(1)).

(c) *Relationship to section 102(d) of HUD Reform Act.* HUD is not required to perform a separate subsidy layering analysis under section 102(d) of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3545(d)), section 911 of the Housing and Community Development Act of 1992 (42 U.S.C. 3545 note), or § 4.13 of this title for any HUD assistance that is included in the

Restructuring Plan. HUD will adopt the PAE certification under this section if a HUD certification would otherwise be required under section 102(d).

(d) *Certification under existing HUD guidelines.* If the PAE has delegated authority from HUD to make section 102(d) subsidy layering certifications in accordance with section 911 of the Housing and Community Development Act of 1992, the PAE may comply with this section by using a procedure substantially similar to the procedure described in the Administrative Guidelines published on December 15, 1994 (59 FR 64748), or any subsequent procedure adopted by HUD to implement section 911.

(e) *Other procedures.* If the PAE does not have the delegated authority described in paragraph (d) of this section, the PAE must submit to HUD for approval proposed procedures for making the subsidy layering certification under this section. Any procedures must conform to the procedures described in paragraph (d) of this section to the extent feasible and appropriate.

§ 401.483 Leasing units to certificate and voucher holders.

A Restructuring Plan must prohibit any refusal of the owner to lease a unit solely because of the status of the prospective tenant as a section 8 certificate or voucher holder.

§ 401.484 Property management standards.

(a) *General.* Each PAE is required by section 518 of MAHRA to establish management standards consistent with industry standards and HUD guidelines. The management standards must be included or referenced in the Restructuring Plan.

(b) *HUD guidelines.* At a minimum, the PAE's management standards must require the project management to:

(1) Protect the physical integrity of the property over the long term through preventative maintenance, repair or replacement;

(2) Ensure that the building and grounds are routinely cleaned;

(3) Maintain good relations with the tenants;

(4) Protect the financial integrity of the project by operating the property with competitive and reasonable costs and maintaining appropriate property and liability insurance at all times;

(5) Take all necessary measures to ensure the tenants' physical safety; and

(6) Comply with other provisions that are required by HUD, including termination of the management agent for cause.

(c) *Conflicts of interest.* The PAE management standards must also conform to any guidelines established by HUD, and industry standards, governing conflicts of interest between owners, managers and contractors.

§ 401.500 Required notices to third parties.

(a) *General.* The PAE must solicit, and document the consideration of, tenant and local community comments. As a minimum, the notices described in paragraphs (b) and (c) of this section, in form and substance acceptable to HUD, must be provided. The PAE may require the owner to give the notices if permitted by HUD.

(b) *Notice of intent to restructure and consultation meeting.* (1) This notice must include at a minimum:

(i) The project, including its name and FHA Project Number;

(ii) The responsible PAE and contact person, including the address and telephone number;

(iii) The owner's notice of intent to restructure through the Mark-to-Market Program; and

(iv) The date of expiration of the project-based assistance.

(2) This notice must state how comments may be provided to the PAE regarding any of the following: the physical condition of the property, whether the rental assistance should be tenant-based or project-based, any proposed sale or transfer of the property, and other matters regarding the property and its management. The notice must establish the date, time and place for a public meeting to be held no sooner than 20 days and no later than 60 days following the date of this notice. The public may provide written comments up to the date of the meeting.

(c) *Notice of completion of Restructuring Plan.* Within 10 days after either the execution of the Restructuring Commitment or a decision not to restructure, the PAE must provide a notice that describes the completed Restructuring Plan and Restructuring Commitment or the reasons not to restructure. Any completed Restructuring Plan and Restructuring Commitment must be made available during normal business hours to the public, subject to Federal, State and local laws restricting access to any information in any of these documents.

§ 401.501 Who is entitled to receive notices under § 401.500?

(a) *Recipients of all notices.* Each notice required under § 401.500 must be given to:

(1) The tenant for each unit in the project or a tenant organization; and

(2) The Chief Executive Officer of the unit of local government and the

Director of the Public Housing Authority with jurisdiction over the project location.

(b) *Other recipients.* The PAE may require notices to be sent to neighborhood representatives and other affected parties identified by the PAE or HUD.

Subpart D—Implementation of the Restructuring Plan after Closing

§ 401.550 Monitoring and compliance agreements.

(a) *Compliance agreements.* The PAE must ensure long-term compliance by the owner with MAHRA, this part, and the Restructuring Plan. As part of this responsibility, the PAE must require each owner with an approved Restructuring Plan to record and execute a Use Agreement that satisfies the requirements of § 401.408.

(b) *Periodic monitoring and inspection.* At least once a year for the term of the Use Agreement, a PAE must review the status of each project for which it developed an approved Restructuring Plan. Monitoring must include on-site inspections.

(c) *HUD acting instead of PAE.* HUD will perform, or contract with other parties to perform, the PAE's functions under this section if:

(1) The project is subject to a PRA with a PAE that is not qualified to be a section 8 contract administrator; or

(2) There is no PAE because the project is not currently subject to a PRA.

§ 401.552 Servicing of second mortgage.

HUD or its designee will be responsible for servicing the second mortgage, including determining the amounts receivable by the owner under § 401.461(b)(2). HUD may designate the PAE, with the PAE's consent, as servicer for the second mortgage.

§ 401.554 Contract administration.

HUD will offer to any PAE that is qualified to be the section 8 contract administrator the opportunity to serve as the section 8 contract administrator for a project restructured under the Mark-to-Market Program. Qualifications will be determined under both statutory requirements and requirements issued by the appropriate office within HUD, depending on the type of section 8 assistance that is provided.

Subpart E—Section 8 Requirements for Restructured Projects

§ 401.595 Contract and regulatory provisions.

The provisions of chapter VIII of this title will apply only to the extent, if any,

provided in the contract. Part 983 of this title will not apply.

§ 401.600 Will a section 8 contract be extended if it would expire while an owner's request for a Restructuring Plan is pending?

If a contract for an eligible project would expire before a Restructuring Plan is implemented, the contract may be extended at current rents for up to the earlier of 1 year or closing on the Restructuring Plan under § 401.407, with a provision for earlier termination if the PAE or HUD determines that an owner is not cooperative under § 401.402 or if an owner's request is rejected under § 401.403 or § 401.405. Any extension of the contract beyond 1 year for a pending Plan must be at comparable market rents or exception rents. An extension at comparable market rents or exception rents under this section will not affect a project's eligibility for the Mark-to-Market Program once it has been initially established under this part.

§ 401.601 Consideration of an owner's request to renew an expiring contract without a Restructuring Plan.

(a) *Applicability of part 402.* If HUD or the PAE determines that renewal at rents that do not exceed comparable market rents under § 402.4 of this chapter would be sufficient to maintain both adequate debt service coverage on the HUD-insured or HUD-held mortgage and necessary replacement reserves to ensure the long-term physical integrity of the project, the project-based assistance will be renewed under § 402.4 of this chapter (subject to § 402.7 of this chapter) without developing a Restructuring Plan.

(b) *When Restructuring Plan needed.* If HUD or the PAE determines that renewal at market comparable rents under § 402.4 of this chapter would not be sufficient to maintain adequate debt service coverage and reserves, HUD or the PAE may require a Restructuring Plan before the owner's request will be given further consideration. If HUD or the PAE determines that the project's continued operation without a Restructuring Plan is not feasible and the owner does not cooperate in the development of an acceptable Restructuring Plan, HUD will pursue whatever administrative actions it considers necessary.

§ 401.602 Tenant protections if an expiring contract is not renewed.

(a) *Notice of non-renewal or rent increase.* (1) The owner of an eligible project who has requested a Restructuring Plan and later fails to extend or renew an expiring contract,

except due to a rejection under § 401.101, § 401.403 or § 401.405, must provide a 12-month notice of contract non-renewal to tenants and HUD as provided in section 514(d) of MAHRA and a 90-day notice of any rent increase to tenants as provided in section 8(c)(8) of the United States Housing Act of 1937. HUD may prescribe the form of the notices. If the owner gives such 12-month notice, the owner is not required to give a separate 180-day notice of contract non-renewal under section 8(c)(9) of the United States Housing Act of 1937.

(2) The owner of an eligible project who has not requested a Restructuring Plan, or an owner who requested a Restructuring Plan but who has been rejected under § 401.101, § 401.403, or § 401.405, must provide 180-day notice of contract non-renewal to tenants and HUD under section 8(c)(9) of the United States Housing Act of 1937 and 90-day notice of any rent increase to tenants under section 8(c)(8) of that Act. If the owner gives such 180-day notice, the owner is not required to give a separate 12-month notice of non-renewal under section 514(d) of MAHRA.

(b) *If owner does not give notice.* If an owner described in paragraph (a)(1) or (a)(2) of this section does not give timely notice of non-renewal, the owner must permit the tenants in assisted units to remain in their units for the required notice period (either 12 months or 180 days, as applicable) with no increase in the tenant portion of their rent. This period will begin on the earlier of the date notice of non-renewal was given to the tenants and HUD or the date of expiration for the contract. If an owner described in paragraph (a) of this section does not give timely notice of any rent increase, the owner must permit the tenants in assisted units to remain in their units for 90 days with no increase in the tenant portion of their rent. This period will begin on the earlier of the date notice of any rent increase was given to the tenants or the date of expiration for the contract. The 90-day period will run concurrently with any applicable 12-month or 180-day period.

(c) *Availability of tenant-based assistance.* Subject to the availability of amounts provided in advance in appropriations, HUD will make tenant-based assistance available under the following circumstances:

(1) If the owner of an eligible project does not extend or renew the project-based assistance, any tenant residing in an assisted unit on the date of contract expiration will be eligible to receive assistance on the later of the date of expiration or the date the owner's

obligations under paragraph (b) of this section expire; and

(2) If a request for a Restructuring Plan is rejected under § 401.101, § 401.403, or § 401.405, any tenant who is a low-income family or who resides in a project-based assisted unit on the date of Plan rejection will be eligible to receive assistance on the later of the date the Restructuring Plan is rejected, or the date the owner's obligation under paragraph (b)(2) of this section expires.

§ 401.605 Project-based assistance provisions.

The project-based assistance rents for a restructured project must be the restructured rents determined under the Restructuring Plan in accordance with §§ 401.410 or 401.411.

§ 401.606 Tenant-based assistance provisions.

If the Restructuring Plan provides for tenant-based assistance, each assisted family residing in a project-based assisted unit when the project-based assistance terminates must be offered tenant-based assistance under part 982. The rent levels provided in 515(c)(4) of MAHRA will apply except for families already receiving tenant-based assistance when the project-based assistance terminates.

§ 401.607 Contract term.

The term of the initial and subsequent contract renewals under this part, whether for project-based or tenant-based assistance, will be determined by the appropriate HUD official.

Subpart F—Owner Dispute of Rejection and Administrative Appeal

§ 401.645 How does the owner dispute a notice of rejection?

(a) *Notice of rejection.* HUD will notify the owner of the reasons for a rejection under §§ 401.101, 401.402, 401.403, 401.405 or 401.451. An owner will have 30 days from receipt of this notice to provide written objections or to cure the underlying basis for the objections. If the owner does not submit written objections or cure the underlying basis for the objections during that period, the decision will become a final determination under section 516(c) of MAHRA and is not subject to judicial review.

(b) *Final decision after objection; right to administrative review.* If an owner submits written objections or asserts that the underlying basis for the objections is cured, after consideration of the matter HUD will send the owner a final decision affirming, modifying, or reversing the rejection and setting forth the rationale for the final decision.

§ 401.650 When may the owner make an administrative appeal of a final decision under this subpart?

The owner has a right to make an administrative appeal of the following:

(a) A final decision by HUD under § 401.645(b) (including a final decision under § 402.7 of this chapter);

(b) A decision by HUD and the PAE to offer a proposed Restructuring Commitment that the owner does not execute; and

(c) A decision by HUD to accelerate the second mortgage under § 401.461.

§ 401.651 Appeal procedures.

(a) *How to appeal.* An owner may submit a written appeal to HUD, within 10 days of receipt of written notice of the decision, contesting the decision and requesting a conference with HUD. At the conference, the owner may submit, in person, in writing, or through a representative, its reasons for appealing the decision. The HUD or PAE official who issued the decision under appeal may participate in the conference and submit in person, in writing, or through a representative, the basis for the decision.

(b) *Written decision.* Within 20 business days after the conference, or 20 business days after any agreed upon extension of time for submission of additional materials by or on behalf of the owner, HUD will advise the owner in writing of the decision to terminate, modify, or affirm the original decision.

(c) *Who is responsible for reviewing appeal?* HUD will designate an official to review any appeal, conduct the conference and issue the written decision. The official designated must be one who was neither involved in, nor reports to another involved in, making the decision being appealed.

§ 401.652 No judicial review.

The reviewing official's decision under § 401.651 is a final determination for purposes of section 516(c) of MAHRA and is not subject to judicial review.

PART 402—PROJECT-BASED SECTION 8 CONTRACT RENEWAL WITHOUT RESTRUCTURING (UNDER SECTION 524(a) OF MAHRA)

Sec.	
402.1	What is the purpose of part 402?
402.2	Definitions.
402.3	Contract provisions.
402.4	Contract renewals under section 524(a)(1) of MAHRA.
402.5	Contract renewals under section 524(a)(2) of MAHRA.
402.6	What actions must an owner take to request section 8 contract renewal under this part?

402.7 Refusal to consider an owner's request for a section 8 contract renewal because of actions or omissions of owner or affiliate.

402.8 Tenant protections if an expiring contract is not renewed.

Authority: 42 U.S.C. 1437f note and 3535(d).

§ 402.1 What is the purpose of part 402?

This part sets out the terms and conditions under which HUD will renew project-based section 8 contracts under the authority provided in section 524(a)(1) or (2) of MAHRA. Renewal will also be in accordance with § 401.601 of this chapter for projects without a HUD-approved Restructuring Plan under part 401 of this chapter. This part permits renewal notwithstanding part 24 of this title, but subject to section 516 of MAHRA (see § 402.7).

§ 402.2 Definitions.

The definitions in § 401.2 of this chapter apply to this part.

§ 402.3 Contract provisions.

The provisions of chapter VIII of this title will apply only to the extent, if any, provided in the contract. Part 983 of this title will not apply.

§ 402.4 Contract renewals under section 524(a)(1) of MAHRA.

HUD may renew any expiring section 8 project-based assistance contract at initial rents that do not exceed comparable market rents. If the project is eligible for a Restructuring Plan under part 401 of this chapter, the owner's request for a renewal will be processed under § 401.601 of this chapter to determine whether a Restructuring Plan is needed. After comparable market rents have been initially established, any future rent adjustments will be determined by using an OCAF as provided in § 401.412 of this chapter, except that rents may be re-determined using a budget-based rent adjustment from time-to-time at the discretion of HUD. OCAF and budget-based adjustments may be positive or negative. The term of the initial and subsequent contract renewals under this section will be determined by the appropriate HUD official.

§ 402.5 Contract renewals under section 524(a)(2) of MAHRA.

(a) *Renewal for exception project at owner's request.* HUD will renew project-based assistance under this section instead of § 402.4 if requested by the owner of a project described in paragraph (b) of this section. The term of the initial and subsequent contract renewals under this section will be determined by the appropriate HUD official.

(b) *Exception projects included.* This section applies to:

(1) A project described in section 524(a)(2)(A) through (D) of MAHRA; and

(2) A project described in section 524(a)(2)(E) of MAHRA.

(c) *Initial rent levels for exception projects.* If the owner of such a project requests renewal of project-based assistance under this section, HUD will initially renew the expiring contract at the lesser of:

(1) Existing rents adjusted by an operating cost adjustment factor established by HUD (OCAF);

(2) A budget-based rent determined in accordance with § 514(g)(3)(a) through (e) of MAHRA, except that HUD rather than a PAE will determine operating expenses and HUD may adjust the debt service component to reflect competitive interest rates; or

(3) In the case of a contract under the section 8 moderate rehabilitation program (other than single room occupancy dwellings under section 441 of the Stewart B. McKinney Homeless Assistance Act), the base rent adjusted by applying an OCAF to the base rent, minus any costs associated with debt service, with the OCAF to be applied to rents for each unit size assisted under the renewal contracts.

(d) *Rent adjustments.* Rent adjustments (either positive or negative) for contracts renewed under this section will be determined using an operating cost adjustment factor as provided in § 401.412 of this chapter, except that rents may be re-determined using a budget-based rent adjustment from time-to-time at the discretion of HUD. A budget-based adjustment may include a rent comparability analysis.

§ 402.6 What actions must an owner take to request section 8 contract renewal under this part?

(a) *Timing and content of request.* For renewals of contracts with expiration dates on or after October 1, 1998, an owner must submit the following information to HUD (or to the contract administrator in the case of a contract under the moderate rehabilitation program) at least 3 months before the expiration date of any project-based section 8 contract on a project or as soon as practicable if the contract expires before January 13, 1999:

(1) A certification that neither the owner nor any affiliate is suspended or debarred;

(2) A comparable market rent analysis (unless the project is eligible under § 402.5(b)(1) or does not have a HUD-insured or HUD-held mortgage, and the

owner is not seeking renewal under § 402.4); and

(3) If an owner is seeking contract renewal under § 402.4, the prior fiscal year's audited financial statement for the project and an owner's evaluation of physical condition as provided in § 401.450 of this chapter.

(b) *Interim extension.* While a determination of owner eligibility for a request for renewal under § 401.4 or § 401.5(b)(2) of this chapter is pending, HUD may extend the contract under § 401.600 of this chapter except that the term of the extension will be determined by HUD in its sole discretion.

(c) *Exception for moderate rehabilitation contracts.* Paragraphs (a) and (b) of this section do not apply to requests for renewal of section 8 moderate rehabilitation contracts (other than for single room occupancy dwellings under section 441 of the Stewart B. McKinney Homeless Assistance Act). Separate instructions for renewal requests will be issued by the appropriate HUD official.

§ 402.7 Refusal to consider an owner's request for a section 8 contract renewal because of actions or omissions of owner or affiliate.

(a) *Determination of eligibility.* HUD may elect not to consider the request for renewal of project-based assistance if, at any time before contract renewal:

(1) The owner or an affiliate is debarred or suspended under part 24 of this title; or

(2) HUD determines that the owner or an affiliate has engaged in material adverse financial or managerial actions or omissions as described in section 516 of MAHRA, including any outstanding violations of civil rights laws in connection with any project of the owner or an affiliate.

(b) *Dispute and appeal.* An owner may dispute a rejection and seek administrative review under the procedures in subpart F of part 401 of this chapter.

(c) *Consequences of refusal to consider request.* If an owner's request for renewal of project based assistance is rejected under this section, HUD may provide tenant-based assistance under § 401.602 of this chapter.

§ 402.8 Tenant protections if an expiring contract is not renewed.

(a) *Notice of non-renewal or rent increase.* An owner who is not eligible for a Restructuring Plan under the Mark-to-Market Program in part 401 of this chapter but who fails to renew an expiring contract must provide a 180-day notice of non-renewal to tenants

and HUD as provided in section 8(c)(9) of the United States Housing Act of 1937 and a 90-day notice to tenants of any rent increase as provided in section 8(c)(8) of that Act. HUD may prescribe the form of the notices.

(b) *If an owner does not give timely notice.* If an owner does not give timely notice of non-renewal or a rent increase, the owner must permit the tenants in

assisted units to remain in their units, with no increase in the tenant portion of their rent, for a period of 180 or 90 days, whichever is the required period for the notice that was not given. Each period will begin on the earlier of the date notice of non-renewal was given to the tenants and HUD or the date notice of rent increase was given to the tenants, whichever applies, or the date of

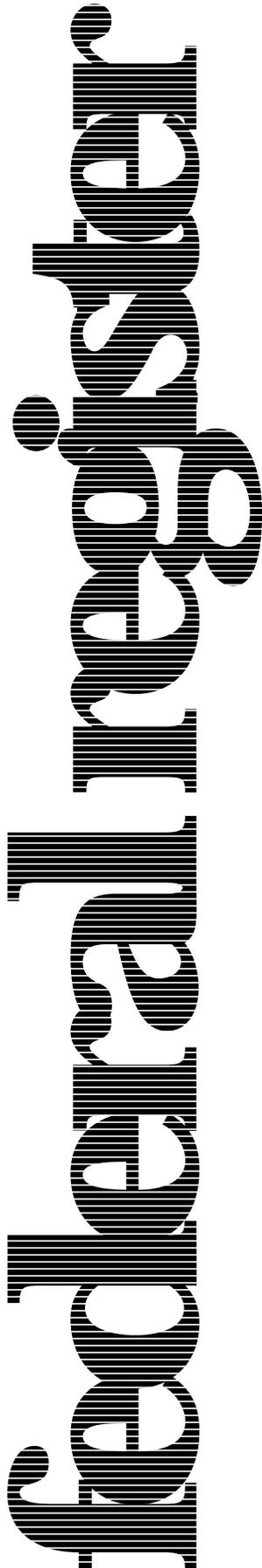
expiration for the contract. A 90-day period under this paragraph (b) will run concurrently with any 180-day period under this paragraph (b).

Dated: August 20, 1998.

Andrew Cuomo,
Secretary.

[FR Doc. 98-24284 Filed 9-10-98; 8:45 am]

BILLING CODE 4210-32-P



Friday
September 11, 1998

Part V

**Department of
Agriculture**

Food Safety and Inspection Service

9 CFR Parts 381 and 441

**Poultry Products Inspection Regulations:
Continuous Chilling of Split Poultry
Portions; Final Rule**

**Poultry Chilling Performance Standards:
Retained Water in Raw Meat and Poultry
Products; Proposed Rule**

DEPARTMENT OF AGRICULTURE**Food Safety and Inspection Service****9 CFR Part 381**

[Docket No. 95-011F]

RIN 0583-AB95

Continuous Chilling of Split Poultry Portions

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: FSIS is amending the poultry products inspection regulations to specify that the continuous immersion chilling of the front or rear portions of transversely-split carcasses is permitted. The existing regulations permit the continuous chilling of whole carcasses or "major portions," including front or rear portions, resulting from trimming or salvage. The final rule defines "major portions" to include the front or rear portions of transversely-split carcasses, without identifying the operation creating the portions. This change will afford flexibility to poultry establishments in adopting efficient production techniques, such as on-line carcass splitting, that meet food safety performance standards. This final rule is compatible with FSIS initiatives addressing fecal contamination and moisture absorption of raw poultry products.

EFFECTIVE DATE: November 10, 1998.

FOR FURTHER INFORMATION CONTACT: Dr. Alice Thaler, Chief, Concepts and Design Branch, Inspection Methods Development Division, Office of Policy, Program Development, and Evaluation, (202) 720-3219.

SUPPLEMENTARY INFORMATION:**Background**

The poultry products inspection regulations contain general and specific requirements for the chilling of ready-to-cook poultry. The current regulations (at 9 CFR 381.66(b)(2)) require that poultry carcasses, and major portions of poultry carcasses, that is, "parts of major size, either front or rear portions, wherein the major portion of the poultry carcass remains intact," be chilled to 40 °F. or lower within a specific time, depending on the weight of the bird. The regulations state that partial trimming and salvage of poultry carcasses often result in these major portions (9 CFR 381.66(c)(2)(iv)). Trimming operations remove some part of a poultry carcass. For example, a broken wing may be trimmed from a breast. Salvage operations, on the other

hand, are intended to save a portion of the carcass by cutting it away from an unacceptable portion. An example of a salvage procedure is the splitting of the carcass into front and rear portions to save the breast portion while condemning the rear portion that has become adulterated.

The regulations governing the chilling of poultry parts, including the provisions addressing "major portions," were intended to prevent the marketing of products containing excessive moisture. Excessive moisture is a form of economic adulteration. It can occur if, for example, individual poultry parts, such as drumsticks, thighs, split breasts, or split halves (carcasses split longitudinally along the sternum into "mirror image" portions), are permitted to be cooled in continuous immersion chillers. Under most current processing conditions, such individual parts are likely to absorb more water than "major portions." Under 9 CFR 381.66(c)(2)(iv), these individual parts may be cooled only in the air, in ice, or under a spray of water with continuous draining. The regulation does, however, permit whole carcasses and major portions of carcasses to be cooled in continuous chillers, provided that the moisture absorption limits prescribed in 9 CFR 381.66 are not exceeded.

The issue in this rulemaking is whether 9 CFR 381.66 should permit the immersion chilling of split poultry portions that are created by procedures other than trimming or salvage.

Establishments that have tested transversely-split-carcass processing methods under FSIS supervision have achieved favorable results in keeping water absorption low, in chilling product rapidly to a safe temperature, and in maintaining product wholesomeness. Proper application of these carcass splitting methods yields product that is not adulterated, even though, like the whole carcass, the front or rear portions of transversely-split carcasses absorb incidental amounts of moisture when placed in continuous chillers. This is true whether the portion was created by trimming, salvage operations, or a procedure such as on-line carcass-splitting.

Nonetheless, 9 CFR 381.66 was developed during the late 1960's and, on its face, it reflects the production and market conditions of that period, when poultry industry operations were oriented primarily toward the marketing of whole birds. At that time, the sale of poultry parts constituted a minor segment of the raw poultry market. Consequently, it does not make any provision for chilling of split carcasses

produced by means other than trimming and salvage.

FSIS tentatively determined that the regulatory provision for chilling major portions should be revised to specifically include transversely-split carcass portions, as described above, regardless of the operation used to create the portions. On June 6, 1997, FSIS proposed to amend the regulations to modify the definition of "major portion" to include transversely-split carcasses and carcasses from which small pieces have been removed. The proposal was not intended, however, to affect the existing regulatory restrictions on the chilling of individual parts.

Comments on the Proposal

FSIS received six letters commenting on the proposal. Two were from poultry processing companies, one was from a company that processes both meat and poultry, and three were from trade associations.

One letter strongly objected to the proposal and suggested that it be "set aside," at least until the completion of rulemaking addressing the larger regulatory issues concerning water absorption by poultry. The other five letters supported the proposal in general but suggested modifications to the proposal.

A poultry processor, an association representing the turkey industry, and an association representing meat and poultry producers and processors suggested that the scope of the proposed rule be broadened to permit the continuous chilling of split halves and other poultry parts. They argued that such a change would give greater flexibility to, and encourage innovation by, the poultry industry; would have the same advantages for the inspection service and food safety as the proposal; and would be consistent with Agency policy to reduce command-and-control regulations. They also pointed out that regulations limiting retained moisture would continue to apply to continuously chilled parts. The meat and poultry association said there should be a single standard for incidental moisture, without regard to poultry portion or part.

The two poultry processors and the turkey association also requested that the Agency consider amending the regulations to reduce the minimum amount of fresh water intake per bird in continuous immersion chillers. They argued that because major portions are smaller than whole birds, the required minimum gallons of fresh water per bird should be proportionally reduced. The turkey association also asserted that the current regulations permit the

adjustment of fresh water intake according to the proportion of the carcass chilled. Elsewhere in this issue of the **Federal Register**, FSIS is proposing new moisture-retention requirements for raw meat and poultry products and changes in the regulations on poultry chilling that include removing the required minimum amount of fresh water intake per bird.

The letter objecting to the proposed rule was submitted by three associations representing, respectively, cattle producers and beef establishments, pork producers, and the sheep industry. These associations called the proposal "inappropriate" and asked that it be "set aside" pending a rulemaking on retained water in poultry products. They presented four arguments for their position: (1) that the proposal would increase the percentage of poultry products subject to immersion chilling and to what the associations view as excess water absorption; (2) that the Agency did not provide data concerning the amount of water absorbed by transversely-split carcasses; (3) that the Agency is affording additional flexibility to poultry establishments while restricting beef processors using spray chill systems to zero-percent carcass weight gain from water retention; and (4) that, before proceeding with a rulemaking on the chilling of split poultry portions, FSIS should amend the regulations on water retention by poultry products that were set aside July 23, 1997, by order of a Federal district court in *Kenney v. Glickman*. As mentioned, elsewhere in this issue of the **Federal Register**, FSIS is proposing new retained-water requirements for raw meat and poultry products.

As noted in the preamble, the proposal clarifying the regulations regarding the chilling of transversely-split carcasses. (62 FR 31019). It was developed to address an issue concerning the interpretation of regulations governing the chilling of "parts of major size" or "major portions" of poultry resulting from trimming or salvage. Some persons had interpreted the regulations as not permitting the continuous chilling of major portions that did not result from trimming or salvage operations (62 FR 31018). To correct that interpretation, FSIS proposed to amend the regulations to specify that the immersion chilling of major portions is permitted, regardless of whether the portions were the result of trimming, salvage, or other handling of carcasses. It proposed to define "major portions" to include transversely-split poultry carcasses.

The suggestion that the regulations be further amended to permit the continuous chilling of split halves and other poultry parts may have merit and perhaps should be considered, but it is outside the scope of this rulemaking. FSIS was able to determine that methods used in continuously chilling transversely-split poultry portions yield product that complies with the water absorption and retention regulations. As indicated in the preamble to the proposal (62 FR 31019), establishments using such methods under FSIS supervision achieved favorable results in keeping water absorption low. Because the Agency had observed the application of these processing methods to the chilling of transversely-split portions, and because the portions so processed were consistently in compliance with the regulations controlling retained moisture, the Agency believed there was a sound basis for proposed rule.

In sum, the purpose of this rulemaking is to clarify the meaning and applicability of the existing regulations with respect to the chilling of major portions. The Agency has significant evidence to support this clarification. The commenters' request to permit the continuous chilling of all kinds of poultry parts is outside the scope of this rulemaking. While this issue may warrant consideration in a future rulemaking, it is not appropriately before the Agency in this proceeding.

The Agency did not intend to address, in the rulemaking, the possibility of changing the required minimum fresh water intake for continuous chillers. This issue is outside the scope of the rulemaking that the Agency instituted with the June 6, 1997, proposal.

Regarding the comments by the three livestock associations opposing the proposed rule, FSIS responds as follows:

(1) As noted above, the purpose of this rulemaking is to clarify the existing regulation, not to expand the percentage of product that would be able to absorb moisture during the chilling process. In fact, as noted in the third point of our response below, the proposed could result in less immersion-chilled product. The proposal was developed to address an issue concerning the interpretation of regulations governing the chilling of "parts of major size" or "major portions" of poultry resulting from trimming or salvage.

(2) The Agency based the proposal on findings that continuously chilled transversely-split portions are in compliance with retained moisture requirements. As noted in the preamble to the proposal, results of in-plant trials

of transversely-split carcasses processed under FSIS supervision showed that product was chilled rapidly to a safe temperature, and that water absorption was within the limits established by the Agency's regulations. The Agency had sufficient retained-moisture data from these trials to make an informed decision on the continuous chilling of transversely-split carcass portions. The data was available for viewing in the FSIS Docket Room during the public comment period.

(3) It is true that the proposal concerned only a limited class of poultry products, and that efficiency gains would be realized only by poultry establishments. However, the limited scope of the proposal does not preclude future consideration of changes that would address a wider range of meat and poultry products. (As previously mentioned, a proposed rule on poultry chilling standards and retained moisture in raw meat and poultry products is being published elsewhere in this issue of the **Federal Register**.)

The efficiency gains foreseen by the Agency would result primarily from the use of automation and large-scale processing techniques to make front and rear portions available for a variety of uses. For example, the use of the rear, dark-meat portions, for processing into such products as turkey salami and turkey ham, was discussed in the preamble (62 FR 31018). An efficiency gain sought with respect to these dark-meat portions would involve routing them past the immersion chilling step altogether (62 FR 31018). The front, or white-meat portions, on the other hand, would be permitted to enter the continuous chillers. Since the rear portions constitute 40% of carcass weight, potentially 40% less turkey would be chilled.

(4) While the U.S. District Court's order in *Kenney v. Glickman* set aside the moisture retention limits for all classes of poultry to be marketed as whole birds (9 CFR 381.66(d)(2)), the requirement to minimize moisture absorption and retention at the time of packaging (9 CFR 381.66(d)(1)) was left in place, as were the moisture absorption and retention limits for poultry intended to be cut up and for ice-packed poultry (9 CFR 381.66(d)(3)-(5)). Thus, the moisture retention limits that would apply to transversely-split poultry portions were left in place by the Court's order. Split poultry portions are intended to be routed to cut-up or further processing operations and obviously cannot be marketed as whole birds.

The Final Rule

This final rule concerns the application of existing moisture retention standards to transversely-split carcass portions, rather than the standards, themselves. Elsewhere in this issue of the **Federal Register**, FSIS is publishing a proposal that addresses the limits on moisture absorption and retention in raw meat and poultry carcasses and parts.

This final rule is limited to clarifying the regulations to accommodate the processing of transversely-split poultry carcasses. The rule amends the chilling requirement at § 381.66(b)(2) to apply both to whole carcasses and to major portions, as defined at proposed § 381.170(b)(22), which includes transversely-split carcasses. FSIS is amending § 381.66(b)(2) to refer to the new § 381.170(b)(22) rather than to § 381.66(c)(2)(iv).

The final rule also amends § 381.66(c)(2)(iv) by removing the word "carcasses" from the term "split carcasses" and replacing it with "halves." As mentioned previously, "split halves" is a term widely used in the poultry industry to denote the left and right halves of a poultry carcass divided lengthwise. (i.e., carcasses split longitudinally along the sternum into "mirror image" portions). The amended paragraph continues to prohibit the continuous chilling of split halves.

FSIS will continue to require establishments creating transversely-split carcass to meet the same moisture absorption and retention limits as for whole carcasses. These limits are set forth in 9 CFR § 381.66(d)(3), Table 3, and § 381.66(d)(4)(ii).

Finally, a new paragraph § 381.170(b)(22) defines "major portions" as carcasses from which small parts may be missing or the front or rear portions of transversely split carcasses. As mentioned, the amended § 381.66(b)(2) refers to this new definition.

Executive Order 12866

This final rule has been determined to be not significant and was not reviewed by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. States and local jurisdictions are preempted by the

Poultry Products Inspection Act (PPIA) from imposing any marking or packaging requirements on federally inspected poultry products that are in addition to, or different than, those imposed under the PPIA. States and local jurisdictions may, however, exercise concurrent jurisdiction over poultry products that are outside official establishments for the purpose of preventing the distribution of poultry products that are misbranded or adulterated under the PPIA, or, in the case of imported articles, which are not at such an establishment, after their entry into the United States.

This final rule is not intended to have retroactive effect.

There are no applicable administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule. However, the administrative procedures specified in 9 CFR § 381.35 must be exhausted prior to any judicial challenge of the application of the provisions of this proposed rule, if the challenge involves any decision of an FSIS employee relating to inspection services provided under the PPIA.

Effect on Small Entities

The Administrator has determined that this final rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). This final rule will not impose any additional requirements on poultry processors. Compliance with this final rule is voluntary; poultry processors that intentionally split poultry carcasses into major portions as a result of a trimming or salvage operation do not have to cool the product using ice and water in a continuous chiller. They may cool major portions using air, ice, or under a spray of water with continuous drainage. Poultry processors opting to chill major parts resulting from production techniques such as on-line carcass-splitting could do so in a continuous ice and water chiller. This would allow them to appropriately handle the separated carcass portions immediately after splitting. The white meat portion could immediately be chilled to the proper temperature for further processing or direct sale to consumers, while the dark meat portion, which is usually processed, could be directly deboned and used in further processed cooked products.

List of Subjects in 9 CFR Part 381

Poultry and poultry products.

For the reasons set forth in the preamble, FSIS is amending 9 CFR part 381, as follows:

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

1. The authority citation for part 381 continues to read as follows:

Authority: 7 U.S.C. 138f; 7 U.S.C. 450; 21 U.S.C. 451-470; 7 CFR 2.18, 2.53.

2. Section 381.66 is amended by revising the first sentence of paragraph (b)(2); by removing the first and second sentences of paragraph (c)(2)(iv) and adding in their place one sentence; and, in the last sentence of (c)(2)(iv), by removing the words "from salvage operations," and by replacing the word "carcasses" with the word "halves" to read as follows:

§ 381.66 Temperatures and chilling and freezing procedures.

* * * * *

(b) * * *

(2) Major portions of poultry carcasses, as defined in § 381.170(b)(22), and poultry carcasses shall be chilled to 40° F. or lower within the following specified times: * * *

* * * * *

(c) * * *

(2) * * *

(iv) Major portions of poultry carcasses, as defined in § 381.170(b)(22), may be chilled in water and ice, including chilling in continuous chillers. * * *

* * * * *

3. Paragraph (b)(22) is added to § 381.170 to read as follows:

§ 381.170 Standards for kinds and classes, and for cuts of raw poultry.

* * * * *

(b) * * *

(22) "Major portions" of eviscerated poultry carcasses are either carcasses from which parts may be missing, or the front or rear portions of transversely-split carcasses.

Done at Washington, DC, on September 3, 1998.

Thomas J. Billy,
Administrator.

[FR Doc. 98-24308 Filed 9-8-98; 12:22 pm]

BILLING CODE 3410-DM-P

DEPARTMENT OF AGRICULTURE**Food Safety and Inspection Service****9 CFR Parts 381 and 441****[Docket No. 97-054P]****RIN 0583-AC26****Retained Water in Raw Meat and Poultry Products; Poultry Chilling Performance Standards****AGENCY:** Food Safety and Inspection Service, USDA.**ACTION:** Proposed rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is proposing regulations to limit the amount of water retained by raw, single-ingredient, meat and poultry products as a result of post-evisceration processing, such as carcass washing and chilling. Meat and poultry carcasses and parts would not be permitted to contain water resulting from post-evisceration processing unless the establishment demonstrates that water retention is necessary to meet applicable food safety requirements. In addition, the establishment would be required to disclose on the label the maximum percentage of retained water in the product. The proposed labeling statement would provide information to consumers of raw meat and poultry products that would help them to make purchasing decisions. Establishments having data demonstrating that there is no retained water in their products could choose not to label the products with the retained-water statement or to make a no-retained-water claim on the product label.

FSIS is also proposing to revise the poultry chilling regulations to improve consistency with the Pathogen Reduction/Hazard Analysis and Critical Control Points (PR/HACCP) regulations, eliminate "command-and-control" features, and reflect current technological capabilities and good manufacturing practices.

DATES: Comments must be received on or before December 10, 1998.

ADDRESSES: Submit one original and two copies of written comments to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, Room 102, 300 12th Street, SW., Washington, DC 20250-3700. Please refer to docket number 97-054P in your comments. All comments submitted in response to this proposal, as well as research and background information used by FSIS in developing this document, will be available for public inspection in the Docket Clerk's

Office between 8:30 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Patricia F. Stolfa, Assistant Deputy Administrator, Office of Policy, Program Development, and Evaluation, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250-3700; (202) 205-0699.

SUPPLEMENTARY INFORMATION:**Background**

FSIS carries out the mandates of the Federal Meat Inspection Act (FMIA; 21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (PPIA; 21 U.S.C. 451 *et seq.*), and the Egg Products Inspection Act (21 U.S.C. 1031 to 1056) to ensure that meat, meat food, poultry, and egg products in interstate and foreign commerce are wholesome, not adulterated, and properly marked, labeled, and packaged. The Agency maintains continuous inspection oversight of operations in meat and poultry slaughtering and processing establishments and in egg product processing plants. Among the requirements enforced by the Agency are those having to do with the post-evisceration handling and storage of carcasses and parts.

Meat and poultry carcasses are handled in a manner intended to yield wholesome, unadulterated products. After evisceration, raw meat and poultry carcasses are subject to various processes, including washing and chilling, to preserve the safety of the products. The Agency is concerned about the potential for water absorption and retention in the stages of processing after livestock and poultry carcasses are eviscerated and trimmed. Because an eviscerated carcass is open and exposed to water through the washing, chilling, and spraying processes, it is likely to absorb and retain water under the skin and in muscle tissue. There is a potential for product adulteration due to excess water absorption and retention.

In livestock slaughtering establishments, carcasses undergo a final wash after slaughter and dressing to remove any adhering foreign matter before being placed in the cooler. Historically, meat carcasses have been air-chilled. Since the late 1970's, FSIS has permitted air chilling in combination with a water spray to minimize carcass shrinkage and promote rapid heat loss.

Air chilling results in carcass weight loss from evaporation of the natural water in the carcass during evaporative cooling. Spraying water on livestock carcasses during air chilling either replaces the water that would have

evaporated during air chilling or prevents the water in the carcass from evaporating. The result is that livestock carcasses subjected to a water spray retain water, and consequently, weight, which would have been lost as a result of air chilling. Water spray systems must be operated in a manner that does not result in a shift's production of meat carcasses from weighing, on average, more than their pre-chilled weight. (FSIS Directive 6330.1) This directive recognizes that it is technologically feasible and commercially practical to chill livestock carcasses in a manner that, on average, does not result in an increase in the carcass weight above the pre-chilled weight.

Although livestock slaughter establishments are not prohibited from using water immersion chilling methods, federally inspected establishments in the United States do not use immersion chilling for livestock carcasses. Immersion chilling is impractical because of the size of livestock carcasses and the associated costs of equipment and other resources.

Processing and chilling methods used for some edible meat byproducts and organ meats may result in water retention. For example, cheek meat, meat from ears and tails, and organ meats are washed, cleaned and chilled to preserve safety and wholesomeness before being shipped. Tripe is bleached and scalded before being shipped. Chitterlings (swine intestines) are washed and chilled before shipment and are packaged with water. A few establishments chill beef cheek meats in water, a process that may result in the absorption of water. The product is labeled to indicate the maximum percentage added water it may contain to alert buyers to the fact that the product may weigh more because of the chilling process.

Unlike livestock establishments, poultry processors have traditionally chilled poultry using the water immersion chilling method. Although air chilling is permitted, immersion chilling is more rapid and cost efficient. The use of water immersion chilling is limited to whole poultry carcasses or major carcass portions. Poultry establishments are required to reduce the internal temperature of water-chilled poultry carcasses to 40 degrees F. or less within 4 to 8 hours after slaughter, depending on the size of the carcass (9 CFR 381.66(b)).

Water-immersion chilling is the preferred poultry chilling method in the United States for several reasons. First, water is the most effective and efficient conducting medium for removing animal heat.

Before the 1960's, poultry was chilled in layers of ice or immersed in small tanks of ice water. The poultry was chilled using these methods for a sufficient amount of time to reduce the temperature of the poultry to 40 degrees F. or below, after which the tanks were emptied. The use of small individual single-use tanks required significant resources, including space, employees, and water or ice. Because of these disadvantages, continuous immersion chillers were developed. Continuous immersion chillers consist of one or more large tanks where chilled water is continually replenished and poultry carcasses continuously enter and exit. Modern chillers are equipped with refrigeration units and systems for controlling water volume, direction, and agitation. They are efficient, rapid, and economical.

Chilling poultry carcasses in water-immersion chillers always results in some absorption and retention of water, primarily in the skin and the tissue immediately under the skin. Also, some water becomes bound to the muscle tissue.

FSIS has consistently required that the retention of water in meat and in poultry products be minimized. FSIS is mandated to prevent the distribution in commerce of meat and poultry products that are adulterated or misbranded. A product is adulterated if, among other circumstances, "a substance has been added to or mixed with the product to increase its bulk or weight or make it appear of greater value than it is." (21 U.S.C. 601(m)(8), 453(g)(8)). Thus, a product containing excessive water may be considered adulterated. Likewise, a product containing excessive water may be considered misbranded. A product is misbranded if, among other circumstances, its label is false or misleading in any particular. (21 U.S.C. 601(n)(1), 453(h)(1)). Immersion chilling of poultry could result in a product's becoming misbranded or economically adulterated through the retention of absorbed water. However, because immersion chilling is the most efficient way to control bacterial growth in poultry products and to ensure that establishments consistently meet applicable chilling time and temperature requirements, FSIS has permitted the retention of some water in poultry.

FSIS has limited water retention to amounts that are considered unavoidable while achieving applicable food safety requirements. The regulations generally require water absorption and retention in poultry products to be minimized (9 CFR 381.66(d)(1)). FSIS promulgated

regulations defining maximum water retention levels for classes of poultry in 1959, 1960, and 1971 (24 FR 9566 (12/1/59); 26 FR 6471 (7/19/61); and 35 FR 739 (10/7/70)). Poultry products containing water in excess of the regulatory limits are considered adulterated.

To ensure that poultry products do not exceed maximum water retention levels, inspectors sample carcasses each day from each chilling system at a point before the poultry is washed and again shortly after the poultry exits the chiller. If the water limits are exceeded, the poultry is retained until enough water has drained to bring the poultry into compliance with the limits. As a practical matter, establishments maintain overall water absorption averages below the maximum limitation to consistently comply with the regulatory limits. However, some firms equip and operate their processing lines in a manner that will enable them to control retained water to a level as close as possible to the regulatory limits. Sometimes the regulatory limits are exceeded. The poultry may then be held at the plant for a longer time to permit excess water to drain, or it may be diverted to operations, such as boning and cut-up, or other processing operations in which excess water is lost.

Concerns About Differences Between the Meat and the Poultry Regulations

Early in 1996, FSIS received a petition from several national livestock industry associations concerning perceived inequities between the meat and poultry regulations. The petitioners argued that the restriction on water absorption in meat carcasses is inequitable in comparison to the absorption allowance for poultry and that, moreover, poultry carcasses with weight added through water absorption are economically adulterated. The petitioners requested that FSIS prohibit the retention of any water absorbed by poultry carcasses during immersion chilling. This request was among those the petitioners reiterated in a February 7, 1997, letter to the Department. FSIS plans to address elements of the petitioners' requests other than the absorbed-water issue in future rulemaking documents.

In 1994, a group of poultry consumers and red meat producers brought an action against the Department in the United States District Court for the Southern District of Iowa challenging several differences in the regulatory requirements for meat and poultry, including the contaminant removal methods, standards of identity, and water-retention. (*Kenney, et al. v. Glickman*.)

Plaintiffs alleged that poultry products containing absorbed water were both economically adulterated and misbranded within the meaning of the PPIA. They also alleged that the regulations establishing maximum levels for water retention violated the Administrative Procedure Act because they were arbitrary and capricious when compared to the regulatory prohibition on absorbed water in meat carcasses. The Court found that poultry containing absorbed water was not economically adulterated or misbranded under the PPIA. However, the Court also found that the regulation specifying water absorption and retention limits for ready-to-cook poultry that is to be frozen, cooked, or consumer-packaged as whole poultry (9 CFR 381.66(d)(2)) was arbitrary and capricious because the Secretary did not explain in the rulemaking record how he determined the particular water retention levels, why water retention cannot be reduced below current levels, or why meat and poultry should be treated differently.

The Court left in place the general requirement at 9 CFR 381.66(d)(1) for establishments to minimize water absorption and retention in poultry at the time of packaging. The Court also left standing the regulations at 9 CFR 381.66(d)(3)-(6) controlling the amount of retained water in chickens and turkeys that are to be cut up or ice-packed.

The American Meat Institute (AMI), a trade association representing meat and poultry slaughtering and processing establishments, petitioned the Department on October 2, 1997, to amend the regulations governing water absorption and retention in certain raw meat and poultry products. This petitioner requested five specific changes:

- Repealing regulations requiring poultry carcasses to be chilled below 40 °F within a specified time
- Requiring water retention in meat and poultry products to have been minimized at the time of packaging
- Allowing meat and poultry carcasses to absorb and retain water that is incidental and unavoidable in chilling practices designed to improve food protection
- Measuring weight gain from water retention as the difference between the hot carcass weight and the weight of packaged, finished products
- Requiring labeling of raw meat and poultry with retained water above certain minimum absorption and retention levels FSIS considered the petitioner's requests in developing this proposal.

Purpose for New Regulation

In proposing new regulations governing water retention in raw meat and poultry products, FSIS intends: (1) to provide consumers with additional information to help them in making purchasing decisions; (2) to eliminate certain differences between the meat and the poultry inspection regulations; (3) to establish regulations that are consistent with the objectives of regulatory reform and with the Agency's "Pathogen Reduction; Hazard Analysis and Critical Control Points Systems (PR/HACCP)" regulations (61 FR 38806; July 25, 1996); and (4) to streamline the regulations.

This proposal would respond to the District Court's findings that the regulations the Court set aside were "arbitrary and capricious" by providing: (1) that any water retention limits be established on the basis of sound data; (2) that such limits be as low as technically feasible in meeting food safety requirements; and (3) that, to the extent possible, the same criteria for establishing water retention limits apply both to meat and to poultry products.

FSIS currently lacks information on which to base any water retention limit, or to determine whether any limit currently in use can be further reduced. The proposal would be intended, in part, to ensure the availability of data demonstrating that water retention in affected products is unavoidable and that any water retention limits the Agency sets are the minimum feasible. The soundness of the data would be ensured in large measure by its having been collected under protocols approved by FSIS (see below).

This proposal would respond, at least in part, to four of the five requests in AMI's petition. It concerns water absorbed and retained in product as a result of post-evisceration processing and, hence, the difference between "hot carcass" and finished product weight. It would require that water retention be minimized, that the processing that resulted in water absorption have a food-safety purpose, and that the amount of water retained be indicated on labels of affected products.

This proposal does not address the time and temperature requirements for chilling poultry carcasses. FSIS intends to undertake a separate rulemaking on this subject.

Proposed Provisions To Limit Retained Water in Meat and Poultry

FSIS is proposing new requirements in new Part 441 to address water retention in single-ingredient raw meat and ready-to-cook poultry products as a

result of post-evisceration processing. The proposed requirements would replace those set forth in 9 CFR § 381.66(d)(3)-(8) as well as those in § 381.66(d)(2). The intention is to restrict, as much as feasible, the amount of water absorbed and retained in meat and poultry products. The Agency would also require product labels to state the maximum percentage of retained water the products may contain.

Some quantitative limit or measure is necessary to determine whether water retention has been minimized. Until the decision in *Kenney v. Glickman*, FSIS used the limits specified in § 381.66(d)(2) to determine whether poultry establishments were meeting the requirement to minimize water absorption and retention in whole birds.

The only currently available quantitative limit for determining whether water retention in raw products has been minimized (other than the limits for cut-up or ice-pack poultry in 9 CFR 381.66(d)(3)-(6)) is zero percent. FSIS is aware that it may be difficult to eliminate water retention for poultry and some meat products while continuing to meet applicable food safety requirements. FSIS is therefore proposing an alternative to a zero-percent retained-water requirement. Establishments would be required to collect data, in accordance with a protocol approved by FSIS, and demonstrate that water retention is an unavoidable consequence of the process used to meet a food safety requirement, such as the *Salmonella* performance standards or time/temperature chilling requirements. FSIS expects that, to determine that any unavoidable water retention is the minimum feasible, the protocol would provide for testing the process under alternative equipment settings or other variables.

FSIS would accept data generated from an approved protocol to support water retention levels for multiple establishments using similar post-evisceration processing techniques and equipment. Depending on the design of the protocol and the adequacy of the data collected under it, the data could be used to justify an industry-wide water-retention limit, a limit applying to poultry products processed by several establishments, or a limit applying only to a single establishment's product. Establishments using an industry-wide or multi-establishment limit would have to be able to demonstrate that the conditions under which their products are processed match those assumed or specified in the protocol used to justify the limit.

FSIS requests comment on the advisability of accepting, during the comment period on this proposed rule, protocols for gathering data that would justify industry-wide or process-specific water retention limits. FSIS also requests comment on whether the Agency should accept protocols submitted by industry groups for individual establishments.

In a recent **Federal Register** notice (62 FR 64767; December 9, 1997), FSIS requested comments on specifications for protocols to be used for collecting data on chilled, ready-to-cook poultry products. The suggested specifications for such a protocol included: a statement of purpose; the type of washing or chilling system; a description of the chiller system process, components, equipment, modifications, and steps in the chilling process; the number of chillers in a series and arrangements of components; the number of evisceration lines feeding into a chiller; any pre-chilling steps; anti-microbial treatments, if any; the length and velocity of dripping lines; any special apparatus or procedure for removing excess water from birds; and a description of chilling system factors affecting water absorption and retention, such as the time of the birds in the chiller, the water temperature, and the amount of chill water agitation.

To date, FSIS has received two comments on the notice. Three livestock producer associations submitted a comment stating that they were not in a position to provide information regarding protocols or specifications for protocols to collect water retention data. They maintained that the poultry industry would be supplying most, if not all, the data needed to support any added-water limitations. They also expressed the suspicion that data collected by the poultry industry would reflect a "push" in the direction of maximum retention rather than the true capability of technology and processing procedures to minimize water retention.

The other comment was submitted by a trade association representing turkey and other poultry producers and processors. The association listed two principles and attendant considerations that, in its view, should be observed in developing protocols. The first principle was food safety: Considerations in achieving safety were rapid chilling of carcasses and the efficiency of immersion chilling. The second principle was product wholesomeness and quality. Attendant considerations were restricting water absorption to the amount necessary to achieve food safety, calculating water absorption from the point of entry of carcasses into

the chilling medium, and recognizing that it is a documented fact that water absorption is unavoidable in all poultry species. Additional considerations presented in the comment were that water absorption is not a food safety issue, and that water loss occurs during further processing of carcasses.

FSIS has considered these comments and will be interested in further discussion of water-data protocols in the context of this proposal. Regarding the livestock producer associations' comment on possible bias in data submitted by the poultry industry, FSIS notes that any data submitted would have to have been collected under scientifically designed protocols approved by the Agency. FSIS now expects protocols it will approve to be composed of the elements listed in Appendix A of this document. Further, any water retention in a single-ingredient, raw meat or poultry product would have to be reflected on the product label. The discipline of the marketplace as well as FSIS regulatory oversight would help ensure the accuracy of label statements.

Under proposed § 441.10(a), meat or poultry products would have to bear a label statement of the maximum percentage of water absorbed and retained as a result of post-evisceration processes. A qualifying statement accompanying the product name could read, "may contain up to ___ percent absorbed water." The percentage would reflect the maximum percentage of water that may be retained in the product. Alternatively, the label could bear an accurate statement of the percentage of retained water in the product. Establishments having data or information to demonstrate that their products do not contain retained water would not have to label the products and could include a no-retained-water claim on the product label. The labels would be generically approved pursuant to 9 CFR 317.5(b)(2) or 381.133(b)(2).

This proposed requirement, which is responsive, in part, to the AMI petition discussed above, would ensure that accurate information concerning the product is conveyed to the consumer in accordance with the anti-misbranding provisions of the FMIA and the PPIA (especially 21 U.S.C. 601(n)(1), (6); 453(h)(1), (6)). It would ensure that the product labeling is not misleading with respect to water retention in the product. The placement of the required information on the label would ensure that the information would be likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

The information to be required would be analogous to the information conveyed to consumers on the labels of "ham—water added" or fruit beverages labeled to indicate the actual percentage of juice in the product. As a result, consumers would be able to determine before they buy packaged raw meat or poultry products whether or not the value of products with retained water was commensurate with prices of alternatives in the meat case. The market will provide significant incentives to plants to adopt new cost-effective technologies for reducing retained water. FSIS requests comment on the usefulness to consumers of the proposed labeling requirement.

The proposed requirements would affect only single-ingredient, raw, whole, cut-up, or ground meat and poultry carcasses and parts, including edible organs and other edible meat and poultry byproducts. It would not affect raw products that now bear complete labeling or nutrition labeling, such as pre-basted frozen turkeys, or further processed products, such as deli meats. This proposal also would not cover cooked and cured pork products, such as those currently subject to protein-fat-free requirements (9 CFR 318.19(a)(5), 319.104–.105, 327.23).

FSIS personnel would verify an establishment's control of water retention by checking the establishment records or by conducting in-plant or in-distribution tests of products by methods that the Agency would develop. FSIS would also conduct independent tests of the establishment's absorbed-water control as part of investigations if a problem were suspected or in the course of special studies.

Proposed Changes in Poultry Chilling Regulations

FSIS is proposing to amend the chilling requirements for poultry. Various prescriptive requirements and specifications, such as the minimum amount of fresh water intake by continuous chillers for each poultry carcass, would be removed. Establishments would be given the flexibility to take advantage of the latest technologies and procedures.

This proposal would amend 9 CFR 381.65, which concerns general operating procedures, by removing provisions that are redundant, excessively detailed, or inconsistent with the PR/HACCP final rule. The proposal would eliminate current paragraph (b), the prohibition on handling and storing materials that could cause adulteration of poultry products in any room where poultry

products are processed, handled, or stored. This provision will be unnecessary when HACCP plans are implemented because each HACCP plan will specify the measures to be taken to protect poultry products from physical, chemical, or biological contamination. The requirements in current paragraphs (a) and (c) of 9 CFR 381.65 would be retained as paragraphs (a) and (b) because they set out general principles of good sanitation and commercial practice that all establishments must observe.

The requirements in paragraphs (h) and (j) of 9 CFR 381.65, relating to poultry thawing and dressing techniques, would be replaced with two performance standards. The first would require simply that establishments use thawing procedures that will prevent adulteration of, or net weight gain by, the product. The second would require that water used in thawing be permitted to drain freely from the carcass. Proposed paragraph (c)(1), which would replace paragraph (h), would require that frozen poultry be thawed for further processing in a manner that will prevent product adulteration but would not require that any specific thawing method be used.

The current thawing regulation does not prevent practices that may constitute hazards to food safety. For example, it does not prevent re-exposure of thawed, or partially thawed, product to a thawing medium that may have become contaminated by previous use and that may be too warm to prevent microbial growth. The current paragraph (h)(1)(i) specifies a maximum permitted thawing medium temperature of 70 °F., which is too high to prevent microbial growth in product that is re-exposed to or held in the medium. The regulation conflicts with HACCP because establishments should assess thawing processes when conducting their hazard analysis. Establishments must be given the responsibility and flexibility to choose thawing measures that are effective and do not create food safety hazards.

Proposed paragraph (c)(2) would replace the current paragraph (j), which specifies the manner in which carcass wash water is to be drained, with a performance standard requiring simply that the wash water be permitted to drain freely from the carcass.

Current paragraph (d), which contains a requirement to remove kidneys from mature chickens and turkeys, would be eliminated. The kidneys of mature chickens and turkeys are a source of cadmium, which can accumulate in the human liver and kidneys and cause acute or chronic health problems.

Kidneys with excess cadmium are a "food safety hazard reasonably likely to occur" that establishments will identify in their hazard analyses and control through their HACCP systems. Thus, current paragraph (d) is redundant with the HACCP regulations. The requirement to remove kidneys is referenced in the definition of "ready-to-cook poultry" at § 381.1(b)(44). Therefore, the Agency is proposing to amend that definition. Commenters on this proposal may wish to address the need for regulatory food safety performance standards to control heavy metal residues in organ meats, given the fact that establishments will be operating HACCP systems.

Current paragraph (i), which specifies how poultry carcasses are to be cut open for evisceration, would be removed. The regulation is outdated, prescriptive, and may be an obstacle to improved product safety. The current regulation is intended to ensure that opening cuts are made without cutting the intestinal tract and without contaminating the carcass. Unnecessary cuts are prohibited because they may result in carcass contamination during evisceration or excessive water absorption during chilling. The regulation is also intended to maximize the viewing of the interior and viscera of the carcass by the postmortem inspector.

In recent years, the poultry industry has developed new methods of poultry evisceration that do not result in adulteration. For example, ultrasound techniques are available for use as a diagnostic aid to detect malformities or other defects before the carcasses are opened. Also, equipment is available that can remove the viscera intact, using vacuum suction, without breakage or spillage of intestinal contents, and other available evisceration systems require that the carcass be opened by a longitudinal cut. The current regulation generally limits the opening cut to the area around the vent (cloaca) to prevent birds from carrying excess water under the skin that could cause water-control test failures. The new technologies can potentially improve efficiency and product wholesomeness but are not likely to be implemented unless the regulation is amended. The Agency believes that establishments should have the flexibility to innovate and to implement promising new technologies, consistent with their HACCP plans.

The requirement in current paragraph (k) to adequately drain ready-to-cook poultry after chilling to remove ice and water before packaging would be retained and the paragraph would be redesignated as paragraph (d).

Current paragraphs (l) through (p) would be removed. These paragraphs include requirements concerning the chilling of poultry parts, the removal from establishments of offal resulting from evisceration, the cleanliness of containers, the sturdiness of packaging materials, and the use of protective coverings. These are all matters to be addressed by establishments in their HACCP plans.

Finally, current paragraph (q), concerning the harvesting of detached ova for human food, would be redesignated as paragraph (e) and would be slightly revised to eliminate a command-and-control requirement that the ova be identified past the point of inspection. The requirement that ova may leave the official establishment only for shipment to an egg products processing plant would remain.

In 9 CFR 381.66, paragraph (a) would be revised. This paragraph requires that poultry be chilled or frozen in a manner that promptly removes animal heat from the carcasses and does not adulterate the product. The second sentence of the current paragraph, a command-and-control requirement to file a description of the chilling or freezing procedures with the inspector in charge, would be removed.

The general chilling requirements for poultry, paragraph (b), would remain the same. FSIS regards the chilling of poultry to a safe internal temperature within a minimum number of hours as a useful food-safety precaution. However, as mentioned above, the Agency intends to undertake rulemaking on this matter. The table of maximum times and temperatures in paragraph (b) is based on the duration of the lag phase of bacterial growth on the surfaces of dressed, ready-to-cook poultry carcasses under plant conditions. Although interested persons are encouraged to submit data that would justify a change in this provision, amending the paragraph is outside the scope of the present rulemaking.

The numerous detailed, prescriptive, command-and-control requirements in paragraph (c) would be removed. For example, proposed paragraph (c)(2)(i) does not specify chilling media temperatures and the use of recording thermometers, as does the current paragraph (c)(2)(i). Proposed paragraph (c)(1) would continue to require the use of potable water, and proposed paragraph (c)(2)(i) would continue to require sufficient water for a continuous overflow from chilling system sections. However, specific requirements (paragraphs (c)(2)(ii)-(iii) and (c)(2)(v)) concerning the operation of continuous chilling systems, including the

minimum amount of fresh water intake per bird, would be removed.

Current paragraph (c)(2)(iv) would be redesignated as (c)(2)(ii). This paragraph, which concerns the chilling of major portions of poultry carcasses, is the subject of a final rule (proposed at 62 FR 31017; June 6, 1997) that appears elsewhere in this issue of the **Federal Register**.

Current paragraph (c)(2)(vi), the highly detailed and prescriptive requirements concerning water reconditioning systems for poultry chillers, including the requirement for prior approval of such systems by FSIS, would be removed. Establishments subject to the poultry products inspection regulations are not using these systems because none have proven feasible in commercial operations.

The requirements in paragraphs (c)(4)(i) and (c)(4)(ii), concerning the holding of poultry in chilling tanks, would be removed, and in paragraph (c)(5), the highly specific requirements concerning the use of continuous chillers to chill giblets would be removed. Establishments will address the food safety hazards associated with these procedures in their HACCP plans. However, the requirement to chill giblets to less than 40 °F. in under 2 hours would remain.

Paragraph (d) of section 381.66 would be completely revised. The general requirement to minimize water absorption by raw poultry, and the requirement to furnish equipment necessary for water tests, would remain. The tables setting water absorption and retention limits for the various kinds and weight classes of poultry would be eliminated, as would the requirements for daily water testing by FSIS inspectors. The requirement to notify FSIS of any adjustments in washing, chilling, and draining methods would be also be removed.

FSIS is proposing to remove current paragraph (d)(10), which specifies how poultry may be ice-packed in barrels and requires FSIS approval for the use of alternative types of containers. Establishments will address any food safety hazards associated with containers in their HACCP plans.

The Agency is likewise proposing to remove paragraph (d)(11), which requires establishments to prevent free water from being included in giblet packages. Among other things, the current regulation requires use of a specific type of giblet wrapping material and incorporates by reference the testing standards that must be met in evaluating the material. This kind of detailed specification is no longer necessary under the Agency's new regulatory

approach. Also, establishments must comply with the regulations on net quantity of contents and net weight (9 CFR 317.18-.19, 381.121-121b). This proposal would give establishments greater responsibility and flexibility in choosing appropriate giblet packaging materials. By complying with the proposed retained-water limitation requirements (discussed below) and by appropriately labeling product, establishments would be ensuring that water absorption is controlled and that consumers are informed.

Finally, paragraph (e), on air chilling, and paragraph (f), governing the freezing of poultry, would be retained substantially in their present form. Paragraph (f)(6), concerning immersion or spray freezing compounds and equipment, would be removed because it is a prior-approval requirement inconsistent with the HACCP regulations and is duplicative of other inspection regulations.

The removal of the current poultry chilling regulations would eliminate prescriptive, command-and-control procedures for determining product compliance and would encourage processors to use the most efficient and effective methods of controlling microorganisms.

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been determined to be economically significant and was reviewed by the Office of Management and Budget under Executive Order 12866. The full text of the PRIA is published as Appendix B of this document.

Summary: Preliminary Regulatory Impact Analysis

The proposed rule resulted from an analysis of six alternative regulatory approaches for addressing retained water in raw meat and poultry products. The six alternatives include: (1) no limit on retained water but mandatory labeling that identifies the percentage of retained water in the product; (2) a requirement that all establishments meet a water limit based on best available technology, with mandatory labeling to indicate any retained water; (3) a moisture limit based on best performance with existing equipment, with mandatory labeling to show any retained water; (4) a standard of zero retained moisture; (5) a requirement that no retained water could be included in net weight; and (6) a requirement of zero retention is unavoidable in processes necessary to meet food safety requirements, e.g., to reduce pathogens,

with product labeling to indicate the presence of retained moisture, where applicable. For all alternatives where a limit on retained water is established, the analysis assumed that the limits would be established by the regulated industry associations or other groups.

FSIS chose the last alternative. The selected option would not allow retained water in an affected product unless it is an inevitable consequence of the process or processes used to meet applicable food-safety requirements. Levels of unavoidable retained water would be established by inspected establishments, associations, or other groups, using acceptable protocols. Also, the maximum amount of retained water that could be present would have to be indicated on the product label. FSIS found that this option provides more benefits and fewer costs than other options allowing retained water. By "inevitable consequence" the Agency means an unavoidable and irreducible side effect. A food-safety requirement could be a regulatory prescription, such as the temperature to which a product must be chilled and held. It could also be a preventive measure taken at a CCP or a critical limit in the establishment's HACCP plan. Given a food-safety requirement, an establishment must choose a method for satisfying the requirement.

FSIS understands that the choice of method is based on a judgment of technical and economic feasibility. FSIS understands that product quality and product acceptability to the consumer are also important factors. The Agency requests comment on these matters.

The method selected for meeting food safety requirements could have side effects that cannot be eliminated. A side effect of an antimicrobial treatment of carcasses or a carcass chilling method could be an increase in the water content of carcasses and parts. FSIS is proposing to require that the amount of water that might be retained in carcasses and parts as a result of using such an antimicrobial or chilling method be an unavoidable and irreducible side effect of using that method.

To be applicable to the raw products of an inspected establishment, a non-zero retained-water limit would have to be based on supporting data collected in accordance with an FSIS-approved protocol. The proposal would allow a protocol to be developed and data-generating studies following the protocol to be carried out by an individual establishment, an industry trade association, or other group using the same or similar processing techniques and equipment. Depending on the design of the protocol, the data

gathered could justify water-retention limits for a single establishment, a group of establishments with similar equipment processing similar classes of raw product, or all such establishments in an industry. To establish a non-zero retained water limit, an inspected establishment, industry trade association, or other group would have to generate the necessary supporting data. The labels of products would have to indicate the presence of retained water in the products.

This requirement would not appear to have a significant impact on the meat industry because the meat industry is already achieving zero-percent retained water. This proposal would, however, provide an alternative for establishments that are having or will have trouble meeting the *Salmonella* performance standards. These establishments could use a full range of antimicrobial rinses or hot-water rinses without having to worry about meeting zero-percent retained water. If they can demonstrate that they need a non-zero limit to meet the *Salmonella* standards, they can use the flexibility provided by the proposed rule and establish a new water limit as long as they state the maximum percentage of water absorbed and retained on product labels.

Immersion chilling is the process used by most poultry establishments to meet the existing chilling requirements for poultry, e.g., 9 CFR 381.66(b)(2) requires that poultry carcasses under 4 pounds shall be chilled to 40 °F within 4 hours following evisceration. It follows that, for most poultry establishments, the inevitable retained water amount is the "minimum" level that can be reached with existing immersion chiller equipment while still meeting the chilling requirement. FSIS recognizes that this "minimum" must be established within practical limits for operating parameters such as drip time and chiller water temperature. The Agency believes that the industry already has information concerning the chiller variable settings that minimize water retention. FSIS, therefore, believes the poultry industry can establish water retention limits for various chiller systems with minimal costs. FSIS also recognizes that some poultry establishments may require higher levels of retained water to meet the *Salmonella* standards than they do to meet the existing chilling requirements.

The proposal does not provide specific guidance on options available for poultry processors that are already operating far below the existing standards for *Salmonella*, such as by permitting higher retained water levels

if data showed further pathogen reductions would be achieved.

The analysis estimates a range of costs the industry will incur to meet this new regulatory requirement. If establishments are able to demonstrate that current levels of retained water are necessary to achieve applicable food safety standards, establishments would not incur costs for reducing retained water. These establishments would only incur costs for establishing limits and costs for labeling the product. The costs of establishing limits for the poultry industry are estimated to be \$1.5 million. This estimate is based on each establishment's conducting its own tests. The cost should be lower if associations or other groups establish limits for different types of chiller systems. Labeling costs are estimated to be \$18.4 million if all raw, single-ingredient poultry continues to retain water.

To the extent that establishments cannot demonstrate that current retained water levels are necessary for achieving applicable food safety standards, significant costs could be incurred as establishments modify processes to minimize retained water levels. Reducing retained water could entail a wide range of processing modifications, depending on the type of chilling equipment currently used and amount of retained water that would have to be removed. The PRIA estimates that the cost of removing a substantial portion of the existing retained water could easily approach \$100 million. The PRIA estimates that the average retained water for chicken as a percentage of net weight is currently in the 5.0 to 6.5 percent range. The corresponding level for turkey is 4.0 to 4.5 percent.

The proposed rule should not have a significant impact on a large number of small businesses. Almost half of all federally inspected poultry slaughter establishments are large, based on the Small Business Administration criterion of more than 500 employees. There are from 50 to 60 establishments that process under a million birds annually. Many of these smaller operations do not use continuous immersion chillers. They use ice or slush to meet the existing chilling requirements. Few, if any, would have to reduce the current level of retained water. The establishments most affected by this proposal are the firms operating immersion chillers in a manner so as to target the maximum allowable retained water.

Because of the Court's decision, FSIS needs to develop new regulatory requirements to carry out its responsibilities for protecting the public

from economic adulteration. Preventing economic adulteration provides a consumer benefit. Consumers would also benefit from the additional information that would be provided by the labeling requirement. The information on retained water should lead to more informed purchasing decisions. The proposal would also provide all affected establishments with the flexibility and market incentives to implement new procedures for meeting pathogen reduction performance standards. In addition, by replacing command-and-control requirements with HACCP-consistent performance standards, the proposal would eliminate some recordkeeping and reporting burdens, provide for increased flexibility and reduce the costs of HACCP implementation.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. States and local jurisdictions are preempted by the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) from imposing any marking or packaging requirements on federally inspected meat or poultry products that are in addition to, or different than, those imposed under the FMIA and PPIA. States and local jurisdictions may, however, exercise concurrent jurisdiction over meat and poultry products that are outside official establishments for the purpose of preventing the distribution of meat or poultry products that are misbranded or adulterated under the FMIA or PPIA, or, in the case of imported articles, which are not at such an establishment, after their entry into the United States.

This proposed rule is not intended to have retroactive effect.

There are no applicable administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this proposed rule. However, the administrative procedures specified in 9 CFR 381.35 must be exhausted prior to any judicial challenge of the application of the provisions of this proposed rule, if the challenge involves any decision of an FSIS employee relating to inspection services provided under the FMIA or PPIA.

Executive Order 12898

Pursuant to Executive Order 12898 (59 FR 7629; February 16, 1994), "Federal Actions to Address Environmental Justice in Minority and Low-Income Populations," FSIS has considered potential impacts of this proposed rule on environmental and

health conditions in low-income and minority communities.

This proposed rule would provide new, uniform regulations limiting the amount of water retained by raw, single-ingredient, meat and poultry products as a result of post-evisceration processing, such as carcass chilling, considered necessary to minimize pathogen growth on the products. As explained in the economic impact analysis above, the proposed regulations should generally benefit consumers of meat and poultry products. The proposed regulations would not require or compel meat or poultry establishments to relocate or alter their operations in ways that could adversely affect the public health or environment in low-income and minority communities. Further, this proposed rule would not exclude any persons or populations from participation in FSIS programs, deny any persons or populations the benefits of FSIS programs, or subject any persons or populations to discrimination because of their race, color, or national origin.

Paperwork Requirements

Title: Retained Water in Raw Meat and Poultry Products; Poultry Chilling Performance Standards.

Type of Collection: Labels and labeling records; data or information supporting labeling statements.

Abstract: Changes to product labels would be generically approved. The paperwork and recordkeeping associated with such label approval is approved under OMB control number 0583-0092. Slaughtering establishments would have to have data to support percent-absorbed-water statements on product labels and to demonstrate that the amount of absorbed water in the product is unavoidable under the establishments' HACCP plans. The data would have to have been collected under FSIS-approved protocols.

This proposed rule would require an estimated 210,000 hours to develop the data to support retained water levels above zero. All 300 federally inspected poultry establishments would need to conduct studies to establish minimum retained water levels. The PRIA assumed that the average establishment would conduct studies for two product categories. The PRIA assumed that a reasonable study would examine 10 alternative chiller settings with four 50-bird water tests conducted for each setting. Each test would require 2.5 hours. Thus, it would take an estimated 200 hours for each of 300 poultry establishments, or more than 30,000 hours.

The PRIA assumes that at most 500 meat establishments need to develop non-zero water levels to meet the existing pathogen-reduction performance standards. With larger carcasses, the recording time is doubled to 200 hours per establishment. These 500 meat establishments would also require 100 hours to collect microbial samples. Thus, the information collection would be 300 hours for each of 500 establishments, or 150,000 hours.

All 800 establishments with non-zero levels would also have to develop new, generically approved labels.

Estimate of Burden: Protocols for determining minimum feasible water retention in product classes (3,000 hours); data supporting absorbed-water label statements or the lack thereof (210,000 hours).

Respondents: Meat and poultry product establishments or trade associations.

Estimated Number of Respondents: 800.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 213,000 hours.

Copies of this information collection assessment can be obtained from Lee Puricelli, Paperwork Specialist, Food Safety and Inspection Service, USDA, Cotton Annex Building, Room 107, Washington, DC 20250.

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Lee Puricelli, Paperwork Specialist, see address above, and Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20253.

Comments are requested by December 10, 1998. To be most effective, comments should be sent to OMB within 30 days of the publication date of this proposed rule.

List of Subjects

9 CFR Part 381

Food labeling, Poultry and poultry products.

9 CFR Part 441

Consumer protection, Meat and meat products, Poultry and poultry products.

For the reasons discussed in the preamble, FSIS is proposing to amend 9 CFR Chapter III, as follows:

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

1. The authority citation for part 381 would continue to read as follows:

Authority: 7 U.S.C. 138f; 7 U.S.C. 450; 21 U.S.C. 451-470; 7 CFR 2.18, 2.53.

2. Paragraph (b)(44) of § 381.1 would be revised to read as follows:

§ 381.1 Definitions.

* * * * *

(b) * * *

(44) Ready-to-cook poultry. "Ready-to-cook poultry" means any slaughtered poultry free from protruding pinfeathers, vestigial feathers (hair or down), and from which the head, feet, crop, oil gland, trachea, esophagus, feet, crop, oil gland, reproductive organs, and lungs have been removed, and mature poultry from which the kidneys have been removed, and with or without the giblets, and which is suitable for cooking without need of further processing. Ready-to-cook poultry also means any cut-up or disjointed portion of poultry or other parts of poultry, such as reproductive organs, head, or feet that are suitable for cooking without need of further processing.

* * * * *

3. Section 381.65 would be revised to read as follows:

§ 381.65 Operations and procedures, generally.

(a) Operations and procedures involving the processing, other handling, or storing of any poultry product shall be strictly in accord with clean and sanitary practices and shall be conducted in such a manner that will result in sanitary processing, proper inspection, and the production of poultry and poultry products that are not adulterated.

(b) Poultry shall be slaughtered in accordance with good commercial practices in a manner that will result in thorough bleeding of the carcasses and assure that breathing has stopped prior to scalding. Blood from the killing operation shall be confined to a relatively small area.

(c)(1) When thawing frozen ready-to-cook poultry in water, the establishment shall use methods that prevent adulteration of, or net weight gain by, the poultry.

(2) The water used in washing the poultry shall be permitted to drain freely from the body cavity.

(d) Ready-to-cook poultry shall be adequately drained after chilling, to remove ice and water before the poultry is packaged or packed for shipping.

(e)(1) Detached ova may be collected for human food in the official establishment provided the collection is sanitary. Ova from condemned carcasses shall be condemned and treated as required in § 381.95. Ova for human food must be cooled, packaged, and handled so as to be fit for human food.

(2) Detached ova harvested for human food may leave the official establishment only for movement to an egg products processing plant for processing as allowed in § 59.440 of the regulations (7 CFR 59.440) under the Egg Products Inspection Act, and when moved from the official establishment shall bear labeling which indicates that the ova were harvested under sanitary supervision of the Inspection Service.

4. Section 381.66 would be amended by revising paragraphs (a), (c), and (d) and removing paragraph (f)(6), to read as follows:

§ 381.66 Temperatures and chilling and freezing procedures.

(a) *General.* Temperatures and procedures which are necessary for chilling and freezing ready-to-cook poultry, including all edible portions thereof, shall be in accordance with operating procedures which ensure the prompt removal of the animal heat and will preserve the condition and wholesomeness of the poultry and assure that the products are not adulterated.

(b) * * *

(c) *Ice and water chilling.* (1) Only ice produced from potable water may be used for ice and water chilling. The ice shall be handled and stored in a sanitary manner.

(2)(i) Chillers must contain sufficient water or ice, or both, to keep the chilling media clean and provide a continuous overflow from each section of the chilling system. If there is no loss of water between sections, multiple section chilling systems may be connected so the overflow from subsequent sections serves as water intake for the first section.

(ii) Partial trimming and salvage of parts of poultry carcasses often result in parts of major size, either front or rear portions, wherein the major portion of

the poultry carcass remains intact. These portions may be chilled in water and ice, including chilling in continuous chillers. Individual parts from salvage operations, including but not limited to drumsticks, thighs, split carcasses, and split breasts, shall not be cooled in water and ice but may be cooled in the air, or ice, or under a spray of water with continuous drainage.

(3) Previously chilled poultry carcasses and major portions shall be maintained constantly at 40 °F. or below until removed from the vats or tanks prior to being cooled to 40 °F. or below, for freezing or cooling in the official establishment. Such products shall not be packed until after they have been chilled to 40 °F. or below, except when the packaging will be followed immediately by freezing at the official establishment.

(4) Giblets shall be chilled to 40 °F. or below within 2 hours from the time they are removed from the inedible viscera, except that when they are cooled with the carcass, the requirements of paragraph (b)(2) of this section shall apply. Any of the acceptable methods of chilling the poultry carcass may be followed in cooling giblets.

(d) *Water absorption and retention.*

(1) Poultry washing, chilling, and draining practices and procedures shall be such as will minimize water absorption and retention at time of packaging.

(2) The establishment shall provide scales, weights, identification devices, and other supplies necessary to conduct water tests.

* * * * *

5. A new Part 441 would be added to subchapter E to read as follows:

PART 441—CONSUMER PROTECTION STANDARDS: RAW PRODUCTS

Authority: 7 U.S.C. 450, 1901–1906; 21 U.S.C. 451–470, 601–695; 7 CFR 2.18, 2.53.

§ 441.10 Retained water.

Raw meat and poultry carcasses and parts shall not contain water resulting from post-evisceration processing unless the establishment preparing them demonstrates to the Administrator, with data collected in accordance with an FSIS-approved protocol, that any water retained is an inevitable consequence of the process used to meet applicable food safety requirements. Raw meat and poultry carcasses and parts that retain water must bear a statement on the label in prominent letters and contiguous to the product name indicating the maximum percentage of water that may be retained. Raw meat and poultry

carcasses and parts that retain no water may bear a statement indicating that no water is retained.

Done at Washington, DC on September 3, 1998.

Thomas J. Billy,
Administrator.

Appendix A—Expected Elements of a Protocol for Gathering Water Retention Data

Purpose statement. The primary purpose of the protocol should be to determine the amount or percentage of water absorption and retention that is inevitable using a particular chilling system while achieving the regulatory pathogen reduction performance standard for *Salmonella* as set forth in the PR/HACCP regulations (9 CFR 310.25(b), 381.94(b)) and the time/temperature requirements set forth in 9 CFR 381.66. Additional purposes that could be included are determining chilling system efficiency and evaluating product quality.

Type of washing and chilling system used by the establishment. Any post-evisceration washing or chilling processes that affect water retention levels in and microbial loads on raw product should be described. For poultry establishments, the main chiller types, identified by the mechanism used to transport the birds through the chiller or to agitate the water in the chiller, are the drag-through, the screw type, and the rocker-arm type.

Configuration and any modifications of the chiller system components. A description of chiller-system configurations and modifications should be provided. The description should include the number and type of chillers in a series and arrangements of chilling system components, and the number of evisceration lines feeding into a chiller system. If there is a pre-chilling step in the process, its purpose and the type of equipment used should be accurately described. Any mechanical or design changes made to the chilling equipment should be described.

Special features in the chilling process. Any special features in the chilling process, such as antimicrobial treatments, should be described. Also, the length and velocity of the dripping line should be described, as well as the total time allowed for dripping. Any special apparatus, such as a mechanism for squeezing excessive water from chilled birds, should be explained.

Description of variable factors in the chilling system. The protocol should describe variable factors that affect water absorption and retention. In poultry processing, such factors are typically considered to be the time in chiller water, the water temperature, and agitation. The protocol should consider air agitation, where applicable.

Additional factors that may affect water-absorption and retention are scalding temperature and the pressure or amount of buffeting applied to birds by feather removal machinery, and the resultant loosening of the skin. Another factor that should be considered is the method used to open the bird for evisceration.

Standards to be met by the chilling system. For example, the chilling system may be designed simply to achieve a reduction in temperature of ready-to-cook poultry to less than 40 °F. within the time limit specified by the regulations, or in less time. As to the standard for pathogen minimization, the *Salmonella* pathogen reduction standards, as set forth in the PR/HACCP final rule, have been suggested. Although there is not yet an applicable *Salmonella* standard for turkeys, commenters are free to suggest a practicable standard for use in gathering data on turkeys under the protocols here suggested.

Additional microbiological targets, such as *E. coli* or *Campylobacter* levels, or reductions in numbers of other microorganisms, may also be used.

Testing methods to be employed. The protocol should detail the testing methods to be used both for measuring water absorption and retention and for sampling and testing product for pathogen reductions. The protocol should call for water retention and pathogen reduction tests at various chilling equipment settings and chilling time-and-temperature combinations. The method to be used in calculating water absorption and retention should be reproducible and statistically verifiable.

With respect to the pathogen-reduction aspect of the testing, FSIS recommends the methods used for *E. coli* and *Salmonella* testing under the PR/HACCP regulations. The number of samples, the type of samples, the sampling time period, and the type of testing or measurement should be included in the protocol.

Reporting of data evaluation of results. The protocol should explain how data obtained are to be reported and summarized. The criteria for evaluating the results and the basis for conclusions to be drawn should be explained.

Conclusions. The protocol should provide for a statement of what the data obtained demonstrate and what conclusions were reached.

Appendix B—Preliminary Regulatory Impact Analysis—Retained Water in Meat and Poultry Products

August 1998—U.S. Department of Agriculture, Food Safety and Inspection Service

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Executive Summary

This analysis was conducted to meet the requirements of Executive Order 12866 and

the Regulatory Flexibility Act. The proposed rule has been designated economically significant because there is a potential impact of \$100 million or more. This Preliminary Regulatory Impact Analysis (PRIA) shows that the rule could lead to a substantial reduction in the amount of retained water in poultry which could have a significant economic impact on the poultry industry. Under the proposed rule, raw, single-ingredient meat and poultry products would not be permitted to contain water resulting from post-evisceration processing unless the establishment demonstrates that water retention is an inevitable consequence of the process or processes used to meet applicable food safety requirements. There are three types of costs associated with this proposed rule. There are costs for conducting the tests necessary to establish retained water levels. There are also costs associated with reducing retained water to such levels. Finally, there are costs for revising product labels to indicate the presence of retained water. Product labels would indicate the percentage of net weight represented by retained water. This information could be used by consumers in making product choices. The market could provide incentives to firms to invest in new technologies that would reduce retained water.

Most of the cost of this proposed rule would be experienced by the poultry industry. Most, if not all, raw poultry products now contain retained water whereas only a few meat byproducts or organ meats may now contain retained water. Most costs experienced by the meat industry would be associated with voluntary decisions to use new or different processes to meet food safety requirements that would result in some level of unavoidable retained water.

This analysis estimates a range of costs the poultry industry would incur to meet this new regulatory requirement. If establishments are able to demonstrate that current levels of retained water levels are an inevitable consequence of the processes used to meet applicable food safety standards, establishments would not incur costs for reducing retained water. These establishments would incur costs for justifying existing retained water levels and costs for revising product labels. The costs of establishing limits for the poultry industry are estimated to be \$1.5 million. Label revision costs are estimated to be \$18.4 million if all raw, single-ingredient poultry continues to contain retained water.

To the extent that poultry establishments cannot demonstrate that current retained water levels are necessary for achieving applicable food safety standards, significant costs could be incurred as establishments modify processes to reduce retained water levels. Reducing retained water could entail a wide range of processing modifications, depending on the type of chilling equipment currently used and the amount of retained water that would have to be removed. The analysis estimates that the average retained water for chicken as a percentage of net weight is probably in the 5.0 to 6.5 percent range. The average retained water for turkey as a percentage of net weight is probably in the 4.0 to 4.5 percent range.

If this proposed rule would require removing a substantial portion of the existing retained water, then the costs to the poultry industry could exceed \$100 million. FSIS' retained water tests on whole broilers show that retained water varies considerably from establishment to establishment. For 13 establishments operating under the 8 percent regulatory limit for whole broilers, the average retained water at the end of the drip line ranged from 4.72 to 7.32 percent. FSIS believes that the establishments operating at the higher end of this spectrum are targeting the regulatory limit and establishments operating at the lower end of this spectrum are, most likely, operating at or near the minimum necessary to meet existing chilling requirements which are food safety standards. For this reason, FSIS does not expect to see costs approaching the \$100 million level. However, FSIS also recognizes that the retained water levels at the lower end of the spectrum could be tied to purchase specifications or other factors and may not be true minimum levels. Therefore, this analysis has estimated the cost of removing a substantial portion of the current levels of retained water from all poultry establishments.

This PRIA estimates that using additional drain time to reduce retained water in poultry by 4 to 5 percentage points in all establishments could cost up to \$94 million in one-time fixed costs. Annual recurring costs are estimated at \$10 million. These cost estimates are based on situations where inspected establishments were required to drain retained water that exceeded regulatory limits. FSIS program personnel do not believe it is feasible to eliminate all retained water from immersion-chilled poultry. Thus, if establishments must eliminate a substantial portion of retained water, they would incur the costs of minimizing the water plus the costs of establishing the minimum or minimums and labeling costs. The costs of the proposed rule, however, are highly dependent on the level of retained water that is necessary to meet existing food safety requirements. That level will remain unknown until established by well-designed studies. However, as discussed above, FSIS predicts that only those poultry establishments operating at the higher end of the retained water spectrum would have to substantially reduce their retained water levels. This prediction is based on data showing that establishments can control retained water and data showing that some are controlling retained water so as to be at or near the applicable regulatory limit.

This proposal fills a regulatory void created by the U.S. District Court decision to set aside the water retention limits for whole birds. The regulatory limits that the Court set aside were not based on adequate analytical support. Regulatory limits are necessary to protect the public from economic adulteration. Preventing economic adulteration provides a consumer benefit. Consumers would also benefit from the additional information that would be provided by the labeling requirement. The information on retained water should lead to more informed purchasing decisions.

The proposal would also provide affected establishments with the flexibility they need

to choose the most appropriate means for implementing HACCP plans for assuring the safety of raw product. For example, under the proposed rule, both meat and poultry carcasses would be allowed to retain absorbed water if data showed that such water was unavoidable in order to assure compliance with the pathogen reduction performance standards for *Salmonella*. In addition, by replacing certain existing command-and-control requirements with HACCP-consistent performance standards, the proposal would allow increased flexibility which should reduce the costs for HACCP implementation. This analysis does not attempt to quantify the benefits of the increased flexibility that results from eliminating command-and-control requirements. The proposal would also remove certain recordkeeping and reporting requirements.

In terms of aggregate market effects, the analysis concludes that, when compared to the present situation, the proposed rule could result in higher prices for both poultry and meat, with less poultry consumed and more meat consumed. However, when estimated costs are compared with aggregate consumer expenditures, the analysis shows that costs are very small compared with current expenditures. Maximum first year cost estimates for the poultry industry represent 0.36 percent of aggregate consumer expenditures on poultry. Recurring costs to the poultry industry represent only 0.03 percent of consumer expenditures and 0.04 cents per pound.

I. Introduction

FSIS is proposing regulations limiting the amount of retained water raw meat and poultry products may contain. The proposed rulemaking would, among other things, amend the meat and poultry inspection regulations governing water retained by carcasses and parts of carcasses as a result of post-evisceration washing and chilling necessary to ensure product safety and wholesomeness. The amended regulations would apply the same retained-water standard to both red meat and poultry. Meat and poultry carcasses and parts would not be permitted to contain water resulting from post-evisceration processing unless the establishment demonstrates that water retention is an unavoidable consequence of the processing used to meet existing food safety requirements. Under the proposal, raw meat and poultry products that retain water would have to be labeled indicating the maximum amount of retained water that may be present as a percentage of product weight.

In addition to revising the regulations controlling retained water, FSIS is also proposing to revise the poultry regulations covering thawing procedures, water use and reconditioning, and certain other operating procedures. These other regulations are being revised to improve consistency with the Pathogen Reduction/Hazard Analysis and Critical Control Points (PR/HACCP) regulations, eliminate "command-and-control" features, and reflect current technological capabilities and good manufacturing practices. By replacing command-and-control requirements with

HACCP-consistent performance standards, the proposal would allow increased flexibility and should reduce costs for HACCP implementation. Removing some command-and-control regulations would also eliminate some existing recordkeeping and reporting burdens. This analysis does not attempt to quantify the benefits of the increased flexibility that results from eliminating command-and-control requirements.

II. Need for Regulatory Action

Respond to Court Decision

The regulations controlling retained water in poultry carcasses have consisted of three major components: (1) a performance standard requiring washing, chilling, and draining practices that will minimize water absorption and retention at time of packaging, (2) limits for maximum retained water in birds that will be packaged as whole carcasses, and (3) limits for maximum retained water in birds that will be ice-packed or cut up prior to packaging. The performance standard is interpreted as minimizing the water that is absorbed and subsequently retained, i.e., it is not interpreted as requiring minimization of both water absorption and water retention. In implementing the standard, FSIS concludes that the performance standard is met when retained water is under the maximum limits.

Until the Court case referred to below, the maximum retained water for most whole chickens (those 4.25 pounds or under) was 8 percent. The maximum retained water for chicken that will be ice-packed or subsequently cut up into parts is 12 percent. The 12 percent limit is based on the premise that chicken parts from whole birds with water levels between 8 and 12 percent will reach the 8 percent level by the time the parts are packaged. The analogous limits for turkey are similar but include unique limits for 12 different carcass weight categories. The maximum retained water limits for whole turkey range from 4.3 to 8.0 percent depending on weight. The corresponding limits for cut-up turkey range from 5.3 to 9.0 percent. The maximum retained water for whole ducks, geese and guineas was 6 percent, the same limit that applied to chickens over 4.25 pounds.

The U.S. District Court, in the matter of *Kennedy v. Glickman*, set aside the water retention limits for whole birds. The Court found that the analytical support for the existing limits was insufficient. Thus, there are currently no regulatory criteria to determine whether retained water has been minimized in chilled or frozen whole birds. FSIS is mandated to prevent the distribution in commerce of meat or poultry products that are adulterated or misbranded. Under the meat and poultry statutes, a product is adulterated if, among other circumstances, a substance has been added to or mixed with the product to increase its bulk or weight or make it appear of greater value than it is. Thus, if water has not been minimized, the product may be considered adulterated. Such product may also be considered misbranded. Without limits on retained water, FSIS cannot adequately protect consumers from adulteration and misbranding due to excessive retained water in whole birds.

Eliminate Inconsistency

In addition to the situation created by the July 1997 Court decision, FSIS sees additional need for regulatory action. With respect to the regulation of retained water, there are differences or inconsistencies both between the livestock and poultry industries and within the existing regulatory framework for poultry. FSIS allows poultry to retain water absorbed during processing as an unavoidable result of traditional chilling practices. There is no comparable allowance for meat. The regulatory definitions for economic adulteration "by substances added so as to increase bulk or weight or make a product appear better or of greater value than it is" are identical for meat and poultry. Although the Secretary of Agriculture has the authority to apply the adulteration provisions differently, FSIS believes there can be more consistency between the livestock and poultry industries in how the adulteration provisions are applied to retained water in raw products. The traditional differences in chilling practices have led to a situation where the weight of a meat carcass usually decreases during chilling while the weight of a poultry carcass increases.

The Department promulgated regulations limiting water absorption in poultry in 1959, 1961, and 1970 (December 1, 1959, 24 FR 9566; July 19, 1961, 26 FR 6471; October 7, 1970, 35 FR 739). The existing regulations contain a standard of performance that calls for minimization and maximum retained water limits for poultry carcasses based on carcass weight and intended use. Under the existing regulatory enforcement framework, a poultry establishment is "minimizing" retained water when it is operating within the existing limits. FSIS is aware that not all establishments are really minimizing retained water. Data analyzed for this PRIA show that some poultry establishments have been controlling their processes to retain the maximum allowed water. While this is considered acceptable in the sense that product is not adulterated, it is not consistent with a regulatory intent to minimize. However, it may be consistent with food safety objectives to reduce pathogens.

The existence of the 12 percent limit for cut-up chicken is in itself inconsistent with the concept of minimization. Many establishments pack both whole and cut-up chicken. In meeting the 8 percent limit for whole birds, they demonstrate that their minimum is below 8 percent. The 12 percent limit serves as an opportunity to maintain water levels in cut-up poultry. The 12 percent limit is also available as default when the 8 percent limit is not achieved. An establishment can divert birds to cut-up operations when they fail the whole bird limit.

III. Background

There are no existing meat regulations that address retained water in raw meat products. Without any regulatory limits, FSIS has enforced the adulteration provision of the FMIA to mean that any level of retained water is adulteration. FSIS has allowed cold water spray chilling systems as a supplement to air chilling of beef and hog carcasses under the conditions outlined in FSIS Directive

6330.1. That document requires that establishments develop quality control systems and inspectors monitor these quality control programs to make sure that the total weight of a group of spray-chilled carcasses is not greater than the total pre-wash weight of the same carcasses. Thus, while an individual carcass may show a weight gain, FSIS enforces a standard of zero-retained water for groups of beef or pork carcasses for spray chilling systems. In contrast, FSIS has not required establishments to closely monitor water when using pathogen reduction methods on the kill floor, such as pre-evisceration carcass sprays or steam vacuum processes.

FSIS implements an extensive program to assure compliance with existing limits for retained water in poultry. Retained water can result from both carcass washing and carcass chilling, i.e., the post-evisceration washing and chilling processes. The existing procedures for conducting retained water tests for poultry are outlined in Part 10 of the Meat and Poultry Inspection Manual. The standard procedures instruct the inspector to tag and weigh a sample of 10 birds from the eviscerating line before the final carcass wash. The final carcass wash occurs before birds enter the chiller. The same 10 birds are then weighed after the chiller at a point specified in the establishment's water control procedures as outlined on FSIS Form 528. The most common point is the end of the drip line or the last accessible point on the drip line. The test procedures are the same regardless of whether the whole bird or cut-up limits apply.

Under standard procedures, inspectors conduct one test each shift. Today, many establishments are tested once each week based on history of compliance. The standard procedures state that test birds must not be allowed extra draining, i.e., they must reflect the production lot. The standard water procedures may specify that the test birds are drained for a specific time if production is all drained for the same time. For example, one establishment specifies that test birds are to be drained four (4) hours before being weighed. When water limits are exceeded, product is retained.

Violations do occasionally occur and appear to be a function of how close to the regulatory limit an establishment is operating. Existing data indicate that some establishments control their process way below the limits and never come close to a violation. Based on the data reviewed for this analysis, most establishments do not have water violations or rarely exceed existing limits. A few, however, appear to target the limit and frequently experience retained product as an extra operating expense. In the data examined for this analysis, retained product required additional drain times ranging from 3 minutes to 12 hours.

FSIS' existing retained water control program is a relatively resource intensive effort. In a poultry establishment with two shifts and two chiller systems, FSIS may be conducting four 10-bird tests each day. Each test takes from 40 to 60 minutes for selecting, tagging, and weighing birds and then recording results and making necessary calculations. Even with reduced testing in

many establishments, it appears reasonable to estimate that FSIS conducts between 300 and 400 retained water tests each day. Assuming a 260-day work year, FSIS conducts from 78,000 to 104,000 tests annually. At 40 to 60 minutes each, the annual testing represents from 25 to 50 staff years of 2,080 hours each. The Agency also expends an estimated 560 staff-hours each year reviewing changes in establishment washing, chilling, and draining procedures. These estimates do not include the cost of addressing violations.

FSIS intends to pursue a new water control program that can incorporate wholesale or retail sampling to identify establishments that may be exceeding water limits and then target resources to conduct follow-up testing to confirm compliance or noncompliance. FSIS is aware of a retail testing method that has been developed and used in European Union member States. The method involves measuring drippage from sampled products against what is considered the natural water content of the product.

In its 1980 net weight proposal, FSIS considered a "building-block" approach to net weight compliance that was then being reviewed by the Codex Alimentarius Commission. This approach, as described in the 1980 notice, "would be modeled on a statistical limits of variance technique developed by Switzerland for application to imported, prepackaged foods. Inspectors would make limited inspections for compliance at retail. If the sampling technique indicates a noncompliance problem, additional inspection of the same product would be made at retail and further back in the marketing chain, including at processing plants. If the problem continues following notification of the producers, a more precise enforcement test would be applied." An alternative that lends itself to this type of approach will rate high on the criterion for an efficient, equitable enforcement system.

IV. Description of Proposed Rule

The proposed rule would establish a single retained water standard for all raw, single ingredient meat and poultry products. This standard would allow retained water only if that water was an inevitable consequence of the process or processes used to assure compliance with existing food safety requirements. The presence of any retained water would, however, have to be identified on product labeling.

The proposed requirements would affect only single-ingredient, raw, whole, cut-up, or ground meat and poultry carcasses and parts, including edible organs and other edible meat and poultry byproducts. It would not affect raw products with labeling that includes a list of ingredients or nutrition labeling, such as pre-basted frozen turkeys or individually quick frozen (IQF) poultry parts labeled to indicate the addition of basting solutions.

The proposal would also modify other existing regulations related to water use and chilling requirements. For example, the proposal would remove a requirement that establishments must file a description of chilling and freezing procedures with the

inspector-in-charge (IIC). At the same time, the proposal would remove the requirements that the establishment submit written notice of any adjustments to washing, chilling, and draining methods before any changes are made and provide FSIS data showing the adjustments are effective in meeting existing water limits. These modifications would reduce recordkeeping and reporting burdens.

The proposal would also remove specific requirements concerning the amount of fresh water intake required in the first section of a continuous chilling system. The existing regulations require a minimum of one-half gallon per frying chicken and proportionately more for other classes of poultry, including not less than one gallon per turkey. The potential for lowering water costs is unknown. The general requirements for using potable water and continuous overflow from one section of the chiller to the next will remain. The requirement for continuous overflow would appear to limit the opportunity for reduced water usage.

The regulations concerning water intake were established at a time when FSIS assumed responsibility for controlling pathogen levels and frequently did so with design requirements. In 1978, the Department published a proposal (43 FR 14043, April 4, 1978) that would reduce water intake requirements by 50 percent when chlorine levels in the incoming water were at least 20 parts per million. The proposal was subsequently withdrawn. Of concern during the rulemaking were studies by USDA and the Virginia Polytechnic Institute and State University (VPI) that showed that bacteria levels increased as intake water was reduced. While the relationship of water intake and pathogen levels remains a public health concern, FSIS is no longer attempting to design protection using command and control regulations. Under the Pathogen Reduction/HACCP final rule, establishments are required to meet pathogen reduction performance standards. This current proposal is a performance-based standard that will lead to retained water levels that are necessary to meet pathogen reduction requirements and other food safety standards. The current proposal is consistent with FSIS objectives of setting performance standards and moving away from design requirements, such as the minimum of one-half gallon of fresh water intake per chicken. It is now industry's responsibility to establish how water intake relates to both retained water and pathogen levels.

The proposal would also remove prescriptive requirements for water reconditioning systems for poultry chillers. This change would not have an impact because reconditioning systems have not proven feasible in commercial operations.

FSIS intends to retain the existing requirements mandating that the internal temperature of poultry carcasses be lowered to 40 °F. or less within a specified time. The Agency also will continue to require that each establishment provide scales, weights, identification devices, and other supplies necessary to conduct water tests. While the Agency envisions a compliance-sampling program using the deviation from an expected level of total water content as a

screening system, the Agency will still use the existing sampling system to confirm potential compliance problems.

The poultry regulations discussed above concerning water use, chilling requirements and water retention are all contained in 9 CFR 381.66 (Temperatures and chilling and freezing procedures). This proposal would also remove several existing regulations from 9 CFR 381.65 that now address general operating procedures, many of which are not related to water use or chilling procedures. Operating procedure requirements that would be removed or revised under this proposal include the following:

- Specific requirements that prescribe the nature of opening cuts for evisceration,
- The requirement to remove kidneys from mature poultry,
- Requirements pertaining to the handling and storage of materials that could adulterate product,
- Requirements for containers, packaging, and covering materials,
- Requirements on removing offal from establishments,
- Requirements prescribing how to thaw frozen poultry and drain ready-to-cook poultry,
- Requirements on how establishments can chill parts of carcasses, and
- Requirements related to harvesting detached ova.

The regulations that would be eliminated are either regulations that are overly prescriptive command and control regulations, such as those defining opening cuts or regulations that are now redundant with HACCP, e.g., the removal of kidneys. The reason for removing the kidneys of mature chickens and turkeys is that they are a source of cadmium, which can accumulate in the human liver and kidneys and cause acute or chronic health problems. This is a "food safety hazard reasonably likely to occur" that establishments will identify in their hazard analyses and control through their HACCP systems. Thus, a regulatory requirement for their removal would be redundant with the HACCP regulations.

V. Analysis of Existing Data on Retained Water

As discussed above, most raw, single-ingredient meat products are not currently allowed to contain any retained water. This analysis assumes that these meat products will continue to be produced without retained water. Products that are packed in water or may retain water are already labeled to indicate such information. Chitterlings (swine intestines) are washed and chilled before shipment and are packaged with water. Certain organ meats and meat from ears and tails are also washed and chilled using water. A few establishments chill beef cheek meats in water, a process that may result in the absorption of water. The product is labeled to indicate the maximum percentage added water it may contain to alert buyers to the fact that the product may weigh more because of the chilling process. The Agency does not have data on the volume of meat products with retained water or data on the current levels of retained water. These products do not, however,

represent a major portion of the meat industry.

In order to estimate the current level of retained water, in early 1997, the Agency's headquarters staff informally requested field offices to forward readily available water data from poultry plants. The material assembled varied from region-to-region and plant-to-plant. The field offices did not use a standard method to summarize available data. In some cases, the individual establishments were identified; in other instances, all plant identification was removed. The allowable water, i.e., the applicable regulatory limit, was not always readily discernible. The data covered the period of January through May 1997. Most of the data was included on the Daily Moisture Records (FSIS Form 549 or its replacement Form 6310-1). These records record the pre-wash and post-chill weight of each individual bird for each 10-bird test. Five 10-bird tests are recorded on each record.

While the data assembled was not systematically collected, it has a degree of randomness and provides a preliminary estimate of the amount of water currently absorbed and retained during the washing and chilling process as measured by existing FSIS water test procedures. An analysis was conducted using all the data that met the following criteria for establishments slaughtering young chickens.

- Minimum of twenty 10-bird tests (200 birds).
- Existing regulatory limit available.
- All available test data collected under a single applicable limit.
- All results clearly legible.
- Establishment identified (to connect water data with production).

The data from 33 establishments slaughtering young chickens met the above criteria. These 33 establishments represented 17.5 percent of FY 1996 production. Within the 33, 19 establishments were operating under the 12 percent water limit that was applicable to cut-up and ice-pack poultry. These 19 establishments accounted for 9.11 percent of the total FY 1996 production and 52 percent of the production within the 33 establishments.

Thirteen establishments were operating under an 8 percent water absorption limit during the period the data was collected. The 8 percent limit applies to whole carcass pack chickens or frozen chickens that are 4.25 pounds or less. The 13 establishments represented 7.95 percent of FY 1996 production. One establishment was operating under the 6 percent limit for whole chickens over 4.25 pounds.

Among the 33 establishments, 48 percent of the young chickens were being processed under the water limits for whole birds. Today, the National Broiler Council estimates that only 10 percent of broilers are "marketed" as whole birds. Two factors explain this difference. First, if any birds in a production shift are to be shipped whole, the entire shift is subject to the whole bird limit. Second, some birds are shipped whole and then cut up in a second establishment conducting further processing. The 10 percent "marketed" as whole birds refers to retail and food service destinations.

The 13 establishments operating under the 8 percent limit had an average absorbed water level of 5.81 percent and a production based weighted average of 5.68 percent. Individual establishment averages ranged from 4.72 to 7.32 percent. These percentages

represent percentage gain relative to the carcass weight prior to the final carcass wash. The individual plant averages were calculated by combining all available water tests from all shifts and all washer/chiller systems. Averaging all water test results in this manner assumes that each test represents an equal amount of production. Many plants have more than one chiller system and multiple shifts. Production may not be equally distributed across all shift-chiller combinations.

The 19 establishments operating under the 12 percent limit had an average absorbed water level of 9.11 and a weighted average of 9.02 percent. As above, these percentages represent percentage gain relative to the carcass weight prior to the final carcass wash. While 18 of these establishments had absorbed water levels close to 8 percent or above, one establishment had an average water level of 5.37 based on sixty 10-bird tests (600 birds) conducted from January through April 1997. The establishment operates two systems, one averaged 5.61 percent, the other 5.14. All the daily records were checked to indicate the establishment was producing cut-up poultry.

In addition to the data analyzed above (33 establishments), the 1997 data included water tests from three young chicken establishments that processed both whole birds under the 8 percent limit and cut-up chickens under the 12 percent limit. For these 3 plants, there were at least 20 tests at each level.

The results are shown in the following table:

Establishment	8 percent limit	12 percent Limit	Difference
A	6.42	7.67	1.25
B	5.26	6.15	0.89
C	5.94	7.30	1.36

An analysis of variance procedure indicated that, after accounting for variability between plants, there is a statistically significant difference (confidence greater than 99%) between the percentages of water gain at the two regulatory limits. It follows that these establishments are not really minimizing retained water when operating under the 12 percent limit because they have lower retained water when processing whole birds. The difference does not, however, approach 4 percent.

Because there are 12 different water limits for different sizes of turkeys, the approach to analyzing existing data had to be different. It's common to see three different water limits for a five-test series recorded on the Daily Moisture Records. The data from turkey establishments was sorted using the following two criteria:

- Minimum of ten 10-bird tests conducted under limits applicable to turkeys packaged as whole birds.
- Establishment identified.

A review of the existing data identified six establishments that were operating under the

limits for whole carcass packing procedures. These six establishments represented 12.7 percent of federally inspected turkeys in FY 1996. An estimated 40 percent of all turkeys are marketed as whole birds. Because of the 12 different limits for whole turkeys depending on weight, this analysis did not attempt to estimate absorbed water for different sizes of birds.

The six turkey plants had an average absorbed water level of 4.39 percent and a weighted average of 4.74 percent. Individual plant averages ranged from 1.91 to 5.53 percent. This analysis did not attempt to estimate water levels for cut-up or ice-packed turkeys.

The review of Daily Moisture Records identified a couple of potential issues that should be addressed by comments. First, some of the highest water results occurred when line speeds were running too slow for the established water control procedures. Since slowing line speeds may be a response to higher pathogen levels there is some indication that water pick up and pathogen levels may be inversely related under some

conditions. In one case, a company conceded that it could not pass the 8 percent whole bird water limits at certain lower speeds and agreed to divert birds to cut-up operations when the line speed dropped to a certain level. By diverting the birds to cut-up, the establishment avoided the process of conducting a 50-bird test to establish the necessary drain time to meet the 8 percent limit. Another plant noted that slower speeds resulted in insufficient numbers of birds for proper travel through their chiller system with rocker arms.

As a second issue, the data indicate that more problems arise with very small birds, i.e., broilers in the 2½ to 3-pound range. Individual birds would show water pick-up in the 20 to 24 percent ranges. FSIS staff notes that eviscerating equipment sometimes causes extra large openings on small carcasses that lead to pockets of water under the skin. These birds are informally referred to as "water bags." The water test is rather meaningless for these birds if they are headed to cut-up operations because the water in

these pockets drains quickly and easily at the cut-up operation.

VI. Retained Water in Net Weight

The proposed rule would require that product labels indicate the percentage of net weight represented by retained water. All the data presented in the previous section refers to retained water as a percentage gain from the carcass weight prior to the final carcass wash. The same volume of retained water expressed as a percentage of net weight will be somewhat lower because net weight includes the pre-wash carcass weight plus any absorbed water.

A second difference occurs because FSIS water tests normally occur at the end of the drip line. The exact relationship between the volume of retained water as recorded by FSIS tests and the volume of retained water in finished packaged product is unknown. Retained water in finished packaged product will be lower for several reasons. First, an establishment's handling procedures will lead to some water loss before the product is packaged and weighed. Today, only 10 percent of broilers are "marketed" as whole birds. Thus, a lot of broilers produced under whole bird limits are being cut up in the originating establishment or in a subsequent establishment before being packed as finished product. Second, any product that exceeds existing limits is required to drain for a specific time as determined by program personnel. Third, the establishment may implement draining procedures to meet a customer's purchase specifications. In these cases, the retained water included in net weight could be far less than the retained water measured by FSIS tests.

It is also difficult to compare the water data for whole birds with the data on cut-up poultry. As discussed above, available data showed whole young chickens to average 5.68 percent while cut-up young chickens averaged 9.02 percent on a production-based weighted average. The 12 percent limit on cut-up chickens was based on a premise that if poultry for cut-up averages less than 12 percent at the time of water test, it would drain to less than 8 percent during the remaining handling prior to final packaging. This does not mean that poultry destined for cut-up will drain 4 percent. It seems reasonable to assume, however, that the level of 9.02 percent will approach the whole bird level of 5.68 percent, probably ending up somewhere between 6.0 and 7.0 percent.

Allowing for some drain in the whole bird packaging process and considering the conversion to percentage of net weight, it seems likely that the average retained water for chicken as a percentage of net weight is probably in the 5.0 to 6.5 percent range. This estimate is consistent with findings published in a study¹ conducted in 1979 by the Economics, Statistics, and Cooperatives Service (ESCS (now ERS)). That study, hereafter referred to as the 1979 ERS study, estimated that average water pickup for six processors at the time of packaging was 5 to

6 percent. Because some product undergoes further cut-up and packaging in other establishments, the average water level leaving originating establishments is not the same as the level in customer packages.

The whole bird data on turkeys, i.e., 4.74 percent retained water, is a better estimate for packaged turkey since 40 percent are marketed as whole birds. One would expect some additional drainage before the birds are packaged. The average retained water level for turkey as a percentage of net weight is probably somewhere in the range of 4 to 4.5 percent.

VII. Economic Analysis of Retained Water in Meat and Poultry

This chapter examines the economic issues associated with retained water in poultry. For analytical purposes, this chapter assumes that the average retained water for all chicken is 5 percent of net weight and the average for turkeys is 4 percent of net weight. The analysis in Sections 4 and 5 concluded that the averaged retained water for chicken is probably between 5.0 and 6.5 percent and the average retained water for turkey is probably between 4.0 and 4.5 percent.

In FY 96, there were 7.67 billion chickens slaughtered under Federal inspection. Based on an estimated average carcass weight of 3.36 pounds, the total weight of ready-to-cook chicken was 25.8 billion pounds. If the average retained water was 5 percent, then one can view the total as 24.5 billion pounds of chicken and 1.3 billion pounds of retained water. Since the wholesale price of whole broilers was \$.6124 per pound,² the chicken had an estimated whole bird, wholesale value of \$15.8 billion.

In FY 96, there were 289.6 million turkeys slaughtered under Federal inspection. Using an average carcass weight of 17.9 pounds, the production was 5.18 billion pounds. The average FY 1996 wholesale price was \$.665 per pound resulting in a total wholesale value of \$3.4 billion. Using an estimated average retained water level of 4 percent, one could view the production as 4.97 billion pounds of turkey and 0.21 billion pounds of retained water.

There are two ways of looking at the current situation. One is the perspective that customers are paying \$15.0 billion for the chicken and \$789.4 million for the retained water and \$3.3 billion for turkey and \$136 million for retained water. The other is that the water has no effect on the value of the poultry. In this case, the value of the chicken is \$15.8 billion and the value of the turkey is \$3.4 billion. The customer is simply not being informed that the true wholesale price of the chicken on a "zero added water" basis is \$.6446 per pound and not \$.6124. Similarly, the customer is not being informed that the true wholesale value of turkey is \$.684 per pound and not \$.665.

While the 1979 ERS study was focused on analyzing alternative net weight regulations, the study addressed essentially the same issue as retained water when it considered drained weight labeling. The ERS study used an "added water in chicken" example to

illustrate the retail price effects of dry tare versus drained weight labeling of packaged chicken. The example was a package of chicken breasts selling for \$1.20 per pound with a labeled weight of 3 pounds using a dry tare system. The tare is the weight of any container, or wrapper, or other material not included in the stated weight of a package. This package would cost the consumer \$3.60. If this package undergoes a water loss of 4 percent, and assuming the net weight was exact under the dry tare system, the consumer selecting this package would be receiving 2.88 pounds of drained weight chicken and the real price per pound of chicken is \$1.25 (\$3.60÷2.88 pounds).

Under a drained weight system, assuming exact measurements, the package would show a net weight of 2.88 pounds and a price per pound of \$1.25. The cost of the package would remain \$3.60. The ERS study used this example to illustrate that changing net weight methodology, by itself, only changes the information a consumer receives but not the real cost of the product. After analyzing the "water in chicken" issue, the 1979 ERS study concluded:

Whether consumers pay chicken prices for water is not clear simply because a dry tare labeling weight is allowed. If \$3.60 is the competitive cost for a package of chicken breasts of that quality, then the consumer is not paying \$1.20/lb. for 0.12 lb. of water and juices. The consumer is simply not being informed that the true price of chicken at the retail level on a drained weight basis is \$1.25/lb. not \$1.20. Consumers may well be paying more for chicken or other meat and poultry products than can be justified. But to verify such an assertion would require an extensive study of the industrial organization of the industry and data on firm costs, revenues, and profits. Answering that question is beyond the scope of this study.

The economic issue raised by the retained water issue is whether labels reflecting the price of poultry on a "green weight" basis would have enough of an effect on the demand for poultry that consumers would purchase less poultry and more product that competes with poultry. This analysis, like the earlier ERS study, has not attempted to predict the shifts in supply and demand that might occur if product labels included the "true" price of poultry. The marketplace issues are more complex than just pounds and cents. Discussions with retail industry personnel indicate that they believe many consumers object to free liquid in packages and that "dry" looking packages would have a positive impact on demand. They also noted that labeling of water is not necessarily a detraction. They point to the rapidly growing market for Individually Quick Frozen (IQF) Ice-Glazed poultry. This product sometimes includes labeling indicating the addition of basting solutions to enhance flavor and juiciness. IQF Ice-Glazed and marinated products are marketed based on convenience.

VIII. Options Identified

FSIS identified six options for regulating retained water in raw meat and poultry products. These six options are:

¹ Assessment of Proposed Net Weight Labeling Regulations, Staff Report, Prepared by the Economics, Statistics, and Cooperatives Service for the Food Safety and Quality Service, USDA, August 1979.

² Livestock, Dairy and Poultry Situation and Outlook, LDP-M-44, ERS, USDA, August 15, 1997.

- No limits on retained water as long as the product label indicated the amount of retained water.
- A standard requiring zero retained water for all raw, single-ingredient products.
- A requirement that there could be no retained water in the stated weight of the product.
- A standard that would set limits for retained water based on best available technology within traditional production practices. This option would also require that retained water be identified on product labels.
- A standard that would set limits for retained water based on optimum use of existing equipment. This option would also require that retained water be identified on product labels.
- A standard that would require an establishment to demonstrate that any retained water is an inevitable consequence of the process used to meet applicable food safety requirements. This option would also require that retained water be identified on product labels.

IX. Analysis of Options

This section provides an assessment of the six regulatory options identified. The six options fit into three categories. The first category is represented by Option 1 and can be characterized as the option where there would be no limits on retained water for any raw product as long as the label indicated the presence of that water. The second category covers options where no retained water would be allowed. This analysis discusses two variations, one (Option 2) where no retained water would be allowed in the product and another (Option 3) where no retained water could be included in the product weight. Options 4, 5, and 6 are all similar in that they would permit limited water retention and they would require that any retained water be identified on product labels. These last three options differ in the basis for establishing the limits for water retention. The three options consider limits based on best available technology, limits based on best performance with existing equipment, and limits based on the retained water necessary to meet existing food safety requirements. Setting new limits based on any of these three criteria would have to meet the Court's requirement that the rulemaking record explain how particular water retention levels are set.

All six options provide consumers with improved information on the "true" price of poultry. Improved information results from either labeling the level of retained water, eliminating all retained water, or a combination of labeling and limiting the amount of retained water. Improved information provides a consumer benefit in that it allows consumers to make more informed purchasing decisions. The analysis that follows does not quantify the consumer benefits of each option. FSIS recognizes that removing all retained water informs consumers of the "true" price of poultry; no further calculation balancing water content and label price would be necessary. A combination of labeling with a limit on retained water may have greater consumer

benefits than labeling alone because the labeled product price would provide improved information to those consumers that would not use the retained water information.

Option 1—Labeling of Percentage Retained Water

Under this option, there would be no limit on retained water as long as the amount, i.e., percentage of product weight, was indicated on the product label. The same requirement would apply to both meat and poultry products. To assure prominent notification, the product name on the labeling of an affected product would be accompanied by a statement, such as "may contain up to ___ percent retained water" or "contains ___ percent retained water."

After identifying this option, the department concluded that this regulatory option would not be consistent with the existing adulteration provisions discussed earlier. In other words, unlimited retained water would constitute economic adulteration, even if identified through labeling. While this conclusion eliminates this option, this analysis uses the option as a vehicle to discuss the costs and benefits of using labels to inform consumers about retained water.

The cost analysis presented later in Section X concludes that all poultry labels could be revised at a cost of \$18.4 million. This cost would be an up-front, nonrecurring cost. The label revision costs of \$18.4 million are an estimate for the cost of revising labels for raw poultry shipped from federally inspected poultry establishments that both slaughter and further process raw poultry. The estimate of \$18.4 million does not include potential label revision costs for product that is produced in one of the slaughter/processing establishments and then further processed in a second inspected establishment that does not slaughter poultry. To illustrate, there are inspected establishments that purchase whole birds and further process these carcasses into parts of carcasses and other establishments that purchase parts of carcasses and further process these parts. The inspected establishments purchasing product that has "percentage retained water labeling" would have to label their further processed, single-ingredient, raw products unless they had data showing that the further processing they conduct removes all the retained water. Presumably, the percentage of retained water would decrease during further processing. The further processing establishments would have to label their products to indicate the presence of any remaining retained water. FSIS does not have information on the number of establishments or labels that could potentially be affected.

There are two other situations where revised labels could be required. While most raw poultry sold in retail stores is packaged and labeled in federally inspected establishments, some raw product is repackaged and labeled at the retail level. Retail stores would have to label their single-ingredient, raw products unless they had data showing that the processing and repackaging they conduct removes all retained water. Thus, there would be some

cost for labeling retained water at the retail level. Finally, there may also be a few meat labels that need to be revised since some byproducts and organ meats are now washed in water before being shipped.

There would also be the cost of establishing the level of retained water. As discussed earlier, FSIS now employs from 25 to 50 staff years measuring retained water. Inspected establishments could utilize FSIS test results or conduct their own retained water tests. If such tests are conducted by Quality Control (QC) technicians making \$35,000 annually, the cost of 25 to 50 staff years represents from \$875,000 to \$1.75 million, annually. This option would not require any reduction in the current levels of retained water. Thus, there would be no costs for modifying production practices. The cost analysis in Section X addresses the cost of establishing a minimum which is a different task than establishing the level.

The labeling of product to identify retained water benefits consumers. The information provided has value because it allows consumers to make better decisions. In the terminology of the 1979 ERS study, the labeling of retained water would help consumers establish the "true" price of poultry.

The extent of the labeling benefit, i.e., the value of labeling information to consumers, is affected by several factors. These include the type of label that will eventually be required, the number of different labels present in the marketplace and the variation in retained water within a specific production lot. The first factor affecting the value of the labeling information is the type of label statement. If the label statement indicates "up to ___ percent retained water," the consumer cannot use the information to calculate a true price per pound because the label would not specify the actual amount of retained water. The "up to ___ percent" type of label would provide consumers with general information indicating that some level of added water was present. This type of label does not provide the same incentive to minimize added water as a label indicating a specific percentage, i.e., "contains ___ percent added water."

The second factor affecting the value of labeling is the number of different labels present in the marketplace. If different establishments have different labels for different levels of retained water, consumers could be faced with a multitude of different labels making price comparisons very difficult. It is not unusual for a large supermarket to stock raw poultry from more than 10 different federally inspected establishments. While it appears reasonable to assume that a company or an establishment would prefer to use a single retained water statement for all raw product labels, it is possible that some establishments would develop alternative labels for each product, each indicating a different level of retained water. Added water content could be established on a day-to-day or production-shift basis.

A third factor affecting the value of labeling is the variation in retained water within a specific production lot. Natural

variation is a component of all food attribute labeling. Variation does appear, however, to present a greater than usual concern with retained water. Based on the 10-bird tests conducted by FSIS, the package-to-package variation could be relatively high for whole birds. In a randomly selected 10-bird test for whole broilers (average "green weight", i.e., carcass weight prior to any water absorption, was 3.6 pounds), the average retained water was 6.57 percent. The range was from less than 1.0 percent (0.95) to 14.6 percent. Only five birds were within ± 2.0 percent of the average 6.57 percent. Two individual birds exceeded the 8.0 percent limit. In a second 10-bird test of 3.2-pound broilers averaging 6.92 percent retained water, 6 of 10 were within ± 2.0 percent. Three individual birds exceeded the 8.0 percent limit. This data raises an issue concerning how a percentage labeling option would be implemented, i.e., what level would be required to appear on product labels? Would it be the average or would it be a level that included 90 or 95 percent of the individual birds?

The amount of retained water appears to vary less for turkeys. In one randomly selected 10-bird test of smaller turkeys (regulatory limit of 6.0 percent), 9 of 10 were within ± 1.0 percent of an average retained water level of 5.45 percent. In a 10-bird test of larger birds (regulatory limit 5.3 percent), 7 of 10 were within ± 1.0 percent. One bird exceeded the regulatory limit.

While the variation rate affects the value of the labeling benefit, it does not eliminate the benefit. For an individual purchase, purchasing a product labeled "2% retained water" does not guarantee more useable product than purchasing a product labeled "4% retained water." When averaged over several purchases, however, the product labeled to indicate less retained water should result in more useable product. In addition, a large portion of raw poultry is now marketed as packages of thighs, wings, breast quarters, leg quarters, and boneless, skinless breast meat, etc. For these types of packages, the bird-to-bird variation is less of a concern.

Option 2—Zero Retained Water

The Agency could establish a standard of zero retained water for all raw, single-ingredient meat and poultry products. In theory, given sufficient drip time or drain time or drying time, all raw, single-ingredient products can be returned to a "green weight." However, available data suggests that returning immersion-chilled poultry to "green weight" may not be feasible. The 1979 ERS study included data that supports the conclusion that water retained during washing and chilling does not completely drain from poultry by the time the product reaches the consumer. For the study, ERS, in conjunction with ten local weights and measures agencies, measured the percent drain in 297 retail packages of chicken from five poultry processors. All packages were whole cut-up chicken packed at establishments using immersion chilling. All brands had an average water pickup of 5 to 6 percent at the time of packaging. For the 297 packages the average drain is a percentage of labeled net weight was 3.42 percent. Assuming the product started at an

average of 5.5 percent, the product was still retaining approximately 2.0 percent absorbed water when sampled at retail. The study did not indicate how many days the product had been in distribution. One processor was shipping to retail stores on both the east and west coast. Thus, in some cases, there was considerable transportation time involved.

There was a second³ study that showed that the water loss that occurs in the plant from the time the poultry is placed in the package to the time it leaves the plant is substantially less than total retained water. During the development of the 1989 Net Weight Proposal (54 FR 9370, March 6, 1989), FSIS, in cooperation with the National Broiler Council and the National Conference on Weights and Measures, conducted a study on water loss. Data collected from ten chicken processors showed that the average water loss occurring in the plant after packaging was 1.8 percent. The study did not, however, include data on the length of time the product stayed in the plant after initial packing.

FSIS technical personnel believe that a zero standard would require the poultry industry to abandon immersion chilling because attaining zero-retained water with immersion chilling is not technically feasible. Installing air chilling or air chilling/spray systems would require major reconstruction costs for the poultry industry. There is also a potential cost associated with possible increases in pathogen levels. Studies have shown that immersion chilling reduces overall pathogen levels on poultry. If this option would force the poultry industry to abandon immersion chilling and pathogen levels increased, then there could be additional social costs associated with increases in foodborne illness. With this option there would be no need to revise product labels.

Under this option, consumers would benefit by being fully informed as to the "true" price of both meat and poultry products. No balancing of water content and label price would be necessary. However, because the benefits of better informed consumers from a zero-retained water standard are unlikely to surpass the costs, this option was eliminated.

Option 3—"Green Weight" Labeling

A variation on the concept of zero-retained water is the option where there could be no retained water in the stated weight of the product. Establishments would be required to establish a retained water level for each "lot" or shift. Scales would then have to be adjusted to account for retained water. The weight indicated on product labels would be an estimate of the "green weight" prior to the final carcass wash.

The only direct cost is the cost of establishing the amount of retained water in order to adjust scales. There would be no need to revise product labels or modify chilling practices. The major impact would be a reduction in the labeled volume of poultry production by an estimated 1.5

billion pounds. To maintain the current level of sales in dollars, the poultry industry would have to raise the wholesale price per pound by an average of 5.1 percent. Retail prices would also increase. Consumers would, most likely, perceive an increase in poultry prices. As the 1979 ERS study noted, however, changing net weight methodology, by itself, only changes that information a consumer receives but not the real cost of the product. Consumers would, however, be fully informed as to the "true" price of poultry.

A disadvantage of this option would be that the labeled weight would only be an estimate of the "green weight." The package-to-package variation would now be an issue for the accuracy of the net weight statement rather than the accuracy of a qualifying statement. There could also be considerable differences between labeled weight and packaged weight. This option would require the Agency to revise the overall system for regulating net weight accuracy.

If this option were selected, FSIS would have to reopen the net weight regulations. In 1990, after four proposals and almost two decades, FSIS published final rules for net weight labeling of meat and poultry products (55 FR 49826, November 30, 1990). In the final net weight rule, FSIS established a regulatory framework that for all compliance testing in federally inspected establishments, the net weight of raw chicken would be established using a dry tare system. In a dry tare system, both free liquid and liquid absorbed by packaging material would be included in the net weight of the product. At the same time, the rule recognized that a few State and local weights and measures authorities still prefer to conduct wet-tare compliance testing. Under a wet-tare system, the free liquid and liquid absorbed by packaging material are not counted in measuring the product weight. The final rule established a 3 percent "gray area" where if fresh poultry minus any liquids (free liquid plus liquid absorbed by any packaging material) is within 3 percent of the labeled weight, further information is sought before any determination is made. The 3 percent "gray area" applies only in localities using wet-tare testing. The task force that recommended the 3 percent gray area for raw poultry noted⁴ that the recommended level would require over pack by manufacturers supplying wet-tare localities to compensate for water lost.

Enforcement of net weight requirements is an area where Federal, State, and local authorities share responsibility and must cooperate. The enforcement procedures, as adopted by the National Conference on Weights and Measures, are published in NIST Handbook 133, Third Edition, Supplement, "Checking the Net Contents of Packaged Goods." FSIS' net weight regulations incorporate Handbook 133 by reference. The National Institute of Standards and Technology (NIST) has a statutory responsibility for "cooperation with the

³ U.S. Department of Commerce, National Institute of Standards and Technology (NIST), Report of the 73rd National Conference on Weights and Measures, NIST Special Publication 750, 1988.

⁴ U.S. Department of Commerce, National Institute of Standards and Technology (NIST), Report of the 73rd National Conference on Weights and Measures, NIST Special Publication 750, 1988.

States in securing uniformity of weights and measures laws and methods of inspection." At the same time, the FMIA and PPIA do not allow State and local jurisdictions to impose any standards that differ from those published by FSIS. In publishing the final net weight regulations in 1990, FSIS stated that the "rule is designed to enhance the ability of Federal, State, and local agencies to enhance the industry-wide use of strict net weight standards at the packing, warehouse and retail level." Although this option would enable FSIS to address economic adulteration, it was eliminated because (1) the benefits in the form of consumer information do not appear to outweigh the costs of adjusting scales and labels to show green weight, and (2) because of the need to maintain uniformity in weights and measures laws and methods of inspection.

Option 4—Retained Water Limits Based on Best Available Technology Within Traditional Production Practices

Under this option, FSIS would require all establishments to meet water limits based on the lowest levels that are currently being achieved by those establishments using the best available water-immersion chilling technology. The limit for retained water in carcass beef, pork, lamb, and goat would remain at zero. There might be some costs associated with establishing limits for the byproducts and organ meats that are now processed separately from carcasses.

FSIS recognizes that, for the poultry industry, the concept of a "minimum" cannot be separated from some definition of standard manufacturing practices that would include a reasonable drip or drain time and some reasonable minimum temperature for chiller water. Longer drip lines and lower chiller water temperatures are both factors that would increase the cost of chilling poultry.

Under this option, it is envisioned that the new limits would be established based on data from the establishments using the best technology. There would be costs for collecting and analyzing the data and costs from modifying processes to reduce water retention. This option could impose considerable costs on those establishments that do not currently have the best available technology.

The maximum allowed water level could actually be a series of levels for different types and weights of meat and poultry products. Under this option, products could not contain more than the established limits and all products containing retained water would have to be labeled indicating the presence of retained water. The costs of labeling the percentage retained water would be similar to those described under Option 1. The factors affecting the value of labeling information would still exist, but there should be fewer different labels because the range of permissible retained water levels would be reduced.

Operating the best technology so as to minimize retained water may not be consistent with minimizing pathogens. Thus, there is a potential cost associated with increased pathogen levels and increased foodborne illness.

This option would enable FSIS to effectively address economic adulteration and would provide consumers information. However, because the costs to industry to acquire the best available technology would be large and would outweigh consumer benefits, this option was eliminated. Furthermore, the option has the effect of a design standard.

Option 5—Water Limits Based on Existing Equipment

This option would require all establishments to operate their existing equipment so as to minimize retained water. As discussed in the previous option, minimums would have to be based on some reasonable limits for operating parameters. The retained water requirement for carcass meat would remain at zero since meat establishments are already operating at zero.

As with the previous option, new retained water limits are required for this option. Data would have to be collected and analyzed to establish minimum water levels for different types of equipment. There would be costs for collecting and analyzing this data, most likely greater than for the previous option. However, no establishment would have to replace equipment, as all minimums would be based on existing equipment. This option would presumably lead to a larger number of retained water requirements. FSIS technical staffs believe retained water is related to variables such as type of chiller, water temperature, time in chiller and type and level of agitation.

Retained water would have to be identified on product labels. The costs of labeling retained water would be similar to those under Options 1 and 4. The factors affecting the value of labeling would still exist. Having different minimums for different equipment would probably lead to a greater number of labeling variations.

Minimizing retained water may not be consistent with processes that minimize pathogens. Thus, there is a potential cost associated with increased pathogen levels and increased foodborne illness.

Option 5 is superior to Option 4 in that no establishment would have to replace existing equipment or processes. This factor outweighs the potentially higher cost of establishing limits and the potential decrease in the value of labeling information due to a greater number of labeling variations. Option 5 is deemed inferior to the preferred option which follows because it does not provide flexibility to the meat industry and does not integrate food safety requirements. Options 4 and 5 may lead to increased pathogen levels and increased costs of foodborne illness.

Option 6—Retained Water Limits Established by Processes Necessary To Meet Food Safety Requirements

Under this option, all establishments would be expected to meet a zero-retained water standard (i.e., Option 2) unless data demonstrate that another level is necessary to meet existing food safety standards using existing washing, chilling, and draining systems (i.e., by introducing food safety objectives to Options 4 and 5). FSIS envisions that such data could be established

on an industry-wide basis, for a specific industry sector using similar processes, or on an establishment-by-establishment basis. The data could be collected and analyzed by individual establishments or by trade associations or other groups.

There would be costs for collecting and analyzing data. For the previous option, the data would be collected to establish a minimum. For this option, the data would be collected to establish a minimum while still meeting the existing chilling requirements. Thus, the poultry industry costs for establishing the limits should be essentially the same as the costs for the previous option. The meat industry would establish limits for retained water only if they viewed it as a new lower cost option for meeting pathogen reduction performance standards. Any retained water would have to be identified on product labels. The limits on retained water would, most likely, be a series of levels for different types and weights of meat and poultry products. The costs of labeling retained water would be similar to those under Options 1, 4 and 5. The value or usefulness of the labeling will depend on the number of different limits and whether those limits are established on an industry-wide basis or on an establishment-by-establishment basis.

The actual retained water limits for this option would be based on the inevitable consequence of meeting food safety requirements with existing processes. The necessity of meeting food safety requirements would lead to equal or higher retained water levels than those based on best available technology (Option 4) or best use of existing equipment (Option 5). Since the costs of modifying production processes decrease as the level of allowed retained water increases, costs are the same or lower for this option than those for Options 4 and 5. The costs for establishing the retained water limits should be similar to those for Options 4 and 5. The labeling costs are essentially the same. For this option, there are no potential costs associated with increases in pathogen levels and foodborne illness. Thus, since the labeling benefits are essentially the same, this option is expected to have the greatest net benefits of the three options that permit limited retained water. This option was selected as the proposed rule.

X. Cost of Proposed Rule

The purpose of this section is to estimate the costs of proposed rule. The proposed rule would create three types of costs: (1) the costs for establishing water levels necessary to meet food safety requirements, (2) the costs associated with reducing retained water to such levels, and (3) the costs of revising product labels to indicate the presence of retained water. Most of the potential cost impact falls on the poultry establishments using water-immersion chiller systems. There are approximately 300 federally inspected and an estimated 65 State-inspected poultry slaughter establishments. There will also be some impact on livestock slaughter establishments and on retail stores that re-pack and re-label raw, single ingredient meat and poultry products.

Cost of Establishing Water Limits

The proposed rule would prohibit retained water in raw meat and poultry products unless the water is an inevitable consequence of the process or processes used to meet applicable food safety requirements. To establish a non-zero retained water limit, an inspected establishment or trade association or other group would have to generate supporting data. The proposal would allow such data generating studies to be conducted for an individual establishment or for an industry sector using the same or similar processing techniques and equipment.

This requirement would not appear to have a significant impact on the meat industry because the meat industry is already achieving zero retained water. This proposal would, however, provide an alternative for establishments that are having or will have trouble meeting the *Salmonella* performance standards. These establishments could utilize a full range of approved antimicrobial rinses or hot water rinses without having to worry about achieving zero retained water. If establishments can demonstrate that they need a non-zero limit to meet the *Salmonella* standards, they can utilize the flexibility provided by this rule and establish a new retained water limit as long as they indicate the presence of retained water on product labels.

It is assumed that 500 meat establishments (10% of the 5,000 affected meat establishments) would conclude that they cannot meet the new pathogen reduction standards without using a process that results in some level of retained water. The 10% estimate is from the Final RIA published with the final PR/HACCP rule (see **Federal Register** Vol. 61, No. 144, July 25, 1966, pages 38976–38977). In that analysis, FSIS referred to historical data showing control problems in from 5 to 10 percent of inspected establishments. The estimated 500 establishments having difficulty meeting pathogen reduction standards would be required to conduct water tests to establish unavoidable levels and possibly some additional *Salmonella* tests. The analysis assumes 200 hours per establishment for water tests and 100 hours to collect a sample set for *Salmonella*. The total cost would be 150,000 hours or \$3.75 million for labor and another \$1.2 million for 35,000 sample analyses. These estimates are based on cost factors from the FRIA for the PR/HACCP rule, i.e., \$25 an hour for a quality control manager and \$34 for a laboratory analysis for *Salmonella*. The average sample set for meat is approximately 70 samples considering 82 for steer or heifer carcasses and 55 for swine carcasses. The total cost for the meat establishments would be an estimated \$5 million. The costs for *Salmonella* testing and the costs of using alternative processes such as carcass washing systems have already been addressed in the FRIA for the PR/HACCP rule in the discussion of compliance costs for meeting the *Salmonella* standards (Federal Register reference noted above). The cost of establishing water limits (100,000 hours or \$2.5 million) would be additional costs. In return, this rule provides an alternative that doesn't currently exist.

FSIS does not consider air chilling an economically feasible alternative for chilling

poultry. Thus, it seems reasonable to assume that the poultry industry would conclude that immersion chilling is necessary to meet the existing chilling requirements for poultry, e.g., 9 CFR 381.66(b)(2) requires that poultry carcasses under 4 pounds shall be chilled to 40° F. within 4 hours following evisceration. It follows that the retained water necessary to meet food safety requirements is the minimum level that can be reached with existing equipment and still be in compliance with chilling requirements. There is also the possibility that the retained water necessary to meet the pathogen reduction performance standards for *Salmonella* would be higher than the level necessary to meet chilling requirements. The following discussion, however, assumes that the unavoidable retained water levels are driven by the chilling requirements.

The Agency believes that the industry already has considerable information concerning the chiller variable settings that minimize water retention. The variables of concern are chiller water temperature, water intake, total time in chiller and level of agitation. FSIS, therefore, believes the poultry industry can establish water limits for various chiller systems with minimal costs. Under current regulations (9 CFR 381.66(d)), establishments must conduct a 50-bird test to demonstrate that any change in chilling procedures does not affect compliance with existing requirements. This analysis assumes that poultry establishments could establish minimum retained water levels by conducting four 10-bird tests at ten different chiller settings for each product category. It is assumed that the average establishments would have two product categories, e.g., light hens versus heavy toms. Each test would take an estimated 2.5 hours to select birds, tag and weigh birds, and reweigh birds after chilling. (The FSIS 10-bird test takes from 40 to 60 minutes.) Time required between tests would not be considered a cost. Thus, testing would cost each plant 200 hours or \$5,000 using a quality control manager making \$25 per hour. The cost to 300 inspected establishments would be 60,000 hours or \$1.5 million. Some smaller federally inspected establishments and presumably more State inspected establishments do not use immersion chilling. They chill using ice and slush on processing tables/counters and have retained water levels below 2 percent. In the data collected from the field, two chicken establishments with annual production under 200,000 birds had retained water levels of 1.58% and 1.7%. It is assumed these smaller establishments are at a minimum level and would incur no additional cost to establish a minimum. These establishments do not appear to have any variables that could be studied during a water test.

The proposal doesn't provide specific guidance on options available for poultry processors that are already operating far below the existing standards for *Salmonella*. As an illustrative example, consider what options are available for a broiler slaughter establishment that has an unavoidable retained water level of 5 percent (due to immersion chilling for time/temperature) and

is consistently achieving *Salmonella* positive levels of around 10 percent, well below the existing standard of 20 percent. Should this establishment be able to operate at a higher retained water level if data showed that the establishment could then achieve an even lower level of *Salmonella*? Should the Agency's food safety objectives lead to a solution where any level of water would be allowed if data demonstrated a reduction in pathogens? While the current proposal does not allow such flexibility, the Agency is requesting comment on this aspect of the proposal. Under the current proposal, if FSIS lowers the pathogen reduction standards as stated in the preamble to the PR/HACCP rule, inspected establishments would have the option of increasing retained water if appropriate tests showed that such increases were unavoidable in meeting revised food safety standards.

Costs of Reducing Retained Water

If establishments are able to demonstrate that current levels of retained water are necessary to meet food safety standards, establishments would not incur costs for reducing retained water. However, to the extent that establishments cannot demonstrate that current retained water levels are necessary for meeting applicable food safety standards, significant costs could be incurred as establishments modify processes to minimize retained water levels. Reducing retained water could entail a wide range of processing modifications, depending on the type of chilling equipment currently used and amount of retained water that would have to be removed.

The Economic Research Service (ERS) conducted some preliminary analyses to begin to establish estimates of what it might cost to significantly reduce the amount of retained water in raw poultry. There are three ways to reduce retained water. The first involves holding poultry in refrigerated rooms until excess water has drained off the birds. The second involves making adjustments in the chilling process to reduce water absorption. The third involves a change in the chilling system, i.e., a move to air chilling or air chilling in combination with a water spray. As noted elsewhere in this PRIA, FSIS does not consider requirements that would mandate air chilling to be economically feasible. The existing regulations for air chilling (9 CFR 381.66(e)) require the internal temperature of the carcass to be reduced to 40 °F or less within 16 hours. There are limited data on costs of air chilling. Both reconstruction costs and operating costs would be high. The 1979 ERS study included an estimate from an industry source that air chilling uses more energy and costs about 4 cents per pound more than immersion chilling. The ERS study noted that there was only one major U.S. poultry processor using air chilling in 1979. A draft Impact Analysis Statement conducted for the 1978 proposal to reduce water use requirements for chilling stated that retail prices for air chilled birds were running approximately 20 percent higher than water chilled birds. That analysis attributed the higher retail prices to the higher capital cost and higher operating expenses.

The simplest way of viewing the cost of reducing retained water is to consider the incremental operating costs under the conditions, e.g., chiller temperature, that established the minimum unavoidable water. Such conditions could also involve optimizing water temperature and flow through the chillers, reducing the amount of agitation of the chilling medium, and reducing the "dwell time" of poultry in the chillers. If, as some believe, lower water temperature reduces water absorption, the response to tighter retained water requirements will be the installation of new or heavier compressors to lower the temperature in the chiller units. An installed additional compressor would cost an estimated \$150,000 per establishment, or an estimated \$45 million for all 300 federally inspected establishments.

FSIS does not have a method for estimating a cost for operating at conditions that establish a non-zero level of retained water necessary to meet food safety requirements. As an alternative, this PRIA estimates the cost of removing a substantial portion of the existing water using an extended draining or dripping process. One can view the estimated draining costs as an upper bound on the cost of removing water. An establishment would only use draining under conditions where the cost of draining was less than the incremental operating costs.

To extend draining or dripping time, many establishments would have to add refrigerated facilities, purchase vats for storing birds being drained, hire additional personnel, and purchase additional stock handling equipment. There would be inventory costs due to holding birds off the market for a longer time before shipment. Holding birds at inspected establishments would also reduce the corresponding retail shelf life.

The ERS staff developed some cost estimates for holding poultry based on the following industry input:

- One common method of draining uses stainless steel vats at a cost of \$1,000 each.
- Vats hold approximately 500 chickens or 100 turkeys.
- Cooler space costs \$125 per square foot.
- Vats can be stacked two high.
- Stacked vats with aisles require 12 square feet of space per vat.
- Forklifts to move vats cost \$24,000 each.

With the above factors in mind, one can address the questions of: "What are the fixed costs of draining a substantial amount of absorbed water from poultry?"

The Daily Moisture Records sometime include a record of the additional drain time required. The time varies considerably probably depending on the initial water level, the drain configuration, and the location of the excess water, i.e., under skin versus between muscle tissue or within muscle tissue. The available data, for cases where young chickens were more than 1 percent over the limit, indicates that it can take from 1/2 to 3 1/2 hours to drain one percent. In two cases where broilers exceeded the 12 percent regulatory limit by more than 4 percent, the required drain time was approximately 12 hours. Program personnel estimate that the drain time per

percent increases as the birds approach "green weight," i.e., it takes longer to drain from 8 to 4 percent than it does from 12 to 8 percent. Thus, it seems reasonable to conclude that a 12-hour drain would be the minimum time required to remove most of the retained water from chickens.

Most of the drain times for turkeys ranged from 1/2 to 1 hour on an "hour per percentage reduction" basis. However, two cases showed drain times in the 10 to 11 hours per percentage reduction range. All of the turkey violations noted were less than 1 percent above the existing limit whereas some of the chickens started at water levels 4 to 5 percentage points above existing limits.

The existing data from water control efforts indicates that it could take at least 12 hours to remove a substantial portion of the retained water in chickens. The 12-hour estimate is based on starting at a relatively high percentage and lowering the level by 4 to 5 percentage points. Thus, a 12-hour drain would reduce the existing level from 5 to 6.5 percent by an amount less than 4 to 5 percentage points. To drain chickens for 12 hours is somewhat equivalent to saying the industry would need to add the extra capacity to drain half a day's production, since most chicken is processed in establishments running two shifts.

Since average chicken production is 29.5 million birds per day (assuming a 260-day work year), half a day's production is 14.75 million birds. Using the above factors, this would require 29,510 vats at \$29.5 million; 354,120 square feet of cooler space at \$44.3 million; and \$4.8 million of forklifts assuming the largest 200 chicken establishments would each require an additional forklift. In this 12-hour case, the total fixed costs would be \$78.6 million.

Similarly, half a day's production for turkeys is 557,000 birds requiring 5,570 vats at a cost of \$5.57 million and cooler space at a cost of \$8.36 million. Assuming that the largest 70 turkey establishments would require an additional forklift at a total cost of \$1.68 million, the total fixed costs for draining all turkeys for 12 hours would be \$15.6 million. Thus, total fixed costs for a 12-hour drain for chickens and turkeys are estimated at \$94.3 million.

One can argue that large plants already have the capacity to store a shift's production. This occurs today when limits are exceeded. The MPI Manual provides, as an alternative to calculated drain time, a 24-hour continuous drain at 40° F. or below before shipping. The data reviewed for this analysis included two such cases. Today's excess capacity can also be viewed as a contingency capacity that would still be required over and above any additional capacity needed to achieve an overall water reduction.

This analysis has not attempted to estimate the complete variable costs of holding poultry to drain. Variable costs would include increased labor costs, increased utility costs, increased overhead, and the cost of carrying additional inventory. Holding half a day's production is equivalent to continually storing a wholesale value of \$37 million in poultry (\$19.2 billion divided by 520 shifts). At a 10 percent interest rate, the

annual cost of draining poultry for 12 hours would be \$3.7 million.

It would also seem reasonable to assume a minimum average of one additional employee per establishment. Three hundred employees at \$21,500 per year (average wage in chicken slaughter establishments of \$10.34 per hour) would result in an annual operating cost of \$6.4 million. Thus, FSIS estimates the minimum variable costs at \$10.1 million (\$3.7 million plus \$6.4 million) per year if the response is to drain poultry.

The above analysis has provided an estimate of the cost of reducing retained water by a "substantial" amount, i.e., an amount that can be equaled to a 12-hour drain. Available data indicates that a 12-hour drain could reduce overall water by an amount somewhat less than 4 to 5 percentage points at an estimated first year cost of \$104.3 million (\$94.2 plus \$10.1 million) and recurring annual costs of at least \$10.1 million.

Cost of Revising Labels

The cost of revising labels is a relatively easy cost to quantify. For previous rulemakings, FSIS has collected survey data on the costs of label revisions. Labeling changes have been the subject of several rulemakings in recent years.

The proposed rule would entail a one-time change in affected raw meat and poultry product labels to add a statement of the percentage of retained water in the product next to the product name. Establishments would have to prepare or order new product labels to comply with this requirement. FSIS would allow establishments to run out their stocks of existing product labels before the proposed labeling requirements would take effect. The establishments would, therefore, not incur costs of discarding existing label inventories.

The cost of revising a label varies widely depending on the type of label, the number of colors affected, and the printing process used. Adding a water content statement is the lowest cost type of modification because it involves single color printing and no graphic art. The cost of revising labels is an up-front, nonrecurring cost. This analysis uses an average cost of \$1,000 for each product label that must be modified. The cost can vary widely, however. Discussions with turkey industry personnel indicate that it can cost from \$1,500 to \$2,000 to change a label for one of the opaque plastic bags used to package whole turkeys. In contrast, a 1992 survey conducted in conjunction with nutrition labeling regulations found that many small firms use simplified labels that can be revised for less than \$200 per label.

The primary impact will be on the approximately 300 federally inspected and 65 State inspected establishments that slaughter and pack raw poultry. Currently, 135 of the federally inspected establishments are considered large entities, according to Small Business Administration (SBA) criteria (establishments having more than 500 employees). The cost to these "large" establishments of changing labels is estimated at approximately \$12.5 million. There are another 168 federally inspected poultry establishments that slaughter and

pack raw poultry. The estimated labeling cost for these establishments is \$5.9 million. The method for estimating these costs is illustrated in Table 2.

TABLE 2.—COSTS OF REVISING PRODUCT LABELS FOR POULTRY ESTABLISHMENTS

Establishment category	Number of establishments	Average number of labels	Cost at \$1,000 per label (\$000)
Large Chicken	115	^a 100	\$11,500
Large Turkey	20	50	1,000
Small Poultry	168	35	5,880
Total	303	18,380

^a Available information indicates large chicken plants have more unique labels, but many are modified by changing a retail chain specific sticker on a base label. A single modification to a base label in effect revises many labels.

There may be some labeling costs to the meat industry. Some edible meat byproducts and organ meats are washed and cleaned before being shipped in commerce and may be chilled or packed in water to preserve their safety and wholesomeness. Tripe, for example, is bleached and scalded before being shipped. Some organ meats, such as chitterlings (swine intestines), are chilled and packed in water. The Agency does not have any data to estimate the number of establishments or number of labels affected. Similarly, the analysis has not accounted for separate packaging of poultry giblets. Poultry giblets, including livers, hearts, and gizzards (and necks, though strictly speaking, necks are not giblets) are washed and chilled in water before being packaged and shipped.

There will also be some labeling cost to retail stores that repack raw products. They would have to apply some form of label, most likely a sticker, to store packaged product that has retained water. Today, most raw poultry sold from retail meat counters is packaged under Federal inspection. Thus, the overall retail impact should be minimal. Many large supermarkets also prepare fried chicken or rotisserie chicken that is marketed through their deli departments. Obviously, if they prepare the product as ready-to-eat product, it would no longer have to be labeled. The same would be true for products that are marinated or otherwise seasoned and marketed as convenience ready-to-cook products.

XI. Benefits of Proposed Rule

The proposed rule provides FSIS with the necessary regulatory limits to prevent economic adulteration and misbranding due to excessive retained water. Preventing economic adulteration provides a consumer benefit. Quantifying that benefit is beyond the scope of this analysis. Another consumer benefit results from the additional labeling information that would be available to household consumers and other customers to help them in their purchasing decisions. As noted in Section VII, customers are currently not being informed as to the true price of poultry. Customers would benefit from having improved knowledge of product quality, in terms of meat or poultry meat content.

The proposed rule would provide the meat industry with additional flexibility for meeting pathogen reduction performance

standards. Meat processors would be able to utilize pathogen reduction techniques without having to be concerned about meeting the existing zero retained water requirement.

This proposed rule would also provide affected establishments with increased flexibility to choose the most appropriate means for implementing HACCP plans for protecting the safety of raw product while minimizing the potential for economic adulteration. By removing certain command-and-control requirements and providing increased flexibility for HACCP implementation, this proposal could reduce HACCP implementation costs.

As discussed in the background section, this proposal would eliminate many requirements, including the following:

- The requirement that poultry establishments must provide FSIS with a description of all chilling and freezing procedures.
- The requirement that poultry establishments must notify FSIS before any changes in chilling procedures are implemented and provide FSIS with test results demonstrating the effectiveness of any such changes.
- The existing requirements that meat carcasses cannot show any weight gain resulting from the use of carcass spray systems.
- The existing water intake requirements.

Retail stores could benefit from reduced water. While discussions with retailers indicate a primary concern with packaging that doesn't leak, reduced water should help prevent leakage which leads to costs of cleaning retail counters.

XII. Effect on Product Quality

FSIS is aware that a substantial change in retained water could have an effect on product quality and performance. Certainly, consumers have become accustomed to purchasing fresh poultry that is very moist and presumably could have a lot less retained water and still have a moist surface. FSIS is not aware of any studies concerning how water level affects cooking properties, flavor, shelf life, or visual attributes. Discussions with officials in the retail industry indicate that they do frequently hear consumer complaints concerning excess water in packages. FSIS is interested in comments providing any information as to

whether poultry without retained water would be too dry after cooking or whether consumers would select packages if the product appeared less moist or if lower water would be perceived as being less fresh. Since most meat products do not currently have retained water, FSIS assumes that industry would conduct marketing studies that would demonstrate the viability of product with added water before any production practices were changed.

XIII. Aggregate Market Effects

Comparative statics analysis provides insight into the qualitative impacts of the proposed rule on the poultry and meat markets. Focusing first on the unambiguous effects on costs of production it is assumed that for the moment the rule has no direct effect on consumer demand. The analysis also assumes that there will be no direct effect on the meat market. The rule will increase the cost of production for poultry. At a minimum there will be cost increases resulting from developing and conducting the protocols and from adding information on water levels to the product label. Costs of production will increase more if poultry plants have to undertake steps to reduce water by adding new equipment, constructing facilities to drain poultry or operating existing equipment at higher costs. In a comparative statics analysis, higher costs of production would be represented by a decrease in the supply of poultry. The result in the poultry market would be a new equilibrium price that would be higher and a new equilibrium quantity that would be lower. There would be an effect on the meat market because meat is a substitute for poultry. Higher poultry prices would lead to an increased demand for meat with the result that both the new equilibrium price and equilibrium quantity consumed of meat would be higher. Thus, compared to the present situation, the proposed rule would result in higher prices for both poultry and meat, with less poultry consumed and more meat consumed.

Consider now the direct effect of the proposed rule on demand for poultry. There are two effects which may affect demand for poultry. First, the rule is expected to result in drier poultry being sold, that is, on average, the retained water in poultry will be lower. Second, labels on retail packages of poultry will inform consumers as to the

maximum retained water permitted in the plant from which the poultry in a retail package was shipped. If consumers consider drier poultry a desirable product quality, this would increase the demand for poultry. This would lead to a higher equilibrium price for poultry. However, the new equilibrium quantity consumed would be indeterminate because of the simultaneous decrease in supply described earlier. Again, the expected higher equilibrium price for poultry will lead to new higher equilibrium price and quantity consumed in the meat market.

The effect of label information on consumer demand for poultry is unclear. Consumers could react to label information showing the percentage retained water by reducing demand for poultry. The reasoning being that consumers will perceive the product as less desirable. If this is the consumer reaction, it would work against the demand increasing effect of drier poultry. In such cases comparative statics analysis cannot predict unambiguously the new equilibrium price and quantity consumed of poultry nor the effect on the meat market. However, consumers might react to label information by increasing poultry demand. An argument for this reaction is that consumers have greater assurance that the package of poultry they purchase is of an acceptable water level. Currently, unless consumers are aware of FSIS water regulations, they have no objective measure of the amount of retained water. For example, consumers who perceived poultry as high in water say, 12 percent, might react favorably

to label information reporting a 6 percent maximum and increase demand for poultry. It seems likely that consumers will use label information to select among poultry supplied from plants with different water limits.

The analysis of costs considered the possibility that some meat plants would not be able to meet the new pathogen reduction standards without using a process that results in some level of retained water. A comparative statics analysis of the meat market would parallel what has been presented for poultry.

Comparative statics analysis can provide insights into the qualitative effects of changes that affect supply and demand. Insights into the magnitude of these effects would require quantitative specifications of supply and demand relationships that incorporate the variables of interest. FSIS is not aware of empirical specifications that would be applicable to analyzing this rule.

Data on the aggregate supply and use can provide additional insight into the effects of this rule on the poultry and meat markets. It was estimated that the cost of the proposed rule for poultry was \$1.5 million for establishing water limits, \$104.3 million if plants had to reduce water, and \$18.4 million for revising labels. Total first year cost could be as high as \$124.2 million. This compares to an estimated \$34.5 billion spent by U.S. consumers on poultry in 1997. In percentage terms, first year costs would represent 0.36 percent of aggregate consumer expenditures on poultry or about one half cent per pound of retail weight. In subsequent years,

recurring costs are \$10.1 million, corresponding to 0.03 percent of consumer expenditures and 0.04 cents per pound.

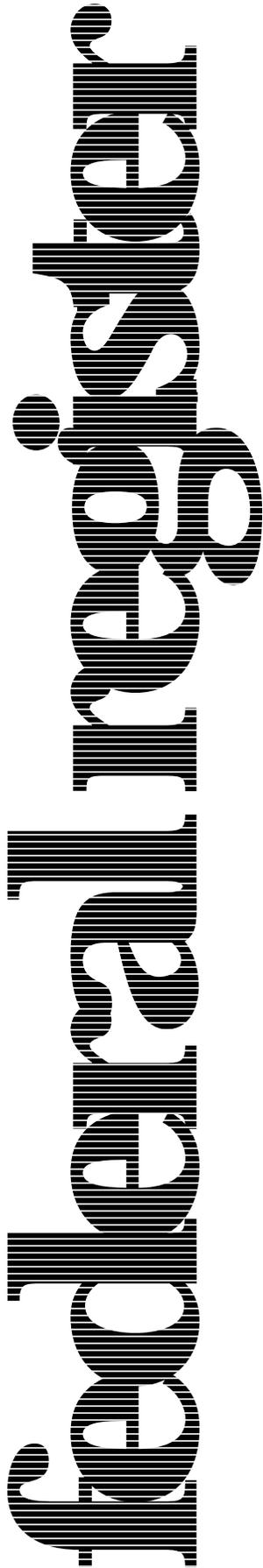
Estimated costs of the rule for meat were \$2.5 million for establishing water levels. No quantitative estimates are provided for reducing water or for labeling but these are expected to be quite small. Aggregate consumer expenditures on meat are estimated at \$80.3 billion dollars in 1997. The quantity consumed on a retail weight basis was about 30.8 billion pounds.

The proposal is not expected to have significant impacts on international trade. Like consumers, trading partners would benefit from additional information that would facilitate purchasing decisions. Countries exporting poultry to the United States would have to have equivalent systems. Currently, annual poultry imports are about 5 million pounds. Any imports containing retained water would have to have product labeling indicating the presence of that water.

Foreign buyers can develop their own purchase specifications in the area of retained water. FSIS is aware that one large domestic customer requires that product weight be adjusted downward based on the results of a 48 hour drain. In other words, if a sample of birds drains "x" percent in 48 hours, the product weight must be reduced by "x" percent.

[FR Doc. 98-24309 Filed 9-8-98; 12:22 pm]

BILLING CODE 3410-DM-P



Friday
September 11, 1998

Part VI

**Department of
Housing and Urban
Development**

**Funding for Fiscal Year 1998: Capacity
Building for Community Development and
Affordable Housing; Notice**

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

[Docket No. FR-4289-N-03]

**Office of the Assistant Secretary for
Community Planning and
Development; Funding for Fiscal Year
1998: Capacity Building for Community
Development and Affordable Housing**

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of funding for fiscal year 1998.

SUMMARY: A recently enacted appropriation provided \$15 million in Fiscal Year 1998 funds for activities authorized in section 4 of the HUD Demonstration Act of 1993 as in effect immediately before June 12, 1997 (Pub. L. 103-120, 107 Stat. 1148, 42 U.S.C. 9816 note). The funds are to be used for capacity building for community development and affordable housing—provided that at least \$5,000,000 of the funding is used in rural areas, including tribal areas.

Section 4 authorizes the Secretary to establish by notice such requirements as may be necessary to carry out its provisions. This notice, which takes effect upon issuance, indicates that HUD will equally divide the \$15 million appropriated for this capacity building initiative between the Enterprise Foundation and the Local Initiatives Support Corporation (LISC). Each organization will match the HUD assistance provided with resources from private sources in an amount equal to three times its share, as required by section 4 of the 1993 Act. Each organization will use at least \$2.5 million of its \$7.5 million share for activities in rural areas, including tribal areas.

This notice also provides details regarding administrative and other requirements which shall apply to this program.

FOR FURTHER INFORMATION CONTACT: Penelope G. McCormack, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7216, Washington DC 20410, Telephone Number (202) 708-3176, Ext. 4391, TTY Number: (202) 708-2565. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

1. Authority

The Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act (Pub. L. 105-65, 111

Stat. 1344, October 27, 1997) (VA/HUD FY 1998 Appropriations Act) makes \$15 million available from the community development grants program for capacity building for community development and affordable housing as authorized by section 4 of the HUD Demonstration Act of 1993 (Pub. L. 103-120, 107 Stat. 1148, 41 U.S.C. 9816 note.) HUD will provide this assistance through Enterprise and LISC "to develop the capacity and ability of community development corporations and community housing development organizations to undertake community development and affordable housing projects and programs."

2. Background

In Fiscal Year 1994, HUD provided \$20 million to Enterprise and LISC through The National Community Development Initiative (NCDI) as authorized by section 4 of the HUD Demonstration Act of 1993. In FY 1996, \$10 million for NCDI was authorized by section 12 (b)(3) of the Housing Opportunity Program Extension Act of 1996 (Pub. L. 104-120, 110 Stat. 845, March 28, 1996). In accordance with these statutes, HUD divided both appropriations equally between Enterprise and LISC. HUD published a notice on March 30, 1994, at 59 FR 14988, which sets forth the requirements for these funds.

In FY 1997, \$30.2 million was authorized by the FY 1997 Emergency Supplemental Appropriations Act (Pub. L. 105-18, 111 Stat. 198 and 201, June 12, 1997). HUD published a notice on January 30, 1998, 63 FR 5220, which contained requirements for these funds which were made available to Enterprise, LISC, Habitat for Humanity and Youthbuild USA. On May 29, 1998 at 63 FR 29418, HUD published a revision to the January 30, 1998 notice. Under these notices, Enterprise and LISC were allocated funding to be used either for new activities or to continue NCDI activities which received funding under the notice dated March 30, 1994 and grant agreements pursuant to it. Funding used to continue NCDI activities was governed by the requirements of the **Federal Register** funding notice dated March 30, 1994.

Today's notice contains requirements for the newly appropriated \$15 million. These funds may be used for new activities or to continue NCDI activities that received funding under the notice dated March 30, 1994 and grant agreements pursuant to it. Funding used to continue NCDI activities is governed by the requirements of the March 30, 1994, **Federal Register** funding notice.

3. Allocation and Form of Awards

The 1998 VA/HUD FY 1998 Appropriations Act provides \$15 million for activities authorized by Section 4. In accordance with congressional intent, Enterprise and LISC will each be awarded \$7.5 million. HUD has determined that LISC and Enterprise were the appropriate organizations to be funded prior to the amendments made effective on June 12, 1997. Therefore, the \$15 million made available by the FY 1998 Appropriations Act is limited to LISC and Enterprise. In addition, each of the two organizations will use \$2.5 million of its share for activities in rural areas, including tribal areas.

4. Eligible Activities

Eligible activities under this award include:

(a) Training, education, support, and advice to enhance the technical and administrative capabilities of community development corporations (CDCs) and community housing development organizations (CHDOs) including the capacity to participate in consolidated planning and continuum of care homeless assistance efforts that help ensure community-wide participation in assessing area needs, consulting broadly within the community, cooperatively planning for the use of available resources in a comprehensive and holistic manner, and assisting in evaluating performance under these community efforts;

(b) Loans, grants, development assistance, predevelopment assistance, or other financial assistance to CDCs/CHDOs to carry out community development and affordable housing activities that benefit low-income families and persons, including the acquisition, construction, or rehabilitation of housing for low-income families and persons, and community and economic development activities which create jobs for low-income persons; and

(c) Such other activities as may be determined by Enterprise and LISC in consultation with the Secretary or his designee.

5. Matching Requirements

As required by section 4 of the 1993 Act, this \$15 million appropriation is subject to each award dollar being matched by three dollars in cash or in-kind contributions to be obtained from private sources. Each of the organizations receiving these funds will document their proportionate share of matching resources, including resources committed directly or by a third party

to a grantee or subgrantee after October 27, 1997 to conduct activities.

In-kind contributions shall conform to the requirements of 24 CFR 84.23.

6. Administrative and Other Requirements

The award will be governed by 24 CFR part 84 (Uniform Administrative Requirements), OMB Circular A-122 (Cost Principles for Nonprofit Organizations), and OMB Circular A-133 (Audits of States, Local Governments, and Non-Profit Organizations).

Other requirements will be detailed in the terms and conditions of the grant agreement provided to grantees, including the following:

(a) Each grantee will submit to HUD a specific work and funding plan for each community showing when and how the federal funds will be used. The work plan must be sufficiently detailed for monitoring purposes and must identify the performance goals and objectives to be achieved. Within 30 days after submission of a specific work plan, HUD will approve the work plan or notify the grantee of matters which need to be addressed prior to approval, or the work plan shall be construed to be approved. Work plans may be developed for less than the full dollar amount and term of the award, but no HUD-funded costs may be incurred for any activity until the work plan is approved by HUD. All activities are also subject to the environmental requirements in paragraph 6 (f) of this notice.

(b) The grantees shall submit to HUD an annual performance report due 90 days after the end of each calendar year, with the first report due on March 31, 1999. Performance reports shall include reports on both performance and financial progress under work plans and shall include reports on the commitment and expenditure of private matching resources utilized through the end of the reporting period. Reports shall conform to the reporting requirements of 24 CFR part 84. Additional information or increased frequency of reporting, not to exceed twice a year, may be required by HUD any time during the grant agreement if HUD finds such reporting to be necessary for monitoring purposes.

To further the consultation process and share the results of progress to date, the Secretary may require grantees to present and discuss their performance reports at annual meetings in Washington, DC during the life of the award.

(c) The performance reports must contain the information required under

24 CFR part 84, including a comparison of actual accomplishments with the objectives and performance goals of the work plans. In the work plans each grantee will identify performance goals and objectives established for each community in which it proposes to work and appropriate measurements under the work plan such as: the number of housing units and facilities each CDC/CHDO produces annually during the grant period and the average cost of these units. Provided, however, that when the activity described in a work plan is not to be undertaken in a single community that a report indicating the areas in which the activity will be undertaken, along with appropriate goals and objectives, will be provided when that information is available. The performance reports will also include a discussion of the reasonableness of the unit costs; the reasons for slippage if established objectives and goals are not met; and additional pertinent information.

(d) A final performance report, in the form described in paragraph (c) above, shall be provided to HUD by each grantee within 90 days after the completion date of the award.

(e) Financial status reports (SF-269A) shall be submitted semiannually.

(f) Environmental review. Individual projects to be funded by these grants may not be known at the time the overall grants are awarded and also may not be known when some of the individual subgrants are made. Therefore, in accordance with 24 CFR 50.3(h), the application and the grant agreement must provide that no commitment or expenditure of HUD or local funds to a HUD-assisted project may be made until HUD has completed an environmental review to the extent required under applicable regulations and has given notification of its approval in accordance with 24 CFR 50.3(h).

8. Application Content

Grantees will be required to file an application containing the following:

(a) Application for Federal Assistance (OMB Standard Form 424), Non-construction Assurances (SF-424B), Certification Regarding Drug-Free Workplace Requirements, Certification Regarding Lobbying and the Fair Housing and Equal Opportunity certification described in section 9(f) of this notice;

(b) A Summary Budget for the amount of funds being requested as described in section VI (10) of the "NOFA for Consolidated Technical Assistance for Community Planning and Development (CPD) Programs; Notice," published at

59 FR 33842, 33848, on June 30, 1994 and specifying any amounts to be committed to NCDI activities under the notice dated March 30, 1994 and grant agreements pursuant to it.

9. Other Matters

(a) *Environmental Impact.* A Finding of No Significant Impact with respect to the environment has been made in accordance with the Department's regulations at 24 CFR part 50, which implements section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays at the Office of the Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410.

(b) *Wage Rates.* Unless triggered by other Federal funds for a project under this grant, the requirements of the Davis-Bacon Act do not apply.

(c) *Relocation.* The Uniform Relocation Act applies to anyone who is displaced as a result of acquisition, rehabilitation, or demolition, for a HUD-assisted activity.

(d) *Federalism.* The General Counsel, as the Designated Official under section 7(a) of the Executive Order 12612, *Federalism*, has determined that the policies contained in this funding notice will not have substantial direct effects on States or their political subdivisions or on the distribution of power and responsibilities among the various levels of government. Specifically, this notice makes funds available through specific entities for specific activities, as required by statute, and does not impinge upon the relationships between the Federal government, and State and local governments.

(e) *Prohibition Against Lobbying Activities.* Applicants for funding under this notice are subject to the provisions of section 319 of the Department of Interior and Related Agencies Appropriation Act for Fiscal Year 1991, 31 U.S.C. 1352 (the Byrd Amendment) and to the provisions of the Lobbying Disclosure Act of 1995, P.L. 104-65 (December 19, 1995).

The Byrd Amendment, which is implemented in regulations at 24 CFR part 87, prohibits applicants for Federal contracts and grants from using appropriated funds to attempt to influence Federal Executive or legislative officers or employees in connection with obtaining such assistance, or with its extension, continuation, renewal, amendment or modification. The Byrd Amendment applies to the funds that are the subject

of this notice. Therefore, applicants must file with their application a certification stating that they have not made and will not make any prohibited payments and, if any payments or agreement to make payments of nonappropriated funds for these purposes have been made, a form SF-LLL disclosing such payments must be submitted.

The Lobbying Disclosure Act of 1995, P.L. 104-65 (December 19, 1995), which repealed section 112 of the HUD Reform Act and resulted in the elimination of

the regulations at 24 CFR part 86, requires all persons and entities who lobby covered Executive or Legislative Branch officials to register with the Secretary of the Senate and the Clerk of the House of Representatives and file reports concerning their lobbying activities.

(f) *Fair Housing and Equal Opportunity*. Applications must contain a certification that the applicant and all subgrantees shall comply with the requirements of the Fair Housing Act, title VI of the Civil Rights Act of 1964,

section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, and will affirmatively further fair housing.

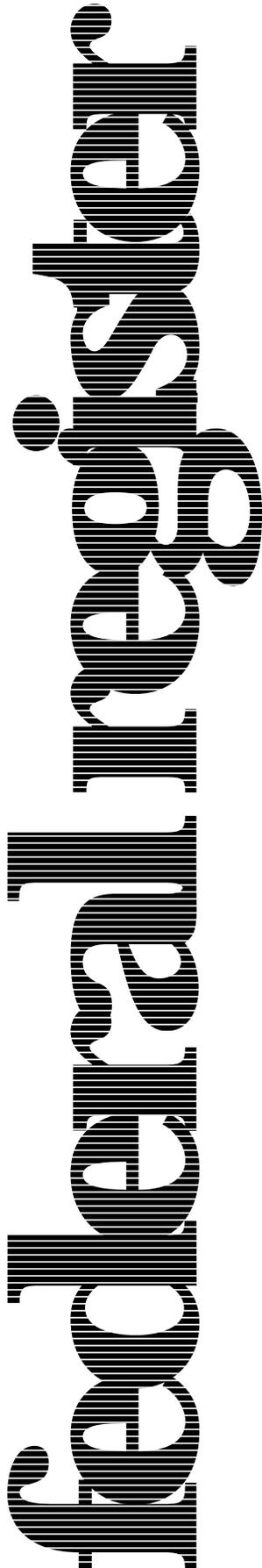
Authority: Section 4 of the HUD Demonstration Act of 1993, Pub. L. 103-120, 42 U.S.C. 9816 note), as amended and Pub. L. 105-65, 111 Stat. 1356.

Dated: September 2, 1998.

Saul N. Ramirez, Jr.,
Assistant Secretary for Community Planning and Development.

[FR Doc. 98-24416 Filed 9-10-98; 8:45 am]

BILLING CODE 4210-29-P



Friday
September 11, 1998

Part VII

**Department of
Housing and Urban
Development**

24 CFR Parts 50 and 1005
Loan Guarantees for Indian Housing;
Direct Guarantee Processing; Interim Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**24 CFR Parts 50 and 1005**

[Docket No. FR-4241-I-01]

RIN 2577-AB78

Loan Guarantees for Indian Housing; Direct Guarantee Processing

AGENCY: Office of the Secretary, HUD.

ACTION: Interim rule.

SUMMARY: This interim rule establishes for the section 184 Indian Housing loan guarantee program a new "direct guarantee" procedure modelled in part on the FHA single family mortgage insurance "direct endorsement" procedure, under which HUD staff are not involved in the processing or approval of individual loans before closing.

DATES: Effective date: October 13, 1998.

Comment Due Date: November 10, 1998.

ADDRESSES: Interested persons are invited to submit comments regarding this interim rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500. Comments should refer to the above docket number and title. A copy of each comment submitted will be available for public inspection and copying during regular business hours at the above address. Facsimile (FAX) comments are not acceptable.

FOR FURTHER INFORMATION CONTACT: Karen Garner-Wing, Director, Office of Loan Guarantees, Office of Native American Programs, Department of Housing and Urban Development, 1999 Broadway, Suite 3390, Denver, CO 80202. Telephone: (303) 675-1600. (This is not a toll-free number.) For hearing- and speech-impaired persons, this number may be accessed via TTY by calling the Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:**Background**

HUD implemented its section 184 loan guarantee program for Indian Housing through an interim rule published at 59 FR 42732 (August 18, 1994) to add a new 24 CFR part 955. The interim rule anticipated that HUD would be involved in loan underwriting decisions. Although the rule did not clearly say when HUD's involvement would occur—before loan closing or simply before the certificate of guarantee was issued—HUD anticipated

that a HUD Field Office would review the application and make its underwriting judgment before the loan closing rather than through a post-closing loan review procedure. Based on its pre-closing review, HUD would issue a commitment to guarantee and the lender would close the loan in accordance with this commitment. The commitment procedure was mentioned in interim § 955.105(d)(2), which restricts advances on construction loans to advances made as provided in the commitment.

HUD issued a final version of part 955 on March 6, 1996 (61 FR 9052). In addition to responding to public comments on the interim rule, HUD used the final rule as an opportunity for including part 955 in HUD's efforts to streamline its rules by eliminating repetition of statutory requirements or provisions that could appropriately be handled in a non-regulatory manner through administrative issuances. However, a fuller "Guide to Loan Guarantees for Indian Housing" including the interim rule material removed in the final rule was published as an Appendix to the final rule. HUD did not indicate in the final rule any intention to change its approach to processing loans for guarantees. The final rule also retained the reference to "commitment" in § 955.105(d)(1).

For these reasons the Department considers it appropriate to offer an opportunity for public comment prior to final adoption of a "Direct Guarantee" alternative procedure which would dispense with commitments and pre-loan closing underwriting review by HUD, with HUD review occurring after loan closing but before guarantee of the loan. As explained below, however, there would be no public benefit in delaying the availability of the procedure to those mortgagees and mortgagors who could benefit from it immediately upon publication of this interim rule.

This interim rule reflects changes made and discussed as part of the recent final rule entitled "Implementation of the Native American Housing Assistance and Self-Determination Act," published on March 12, 1998 at 63 FR 12334. In particular, part 955 has been redesignated as part 1005.

Content of Rule

The proposed Direct Guarantee procedure for the Indian Housing Loan Guarantee program resembles the Direct Endorsement (DE) program for FHA single family mortgage insurance. The Department has determined that it is not necessary for most of the processing details of this similar Direct Guarantee

program to be published in regulatory form. The key feature of the new procedure, as described in § 1005.106(a), is that the Department's approval of the loan will occur after the loan is closed but before the loan is guaranteed. Instead of adding extensive new material this interim rule makes only those changes needed to avoid conflict between part 1005 and the intended manner of implementation, and to provide a sound legal basis for any necessary administrative actions against lenders approved for the Direct Guarantee procedure. As an Appendix to this rule, the Department is updating the "Guide to Loan Guarantees for Indian Housing" that was published with the final version of part 955 (now part 1005), to reflect recent legislation and the availability of the new alternative Direct Guarantee procedure and to make other minor improvements. The updated Appendix will not be included in the Code of Federal Regulations.

One streamlining change is made: § 1005.111 is shortened substantially by removing language that repeated verbatim the provisions of section 184(j) regarding housing safety and quality standards.

The following other technical changes or corrections to part 1005 are made:

1. In § 1005.103, the definition of "mortgage" is clarified to include a loan with collateral other than the home. A new definition of "trust or restricted land" is added with the same meaning as "trust land" in section 184(k)(9) of the statute. The rule currently uses the terms "trust land", "trust and restricted land" and "trust land or restricted Indian land" to describe the same property. By adopting a single defined term and making conforming changes in §§ 1005.101, 1005.105(f) and 1005.107(b), the Department intends to clarify that the same rule provisions apply to land held in trust by the United States and other land not held in trust but subject to a restriction against alienation imposed by the United States.

2. Sections 1005.104(d) and (e) are amended to clarify that they do not include lenders approved by the Secretary under other authorities, such as Title I lenders approved under 24 CFR part 202.

3. Section 1005.105(d)(2) is amended to provide that loan advances are to be made as provided in the building loan agreement instead of the commitment, and the term "building loan agreement" is substituted for "loan agreement" in § 1005.105(d)(3).

4. Section 1005.105(d)(3) is corrected to restore a reference to advancement to the mortgage that was inadvertently

omitted, and a conforming change is made to § 1005.105(d)(4).

5. The introductory language of § 1005.107(b) is amended to indicate that a leasehold of trust land rather than the land itself can be collateral, and a reference in § 1005.107(b)(2) to the "loan form" is corrected to refer to the "lease form".

6. The rule makes a non-substantive revision to § 1005.112 to improve clarity.

This interim rule also amends HUD's environmental rules at 24 CFR 50.19(b)(17) (as amended by 62 FR 15802, April 2, 1997) to apply to the Direct Guarantee procedure the same categorical exclusion from environmental review under the National Environmental Policy Act of 1969 (NEPA) and other Federal environmental laws and authorities that currently applies to the FHA DE program and the recently announced FHA Lender Insurance program for single family mortgages. As with those programs, under the Direct Guarantee procedure HUD will have no involvement in the processing of an individual loan before it has closed, so that HUD cannot prevent a loan closing on the basis of an assessment of environment factors presented by a particular property. As with DE and Lender Insurance mortgages, Direct Guarantee loans will be subject to requirements for the purchase of flood insurance on structures located in special flood hazard areas mapped by the Federal Emergency Management Agency, a prohibition of loan guarantees on properties in the Coastal Barriers Resources System, and a requirement for notice to purchasers of properties located in airport clear zones.

The rule also restores language that was deleted in a 1996 streamlining of 24 CFR part 50 to make clear that the categorical exclusion of § 50.19(b)(17) applies only when HUD does not review or approve a loan before the completion of construction or rehabilitation and the loan closing. In accordance with this limitation, the categorical exclusion would not apply in those Direct Guarantee cases where HUD guarantees a loan for which advances will be made during construction; accordingly, before approving loans in those cases HUD will be required to comply, where applicable, with the related Federal laws and authorities listed in § 50.4. A separate categorical exclusion from the NEPA requirements of 24 CFR part 50 will apply (§ 50.20(a)(3)).

In a related change, the current § 1005.105(e) is revised to reflect the new Direct Guarantee procedure and a new sentence is added to provide that

procedures similar to the FHA builder certification procedures in 24 CFR 203.12(c)(2) will be required for proposed or new construction. Under those procedures, a builder reviews the area for environmental problems and hazards.

Findings and Certifications

Justification for Interim Rule

It is the general practice of the Department to provide a 60-day public comment period on all rules in accordance with 24 CFR part 10. However, part 10 provides that prior public procedure will be omitted if HUD determines that it is "impracticable, unnecessary, or contrary to the public interest" (24 CFR 10.1). HUD considers that this standard has been met.

The interim rule does not require any lender currently participating in the Indian Housing Loan Guarantee program, or that may desire to participate in the future, to use the Direct Guaranty procedure. Commitments to guarantee will continue to be available from HUD in advance of loan closing for eligible loans upon application by the lender. The interim rule simply makes available a second method of processing, which HUD believes will have clear advantages for many lenders and borrowers, by reducing delays that can result from limited HUD resources in both pre-loan review and in post-loan issuance of the guaranty. Delaying the availability of this new procedure for those mortgagees who regard it as advantageous would not be in the public interest.

In the interest of obtaining the fullest participation possible in determining the proper means of administering the Indian Housing Loan Guarantee program, the Department invites public comment on the interim rule. The comments received within the 60-day comment period will be considered during development of a final rule that ultimately will supersede this interim rule.

Executive Order 12866

This interim rule was reviewed by the Office of Management and Budget (OMB) under Executive Order 12866, *Regulatory Planning and Review*. OMB determined that this rule is a "significant regulatory action," as defined in section 3(f) of the Order (although not economically significant under section (3)(f)(1) of the Order). Any changes made to the interim rule subsequent to its submission to OMB are clearly identified in the docket file, which is available for public inspection in the office of the Department's Rules

Docket Clerk, Room 10276, 451 Seventh Street SW, Washington DC, 20410.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this interim rule, and in so doing certifies that this rule does not have a significant economic impact on a substantial number of small entities. This interim rule merely authorizes an alternative procedure for obtaining HUD guarantee for an Indian Housing loan. The rule has no adverse or disproportionate economic impact on small businesses. Small businesses are specifically invited, however, to comment on whether this rule will significantly affect them, and persons are invited to submit comments according to the instructions in the **DATES** and **ADDRESSES** sections in the preamble of this interim rule.

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection and copying during regular business hours (7:30 a.m. to 5:30 p.m.) in the Office of the Rules Docket Clerk, Room 10276, 451 Seventh Street, S.W., Washington, D.C. 20410-0500.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that this interim rule would not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. No programmatic or policy changes would result from this interim rule that affect the relationship between the Federal Government and State and local governments.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4; approved March 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This rule does not impose any Federal mandates on any State, local, or tribal governments, or on the private

sector, within the meaning of the UMRA.

Catalog

The Catalog of Federal Domestic Assistance number for the Loan Guarantees for Indian Housing program is 14.865.

List of Subjects

24 CFR Part 50

Compliance record, Environmental impact statement, Environmental protection.

24 CFR Part 1005

Indians, Reporting and recordkeeping requirements.

Accordingly, parts 50 and 1005 of title 24 of the Code of Federal Regulations are amended as follows:

PART 50—PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

1. The authority citation for part 50 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 4332; and Executive Order 11991, 3 CFR, 1977 Comp., p. 123.

2. Section 50.19(b)(17) is revised to read as follows:

§ 50.19 Categorical exclusions not subject to the Federal laws and authorities cited in § 50.4.

* * * * *

(b) * * *

(17) HUD's insurance of one-to-four family mortgages under the Direct Endorsement program, the insurance of one-to-four family mortgages under the Lender Insurance program, and HUD's guarantee of loans for one-to-four family dwellings under the Direct Guarantee procedure for the Indian Housing loan guarantee program, without any HUD review or approval before the completion of construction or rehabilitation and the loan closing; and HUD's acceptance for insurance of loans insured under Title I of the National Housing Act; however, compliance with §§ 50.4(b)(1) and (c)(1) and 24 CFR 51.303(a)(3) is required.

* * * * *

PART 1005—LOAN GUARANTEES FOR INDIAN HOUSING

3. The authority citation for part 1005 continues to read as follows:

Authority: 42 U.S.C. 1715z-13a and 3535(d).

4. Section 1005.101 is revised to read as follows:

§ 1005.101 What is the applicability and scope of these regulations?

Under the provisions of section 184 of the Housing and Community Development Act of 1992, as amended by Native American Housing Assistance and Self-Determination Act of 1996 (12 U.S.C. 1715z-13a), the Department of Housing and Urban Development (the Department or HUD) has the authority to guarantee loans for the construction, acquisition, or rehabilitation of 1- to 4-family homes that are standard housing located on trust or restricted land or land located in an Indian or Alaska Native area, and for which an Indian Housing Plan has been submitted and approved under 24 CFR part 1000. This part provides requirements that are in addition to those in section 184.

5. Section 1005.103 is amended by revising the definition of "mortgage" and adding definitions of "property" and "trust and restricted land" to read as follows:

§ 1005.103 What definitions are applicable to this program?

* * * * *

Mortgage means:

(1)(i) A first lien as is commonly given to secure advances on, or the unpaid purchase price of, real estate under the laws of the jurisdiction where the property is located and may refer to a security instrument creating a lien, whether called a mortgage, deed of trust, security deed, or another term used in a particular jurisdiction; or

(ii) A loan secured by collateral as required by 24 CFR 1005.107; and

(2) The credit instrument, or note, secured thereby.

* * * * *

Property means the property constructed, acquired, or rehabilitated with the guaranteed loan, except when the context indicates that the term means other collateral for the loan.

* * * * *

Trust or restricted land has the meaning given to "trust land" in section 184(k)(9) of the Housing and Community Development Act of 1992.

6. Section 1005.104 is amended by revising paragraphs (d) and (e) to read as follows:

§ 1005.104 What lenders are eligible for participation?

* * * * *

(d) Any other lender that is supervised, approved, regulated, or insured by any other agency of the United States; or

(e) Any other lender approved by the Secretary under this part.

7. Section 1005.105 is amended by revising paragraphs (d)(2), (d)(3), (d)(4), (e), and (f) to read as follows:

§ 1005.105 What are eligible loans?

* * * * *

(d) * * *

(2) The advances may be made only as provided in the building loan agreement;

(3) The principal amount of the mortgage is held by the mortgagee in an interest bearing account, trust, or escrow for the benefit of the mortgagor, pending advancement to the mortgagor or the mortgagor's creditors as provided in the loan agreement; and

(4) The mortgage shall bear interest on the amount advanced to the mortgagor or the mortgagor's creditors and on the amount held in an account or trust for the benefit of the mortgagor.

(e) Environmental compliance. Prior to the Department's issuance of a commitment to guarantee any loan or (if no commitment is issued) prior to guarantee of any loan, there must be compliance with environmental review procedures to the extent applicable under part 50 of this title. If the loan involves proposed or new construction, the Department will require compliance with procedures similar to those required by § 203.12(c)(2) of this title for FHA mortgage insurance.

(f) Lack of access to private financial markets. In order to be eligible for a loan guarantee if the property is not on trust or restricted land, the borrower must certify that the borrower lacks access to private financial markets. Borrower certification is the only certification required by HUD.

8. A new § 1005.106 is added to read as follows:

§ 1005.106 What is the Direct Guarantee procedure?

(a) General. A loan may be processed under a Direct Guarantee procedure approved by the Department, under which the Department does not issue commitments to guarantee or review applications for loan guarantees before mortgages are executed by lenders approved for Direct Guarantee processing. The Department will approve a loan before the loan is guaranteed.

(b) Mortgagee sanctions. Depending on the nature and extent of the noncompliance with the requirements applicable to the Direct Guarantee procedure, as determined by the Department, the Department may take such actions as are deemed appropriate and in accordance with published guidelines.

9. Section 1005.107 is amended by adding a heading for paragraph (a) and

by revising paragraph (a)(1), the introductory text of paragraph (b), and the first sentence of paragraph (b)(2) to read as follows:

§ 1005.107 What is eligible collateral?

(a) In general. * * *

(1) The property and/or improvements to be acquired, constructed, or rehabilitated, to the extent that an interest in such property is not subject to the restrictions against alienation applicable to trust or restricted land;

* * * * *

(b) *Leasehold of trust or restricted land as collateral.* If a leasehold interest in trust or restricted land is used as collateral or security for the loan, the following additional provisions apply:

(1) * * *

(2) *Assumption or sale of leasehold.*

The lease form must contain a provision requiring tribal consent before any assumption of an existing lease, except where title to the leasehold interest is obtained by the Department through foreclosure of the guaranteed mortgage or a deed in lieu of foreclosure. * * *

* * * * *

10. Section 1005.111 is revised to read as follows:

§ 1005.111 What safety and quality standards apply?

Loans guaranteed under section 184 must be for dwelling units which meet the safety and quality standards set forth in section 184(j).

11. The first sentence of § 1005.112 is revised to read as follows:

§ 1005.112 How do eligible lenders and eligible borrowers demonstrate compliance with applicable tribal laws?

The lender and the borrower will each certify that they acknowledge and agree to comply with all applicable tribal laws. * * *

Dated: August 4, 1998.

Andrew Cuomo,
Secretary.

Note: The following appendix will not be codified in the Code of Federal Regulations.

Appendix—Guide To Loan Guarantees For Indian Housing

Section 1. Purpose, applicability and scope.
Section 2. Definitions.
Section 3. Eligible loans.
Section 4. Eligible housing.
Section 5. Eligible lenders.
Section 6. Eligible collateral.
Section 7. Procedures.
Section 8. Guarantee.
Section 9. Guarantee fee.
Section 10. Liability under guarantee.
Section 11. Transfer and assumptions.
Section 12. Disqualification of lenders and civil money penalties.

Section 12. Payment under guarantee.
Section 13. Certification of compliance with tribal laws, and enforcement.

Section 1. Purpose, Applicability and Scope

The purpose of this guide is to present, in a single document, the statutory and regulatory requirements, and certain other important administrative requirements, that apply to the Loan Guarantees for Indian Housing Program under section 184 of the Housing and Community Development Act of 1992 (P.L. 102-550, approved October 28, 1992, as amended by the Native American Housing Assistance and Self-Determination Act of 1996 (P.L. 104-330)). Although it presents the regulatory and statutory requirements in a combined format, this guide is a secondary source for these requirements. Title 24 of the Code of Federal Regulations is the primary, governing source for regulatory requirements, and section 184 is the primary, governing source for statutory requirements.

Under section 184, the Department of Housing and Urban Development (the Department) has the authority to guarantee loans for the construction, acquisition, rehabilitation, or acquisition and rehabilitation, of 1- to 4-family homes on trust and restricted lands for Indians (including Alaska Natives) and certain other lands under the jurisdiction of an Indian tribe. This guide describes the eligibility of borrowers, lenders and property, as well as the benefits of the Indian Loan Guarantee Program.

Section 2. Definitions

Default means the failure by a borrower to make any payment or to perform any other obligation under the terms of a loan, if such failure continues for a period of more than 30 days.

Department or *HUD* means the U. S. Department of Housing and Urban Development.

Direct guarantee means the underwriting procedure which qualified and approved mortgagees may use as described in 24 CFR 1005.104. The Secretary will publish guidelines for Direct guaranty underwriting procedures and underwriter qualifications in a Guidebook. Compliance with these guidelines is the minimum standard of due diligence.

Guarantee Fund means the Indian Housing Loan Guarantee Fund established under section 184(i) of the Housing and Community Development Act of 1992.

Holder means the holder of the guarantee certificate and in this program is variously referred to as the lender, the holder of the certificate, the holder of the guarantee, and the mortgagee.

Indian means any person recognized as being an Indian or Alaska Native by an Indian tribe, the Federal Government, or any State, and includes the term "Native American".

Indian or Alaska Native area means the area within which an Indian housing authority or tribally designated housing entity (THDE), as defined in section 4 of the Native American Housing Assistance and Self-Determination Act of 1996, is authorized to provide housing.

Indian Housing Authority (IHA) means any entity that is authorized to engage in or assist in the development or operation of low-income housing for Indians or housing subject to the provisions of section 184 and that is established either (1) by exercise of the power of self-government of an Indian tribe independent of State law, or (2) by operation of State law providing specifically for housing authorities for Indians, including regional housing authorities in the State of Alaska. The term includes tribally designated housing entities under the Native American Housing Assistance and Self-Determination Act of 1996.

Mortgage means:

(a)(i) A first lien as is commonly given to secure advances on, or the unpaid purchase price of, real estate under the laws of the jurisdiction where the property is located and may refer to a security instrument creating a lien, whether called a mortgage, deed of trust, security deed, or another term used in a particular jurisdiction; or

(ii) A loan secured by collateral as required by 24 CFR 1005.107; and

(b) The credit instrument, or note, secured thereby.

Mortgagee or *lender* means the same as *holder*.

Mortgagor or *borrower* means the party receiving the loan, and authorized successors or assigns.

Principal residence means the dwelling where the mortgagor maintains (or will maintain) his or her permanent place of abode, and typically spends (or will spend) the majority of the calendar year. A person may have only one principal residence at any one time.

Secretary means the Secretary of Housing and Urban Development.

Section 184 means section 184 of the Housing and Community Development Act of 1992.

Standard housing means a dwelling unit or housing that complies with the requirements established in this guide.

Tribe or *Indian tribe* means any tribe, band, nation or other organized group or community of Indians, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians pursuant to the Indian Self-Determination and Education Assistance Act of 1975.

Trust or restricted land means land, title to which is held by the United States for the benefit of an Indian or Indian tribe; or, land, title to which is held by an Indian tribe, subject to a restriction against alienation imposed by the United States.

Underwriting is the evaluation of documentation to determine risk.

Section 3. Eligible Loans

(a) In general. Only fixed rate, fixed term loans with even monthly payments are eligible under the Section 184 program.

(b) Eligible borrowers. A loan guaranteed under Section 184 may be made to a borrower that is:

(1) An Indian who will occupy it as a principal residence and who is otherwise qualified under this part;

(2) An Indian Housing Authority; or

(3) An Indian tribe.

(c) Terms of loan. The loan shall:

(1) Be made for a term not exceeding 30 years;

(2) Bear interest (exclusive of the guarantee fee and service charges, if any) at a fixed rate agreed upon by the borrower and the lender and determined by the Department to be reasonable, which may not exceed the rate generally charged in the area (as determined by the Department) for home mortgage loans not guaranteed or insured by any agency or instrumentality of the Federal Government.

(d) Maximum loan amounts.

(1) A principal obligation may not exceed the lesser of:

(i) 97.75 percent of the appraised value of the property as of the date the loan is accepted for guarantee (or 98.75 percent if the value of the property is \$50,000 or less); and

(ii) Amounts approved otherwise by the Department.

(2) The balance of the purchase price must involve a payment on account of the property that may be:

(i) In cash or other property of equivalent value acceptable to the lender and the Department, or

(ii) The value of any improvements to the property made through the skilled or unskilled labor of the borrower, appraised in accordance with generally acceptable practices and procedures.

(e) Construction advances. The Department may guarantee loans from which advances will be made during construction. The Department will provide guarantees for advances made by the mortgagee during construction if all of the following conditions are satisfied:

(1) The mortgagor and the mortgagee execute a building loan agreement, approved by HUD, setting forth the terms and conditions under which advances will be made;

(2) The advances are made only as provided in the building loan agreement;

(3) The principal amount of the mortgage is held by the mortgagee in an interest bearing account, trust, or escrow for the benefit of the mortgagor, pending advancement to the mortgagor to the mortgagor's creditors as provided in the building loan agreement; and

(4) The mortgage shall bear interest on the amount advanced to the mortgagor or to the mortgagor's creditors and on the amount held in an account or trust for the benefit of the mortgagor.

(f) Environmental compliance. Prior to the Department's issuance of a commitment to guarantee any loan or (if no commitment is issued) prior to guarantee of any loan, there must be compliance with environmental review procedures to the extent applicable under 24 CFR part 50. If the loan involves proposed or new construction, the Department will require compliance with procedures similar to those required by 24 CFR 203.12(c)(2) for FHA mortgage insurance.

Section 4. Eligible Housing

(a) In general. A loan guaranteed under Section 184 may be used for the construction, acquisition, rehabilitation, or acquisition and rehabilitation, of a 1- to 4-family dwelling located on trust or restricted land, or land located in an Indian area that is under the jurisdiction of an Indian tribe for which an Indian housing plan has been submitted and approved pursuant to Sections 102 and 103 of the Native American Housing Assistance and Self-Determination Act of 1996 that provides for the use of loan guarantees under Section 184 to provide affordable homeownership housing in such areas.

(b) Safety and quality standards. Loans guaranteed under Section 184 shall be made only on dwelling units which meet safety and quality standards set forth herein. Each unit must:

(1) Be decent, safe, sanitary, and modest in size and design;

(2) Conform with applicable general construction standards for the region;

(3) Contain a heating system that:

(i) Has the capacity to maintain a minimum temperature in the dwelling of 65 degrees Fahrenheit during the coldest weather in the area;

(ii) Is safe to operate and maintain;

(iii) Delivers a uniform distribution of heat; and

(iv) Conforms to any applicable tribal heating code or, if there is no applicable tribal code, an appropriate county, State, or National code;

(4) Contain a plumbing system that:

(i) Uses a properly installed system of piping;

(ii) Includes a kitchen sink and a partitioned bathroom with lavatory, toilet, and bath or shower; and

(iii) Uses water supply, plumbing and sewage disposal systems that conform to any applicable tribal code or, if there is no applicable tribal code, the minimum standards established by the applicable county or State;

(5) Contain an electrical system using wiring and equipment properly installed to safely supply electrical energy for adequate lighting and for operation of appliances that conforms to any applicable tribal code or, if there is no applicable tribal code, an appropriate county, State, or National code;

(6) Be not less than:

(i) 570 square feet in size, if designed for a family of not more than 4 persons;

(ii) 850 square feet in size, if designed for a family of not less than 5 and more than 7 persons; and

(iii) 1020 square feet in size, if designed for a family of not less than 8 persons, or

(iv) The size provided under the applicable locally adopted standards for size of dwelling units; except that the Department, upon the request of a tribe or Indian Housing Authority, may waive the size requirements under this paragraph; and

(7) Conform with the energy performance requirements for new construction established by the Department under section 526(a) of the National Housing Act.

Section 5. Eligible Lenders

(a) Required approval. The loan shall be made only by a lender meeting qualifications

established in this part, except that loans otherwise insured or guaranteed by any agency of the Federal Government, or made by an organization of Indians from amounts borrowed from the United States shall not be eligible for guarantee under this part. The following lenders are approved under this part:

(1) Any mortgagee approved by the Department of Housing and Urban Development for participation in the single family mortgage insurance program under title II of the National Housing Act.

(2) Any lender whose housing loans under chapter 37 of title 38, United States Code are automatically guaranteed pursuant to section 1802(d) of such title.

(3) Any lender approved by the Department of Agriculture to make guaranteed loans for single family housing under the Housing Act of 1949.

(4) Any other lender that is supervised, approved, regulated, or insured by any other agency of the Federal Government.

(5) Any other lender approved by the Secretary under this part.

(b) Direct guarantee approval. To be approved for the Direct guarantee program, a lender must be an approved mortgagee under 24 CFR 202.6, 202.7 or 203.10, or must meet the requirements of section (a)(4) or (a)(5) above. In addition, the lender must establish that it meets the following qualifications:

(1) The lender, or one of its principal officers, has 5 years of experience in the origination of single family mortgages.

(2) The lender has on its permanent staff an underwriter meeting the standards of the Secretary and authorized by the lender to bind the lender on matters involving the origination of section 184 mortgage loans through the direct guarantee procedure.

(3) The lender must assure that its underwriter and technical staff have been trained and are knowledgeable in the section 184 underwriting requirements.

(4) The mortgagee must submit initially two section 184 mortgage loans, processed in accordance with the process set forth in section 7(b) of this guide. The documents required by section 7(b) will be reviewed by the Secretary and, if acceptable, a firm commitment will be issued prior to loan closing. If the underwriting and processing of these two loans is satisfactory, then the lender may be approved to close subsequent loans without a prior commitment and submit them directly for guarantee in accordance with the process set forth in section 7(b). Unsatisfactory performance by the lender at this stage constitutes grounds for denial of approval for the direct guarantee procedure or for continued pre-closing review of a lender's submissions.

(c) Mortgagee sanctions. Depending on the nature and extent of the noncompliance with the requirements applicable to the Direct Guarantee procedure, as determined by the Department, the Department may take such actions as are deemed appropriate and in accordance with published guidelines.

Section 6. Eligible Collateral

(a) In general. A loan guaranteed under Section 184 may be secured by any collateral authorized under Federal, State, or tribal law

and determined by the lender and approved by the Department to be sufficient to cover the amount of the loan, and may include, but is not limited to, the following:

(1) The property and/or improvements to be acquired, constructed, or rehabilitated, to the extent that an interest in such property is not subject to the restrictions of trust lands against alienation;

(2) A first and/or second mortgage on property other than trust land;

(3) Personal property; or

(4) Cash, notes, an interest in securities, royalties, annuities, or any other property that is transferable and whose present value may be determined.

(b) Leasehold on trust or restricted land as collateral. If a leasehold interest in trust or restricted land is used as collateral for the loan, the following additional provisions apply:

(1) Approved Lease. Any land lease for a unit financed under Section 184 must be on a form approved by both HUD and the Bureau of Indian Affairs, U.S. Department of Interior.

(2) Assumption or sale of leasehold. If a leasehold is used as security for the loan, the lease form must contain a provision requiring tribal consent before any assumption of an existing lease, except where title to the leasehold interest is obtained by the Department through foreclosure of the guaranteed mortgage. A mortgagee other than the Department must obtain tribal consent before obtaining title through a foreclosure sale. Tribal consent must be obtained on any subsequent transfer from the purchaser, including the Department, at foreclosure sale. The lease may not be terminated by the lessor without HUD's approval while the mortgage is guaranteed or held by the Department.

(3) Eviction procedures. Before HUD will guarantee a loan secured by trust or restricted land, the tribe having jurisdiction over such property must notify the Department that it has adopted and will enforce procedures for eviction of defaulted mortgagors where the guaranteed loan has been foreclosed.

(i) Enforcement. If the Department determines that the tribe has failed to enforce adequately its eviction procedures, HUD will cease issuing guarantees for loans for tribal members except pursuant to existing commitments by the Department or loan approvals by the lender under the Direct Guarantee procedure. Adequate enforcement is demonstrated where prior evictions have been completed within 60 days after the date of the notice by HUD that foreclosure was completed.

(ii) Review. If the Department ceases issuing guarantees in accordance with the first sentence of paragraph (c)(1) of this section, HUD shall notify the tribe of the reasons for such action and that the tribe may, within 30 days after notification of HUD's action, file a written appeal with the Field Office of Native American Programs (FONAP) Administrator. Within 30 days after notification of an adverse decision on the appeal by the FONAP Administrator, the tribe may file a written request for review with the Deputy Assistant Secretary, Office of Native American Programs (ONAP). Upon notification of an adverse decision by the

Deputy Assistant Secretary, the tribe has 30 additional days to file an appeal with the Assistant Secretary for Public and Indian Housing. The determination of the Assistant Secretary shall be final, but the tribe may resubmit the issue to the Assistant Secretary for review at any subsequent time if new evidence or changed circumstances warrant reconsideration. (Any other administrative actions determined to be necessary to debar a tribe from participating in this program will be subject to the formal debarment or limited denial of participation procedures contained in 24 CFR part 24).

Section 7. Procedures.

(a) Firm commitment procedure. Lenders that do not meet the approval requirements of section 5(b), or lenders approved for the direct guarantee procedure that do not process a particular loan using that procedure, must submit an application for section 184 loan guarantee in a form prescribed by the Secretary, prior to making the loan. If:

(1) A loan for a specified property has been approved for a guarantee, and

(2) A specified borrower and all other proposed terms and conditions of the loan meet the eligibility requirements for guarantee as determined by the Secretary, the Secretary will approve the application for guarantee by issuing a commitment setting forth the terms and conditions of guarantee.

(b) Direct guarantee procedure. (1) In general. Under the Direct Guarantee procedure, the Secretary does not review or approve applications for loan guarantee before the loan is executed or issue a firm commitment except as determined by the Secretary. Under this program, the lender determines that the proposed loan is eligible for guarantee under the section 184 program requirements, and submits to the Secretary processing and closing documents that the Secretary will identify for lenders in administrative issuances. The Secretary then reviews the documents as needed (and, in cases involving the guarantee of a loan from which advances will be made during construction, completes an environmental review to the extent required by 24 CFR 50.4) before approving and guaranteeing the loan.

(2) Use of procedure. A lender's use of the direct guarantee procedure is voluntary. Lender who are approved for that procedure may choose which section 184 loans are underwritten using that procedure or the firm commitment procedure.

Section 8 Guarantee

(a) Extent of guarantee. A certificate issued in accordance with Section 184 guarantees 100 percent of the unpaid principal and interest of the underlying loan.

(b) Approval process. If the Department approves a loan for guarantee and receives the required guarantee fee, the Department will issue a certificate under Section 184 as evidence of the guarantee. The loan is considered guaranteed when the certificate is issued.

(c) Standard for approval. The Department may approve a loan for guarantee under Section 184 and issue a certificate only if the Department determines there is a reasonable

prospect of repayment of the loan. For loans under the firm commitment procedure, this determination will be made before a firm commitment is issued and the Secretary will issue a certificate if the loan complies with the firm commitment. For loans under the direct guarantee procedure, the lender must submit to the Secretary within 60 days of loan closing properly completed documentation and certifications as required by the Secretary, and the Department may make the required determination after loan closing on the basis of a review of the documents and certifications submitted by the lender.

(d) Effect. A certificate of guarantee issued under Section 184 by the Department shall be conclusive evidence of the eligibility of the loan for guarantee under the provisions of Section 184 and the amount of such guarantee. Such evidence shall be incontestable in the hands of the bearer and the full faith and credit of the United States is pledged to the payment of all amounts agreed to be paid by the Department as security for such obligations.

(e) Fraud and misrepresentation. Nothing in Section 184 may preclude the Department from establishing:

(1) Defenses against the original lender based on fraud or material misrepresentation; and

(2) Establishing partial defenses, based upon regulations in effect on the date of issuance or disbursement (whichever is earlier), to the amount payable on the guarantee.

Section 9. Guarantee Fee

The lender shall pay to the Department, at or before the time of issuance of the guarantee, a fee for the guarantee of loans under Section 184, in an amount equal to 1 percent of the principal obligation of the loan. This amount is payable by the borrower at closing.

Section 10. Liability Under Guarantee

The liability under a guarantee provided in accordance with Section 184 shall decrease or increase on a pro rata basis according to any decrease or increase in the amount of the unpaid obligation under the provisions of the loan agreement.

Section 11. Transfer and Assumptions

Notwithstanding any other provision of law, any loan guaranteed under this part, including the security interest given for the loan, may be sold or assigned by the lender to any financial institution subject to examination and supervision by an agency of the Federal Government or of any State or the District of Columbia.

Section 12. Disqualification of Lenders and Civil Money Penalties

(a) General. If the Department determines that a lender or holder of a guarantee certificate under Section 184 has failed to maintain adequate accounting records, to adequately service loans guaranteed under Section 184, to exercise proper credit or underwriting judgment, or has engaged in practices otherwise detrimental to the interest of a borrower or the United States, the Department may:

(1) Refuse, either temporarily or permanently, to guarantee any further loans made by such lender or holder;

(2) Bar such lender or holder from acquiring additional loans guaranteed under Section 184; and

(3) Require that such lender or holder assume not less than 10 percent of any loss on further loans made or held by the lender or holder that are guaranteed under Section 184.

(b) Civil money penalties for intentional violations. If the Department determines that any lender or holder of a guarantee certificate under Section 184 has intentionally failed to maintain adequate accounting records, to adequately service loans guaranteed under Section 184, or to exercise proper credit or underwriting judgement, the Department may impose a civil money penalty on such lender or holder in the manner and amount provided under section 536 of the National Housing Act with respect to mortgagees and lenders under such Act.

(c) Payment of loans made in good faith. Notwithstanding paragraphs (a) and (b), the Department may not refuse to pay pursuant to a valid guarantee on loans of a lender or holder barred under Section 184, if the loans were previously made in good faith.

Section 13. Payment Under Guarantee

(a) Lender options.

(1) General. In the event of default by the borrower on a loan guaranteed under this part, the holder of the guarantee certificate shall provide written notice of the default to the Department. Upon providing this notice, the holder of the guarantee certificate will be entitled to payment under the guarantee (subject to the provisions of this part) and

may proceed to obtain payment in one of the following manners:

(i) Foreclosure. The holder of the certificate may initiate foreclosure proceedings (after providing written notice of such action to the Department) and upon a final order by the court authorizing foreclosure and submission to the Department of a claim for payment under the guarantee, the Department will pay to the holder of the certificate the pro rata portion of the amount guaranteed (as determined in accordance with Section 9 of this guide) plus reasonable fees and expenses as approved by the Department. The Department will be subrogated to the rights of the holder of the certificate and the holder shall assign the obligation and security to the Department.

(ii) No foreclosure. Without seeking a judicial foreclosure (or in any case in which a foreclosure proceeding initiated under paragraph (i) of this section continues for a period in excess of 1 year), the holder of the certificate may submit to the Department a request to assign the obligation and security interest to the Secretary in return for payment of the claim under the guarantee. The Department may accept assignment of the loan if the Secretary determines that the assignment is in the best interests of the United States. Upon assignment, the Department will pay to such holder for a loss on any single loan an amount equal to the pro rata portion of the amount guaranteed (as determined in accordance with Section 9 of this guide). The Department will be subrogated to the rights of the holder of the guarantee and the holder shall assign the obligation and security to the Department.

(2) Requirements. Before any payment under a guarantee is made under paragraph

(1) of this section, the holder of the certificate shall exhaust all reasonable possibilities of collection. Upon payment, in whole or in part, to the holder, the note of judgment evidencing the debt shall be assigned to the United States and the holder shall have no further claim against the borrower or the United States.

(b) Limitations on liquidation. In the event of default by the borrower on a loan guaranteed under Section 184 involving a security interest in restricted Indian land, the lender or the Department will only pursue liquidation after offering to transfer the account to an eligible tribal member, the tribe, or the Indian Housing Authority serving the tribe or tribes. If the Department subsequently proceeds to liquidate the account, the Department will not sell, transfer, otherwise dispose of or alienate the property except to one of the entities described in the preceding sentence.

Section 14. Certification of Compliance With Tribal Laws, and Enforcement

(a) Certification. Each lender and borrower must certify to acknowledge and agree to comply with all applicable tribal laws. An Indian tribe with jurisdiction over the dwelling unit does not have to be notified of individual section 184 loans unless required by applicable tribal law.

(b) Enforcement. Failure of the lender to comply with applicable tribal law is considered to be a practice detrimental to the interest of the borrower and may be subject to enforcement action(s) under section 184(g) of the statute.

[FR Doc. 98-24415 Filed 9-10-98; 8:45 am]

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