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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM159; Special Conditions No. 25-145-SC]

Special Conditions: Boeing Model 707-353B (USAF C-137) Airplanes; High Intensity Radiated Fields (HIRF) Protection

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for Boeing Model 707-353B (USAF C-137) airplanes. These airplanes will have novel and unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. These design features include the installation of an inertial navigation system (INS) for which the current applicable airworthiness regulations do not contain adequate or appropriate safety standards with regard to protection of the system from the effects of high-intensity radiated fields. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is July 13, 1999. Comments must be received on or before August 20, 1999.

ADDRESSES: Comments on these special conditions may be mailed in duplicate to: Federal Aviation Administration, Transport Airplane Directorate, Attention: Rules Docket (ANM-114), Docket No. NM159, 1601 Lind Avenue SW., Renton, Washington 98055-4056; or delivered in duplicate to the

Transport Airplane Directorate at the above address. All comments must be marked: Docket No. NM159. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4:00 p.m.

FOR FURTHER INFORMATION CONTACT:

Mark Quam, FAA, Standardization Branch, ANM-113, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98055-4056; telephone (425) 227-2799; facsimile (425) 227-1149.

SUPPLEMENTARY INFORMATION:

FAA's Determination as to Need for Public Process

The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because those procedures would significantly delay issuance of the approval design and, thus, the delivery of the affected aircraft.

In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. Thus, the FAA has previously provided the public with a number of opportunities to comment on proposed special conditions that are substantively identical to those at issue; and the FAA is reasonably assured that all interested members of the public have had an opportunity to comment and that their comments have been fully considered. The FAA, therefore, finds that additional redundant notices are unnecessary, and good cause exists for making these special conditions effective upon issuance.

Comments Invited

Although this action is in the form of final special conditions and, for the reasons stated above, is not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to submit such written data, views, or arguments as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The special conditions may be changed in light of the comments received. All comments

received will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket NM159." The postcard will be date stamped and returned to the commenter.

Background

On August 7, 1998, Boeing Commercial Airplane Group, P.O. Box 7730, Wichita, Kansas 67277, made application to the FAA for a Supplemental Type Certificate (STC) for the Boeing Model B-707-353B airplane [known as the U.S. Air Force (USAF) C-137]. The proposed configuration of this model will incorporate an upgrade of the inertial navigation system (INS) from the Litton LTN-72 model to the LTN-92 model.

The INS provides attitude, heading, and navigation data to the flight crew. Display of attitude information is considered a critical function. Critical functions must be designed and installed to ensure that their operations are not adversely affected by high intensity radiated fields (HIRF). The existing airworthiness regulations do not contain adequate or appropriate safety standards for protection from the effects of HIRF external to the airplane; therefore, a special condition is proposed.

Supplemental Type Certification Basis

Under the provisions of 14 CFR § 21.101 ("Designation of applicable regulations"), Boeing must show that the Model 707-353B (USAF C-137) airplanes meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. 4A26, or the applicable regulations in effect on the date of application for the change to the Model 707-353B. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type certification basis." The certification basis for the Model 707-353B airplanes includes Civil Air Regulations (CAR) 4b, as amended by Amendments 4b-1, 4b-2, and 4b-3; and

additional requirements identified in Type Certificate Data Sheet 4A26.

Purpose of Special Conditions

If the Administrator finds that the applicable airworthiness regulations do not contain adequate or appropriate safety standards for an airplane because of a novel or unusual design feature of that airplane, the FAA may then prescribe special conditions to establish a level of safety equivalent to that established in the regulations. Special conditions are authorized under the provisions of 14 CFR 21.16 ("Special conditions").

Special conditions, as appropriate, are issued in accordance with 14 CFR 11.49, as required by §§ 11.28 and 11.29, and become part of the airplane's type certification basis in accordance with § 21.101(b)(2).

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of 14 CFR 21.101(a)(1).

Novel or Unusual Design Features

The Boeing STC for the Model 707-353B (USAF C-137) airplanes includes the upgrade of the INS system from the Litton LTN-72 model to the LTN-92 model. This INS contains electronic equipment for which the current airworthiness standards (14 CFR part 25) do not contain adequate or appropriate safety standards that address protecting this equipment from the adverse effects of HIRF. Accordingly, this system is considered to be a "novel or unusual design feature."

Discussion

As stated previously, there is no specific regulation that addresses requirements for protection of electrical and electronic systems from HIRF external to the airplane. Increased power levels from ground-based radio transmitters and the growing use of sensitive electrical and electronic systems to command and control airplanes have made it necessary to provide adequate protection.

To ensure that a level of safety is achieved equivalent to that intended by the regulations incorporated by reference, the FAA has determined that special conditions are needed for the Boeing Model 707-353B (USAF C-137) modified to include the upgraded INS. These special conditions will require that this system, which performs critical functions, must be designed and installed to preclude component damage and interruption of function due to both the direct and indirect effects of HIRF.

Protection of Systems from High-Intensity Radiated Fields (HIRF)

Recent advances in technology have given rise to the application in aircraft designs of advanced electrical and electronic systems that perform functions required for continued safe flight and landing. Due to the use of sensitive solid-state advanced components in analog and digital electronics circuits, these advanced systems are readily responsive to the transient effects of induced electrical current and voltage caused by HIRF. Such HIRF can degrade electronic systems performance by damaging components or by upsetting system functions.

Furthermore, the HIRF environment has undergone a transformation that was not foreseen when the current requirements were developed: Higher energy levels are radiated from transmitters that are used for radar,

radio, and television. Also, the number of transmitters has increased significantly. There also is uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling to cockpit-installed equipment through the cockpit window apertures is undefined.

The combined effect of the technological advances in airplane design and the changing environment has resulted in an increased level of vulnerability of electrical and electronic systems required for the continued safe flight and landing of the airplane. Effective measures against the effects of exposure to HIRF must be provided during the design and installation of these systems.

Actions Required by Special Conditions

The accepted maximum energy levels in which airplane system installations must be capable of operating safely are based on surveys and analyses of existing radio frequency emitters. These special conditions require that the airplane be evaluated under these energy levels for the protection of the electronic system and its associated wiring harness. These external threat levels, which are lower than previously required values, are believed to represent the worst case to which an airplane would be exposed in the operating environment.

These special conditions require that the systems installed in aircraft that perform critical functions must be qualified to the HIRF environment defined in paragraph 1., below, or (as an option to a fixed value using laboratory tests) that defined in paragraph 2, below:

1. The applicant may demonstrate that the operation and operational capability of the installed electrical and electronic systems that perform critical functions are not adversely affected when the airplane is exposed to the HIRF environment defined below:

Frequency	Field Strength (volts per meter)	
	Peak	Average
10 kHz–100 kHz	50	50
100 kHz–500 kHz	50	50
500 kHz–2 MHz	50	50
2 MHz–30 MHz	100	100
30 MHz–70 MHz	50	50
70 MHz–100 MHz	50	50
100 MHz–200 MHz	100	100
200 MHz–400 MHz	100	100
400 MHz–700 MHz	700	50
700 MHz–1 GHz	700	100
1 GHz–2 GHz	2000	200
2 GHz–4 GHz	3000	200
4 GHz–6 GHz	3000	200

Frequency	Field Strength (volts per meter)	
	Peak	Average
6 GHz–8 GHz	1000	200
8 GHz–12 GHz	3000	300
12 GHz–18 GHz	2000	200
18 GHz–40 GHz	600	200

The field strengths are expressed in terms of peak root-mean-square (rms) values.

Or

b. The applicant may demonstrate by a system laboratory test that the electrical and electronic systems that perform critical functions withstand an electromagnetic field strength of 100 volts per meter, without the benefit of airplane structural shielding, over a frequency range of 10 kHz to 18 GHz.

Note: The field strength values for the HIRF environment and laboratory test levels are expressed in root-mean-square units measured during the peak of the modulation cycle, as many laboratory instruments indicate amplitude. These are commonly called "peak-rms" values. The true peak field strength values will be higher by a factor of the square root of two.

Applicability

As discussed above, these special conditions are applicable to the Boeing Model 707–353B (USAF C–137) airplanes modified to include the upgraded INS. Should Boeing Commercial Airplane Group apply at a later date for a design change approval to the type certificate to include any other model incorporating the same novel or unusual design feature, these special conditions would apply to that model as well, under the provisions of 14 CFR 21.101(a)(1).

Conclusion

This action affects only certain novel or unusual design features on the Boeing 707–353B (USAF C–137) airplanes. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

Further, the substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained in this document. For this reason, and because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause

exists for adopting these special conditions upon issuance. However, the FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the supplemental type certification basis for the Boeing Model 707–353B (USAF C–137) airplanes.

1. *Protection of Electrical and Electronic Systems from Unwanted Effects of High-Intensity Radiated Fields (HIRF).* Each electrical and electronic system that performs critical functions must be designed and installed to ensure that the operations and operational capability of these systems to perform critical functions are not adversely affected when the airplane is exposed to high-intensity radiated electromagnetic fields external to the airplane.

2. For the purpose of these special conditions, the following definition applies:

Critical Functions: Functions whose failure would contribute to or cause a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Renton, Washington, on July 13, 1999.

Donald L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99–18566 Filed 7–20–99; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–CE–05–AD; Amendment 39–11226; AD 99–15–07]

RIN 2120–AA64

Airworthiness Directives; deHavilland Inc. Models DHC–2 Mk. I, DHC–2 Mk. II, and DHC–2 Mk. III Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to all deHavilland Inc. (deHavilland) Models DHC–2 Mk. I, DHC–2 Mk. II, and DHC–2 Mk. III airplanes. This AD requires repetitively inspecting the rear fuselage bulkhead at Station 228 for cracks. This AD also requires repairing any crack found or replacing any cracked rear fuselage bulkhead in accordance with a repair or replacement scheme obtained from the manufacturer through the Federal Aviation Administration (FAA). This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Canada. The actions specified by this AD are intended to detect and correct cracking of the rear fuselage bulkhead at Station 228, which could result in structural damage of the fuselage to the point of failure with consequent loss of airplane control.

DATES: Effective September 10, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of September 10, 1999.

ADDRESSES: Service information that applies to this AD may be obtained from Bombardier Inc., Bombardier Regional Aircraft Division, Garratt Boulevard, Downsview, Ontario, Canada M3K 1Y5; telephone: (416) 633–7310. This information may also be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules

Docket No. 99-CE-05-AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. James Delisio, Aerospace Engineer, FAA, New York Aircraft Certification Office, 10 Fifth Street, 3rd Floor, Valley Stream, New York 11581-1200; telephone: (516) 256-7521; facsimile: (516) 568-2716.

SUPPLEMENTARY INFORMATION:

Events Leading to the Issuance of This AD

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to all deHavilland Models DHC-2 Mk. I, DHC-2 Mk. II, and DHC-2 Mk. III airplanes was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on April 23, 1999 (64 FR 19932). The NPRM proposed to require repetitively inspecting the rear fuselage bulkhead at Station 228 for cracks. Accomplishment of the proposed repetitive inspections as specified in the NPRM would be required in accordance with deHavilland Beaver Service Bulletin 2/52, dated August 30, 1998, and deHavilland Beaver Service Bulletin TB/60, dated August 30, 1998. The NPRM also proposed to require repairing any crack found or replacing any cracked rear fuselage bulkhead. Accomplishment of the proposed repair or replacement as specified in the NPRM would be required in accordance with a repair or replacement scheme obtained from the manufacturer through the FAA.

The NPRM was the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Canada.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposed rule or the FAA's determination of the cost to the public.

The FAA's Determination

After careful review of all available information related to the subject presented above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. The FAA has determined that these minor corrections will not change the meaning of the AD and will not add any additional burden upon the public than was already proposed.

Compliance Time of This AD

The compliance time of this AD is presented in both calendar time and hours time-in-service (TIS). While cracks are generally a result of classic fatigue (i.e., aging and cyclic operation), the FAA believes that cracks could develop over time regardless of how often the airplane is operated. In order to assure that rear fuselage bulkhead cracking does not go undetected, a compliance time of specific hours TIS and calendar time (whichever occurs first) is utilized.

Cost Impact

The FAA estimates that 350 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 1 workhour per airplane to accomplish the initial inspection, and that the average labor rate is approximately \$60 an hour. Based on these figures, the total cost impact of the initial inspection on U.S. operators is estimated to be \$21,000, or \$60 per airplane.

These figures only take into the account the costs of the initial inspection and do not take into account the costs of the repetitive inspections or the cost of any repair or replacement necessary if any rear fuselage bulkhead is found cracked. The FAA has no way of determining the number of repetitive inspections each owner/operator will incur over the life of his/her affected airplane or the number of airplanes that will have a cracked rear fuselage bulkhead and need repair or replacement.

Regulatory Impact

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.

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) 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 final 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, 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 a new airworthiness directive (AD) to read as follows:

99-15-07 DeHavilland Inc.: Amendment 39-11226; Docket No. 99-CE-05-AD.

Applicability: Models DHC-2 Mk. I, DHC-2 Mk. II, and DHC-2 Mk. III 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 detect and correct cracking of the rear fuselage bulkhead at Station 228, which could result in structural damage of the fuselage to the point of failure with consequent loss of airplane control, accomplish the following:

(a) Within the next 400 hours time-in-service (TIS) after the effective date of this AD or within the next 12 calendar months after the effective date of this AD, whichever occurs first, and thereafter at intervals not to exceed 2,000 hours TIS or 5 years, whichever occurs first, inspect the rear fuselage bulkhead at Station 228 for cracks. Inspect in accordance with the Accomplishment Instructions section of whichever of the following service bulletins that is applicable:

(1) *For the Models DHC-2 Mk. I and DHC-2 Mk. II airplanes:* deHavilland Beaver

Service Bulletin 2/52, dated August 30, 1998; or

(2) *For the Model DHC-2 Mk. III airplanes:* deHavilland Beaver Service Bulletin TB/60, dated August 30, 1998.

(b) If any crack(s) is/are found in the rear fuselage bulkhead at Station 228 during any inspection required by paragraph (a) of this AD, prior to further flight, accomplish the following:

(1) Obtain a repair or replacement scheme from the manufacturer through the FAA, New York Aircraft Certification Office (ACO), 10 Fifth Street, 3rd Floor, Valley Stream, New York 11581-1200; facsimile: (516) 568-2716.

(2) Incorporate this repair or replacement scheme.

(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 initial or repetitive compliance times that provides an equivalent level of safety may be approved by the Manager, New York ACO, 10 Fifth Street, 3rd Floor, Valley Stream, New York 11581-1200. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, New York ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the New York ACO.

(e) Questions or technical information related to deHavilland Beaver Service Bulletin TB/60, dated August 30, 1998, and deHavilland Beaver Service Bulletin 2/52, dated August 30, 1998, should be directed to Bombardier Inc., Bombardier Regional Aircraft Division, Garratt Boulevard, Downsview, Ontario, Canada M3K 1Y5; telephone: (416) 633-7310. 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.

(f) The inspections required by this AD shall be done in accordance with deHavilland Beaver Service Bulletin TB/60, dated August 30, 1998, or deHavilland Beaver Service Bulletin 2/52, dated August 30, 1998. 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 Bombardier Inc., Bombardier Regional Aircraft Division, Garratt Boulevard, Downsview, Ontario, Canada M3K 1Y5. Copies may be inspected at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

Note 3: The subject of this AD is addressed in Canadian AD No. CF-98-38, dated October 15, 1998.

(g) This amendment becomes effective on September 10, 1999.

Issued in Kansas City, Missouri, on July 12, 1999.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99-18197 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98-NM-247-AD; Amendment 39-11227; AD 99-15-08]

RIN 2120-AA64

Airworthiness Directives; Boeing Model 747-200 and -300 Series Airplanes Equipped With General Electric CF6-80C2 Series Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Boeing Model 747-200 and -300 series airplanes, that currently requires various inspections and functional tests to detect discrepancies of the thrust reverser control and indication system, and correction of any discrepancy found. This amendment reduces the repetitive interval for one certain functional test. This amendment is prompted by reports indicating that several center drive units (CDU) were returned to the manufacturer of the CDU's because of low holding torque of the CDU cone brake. The actions specified by this AD are intended to ensure the integrity of the fail safe features of the thrust reverser system by preventing possible failure modes in the thrust reverser control system that can result in inadvertent deployment of a thrust reverser during flight.

DATES: Effective August 25, 1999.

The incorporation by reference of Boeing Service Bulletin 747-78A2166, Revision 1, dated October 9, 1997, as listed in the regulations, is approved by the Director of the Federal Register as of August 25, 1999.

The incorporation by reference of Boeing Alert Service Bulletin 747-78A2130, dated May 26, 1994, was approved previously by the Director of the Federal Register as of April 13, 1995 (60 FR 13623, March 14, 1995).

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle,

Washington 98124-2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT:

Holly Thorson, Aerospace Engineer, Propulsion Branch, ANM-140S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-1357; fax (425) 227-1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 95-06-01, amendment 39-9171 (60 FR 13623, March 14, 1995), which is applicable to certain Boeing Model 747-200 and -300 series airplanes, was published in the **Federal Register** on January 21, 1999 (64 FR 3226). The action proposed to continue to require various inspections and functional tests to detect discrepancies of the thrust reverser control and indication system, and correction of any discrepancy found. The action also proposed to reduce the repetitive interval for one certain functional test.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the single comment received.

The commenter supports the proposed rule.

Explanation of Change to the Final Rule

In the notice of proposed rulemaking (NPRM), the FAA proposed to require repetitive functional tests of the CDU cone brake on Model 747-200 and -300 series airplanes, at intervals not to exceed 650 hours time-in-service, regardless of whether the airplane is equipped with thrust reversers modified in accordance with Boeing Service Bulletin 747-78-2144. Since the issuance of the NPRM, the FAA has determined that a repetitive interval of 1,000 hours time-in-service would adequately ensure safety on airplanes equipped with thrust reversers modified in accordance with Boeing Service Bulletin 747-78-2144, Revision 1, dated April 11, 1996. This decision is based on the FAA's determination that frequent maintenance on such systems as the thrust reverser system could increase the risk of maintenance errors. Also, Boeing Service Bulletin 747-78-

2144, Revision 1, recommends functional tests at intervals not to exceed 1,000 hours time-in-service for thrust reversers that have been modified to incorporate a third locking device in accordance with that service bulletin. Performing the functional test of the cone brake at the same interval as the functional test of the third locking device would allow both thrust reverser tests to be scheduled and performed at the same time. Therefore, paragraph (d) of this final rule has been revised accordingly, and new paragraphs (d)(1) and (d)(2) have been added to this final rule.

Conclusion

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes described previously. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Interim Action

This is considered to be interim action. The manufacturer has advised that it currently is developing a modification that will positively address the unsafe condition addressed by this AD. Once this modification is developed, approved, and available, the FAA may consider additional rulemaking.

Cost Impact

There are approximately 9 airplanes of the affected design in the worldwide fleet. The FAA estimates that 2 airplanes of U.S. registry will be affected by this AD.

The actions required by this AD will not add any additional economic burden on affected operators, other than the costs that are associated with repeating the functional test of the cone brake at reduced intervals (at intervals not to exceed 650 hours time-in-service rather than at intervals not to exceed 1,000 hours time-in-service). The current costs associated with AD 95-06-01 are reiterated in their entirety (as follows) for the convenience of affected operators.

The actions that are currently required by AD 95-06-01, and retained in this AD, take approximately 33 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 actions on U.S. operators is estimated to be \$3,960, or \$1,980 per airplane, per inspection/test cycle.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Regulatory Impact

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.

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) 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 final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it 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 removing amendment 39-9171 (60 FR 13623, March 14, 1995), and by adding a new airworthiness directive (AD),

amendment 39-11227, to read as follows:

99-15-08 Boeing: Amendment 39-11227.

Docket 98-NM-247-AD. Supersedes AD 95-06-01, Amendment 39-9171.

Applicability: Model 747-200 and -300 series airplanes equipped with General Electric Model CF6-80C2 series engines with Power Management Control engine controls, 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 (f) 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 ensure the integrity of the fail safe features of the thrust reverser system by preventing possible failure modes in the thrust reverser control system that can result in inadvertent deployment of a thrust reverser during flight, accomplish the following:

Restatement of Requirements of AD 95-06-01

(a) Within 90 days after April 13, 1995 (the effective date of AD 95-06-01, amendment 39-9171), perform tests of the position switch module and the cone brake of the center drive unit (CDU) on each thrust reverser, and perform an inspection to detect damage to the bullnose seal on the translating sleeve on each thrust reverser, in accordance with paragraphs III.A. through III.C. of the Accomplishment Instructions of Boeing Alert Service Bulletin 747-78A2130, dated May 26, 1994. Repeat the tests and inspection thereafter at intervals not to exceed 1,000 hours time-in-service until the functional test required by paragraph (d) of this AD is accomplished.

(b) Within 9 months after April 13, 1995, perform inspections and functional tests of the thrust reverser control and indication system in accordance with paragraphs III.D. through III.F., III.H., and III.I. of the Accomplishment Instructions of Boeing Alert Service Bulletin 747-78A2130, dated May 26, 1994. Repeat these inspections and functional tests thereafter at intervals not to exceed 18 months.

(c) If any of the inspections and/or functional tests required by paragraphs (a) and (b) of this AD cannot be successfully performed, or if any discrepancy is found during those inspections and/or functional tests, accomplish either paragraph (c)(1) or (c)(2) of this AD.

(1) Prior to further flight, correct the discrepancy found, in accordance with Boeing Alert Service Bulletin 747-78A2130, dated May 26, 1994. Or

(2) The airplane may be operated in accordance with the provisions and limitations specified in an operator's FAA-approved Minimum Equipment List (MEL), provided that no more than one thrust reverser on the airplane is inoperative.

New Requirements of This AD

(d) Within 1,000 hours time-in-service after the most recent test of the CDU cone brake performed in accordance with paragraph (a) of this AD, or within 650 hours time-in-service after the effective date of this AD, whichever occurs first: Perform a functional test to detect discrepancies of the CDU cone brake on each thrust reverser, in accordance with Boeing Service Bulletin 747-78A2166, Revision 1, dated October 9, 1997, or paragraph III.B. of the Accomplishment Instructions of Boeing Alert Service Bulletin 747-78A2130, dated May 26, 1994. Repeat the functional test thereafter at the interval specified in paragraph (d)(1) or (d)(2) of this AD, as applicable. Accomplishment of such functional test constitutes terminating action for the repetitive test of the CDU cone brake required by paragraph (a) of this AD.

(1) For airplanes equipped with thrust reversers NOT modified in accordance with Boeing Service Bulletin 747-78-2144, Revision 1, dated April 11, 1996: Repeat the functional test at intervals not to exceed 650 hours time-in-service.

(2) For airplanes equipped with thrust reversers modified in accordance with Boeing Service Bulletin 747-78-2144, Revision 1, dated April 11, 1996: Repeat the functional test at intervals not to exceed 1,000 hours time-in-service.

(e) If any functional test required by paragraph (d) of this AD cannot be successfully performed, or if any discrepancy is found during any functional test required by paragraph (d) of this AD, accomplish either paragraph (e)(1) or (e)(2) of this AD.

(1) Prior to further flight, correct the discrepancy found, in accordance with Boeing Service Bulletin 747-78A2166, Revision 1, dated October 9, 1997, or paragraph III.B. of the Accomplishment Instructions of Boeing Alert Service Bulletin 747-78A2130, dated May 26, 1994. Or

(2) The airplane may be operated in accordance with the provisions and limitations specified in the operator's FAA-approved MEL, provided that no more than one thrust reverser on the airplane is inoperative.

Alternative Methods of Compliance

(f) 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, Seattle Aircraft Certification Office, FAA, Transport 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, Seattle ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

(g) 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.

Incorporation by Reference

(h) Except as provided by paragraphs (c)(2) and (e)(2) of this AD, the actions shall be done in accordance with Boeing Alert Service Bulletin 747-78A2130, dated May 26, 1994, or Boeing Service Bulletin 747-78A2166, Revision 1, dated October 9, 1997, as applicable.

(1) The incorporation by reference of Boeing Service Bulletin 747-78A2166, Revision 1, dated October 9, 1997, is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The incorporation by reference of Boeing Alert Service Bulletin 747-78A2130, dated May 26, 1994, was approved previously by the Director of the Federal Register as of April 13, 1995 (60 FR 13623, March 14, 1995).

(3) Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(i) This amendment becomes effective on August 25, 1999.

Issued in Renton, Washington, on July 12, 1999.

D. L. Riggins,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99-18198 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99-NM-113-AD; Amendment 39-11230; AD 99-15-10]

RIN 2120-AA64

Airworthiness Directives; Boeing Model 777 Series Airplanes

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 Boeing Model 777 series airplanes. This action requires replacement of a certain engine-driven pump (EDP) supply shutoff valve, which is located in the aft strut fairing, with a new shutoff valve. This

amendment is prompted by reports of failure of the shutoff valve due to corrosion in the direct current motor in the shutoff valve. The actions specified in this AD are intended to prevent failure of an EDP supply shutoff valve. Such failure, in the event of an engine fire, could result in an uncontrolled fire in the engine compartment.

DATES: Effective August 5, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 5, 1999.

Comments for inclusion in the Rules Docket must be received on or before September 20, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 99-NM-113-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Kenneth W. Frey, Aerospace Engineer, Systems and Equipment Branch, ANM-130S; FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue, SW., Renton, Washington; telephone (425) 227-2673; fax (425) 227-1181.

SUPPLEMENTARY INFORMATION: The FAA has received reports of failures of the engine-driven pump (EDP) supply shutoff valves located in the aft strut fairings. Subsequently, the airplane manufacturer investigated this failure mode and reported to the FAA that failure of the supply shutoff valves was caused by corrosion in the direct current (DC) motors in the valves. Such corrosion forms between the stator and rotor in the DC motor in the supply shutoff valve assembly. Since the DC motor drives the actuator in the motor-operated supply shutoff valve to the commanded position, corrosion in the motor prevents the motor and the actuator from operating. In the event of an engine fire, failure of an EDP supply shutoff valve, if not corrected, could result in an uncontrolled fire in the engine compartment.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Alert Service Bulletin 777-29A0022, Revision 1, dated May 21, 1999, which describes procedures for replacement of a certain EDP supply shutoff valve with a new EDP supply shutoff valve. The Boeing alert service bulletin references Parker-Hannifin Service Bulletin 2910044-29-48, "Introduction of Motor Operated Shutoff Valve, Part Number (P/N) 2960034-101," as an additional source of service information to accomplish the replacement.

Explanation of the Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other Boeing Model 777 series airplanes of the same type design, this AD is being issued to prevent failure of an EDP supply shutoff valve due to corrosion in the DC motor in the shutoff valve. In the event of an engine fire, failure of an EDP supply shutoff valve could result in an uncontrolled fire in the engine compartment. This AD requires replacement of a certain EDP supply shutoff valve, which is located in the aft strut fairing, with a new shutoff valve.

Differences Between the AD and the Alert Service Bulletin

Boeing Alert Service Bulletin 777-29A0022, Revision 1, specifies that the replacement actions required by this AD may be accomplished in accordance with the procedures specified in the alert service bulletin, or in accordance with an "operator's equivalent procedure." However, this AD requires that the actions be accomplished in accordance with the procedures specified in the Boeing alert service bulletin. An "operator's equivalent procedure" may be used only if approved as an alternative method of compliance in accordance with paragraph (c) of this AD.

Determination of Rule's Effective Date

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 shall 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 rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 99-NM-113-AD." The postcard will be date stamped and returned to the commenter.

Regulatory Impact

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 that it 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:

99-15-10 BOEING: Amendment 39-11230. Docket 99-NM-113-AD.

Applicability: Model 777 series airplanes, equipped with an engine-driven pump supply shutoff valve having Boeing part number S271W741-21; 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 (c) 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 failure of an engine-driven pump (EDP) supply shutoff valve, which, in the event of an engine fire, could result in an uncontrolled fire in the engine compartment, accomplish the following:

Replacement

(a) Except as provided by paragraph (b) of this AD, within 90 days after the effective date of this AD, replace any EDP supply shutoff valve, Boeing part number (P/N) S271W741-21, that is located in each aft strut fairing, with a new EDP supply shutoff valve, Boeing P/N S271W741-22, in accordance with Boeing Alert Service Bulletin 777-29A0022, Revision 1, dated May 21, 1999.

(b) Where Boeing Alert Service Bulletin 777-29A0022, Revision 1, dated May 21, 1999, specifies that replacements may be accomplished in accordance with an operator's "equivalent procedure," those actions must be accomplished in accordance with the applicable chapter of the Boeing 777 Airplane Maintenance Manual (AMM) specified in the alert service bulletin.

Alternative Methods of Compliance

(c) 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 Seattle Aircraft Certification Office (ACO), FAA, Transport 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, Seattle ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

(d) Special flight permits may be issued in accordance with §§ 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.

Incorporation by Reference

(e) The replacement shall be done in accordance with Boeing Alert Service Bulletin 777-29A0022, Revision 1, dated May 21, 1999. 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 Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(f) This amendment becomes effective on August 5, 1999.

Issued in Renton, Washington, on July 13, 1999.

D. L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99-18365 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99-ACE-36]

Amendment to Class E Airspace; Parsons, KS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action amends Class E airspace area at Tri-City Airport, Parsons, KS. A review of the Class E airspace area for Tri-City Airport indicates it does not comply with the criteria for 700 feet Above Ground Level (AGL) airspace required for diverse departures as specified in FAA Order 7400.2D. The Class E airspace has been enlarged to conform to the criteria of FAA Order 7400.2D.

In addition, a minor revision to the Airport Reference Point (ARP) coordinates is included in this document.

The intended effect of this rule is to provide additional controlled Class E airspace for aircraft operating under Instrument Flight Rules (IFR), revise the ARP, and comply with the criteria of FAA Order 7400.2D.

DATES: Effective date: 0901 UTC, November 4, 1999.

Comments for inclusion in the Rules Docket must be received on or before August 15, 1999.

ADDRESSES: Send comments regarding the rule in triplicate to: Manager, Airspace Branch, Air Traffic Division, ACE-520, Federal Aviation Administration, Docket Number 99-ACE-36, 601 East 12th Street, Kansas City, MO 64106.

The official docket may be examined in the Office of the Regional Counsel for the Central Region at the same address between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

An informal docket may also be examined during normal business hours in the Air Traffic Division at the same address listed above.

FOR FURTHER INFORMATION CONTACT:

Kathy Randolph, Air Traffic Division, Airspace Branch, ACE-520C, Federal Aviation Administration, 601 East 12th Street, Kansas City, MO 64106; telephone: (816) 426-3408.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR 71 revises the Class E airspace at Parsons, KS. A review of the Class E airspace for Tri-City Airport, KS, indicates it does not meet the criteria for 700 feet AGL airspace required for diverse departures as specified in FAA Order 7400.2D. The criteria in FAA Order 7400.2D for an aircraft to reach 1200 feet AGL is based on a standard climb gradient of 200 feet per mile plus the distance from the ARP to the end of the outermost runway. Any fractional part of a mile is converted to the next higher tenth of a mile. The amendment at Parsons, Tri-City Airport,

KS, will provide additional controlled airspace for aircraft operating under IFR, revise the ARP, and comply with the criteria of FAA Order 7400.2D. The area will be depicted on appropriate aeronautical charts. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9F, dated September 10, 1998, and effective September 16, 1998, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and, therefore, is issuing it as a direct final rule. Previous actions of this nature have not been controversial and have not resulted in adverse comments or objections. The amendment will enhance safety for all flight operations by designating an area where VFR pilots may anticipate the presence of IFR aircraft at lower altitudes, especially during inclement weather conditions. A greater degree of safety is achieved by depicting the area on aeronautical charts. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a final rule and was not preceded by a notice of proposed rulemaking, 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 **ADDRESS**. All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn

in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy-related 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 action will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 99-ACE-36." The postcard will be date stamped and returned to the commenter.

Agency Findings

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 noncontroversial and unlikely to result in adverse or negative comments. For the reasons discussed in the preamble, I certify that this regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) 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.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

Accordingly, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9F, Airspace Designations and Reporting Points, dated September 10, 1998, and effective September 16, 1998, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ACE KS E5 Parsons, KS [Revised]

Parsons, Tri-City Airport, KS
(Lat. 37°19'53" N., long. 95°30'32" W.)

Parsons NDB
(Lat 37°20'17" N., long. 95°30'31" W.)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of Tri-City Airport and within 2.6 miles each side of the 009° bearing from Parsons NDB extending from the 6.6-mile radius to 7.4 miles north of the airport and within 2.6 miles each side of the 17° bearing from the Parsons NDB extending from the 6.6-mile radius to 7.4 miles south of the airport.

* * * * *

Issued in Kansas City, MO, on June 24, 1999.

Donovan D. Schardt,

Acting Manager, Air Traffic Division, Central Region.

[FR Doc. 99-18576 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99-ACE-35]

Amendment to Class E Airspace; Lawrence, KS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule, request for comments.

SUMMARY: This action amends the Class E airspace area at Lawrence Municipal Airport, Lawrence, KS. A review of the Class E airspace area for Lawrence Municipal Airport, indicates the

extension to the southwest can be eliminated and the Lawrence Nondirectional Radio Beacon (NDB) has been relocated and the name changed. The Class E airspace does not comply with the 700 feet Above Ground Level (AGL) airspace required for diverse departures as specified in FAA Order 7400.2D. The Class E airspace area has been enlarged to conform to the criteria of FAA Order 7400.2D. Enlarging the Class E airspace area eliminates the extension of the southeast.

The intended effect of this rule is to provide additional Class E airspace for aircraft operating under Instrument Flight Rules (IFR), eliminate the extension, remove reference to the NDB, and comply with the criteria of FAA Order 7400.2D.

DATES: Effective date: 0901 UTC, November 4, 1999.

Comments for inclusion in the Rules Docket must be received on or before August 25, 1999.

ADDRESSES: Send comments regarding the rule in triplicate to: Manager, Airspace Branch, Air Traffic Division, ACE-520, Federal Aviation Administration, Docket Number 99-ACE-35, 601 East 12th Street, Kansas City, MO 64106.

The official docket may be examined in the Office of the Regional Counsel for the Central Region at the same address between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

An informal docket may also be examined during normal business hours in the Air Traffic Division at the same address listed above.

FOR FURTHER INFORMATION CONTACT: Kathy Randolph, Air Traffic Division, Airspace Branch, ACE-520C, Federal Aviation Administration, 601 East 12th Street, Kansas City, MO 64106; telephone: (816) 426-3408.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR 71 revises the Class E airspace area at Lawrence, KS. A review of the Class E airspace area indicates the extension to the southeast can be eliminated. The review of the Class E airspace area for Lawrence Municipal Airport, KS, indicates it does not meet the criteria for 700 feet AGL airspace required for diverse departures as specified in FAA Order 7400.2D. The criteria in FAA Order 7400.2D for an aircraft to reach 1200 feet AGL is based on a standard climb gradient of 200 feet per mile plus the distance from the Airport Reference Point (ARP) to the end of the outermost runway. Any fractional part of a mile is converted to the next higher tenth of a mile. The amendment at Lawrence Municipal

Airport, KS, will provide additional controlled airspace for aircraft operating under IFR, eliminate the extension, remove reference to the NDB, and comply with the criteria of FAA Order 7400.2D. The area will be depicted on appropriate aeronautical charts. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9F, dated September 10, 1998, and effective September 16, 1998, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and, therefore, is issuing it as a direct final rule. Previous actions of this nature have not been controversial and have not resulted in adverse comments or objections. The amendment will enhance safety for all flight operations by designating an area where VFR pilots may anticipate the presence of IFR aircraft at lower altitudes, especially during inclement weather conditions. A greater degree of safety is achieved by depicting the area on aeronautical charts. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a final rule and was not preceded by a notice of proposed rulemaking, 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 or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy-related 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 action will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 99-ACE-35." The postcard will be date stamped and returned to the commenter.

Agency Findings

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 noncontroversial and unlikely to result in adverse or negative comments. For the reasons discussed in the preamble, I certify that this regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) 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.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

Accordingly, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9F, Airspace Designations and Reporting Points, dated September 10, 1998, and effective September 16, 1998, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ACE KS E5 Lawrence, KS [Revised]

Lawrence Municipal Airport, KS
(Lat. 39°00'40" N., long. 92°13'00" W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Lawrence Municipal Airport.

* * * * *

Issued in Kansas City, MO, on June 22, 1999.

Donovan D. Schardt,

Acting Manager, Air Traffic Division, Central Region.

[FR Doc. 99-18575 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99-ACE-28]

Amendment to Class E Airspace; Grain Valley, MO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action amends the Class E airspace area at Grain Valley, East Kansas City Airport, MO. The FAA has developed Global Positioning System (GPS) Runway (RWY) 9 and GPS RWY 27 Standard Instrument Approach Procedures (SIAPs) to serve Grain Valley, East Kansas City Airport, MO. Additional controlled airspace

extending upward from 700 feet Above Ground Level (AGL) is needed to accommodate these SIAPs and for Instrument Flight Rules (IFR) operations at this airport. Reference to the RABOD waypoint and Napoleon VORTEC have been deleted. Enlarging the Class E airspace area will eliminate the extensions to the east and northeast. The enlarged area will contain the new GPS RWY 9 and GPS RWY 27 SIAPs in controlled airspace.

The intended effect of this rule is to provide controlled Class E airspace for aircraft executing GPS RWY 9 and GPS RWY 27 SIAPs, remove references to the RABOD waypoint, Napoleon VORTAC, eliminate extensions and to segregate aircraft using instrument approach procedures in instrument conditions from aircraft operating in visual conditions.

DATES: This direct final rule is effective on 0901 UTC, November 4, 1999.

Comments for inclusion in the Rules Docket must be received on or before August 15, 1999.

ADDRESSES: Send comments regarding the rule in triplicate to: Manager, Airspace Branch, Air Traffic Division, ACE-520, Federal Aviation Administration, Docket Number 99-ACE-28, 601 East 12th Street, Kansas City, Mo 64106.

The official docket may be examined in the Office of the Regional Counsel for the Central Region at the same address between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours in the Air Traffic Division at the same address listed above.

FOR FURTHER INFORMATION CONTACT: Kathy Randolph, Air Traffic Division, Airspace Branch, ACE-520C, Federal Aviation Administration, 601 East 12th Street, Kansas City, MO 64106; telephone: (816) 426-3408.

SUPPLEMENTARY INFORMATION: The FAA has developed GPS RWY 9 and GPS RWY 27 SIAPs to serve the Grain Valley, East Kansas City Airport, MO. The amendment to Class E airspace area at Grain Valley, MO, will provide additional controlled airspace at and above 700 feet AGL in order to contain the new SIAPs within controlled airspace, and thereby facilitate separation of aircraft operating under Instrument Flight Rules. References to the RABOD waypoint and Napoleon VORTAC have been removed from the text header and airspace designation.

The amendment at Grain Valley, East Kansas City Airport, MO, will provide additional controlled airspace for aircraft operating under IFR. The area

will be depicted on appropriate aeronautical charts. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9F, dated September 10, 1998, and effective September 16, 1998, which is incorporated by reference in 14 CFR 71.1 The Class E airspace designation listed in this document will be published subsequently in the Order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and, therefore, is issuing it as a direct final rule. Previous actions of this nature have not been controversial and have not resulted in adverse comments or objections. The amendment will enhance safety for all flight operations by designating an area where VFR pilots may anticipate the presence of IFR aircraft at lower altitudes, especially during inclement weather conditions. A greater degree of safety is achieved by depicting the area on aeronautical charts. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a final rule and was not preceded by a notice of proposed rulemaking, 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 the rule may be amended or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the

effectiveness of this action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy-related 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 action will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 99-ACE-28." The postcard will be date stamped and returned to the commenter.

Agency Findings

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 noncontroversial and unlikely to result in adverse or negative comments. For the reasons discussed in the preamble, I certify that this regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) 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.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

Accordingly, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

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

Authority: 49 U.S.C. 106(g), 4013, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR 1959—1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9F, Airspace Designations and Reporting Points, dated September 10, 1998, and effective September 16, 1998, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth

* * * * *

ACE MO E5 Grain Valley, MO [Revised]

Grain Valley, East Kansas City Airport, MO (Lat. 39°00'56" N., long. 94°12'48" W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of East Kansas City Airport.

* * * * *

Issued in Kansas City, MO, on June 17, 1999.

Donovan D. Schardt,

Acting Manager, Air Traffic Division, Central Region.

[FR Doc. 99-18574 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99-ASW-15]

Revision of Class E Airspace; Perry, OK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This amendment revises the Class E airspace at Perry, OK. The development of a Global Positioning System (GPS) Standard Instrument Approach Procedure (SIAP), at Ditch Witch Airport, Perry, OK has made this rule necessary. This action is intended to provide adequate controlled airspace extending upward from 700 feet or more above the surface for Instrument Flight Rules (IFR) operations to Ditch Witch Airport, Perry, OK.

DATES: Effective 0901 UTC, November 4, 1999. Comments must be received on or before September 7, 1999.

ADDRESSES: Send comments on the rule in triplicate to Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Docket No. 99-ASW-15, Fort Worth, TX 76193-0520.

The official docket may be examined in the Office of the Regional Counsel, Southwest Region, Federal Aviation Administration, 2601 Meacham Boulevard, Room 663, Fort Worth, TX, between 9 AM and 3 PM, Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Room 414, Fort Worth, TX.

FOR FURTHER INFORMATION CONTACT: Donald J. Day, Airspace Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, Fort Worth, TX 76193-0520, telephone 817-222-5593.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR part 71 revises the Class E airspace at Perry, OK. The development of a GPS SIAP, at Ditch Witch Airport, Perry, OK has made this rule necessary. This action is intended to provide adequate controlled airspace extending upward from 700 feet or more above the surface for Instrument Flight Rules (IFR) operations to Ditch Witch Airport, Perry, OK.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.9F, dated September 10, 1998, and effective September 16, 1998, which is incorporated by reference in 14 CFR § 71.1. The Class E airspace designation listed in this document will be published subsequently in the order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and therefore is issuing it as a direct final rule. A substantial number of previous opportunities provided to the public to comment on substantially identical actions have resulted in negligible adverse comments or objections. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and

confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this section is in the form of a final rule and was not preceded by a notice of proposed rulemaking, 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 or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action is 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 action will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 99-ASW-15." The postcard will be date stamped and returned to the commenter.

Agency Findings

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.

Further, the FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments and only involves an established body of technical regulations that require frequent and routine amendments to keep them operationally current. Therefore, I certify that this regulation (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. Since this rule involves routine matters that will only affect air traffic procedures and air navigation, it does not warrant preparation of a Regulatory Flexibility Analysis because the anticipated impact is so minimal.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

1. The authority citation for 14 CFR part 71 continue to read as follows

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9F, *Airspace Designations and Reporting Points*, dated September 10, 1998, and effective September 16, 1998, is amended as follows:

Paragraph 6005—Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ASW OF E5 Perry, OK [Revised]

Ditch Witch Airport, Perry, OK
(Lat. 36°18'00" N., long. 97°19'01" W.)

Perry Municipal Airport, OK
(Lat. 36°23'08" N., long. 97°16'38" W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Perry Municipal Airport and within 2 miles each side of the 359° bearing from the airport extending from the 6.5-mile radius to

10.5 miles north of the airport and within a 6.5-mile radius of Ditch Witch Airport.

* * * * *

Issued in Fort Worth, TX, on July 12, 1999.

Robert N. Stevens,

*Acting Manager, Air Traffic Division,
Southwest Region.*

[FR Doc. 99–18570 Filed 7–20–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99–ASW–14]

Revision of Class E Airspace; Center, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This amendment revises the Class E airspace at Center, TX. The development of a Nondirectional Radio Beacon (NDB) Standard Instrument Approach Procedure (SIAP) at Center Municipal Airport, Center, TX has made this rule necessary. This action is intended to provide adequate controlled airspace extending upward from 700 feet or more above the surface for Instrument Flight Rules (IFR) operations to Center Municipal Airport, Center, TX. **EFFECTIVE DATES:** 0901 UTC, November 4, 1999. Comments must be received on or before September 7, 1999.

ADDRESSES: Send comments on the rule in triplicate to the Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Docket No. 99–ASW–14, Fort Worth, TX 76193–0520. The official docket may be examined in the Office of the Regional Counsel, Southwest Region, Federal Aviation Administration, 2601 Meacham Boulevard, Room 663, Fort Worth, TX, between 9 AM and 3 PM, Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Room 414, Fort Worth, TX.

FOR FURTHER INFORMATION CONTACT: Donald J. Day, Airspace Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, Fort Worth, TX 76193–0520, telephone 817–222–5593.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR part 71 revises

the Class E airspace at Center, TX. The development of a NDB SIAP, at Center Municipal Airport, Center, TX has made this rule necessary. This action is intended to provide adequate controlled airspace extending upward from 700 feet or more above the surface for Instrument Flight Rules (IFR) operations to Center Municipal Airport, Center, TX.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.9F, dated September 10, 1998, and effective September 16, 1998, which is incorporated by reference in 14 CFR § 71.1. The Class E airspace designation listed in this document will be published subsequently in the order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and therefore is issuing it as a direct final rule. A substantial number of previous opportunities provided to the public to comment on substantially identical actions have resulted in negligible adverse comments or objections. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a final rule and was not preceded by a notice of proposed rulemaking, 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 or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the

effectiveness of this action and determining whether additional rulemaking action is 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 action will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 99-ASW-14." The postcard will be date stamped and returned to the commenter.

Agency Findings

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 level 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.

Further, the FAA has determined that this regulation is a noncontroversial and unlikely to result in adverse or negative comments and only involves an established body of technical regulations that require frequent and routine amendments to keep them operationally current. Therefore, I certify that this regulation (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. Since this rule involves routine matters that will only affect air traffic procedures and air navigation, it does not warrant preparation of a Regulatory Flexibility Analysis because the anticipated impact is so minimal.

List of Subjects in 14 CFR part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9F, *Airspace Designations and Reporting Points*, dated September 10, 1998, and effective September 16, 1998, is amended as follows:

Paragraph 6005—Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ASW TX E5 Center, TX [Revised]

Center Municipal Airport, Center, TX
(Lat. 31°49'54" N., long. 94°09'23" W.)

Amason NDB
(Lat. 31°49'54" N., long. 94°09'14" W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Center Municipal Airport and within 2.5 miles each side of the 341° bearing from the Amason NDB extending from the 6.5-mile radius to 7.5 miles northwest of the airport.

* * * * *

Issued in Fort Worth, TX, on July 21, 1999.

Robert N. Stevens,

*Acting Manager, Air Traffic Division,
Southwest Region.*

[FR Doc. 99-18569 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99-ASW-10]

Revision of Class E Airspace; Shreveport, LA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This amendment revises the Class E airspace at Shreveport, LA. The development of a Nondirectional Radio

Beacon (NDB) or Global Positioning System (GPS) Standard Instrument Approach Procedure (SIAP), at Shreveport Regional Airport, Shreveport, LA has made this rule necessary. This action is intended to provide adequate controlled airspace extending upward from 700 feet or more above the surface for Instrument Flight Rules (IFR) operations to Shreveport Regional Airport, Shreveport, LA.

DATES: Effective 0901 UTC, September 9, 1999. Comments must be received on or before September 7, 1999.

ADDRESSES: Send comments on the rule in triplicate to Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Docket No. 99-ASW-10, Fort Worth, TX 76193-0520. The official docket may be examined in the Office of the Regional Counsel, Southwest Region, Federal Aviation Administration, 2601 Mechanism Boulevard, Room 663, Fort Worth, TX, between 9 AM and 3 PM, Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Room 414, Fort Worth, TX.

FOR FURTHER INFORMATION CONTACT: Donald J. Day, Airspace Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, Fort Worth, TX 76193-0520, telephone 817-222-5593.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR part 71 revises the Class E airspace at Shreveport, LA. The development of an NDB or GPS SIAP, at Shreveport Regional Airport, Shreveport, LA has made this rule necessary. This action is intended to provide adequate controlled airspace extending upward from 700 feet or more above the surface for Instrument Flight Rules (IFR) operations to Shreveport Regional Airport, Shreveport, LA.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.9F, dated September 10, 1998, and effective September 16, 1998, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and therefore is issuing it as a direct final rule. A substantial number of previous opportunities provided to the public to comment on substantially identical

actions have resulted in negligible adverse comments or objections. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a final rule and was not preceded by a notice of proposed rulemaking, 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 or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action is 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 contract concerned with the substance of this action will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 99-ASW-10." The postcard will be date stamped and returned to the commenter.

Agency Findings

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 level 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.

Further, the FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments and only involves an established body of technical regulations that require frequent and routine amendments to keep them operationally current. Therefore, I certify that this regulation (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. Since this rule involves routine matters that will only affect air traffic procedures and air navigation, it does not warrant preparation of a Regulatory Flexibility Analysis because the anticipated impact is so minimal.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9F, *Airspace Designations and Reporting Points*, dated September 10, 1998, and effective September 16, 1998, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ASW LA E5 Shreveport, LA [Revised]

Shreveport Regional Airport, Shreveport, LA (Lat. 32°26'48" N., long. 93°49'32" W.)

Shreveport, Barksdale AFB, LA (Lat. 32°30'07" N., long. 93°39'46" W.)

Shreveport Downtown Airport, LA (Lat. 32°32'24" N., long. 93°44'41" W.)

That airspace extending upward from 700 feet above the surface within a 9.4-mile radius of Shreveport Regional Airport and within a 8-mile radius of Barksdale AFB and within a 8.1-mile radius of Shreveport Downtown Airport.

* * * * *

Issued in Fort Worth, TX, on July 12, 1999.

Robert N. Stevens,

Acting Manager, Air Traffic Division, Southwest Region.

[FR Doc. 99-18571 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99-ASW-09]

Revision of Class E Airspace; Galveston, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This amendment revises the Class E airspace extending upward from the surface within a 4.1-mile radius of Scholes Field, Galveston, TX. Increased air traffic operations and instrument approaches have made this rule necessary. This action is intended to provide continuous controlled airspace for aircraft operating in the vicinity of Scholes Field, Galveston, TX.

DATES: Effective 0901 UTC, September 9, 1999. Comments must be received on or before September 7, 1999.

ADDRESSES: Send comments on the rule in triplicate to Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Docket No. 99-ASW-09, Fort Worth, TX 76193-0520. The official docket may be examined in the Office of the Regional Counsel, Southwest Region, Federal Aviation Administration, 2601 Meacham Boulevard, Room 63, Fort Worth, TX, between 9 AM and 3 PM, Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours

at the Airspace Branch, Air Traffic Division, Federal Aviation Administration, Southwest Region, Room 414, Fort Worth, TX.

FOR FURTHER INFORMATION CONTACT: Donald J. Day, Airspace Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, Fort Worth, TX 76193-0520, telephone 817-222-5593.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR part 71 revises the Class E airspace extending upward from the surface within a 4.1-mile radius of Scholes Field, Galveston, TX. Increased air traffic operations and instrument approaches have made this rule necessary. This action is intended to provide continuous controlled airspace for aircraft operating in the vicinity of Scholes Field, Galveston, TX.

Class E airspace designations are published in Paragraph 6002 of FAA Order 7400.9F, dated September 10, 1998, and effective September 16, 1998, which is incorporated by reference in 14 CFR § 71.1. The Class E airspace designation listed in this document will be published subsequently in the order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and therefore is issuing it as a direct final rule. A substantial number of previous opportunities provided to the public to comment on substantially identical actions have resulted in negligible adverse comments or objections. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comments, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a final rule and was not preceded by a notice of proposed rulemaking, 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 or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions in extremely helpful in evaluating the effectiveness of this action and determination whether additional rulemaking action is 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 action will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 99-ASW-09." The postcard will be date stamped and return to the commenter.

Agency Findings

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 level 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 Federal Assessment.

Further, the FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments and only involves an established body of technical regulations that require frequent and routine amendments to keep them operationally current. Therefore, I certify that this regulation (1) 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. Since this rule involves routine matters that will only affect air

traffic procedures and air navigation, it does not warrant preparation of a Regulatory flexibility Analysis because the anticipated impact is so minimal.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration amends 14 CFR part 71 as follows:

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

1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9F, *Airspace Designations and Reporting Points*, dated September 10, 1998, and effective September 16, 1998, is amended as follows:

Paragraph 6002 Class E airspace areas extending upward from the surface of the earth.

* * * * *

ASW TX E2 Galveston, TX [Revised]

Galveston, Scholes Field, TX
(Lat. 29°15'55" N., long. 94°51'38" W.)

That airspace extending upward from the surface within a 4.1-mile radius of Scholes Field

* * * * *

Issued in Fort Worth, TX, on July 12, 1999.

Robert N. Stevens,

Acting Manager, Air Traffic Division, Southwest Region.

[FR Doc. 99-18572 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99-ACE-19]

Amendment to Class E Airspace; Decorah, IA

AGENCY: Federal Aviation Administration [FAA], DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace area at Decorah, IA. A Global

Positioning System (GPS) COPTER 339° Point in Space, Standard Instrument Approach Procedure (SIAP) has been developed to serve Winneshiek County Memorial Hospital Heliport, Decorah, IA. Additional controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to accommodate aircraft executing the SIAP. This action revises existing controlled airspace for Decorah, IA, in order to include the Point in Space SIAP serving Winneshiek County Memorial Hospital Heliport.

EFFECTIVE DATE: 0901 UTC September 9, 1999.

FOR FURTHER INFORMATION CONTACT: Kathy Randolph, Air Traffic Division, Airspace Branch, ACE-520C, Federal Aviation Administration, 601 E. 12th Street, Kansas City, MO 64106; telephone: (816) 426-3408.

SUPPLEMENTARY INFORMATION:

History

On April 20, 1999, the FAA proposed to amend 14 CFR part 71 of the Federal Regulations (14 CFR part 71) by amending the Class E airspace area at Decorah, IA (64 FR 19317). The proposed action would provide additional controlled airspace to accommodate aircraft executing the Point in Space SIAP.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9F, dated September 10, 1998, and effective September 16, 1998, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

The Rule

This amendment to 14 CFR part 71 of the Federal Regulations (14 CFR part 71) amends the Class E airspace area at Decorah, IA, by providing additional controlled airspace for aircraft executing the COPTER 339° Point in Space SIAP. The area will be depicted on appropriate aeronautical charts.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not

a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9F, Airspace Designations and Reporting Points, dated September 10, 1998, and effective September 16, 1998, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ACE IA E5 Decorah, IA [Revised]

Decorah Municipal Airport, IA
(Lat. 43°16'32"N., long. 91°44'22"W.)
Waukon VORTAC
(Lat. 43°16'48"N., long. 91°32'15"W.)
Decorah NDB
(Lat. 43°16'32"N., long. 91°44'11"W.)
Winneshiek County Memorial Hospital, IA
Point in Space Coordinates
(Lat. 43°16'57"N., long. 91°45'56"W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Decorah Municipal Airport and within 2.0 miles each side of the 267° radial of the Waukon VORTAC extending from the 6.4-mile radius to the VORTAC and within 2.6 miles each side of the 122° bearing from the Decorah NDB extending from the 6.4-mile radius to 7.0 miles southeast of the airport, and within a 6.0-mile radius of the Point in Space serving Winneshiek County Memorial Hospital.

* * * * *

Issued in Kansas City, MO on May 20, 1999.

Herman J. Lyons, Jr.,

Manager, Air Traffic Division, Central Region.

[FR Doc. 99-18568 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Airspace Docket No. 98-ASO-11]

RIN 2120-AA66

Change Name of Using Agency for Restricted Areas R-2102A, R-2102B, and R-2102C; AL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action changes the name of the using agency for Restricted Areas R-2102A, R-2102B, and R-2102C, Fort McClellan, AL, from "Commanding Officer, Fort McClellan, AL," to "Alabama Army National Guard." This change is required due to the closure of Fort McClellan as an active duty Army installation. As a result of this change, the Army National Guard assumes "using agency" responsibilities for the restricted areas.

EFFECTIVE DATE: 0901 UTC, September 9, 1999.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace and Rules Division, ATA-400, Office of Air Traffic Airspace Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-8783.

SUPPLEMENTARY INFORMATION:

Background

Fort McClellan is being closed as an active duty Army installation as a result of the Defense Base Realignment and Closure process. As part of that effort, the Alabama Army National Guard will assume control of all of the existing restricted airspace associated with Fort McClellan and the Pelham Range (R-2102A, R-2102B, R-2102C). These restricted areas are used for training to maintain and increase the combat readiness of National Guard and Reserve forces. By this action, the Alabama Army National Guard is being designated as the using agency for the restricted areas.

The Rule

This action amends 14 CFR part 73 by changing the name of the using agency

for Restricted Areas R-2102A, R-2102B, and R-2102C, from "Commanding Officer, Fort McClellan, AL," to "Alabama Army National Guard." Although Fort McClellan is closing as an active duty Army installation, there is a continuing requirement for the existing restricted airspace to accommodate ongoing National Guard and Reserve forces readiness training.

Since this administrative change will not alter the boundaries, altitudes, time of designation for the restricted areas or the activities conducted therein; I find that notice and public procedure under 5 U.S.C 553(b) are unnecessary.

Section 73.21 of part 73 was republished in FAA Order 7400.8F, dated October 27, 1998.

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

Environmental Review

This action involves a minor administrative change to amend the name of the using agency of existing restricted areas. There are no changes to the dimensions of the restricted areas, or to air traffic control procedures or routes as a result of this action. Therefore, this action is not subject to environmental assessments and procedures in accordance with FAA Order 1050.1D, "Policies and Procedures for Considering Environmental Impacts," and the National Environmental Policy Act of 1969.

List of Subjects in 14 CFR Part 73

Airspace, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73, as follows:

PART 73—SPECIAL USE AIRSPACE

1. The authority citation for part 73 continues to read as follows:

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

§ 73.21 [Amended]

2. § 73.21 is amended as follows:

* * * * *

R-2102A, R-2102B, R-2102C Fort McClellan, AL [Amended]

By removing "Using agency. Commanding Officer, Fort McClellan, AL," and adding "Using agency. Alabama Army National Guard."

* * * * *

Issued in Washington, DC, on July 14, 1999.

Reginald C. Matthews,

Manager, Airspace and Rules Division.

[FR Doc. 99–18567 Filed 7–20–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 600

[Docket No. 981228324–9168–02; I.D. 121697A]

RIN 0648–AJ70

Magnuson-Stevens Fishery Conservation and Management Act; Amendment of Foreign Fishing Regulations; OMB Control Numbers

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to amend the foreign fishing regulations to provide for the issuance of certain transshipment permits under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), as amended by the Sustainable Fisheries Act (SFA), and to update permit application and issuance procedures applicable to all types of foreign fishing permits issued under the Magnuson-Stevens Act.

DATES: Effective August 20, 1999.

FOR FURTHER INFORMATION CONTACT: Robert A. Dickinson, 301–713–2276.

SUPPLEMENTARY INFORMATION: Regulations at 50 CFR part 600, subpart F, govern foreign fishing under the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq.*). Among other things, the regulations establish procedures for

permit application and issuance under section 204(b) of the Magnuson-Stevens Act. Under these regulations, foreign fishing vessels may be permitted to fish in the U.S. Exclusive Economic Zone (EEZ). Until the SFA (Pub. L. 104–297) established section 204(d) of the Magnuson-Stevens Act, all foreign fishing applications were submitted under section 204(b) of the Magnuson-Stevens Act.

Section 204(d) of the Magnuson-Stevens Act authorizes the Assistant Administrator for Fisheries (AA) to issue transshipment permits authorizing foreign vessels to engage in fishing consisting solely of transporting fish or fish products at sea from a point within the EEZ or, with the concurrence of a state, within the boundaries of that state, to a point outside the United States. Issuance of a permit to a foreign vessel to receive fish or fish products at sea within the boundaries of a state is subject to certain conditions and restrictions and contingent upon the concurrence of the involved state.

Shortly after passage of the SFA, it was necessary for NMFS to issue permits within a short timeframe to certain Canadian vessels under section 204(d) of the Magnuson-Stevens Act. It was determined at the time that NMFS had the authority to issue the permits without first amending the existing foreign fishing regulations to specifically provide the procedures for permit application and issuance under section 204(d). After obtaining an initial "worksheet" adjustment for the collection of 204(d) application information from the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA), NMFS issued permits to the Canadian vessels and has subsequently issued several other permits under section 204(d) of the Magnuson-Stevens Act.

Although the determination was made that NMFS could issue 204(d) permits before amending the foreign fishing regulations to establish procedures for permit application and issuance, the SFA implementation plan anticipated the eventual amendment of the regulations to establish such procedures. To this end, NMFS published a proposed rule on April 5, 1999 (64 FR 16414). The proposed rule discussed a number of revisions to be made to the foreign fishing regulations at 50 CFR part 600, subpart F, to provide for permit application and issuance procedures under section 204(d) of the Magnuson-Stevens Act. Additionally, several revisions to the foreign fishing regulations were proposed to update provisions applicable to all types of foreign fishing permits issued under the

Magnuson-Stevens Act. Readers should refer to the proposed rule for information on the specific revisions.

One individual submitted comments on the proposed rule. The comments are summarized as follows:

Comment 1: During 1998 certain U.S. vessels missed "the opportunity to supply fish" to foreign processor vessels during a joint venture (JV) for Atlantic mackerel because the freezers of the foreign processing vessels were filled to capacity with processed product while the vessels were "waiting for refrigerated cargo vessels to be permitted" under section 204(d) of the Magnuson-Stevens Act.

Response: All permits issued under section 204(d) of the Magnuson-Stevens Act in support of the JV in question were issued within 14 to 21 days of receipt of the applications. NMFS has always carried out its role in permit processing under the Magnuson-Stevens Act with as much expediency as possible. However, given the multi-agency review process, the vagaries of fishing, weather and trade, and the resultant inability of applicants to know precisely when they will need to transship, NMFS cannot guarantee there will not be occasions when applicants are ready to transship before NMFS has had time to properly process an application and, if appropriate, issue a permit.

Comment 2: Two weeks is usually as far in advance as it is possible to contract with cargo vessel operators for a specific vessel to transship, yet under the proposed regulations applicants will have to wait for a 90 day process to obtain a permit for a transshipment vessel.

Response: The 90 day period is not an absolute requirement, but rather a limit of time to allow for application processing in complex situations. Most transshipment applications, whether submitted under section 204(d) or 204(b) of the Magnuson-Stevens Act, are processed within 14 to 21 days of receipt of an application. While the mere submission of an application does not guarantee issuance of a permit, NMFS expects that most transshipment permits issued will be issued within a similar timeframe in the future, particularly in cases where the applicant vessels will be supporting foreign or domestic processors engaged in previously approved activities. NMFS realizes this time period is still potentially longer than the commenter reports is usually possible for advance notice. However, while NMFS is appreciative of the possible difficulties some applicants may face in locating a transport vessel far enough in advance

of an anticipated transshipping date, given the time necessary for NMFS to make all the statutorily required determinations identified at section 204(d)(3) of the Magnuson-Stevens Act, NMFS cannot guarantee that issuance of permits will always be possible within an applicant's desired timeframe.

Comment 3: There are no U.S. refrigerated cargo transport vessels operating on the East Coast of the United States available to transship and transport JV product; therefore, the proposed application processing procedures, including the intention of NMFS to publish a notice of receipt of each application in the **Federal Register**, will create unnecessary delays in the permitting process.

Response: Section 204(d)(3)(D) of the Magnuson-Stevens Act provides that an application may not be approved until a determination is made that "no owner or operator of a vessel of the United States which has adequate capacity to perform the transportation for which the application is submitted has indicated * * * an interest in performing the transportation at fair and reasonable rates." Even assuming there are no U.S. refrigerated cargo transports of the type needed to support a JV currently operating on the East Coast, this may not always be the case. Thus, NMFS believes that publishing a notice of receipt of an application in the **Federal Register** is the best means of making the determination in accordance with section 204(d)(3)(D) of the Magnuson-Stevens Act because publication in the **Federal Register** provides official notice to all interested parties. NMFS must also consult with multiple agencies during the processing of each application. NMFS believes the proposed procedures will enable it to process applications in the most expedient manner possible and in compliance with all applicable requirements of the Magnuson-Stevens Act. Accordingly, NMFS believes the proposed processing procedures are appropriate and should not be changed.

Comment 4: Clarification is requested as to whether applications under section 204(d) of the Magnuson-Stevens Act must be submitted by official representatives of nations having a Governing International Fishery Agreement (GIFA) with the United States.

Response: Applications for permits under section 204(d) of the Magnuson-Stevens Act may be submitted by any person. The applicant vessel does not have to be of a nation that has a GIFA with the United States.

In summary, NMFS does not believe any changes are necessary to the

regulations as proposed on April 5, 1999 (64 FR 16414). The regulations as proposed are necessary to properly administer foreign fishing under the applicable provisions of the Magnuson-Stevens Act. Further, nothing in the revised foreign fishing regulations precludes issuance of transshipment permits submitted under section 204(d) of the Magnuson-Stevens Act within 14 to 21 days of receipt of an application. Accordingly, the regulations as proposed are adopted as final.

Under NOAA Administrative Order 205-11, 7.01, dated December 17, 1990, the Under Secretary for Oceans and Atmosphere has delegated to the Assistant Administrator for Fisheries, NOAA, the authority to sign material for publication in the **Federal Register**.

Classification

This final rule has been determined to be not significant for purposes of E.O. 12866.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not prepared.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to, a penalty for failure to comply with a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number.

As noted in the proposed rule, this action directly relates to two collection-of-information requirements subject to the PRA: application information and vessel reporting requirements. This action is also indirectly related to another collection of information under the PRA which was recently assigned a new OMB control number for administrative purposes: vessel identification requirements. Additionally, NMFS is updating a reference to a collection of information under the PRA not directly related to this action which, for administrative purposes, was recently assigned a new OMB control number: gear identification. The collections of information, all of which have been approved by OMB, are as follows:

(1) *Approved under OMB control number 0648-0089*—Application form

for foreign fishing permits, including those to be issued under section 204(d) of the Magnuson-Stevens Act; estimated at 45 minutes per response.

(2) *Approved under OMB control number 0648-0075*—Reporting by vessels operating under foreign fishing permits, including those issued under section 204(d) of the Magnuson-Stevens Act; estimated at 6 minutes per response.

(3) *Approved under OMB control number 0648-0356*—Vessel identification requirements for vessels operating under foreign fishing permits, including those issued under section 204(d) of the Magnuson-Stevens Act; estimated at 45 minutes per response.

(4) *Approved under OMB control number 0648-0354*—Gear identification requirements for vessels operating under foreign fishing permits issued under section 204(b) of the Magnuson Stevens Act; estimated at 1.25 hours per response. This collection of information was recently renewed for administrative purposes only; at the present time there are no species available for foreign directed fishing.

List of Subjects

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 600

Fisheries, Fishing, Foreign relations, Intergovernmental relations.

Dated: July 15, 1999.

Penelope D. Dalton,

Assistant Administrator for Fisheries,
National Marine Fisheries Service.

For the reasons set out in the preamble, 15 CFR Chapter IX and 50 CFR Chapter VI are amended as follows:

15 CFR Chapter IX

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

2. In § 902.1, in paragraph (b), in the table, under 50 CFR, the entry for § 600.503, is amended by removing the control numbers “-0305 and -0306” and adding the control numbers “-0354 and -0356” in their place to read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648-)
* * *	* *
50 CFR	
* * *	* *
§ 600.503	-0354 and -0356
* * *	* *

50 CFR Chapter VI

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

3. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

4. In § 600.501, paragraph (c) introductory text, and paragraphs (d)(1), (d)(4), (e) and (k) are revised, and paragraph (c)(10) is added to read as follows:

§ 600.501 Vessel permits.

* * * * *

(c) *Activity codes.* Permits to fish under this subpart may be issued by the Assistant Administrator for the activities described in this paragraph, but the permits may be modified by regulations of this subpart and by the conditions and restrictions attached to the permit (see paragraphs (e)(1)(v) and (l) of this section). The Assistant Administrator may issue a permit, as appropriate, for one or more of the activity codes listed. Only vessels of nations having a GIFA with the United States may be issued permits for activity codes 1 through 9. A GIFA is not required for a vessel to be issued a permit for activity code 10. The activity codes are described as follows:

* * * * *

(10) *Activity Code 10.* Transshipping at sea for the purpose of transporting fish or fish products from a point within the EEZ or, with the concurrence of a state, within the boundaries of that state, to a point outside the United States.

(d) *Application.* (1) Applications for FFV permits authorizing activity codes 1 through 9 must be submitted by an official representative of a foreign nation to the DOS. Applications for permits authorizing activity codes 1 through 9 are available from, and should be submitted to, DOS, OES/OMC, Washington, DC 20520. Applications for FFV permits authorizing activity code 10 may be submitted by any person to the Assistant Administrator. Applications for permits authorizing

activity code 10 are available from NMFS, Attn: International Fisheries Division, 1315 East West Highway, Silver Spring, Maryland 20910. All applicants should allow 90 days for review and comment by the public, involved governmental agencies, and appropriate Councils and for processing before the anticipated date to begin fishing. The permit application fee must be paid at the time of application according to § 600.518.

* * * * *

(4) Each applicant may request to substitute one FFV for another of the same flag by submitting a new application form and a short explanation of the reason for the substitution to the appropriate address listed at paragraph (d)(1) of this section. Each substitution is considered a new application, and a new application fee must be paid. NMFS will promptly process an application for a vessel replacing a permitted FFV that is disabled or decommissioned, once the appropriate Council(s) and governmental agencies have been notified of the substituted application.

(e) *Issuance.* (1) Permits may be issued to an FFV by the Assistant Administrator after—

(i) The Assistant Administrator determines that the fishing described in the application will meet the requirements of the Magnuson-Stevens Act and approves the permit application.

(ii) The applicant has paid the fees and provided any assurances required by the Secretary in accordance with the provisions of § 600.518.

(iii) The applicant has appointed an agent.

(iv) The applicant has identified a designated representative.

(v) The applicant has accepted the general “conditions and restrictions” of receiving permits, as required by section 204(b)(7) of the Magnuson-Stevens Act, and any “additional restrictions” attached to the permit for the conservation and management of fishery resources or for the prevention of significant impairment of the national defense or security interests.

(2) The DOS will provide permits for activity codes 1 through 9 to the official representative of the applicant foreign nation. The Assistant Administrator will provide permits for activity code 10 directly to the applicant.

(3) An approved permit will contain—

(i) The name and IRCS of the FFV and its permit number. (ii) The permitted fisheries and/or activity codes.

(iii) The date of issuance and expiration date, if other than December 31.

(iv) All conditions and restrictions, and any additional restrictions and technical modifications appended to the permit.

(4) Permits are not issued for boats that are launched from larger vessels. Any enforcement action that results from the activities of a launched boat will be taken against the permitted vessel.

* * * * *

(k) *Change in application information.* The applicant must report, in writing, any change in the information supplied under paragraph (d) of this section to the Assistant Administrator within 15 calendar days after the date of the change. Failure to report a change in the ownership from that described in the current application within the specified time frame voids the permit, and all penalties involved will accrue to the previous owner.

* * * * *

5. In § 600.502, paragraph (a) is revised, and a new paragraph (h) is added to read as follows:

§ 600.502 Vessel reports.

(a) The operator of each FFV must report the FFV's activities to the USCG and NMFS as specified in this section.

* * * * *

(h) *Alternative reporting procedures.* As an alternative to the use of the specific procedures provided, an applicant may submit proposed reporting procedures for a general type of fishery operation (i.e., transshipments under Activity Code 10) to the appropriate Regional Administrator and the USCG commander (see tables 1 and 2 to § 600.502 of this chapter). With the agreement of the USCG commander, the Regional Administrator may authorize the use of alternative reporting procedures.

* * * * *

6. In § 600.505, paragraphs (a)(8), (a)(9), and (b)(1) are revised to read as follows:

§ 600.505 Prohibitions.

(a) * * *

(8) Engage in any fishing activity within the EEZ without a U.S. observer aboard the FFV, unless the requirement has been waived by the Assistant Administrator or appropriate Regional Administrator;

(9) Retain or attempt to retain, directly or indirectly, any U.S. harvested fish, unless the FFV has a permit for Activity Codes 4, 6, or 10;

* * * * *

(b) * * *

(1) Within the boundaries of any state, unless:

(i) The fishing is authorized by the Governor of that state as permitted by section 306(c) of the Magnuson-Stevens Act to engage in a joint venture for processing and support with U.S. fishing vessels in the internal waters of that state; or

(ii) The fishing is authorized by, and conducted in accordance with, a valid permit issued under § 600.501, and the Governor of that state has indicated concurrence to allow fishing consisting solely of transporting fish or fish products from a point within the boundaries of that state to a point outside the United States; or

* * * * *

7. In § 600.506, the last sentence in paragraph (a) and the first sentence in paragraph (b) introductory text are revised to read as follows:

§ 600.506 Observers.

(a) * * * Except as provided for in section 201(h)(2) of the Magnuson-Stevens Act, no FFV may conduct fishing operations within the EEZ unless a U.S. observer is aboard.

(b) *Effort plan.* To ensure the availability of an observer as required by this section, the owners and operators of FFV's wanting to fish within the EEZ will submit to the appropriate Regional Administrator or Science and Research Director and also to the Chief, Financial Services Division, NMFS, 1315 East West Highway, Silver Spring, MD 20910 a schedule of fishing effort 30 days prior to the beginning of each quarter. * * *

* * * * *

8. In § 600.508, paragraph (g) is added to read as follows:

§ 600.508 Fishing operations.

* * * * *

(g) *Transshipping.* Each FFV with Activity Code 1, 2, 3, 4, 5, 6, 7, 8, or 10 may transship in accordance with this subpart and the vessel's permit.

9. In § 600.518, paragraph (c) is removed, paragraphs (d) and (e) are redesignated as paragraphs (c) and (d) respectively, and paragraph (a), (b)(1) introductory text, (b)(2) heading, and (b)(2)(i) introductory text are revised to read as follows:

§ 600.518 Fee schedule for foreign fishing.

(a) *Permit application fees.* Each vessel permit application submitted under § 600.501 must be accompanied by a fee. The amount of the fee will be determined in accordance with the procedures for determining administrative costs of each special product or service contained in the NOAA Finance Handbook, which is available upon request from the International Fisheries Division (see

address at § 600.501(d)(1)). The fee is specified with the application form. At the time the application is submitted, a check for the fees, drawn on a U.S. bank, payable to the order of "Department of Commerce, NOAA," must be sent to the Assistant Administrator. The permit fee payment must be accompanied by a list of the vessels for which the payment is made. In the case of applications for permits authorizing activity code 10, the permit application fee will be waived if the applicant provides satisfactory documentary proof to the Assistant Administrator that the foreign nation under which the vessel is registered does not collect a fee from a vessel of the United States engaged in similar activities in the waters of such foreign nation. The documentation presented (e.g., copy of foreign fishing regulations applicable to vessels of the United States) must clearly exempt vessels of the United States from such a fee.

(b) *Poundage fees.* (1) *Rates.* If a Nation chooses to accept an allocation, poundage fees must be paid at the rate specified in the following table.

* * * * *

(2) *Method of payment of poundage fees and observer fees.* (i) If a Nation chooses to accept an allocation, a revolving letter of credit (L/C) must be established and maintained to cover the poundage fees for at least 25 percent of the previous year's total allocation at the rate in paragraph (b)(1) of this section, or as determined by the Assistant Administrator, plus the observer fees required by paragraph (c) of this section. The L/C must—

* * * * *

[FR Doc. 99-18642 Filed 7-20-99; 8:45 am]

BILLING CODE 3510-22-F

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 8829]

RIN 1545-AW87

Compromises

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations that provide additional guidance regarding the compromise of internal revenue taxes. The temporary regulations reflect changes to the law made by the Internal Revenue Service Restructuring and

Reform Act of 1998 and the Taxpayer Bill of Rights II. The text of these temporary regulations serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**.

DATES: *Effective date.* These temporary regulations are effective July 21, 1999.

Applicability date. For dates of applicability, see § 301.7122-1T(j) of these regulations.

FOR FURTHER INFORMATION CONTACT: Carol A. Campbell, (202) 622-3620 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains temporary regulations amending the Procedure and Administration Regulations (26 CFR part 301) under section 7122 of the Internal Revenue Code (Code). The regulations reflect the amendment of section 7122 by section 3462 of the Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA 1998") Public Law 105-206, (112 Stat. 685, 764) and by section 503 of the Taxpayer Bill of Rights II Public Law 104-168, (110 Stat. 1452, 1461).

As amended by RRA 1998, section 7122 provides that the Secretary will develop guidelines to determine when an offer to compromise is adequate and should be accepted to resolve a dispute. The legislative history accompanying RRA 1998 explains that Congress intended that factors such as equity, hardship, and public policy be evaluated in the compromise of individual tax liabilities, in certain circumstances, if such consideration would promote effective tax administration. H. Conf. Rep. 599, 105th Cong., 2d Sess. 289 (1998).

The current regulations under Treasury regulation § 301.7122-1 permit the compromise of cases on only the grounds of doubt as to collectibility, doubt as to liability, or both. These regulations are being removed. Like the current regulations, the temporary regulations provide for compromise based on doubt as to liability and doubt as to collectibility; however, they also provide for compromise based upon specific hardship and/or equitable criteria if such a compromise would promote effective tax administration. The inclusion in these regulations of a standard that will allow compromise on grounds other than doubt as to liability or doubt as to collectibility represents a significant change in the IRS' exercise of compromise authority.

Section 7122 of the Code provides broad authority to the Secretary to compromise any case arising under the internal revenue laws, as long as the case has not been referred to the Department of Justice for prosecution or defense. Although the statutory language of Section 7122 does not explicitly place limits on the Secretary's authority to compromise, opinions of the Attorney General and the regulations issued under section 7122 prior to RRA 1998 authorized the Secretary to compromise a liability under the revenue laws only when there was doubt as to liability (uncertainty as to the existence or amount of the tax obligation) or doubt as to collectibility (uncertainty as to the taxpayer's ability to pay). The opinion of the Attorney General most often cited as the principal source of these limitations is the 1933 opinion of Attorney General Cummings that was issued in response to an inquiry from then Acting Secretary of the Treasury Acheson.

In requesting an opinion from the Attorney General, Acting Secretary of the Treasury Acheson expressed concern that the country was trying to recover from the depression. He suggested that the public interest required compromise of tax claims where collection of the tax would "destroy a business, ruin a tax producer, throw men out of employment, or result in the impoverishment of widows or minor children of a deceased taxpayer." The Secretary expressed the belief that in ordinary times, compromise of cases on public policy grounds should be rare but that, in light of the current state of the country, public policy should play a significantly greater role. Expressing the belief that it was more important that "the business of the taxpayer be preserved and not destroyed," Acting Secretary Acheson suggested that cases should be compromised where the taxpayer is insolvent, even though the tax is fully collectible, and that penalties and certain interest charges should be "compromisable wherever justice, equity, or public policy seems to justify the compromise * * *." Letter from Treasury Department, XIII-47-7137 (July 31, 1933).

Attorney General Cummings replied that "[t]here is much to be said for the proposition that a liberal rule should exist, but my opinion is that if such a course is to be taken it should be at the instance of Congress. I conclude that where liability has been established by a valid judgment or is certain, and there is no doubt as to the ability of the Government to collect, there is no room for 'mutual concessions,' and therefore no basis for a 'compromise.'" Op. Atty.

Gen. 6, XIII-47-7138 (October 24, 1933). See also Op. Atty. Gen. 7, XIII-47-7140 (October 2, 1934), wherein Attorney General Cummings stated that "[t]here appears to be no statutory authority to compromise solely upon the ground that a hard case is presented, which excites sympathy or is merely appealing from the standpoint of equity, but the power to compromise clearly authorizes the settlement of any case about which uncertainty exists as to liability or collection."

Although the 1933 opinion of Attorney General Cummings is the most often cited opinion regarding the limits of the IRS' compromise authority (prior to RRA 1998), the conclusion he reached mirrored conclusions reached by a number of his predecessors. Thus, since 1868, a number of Attorneys General opined that when liability is not at issue, the Secretary's compromise authority permitted compromise only when "the full amount of the debt" could not be collected. See, e.g., 12 Op. Atty. Gen. 543 (1868); 16 Op. Atty. Gen. 617 (1879) (the Secretary's authority to compromise does not permit the "voluntary relinquishment" of any part of a lawfully assessed tax from a solvent person or corporation).

Following the issuance of Attorney General Cummings' 1933 opinion, Commissioner Helvering established a policy that IRS tax collectors should make every endeavor to secure offers that represent the taxpayer's "maximum capacity to pay." Commissioner's Statement of Policy with Respect to the Compromise of Taxes, Interest, and Penalties, July 2, 1934. Commissioner Helvering recognized that the Attorney General's opinion did not specify or quantify the amount of doubt necessary to compromise, but concluded that "* * * the Treasury Department does not propose to compromise when there is merely the possibility of doubt. The doubt as to liability or collectibility must be supported by evidence and must be substantial in character, and when such doubt exists, the amount acceptable will depend upon the degree of doubt found in the particular case." *Id.* Implementing the policy established by Commissioner Helvering, the IRS concluded that an offer premised upon doubt as to collectibility should be accepted only when the amount offered represented the maximum amount the taxpayer could pay, taking into account net equity in assets and both current and future income.

The interpretation of section 7122 adopted by Attorney General Cummings (and reflected in Treasury reg. § 301.7122-1(a)), together with the "maximum capacity to pay" policy

established by Commissioner Helvering, have been the fundamental guiding principles for IRS offer in compromise programs for the past 65 years. From the 1930's to the early 1990's, offers to compromise were not widely used to resolve tax cases. In the early 1990s, however, the IRS determined that expanded use of offers to compromise could contribute to more effective tax administration in two important respects. First, the IRS determined that compromise could be used as a technique to enhance overall compliance by providing taxpayers with a reasonable avenue to resolve past difficulties. Second, the IRS determined that it should make more effective use of offers to compromise to help manage the inventory of delinquent tax accounts. Accordingly, while still operating within the basic legal and policy guidelines established in the 1930's, the IRS initiated two significant changes intended to enhance the compromise program.

In 1992, the IRS adopted a new compromise policy and issued revised compromise procedures. The policy provides that an offer to compromise will be accepted when it is unlikely that the tax liability can be collected in full and the amount offered reasonably reflects collection potential. As set forth in the new policy statement, the goal of the compromise program is to achieve collection of what is potentially collectible at the earliest possible time and at the least cost to the government while providing taxpayers with a fresh start toward future voluntary compliance. Policy Statement, P-5-100. In administering its policies under the offer program, the threshold question of "doubt as to liability or doubt as to collectibility" set forth in the regulations constituted a legal requirement that must be followed; once that threshold was met, however, the IRS could legally accept less than the taxpayer's maximum capacity to pay. References in the offer procedures to "maximizing collection" and "maximum capacity to pay" were replaced with "reasonably reflects collection potential." *Id.*

In determining whether an offer reasonably reflects collection potential, the IRS takes into consideration amounts that might be collected from (1) The taxpayer's assets, (2) the taxpayer's present and projected future income, and (3) third parties (e.g., persons to whom the taxpayer had transferred assets). Although most doubt as to collectibility offers only involve consideration of the taxpayer's equity in assets and future disposable income over a fixed period of time, the IRS on

occasion also will consider whether the taxpayer should be expected to raise additional amounts from assets in which the taxpayer's interest is beyond the reach of enforced collection (e.g., interests in property located in foreign jurisdictions or held in tenancies by the entirety). IRM 57(10)(10).1.

The compromise program was also affected by a 1995 IRS initiative designed to ensure uniform treatment of similarly situated taxpayers. In administering its collection operations, including both the installment agreement program and the compromise program, the IRS has always permitted taxpayers to retain sufficient funds to pay reasonable living expenses. Certain commentators had asserted that there were wide variances in the type and amount of such reasonable expense allowances within and between districts. In September of 1995, the IRS adopted and published national and local standards for determining allowable expenses, designed to apply to all collection actions, including offers to compromise. National expense standards derived from the Bureau of Labor Statistics Consumer Expenditure Survey were promulgated for expense categories such as food, clothing, personal care items, and housekeeping supplies. Local expense standards derived from Census Bureau data were promulgated for housing, utilities, and transportation.

The IRS allowable expense criteria play an important role in determining whether taxpayers are candidates for compromise or installment agreements. Although offers to compromise and installment agreements are separate mechanisms for resolving outstanding tax liabilities, there often is a significant interplay between the two programs, because a taxpayer's income available to satisfy the tax liability is determined after the deduction of allowable expenses. In some cases, the allowable expense criteria may be the determining factor in whether the taxpayer receives an installment agreement or a compromise. An installment agreement must provide for payment in full of the amount of the outstanding liability through regular, periodic payments (generally monthly). I.R.C. § 6159. An offer to compromise, by contrast, reflects the fact that the taxpayer has no ability to pay the liability in full. Accordingly, taxpayers entering into compromise agreements can pay an amount less than the full amount due in satisfaction of the liability.

Congress now has directed the Secretary to consider factors other than doubt as to collectibility and doubt as to liability in determining whether to

accept an offer to compromise. Under § 7122(c), added by RRA 1998, factors such as equity, hardship, and public policy will be considered in certain circumstances where such consideration will promote effective tax administration. The legislative history of this provision (H. Conf. Rep. 599, 105th Cong., 2d Sess. 289 (1998)) states that—

* * * the conferees expect that the present regulations will be expanded so as to permit the IRS, in certain circumstances, to consider additional factors (i.e., factors other than doubt as to liability or collectibility) in determining whether to compromise the income tax liabilities of individual taxpayers. For example, the conferees anticipate that the IRS will take into account factors such as equity, hardship, and public policy where a compromise of an individual taxpayer's income tax liability would promote effective tax administration. The conferees anticipate that, among other situations, the IRS may utilize this new authority, to resolve longstanding cases by forgoing penalties and interest which have accumulated as a result of delay in determining the taxpayer's liability. The conferees believe that the ability to compromise tax liability and to make payments of tax liability by installment enhances taxpayer compliance. In addition, the conferees believe that the IRS should be flexible in finding ways to work with taxpayers who are sincerely trying to meet their obligations and remain in the tax system. Accordingly, the conferees believe that the IRS should make it easier for taxpayers to enter into offer-in-compromise agreements, and should do more to educate the taxpaying public about the availability of such agreements.

Another consideration for compromise cases is Chief Counsel review. Since its enactment in section 102 of the Act of July 20, 1868 (15 Stat. 166), the statute authorizing the Secretary to compromise liabilities has contained a requirement that Counsel issue opinions regarding certain of those compromises. Section 7122(b) of the Code requires that the opinion of Counsel, with the reasons therefor, be placed on file whenever a compromise is made by the IRS. Chief Counsel opinions assess both whether the offer meets the legal requirements for compromise and whether the offer conforms to IRS policy and procedure. The opinion provided by Chief Counsel, however, does not have to be in favor of compromise. Pursuant to delegated authority, district directors, service center directors, and regional directors of Appeals have the authority to accept an offer that Counsel has opined does not conform to IRS policy.

Until passage of the Taxpayer Bill of Rights II (TBOR 2), Chief Counsel review was required in all cases in which the liability compromised was

\$500 or more. Under TBOR 2, such an opinion is required only in cases where the compromised liability is \$50,000 or more.

Explanation of Provisions

The temporary regulations continue the traditional grounds for compromise based on doubt as to liability or doubt as to collectibility. In addition, to reflect the changes made in RRA 1998, the temporary regulations allow a compromise where there is no doubt as to liability or as to collectibility, but where either: (1) Collection of the liability would create economic hardship, or (2) exceptional circumstances exist such that collection of the liability would be detrimental to voluntary compliance. Compromise based on these hardship and equity bases may not, however, be authorized if it would undermine compliance. Although the temporary regulations set forth the conditions that must be satisfied to accept an offer to compromise liabilities arising under the internal revenue laws, they do not prescribe the terms or conditions that should be contained in such offers. Thus, the amount to be paid, future compliance or other conditions precedent to satisfaction of a liability for less than the full amount due are matters left to the discretion of the Secretary.

The temporary regulations also add provisions relating to the promulgation of requirements for providing for basic living expenses, evaluating offers from low income taxpayers, and reviewing rejected offers, as required by RRA 1998. The temporary regulations also add provisions relating to staying collection, modifying the dollar criteria for requiring the opinion of Chief Counsel in accepted offers, and setting forth the requirements regarding waivers and suspensions of the statute of limitations. Except for the provision related to dollar criteria for Chief Counsel review, all of the additional provisions of § 301.7122-1T are authorized by RRA 1998. The modification of dollar criteria for Chief Counsel review is authorized by section 503(a) of the Taxpayer Bill of Rights II.

As required by § 7122(c)(2)(A) and (B), added by RRA 1998, the temporary regulations provide for the development and publication of national and local living allowances that permit taxpayers entering into offers to compromise to have an adequate means to provide for their basic living expenses. The determination whether the published standards should be applied in any particular case must be based upon an evaluation of the individual facts and circumstances presented. The Secretary

will determine the appropriate means to publish these national and local living allowances.

In accordance with § 7122(c)(3)(A), the temporary regulations also require the development of supplemental guidelines for the evaluation of offers from "low income" taxpayers. The temporary regulations permit the Secretary to determine which taxpayers qualify as "low income" taxpayers based upon current dollar criteria applied by the U.S. Department of Health and Human Services under authority of section 673(2) of the Omnibus Budget Reconciliation Act of 1981, or any other measure reasonably designed to identify such taxpayers.

In accordance with § 7122(d)(1), the temporary regulations provide that all proposed rejections of offers to compromise will receive independent administrative review prior to final rejection. Section 7122(d)(2) requires and the temporary regulations also provide that the taxpayer has the right to appeal any rejection of an offer to compromise to the IRS Office of Appeals. The temporary regulations provide, however, that when the IRS returns an offer to compromise because it was not processable under IRS procedures, because the offer was submitted solely to delay collection or because the taxpayer failed to provide requested information required by the IRS to evaluate the offer, such a return of the offer does not constitute a rejection and thus, does not entitle the taxpayer to appeal rights under this provision. In the event that an offer to compromise is returned under these circumstances and the IRS institutes collection action, the taxpayer may have the right to consideration of the whole of his or her collection case under other provisions of the Code.

Pursuant to section 6331(k) of the Code, as amended by section 3462 of RRA 1998, the temporary regulations also provide that for offers pending on or submitted on or after January 1, 2000, no enforced collection activity may be taken by the IRS to collect a liability while an offer to compromise is pending, or for the 30 days following any rejection of an offer to compromise, or during any period that an appeal of any rejection, when such appeal is instituted within the 30 days following rejection, is being considered. Collection activity will not, however, be precluded in any case where collection is in jeopardy or the offer to compromise was submitted solely to delay collection.

Effective through December 31, 1999, the temporary regulations continue to require the taxpayer to waive the

running of the statutory period of limitations on collection as a condition of acceptance of an offer to compromise. Effective January 1, 2000, waivers of the statute of limitations on collection will no longer be required for the acceptance of an offer to compromise. Instead, the statute of limitations for collection will be suspended during the period the offer to compromise is under consideration by the IRS. This provision of the temporary regulations implements section 3461 of RRA 1998.

The temporary regulations also implement section 503(a) of the Taxpayer Bill of Rights II by specifying that Chief Counsel review of an accepted offer to compromise is required only for offers in compromise involving \$50,000 or more in unpaid liabilities.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that sections 553(b) and (d) of the Administrative Procedure Act (5 U.S.C. chapter 5) do not apply to these regulations. Please refer to the cross-referenced notice of proposed rulemaking published elsewhere in this issue of the **Federal Register** for the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6). Pursuant to section 7805(f) of the Internal Revenue Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information: The principal author of these temporary regulations is Carol A. Campbell of the Office of Assistant Chief Counsel (General Litigation). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

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

Authority: 26 U.S.C. 7805 * * *

§ 301.7122-1— [Removed]

Par. 2. Section 301.7122-1 is removed.

Par. 3. Section § 301.7122-0T and 301.7211-1T are added to read as follows:

§ 301.7122-0T-2 Table of contents.

This section list the captions that appear in the temporary regulations under § 301.7122-1T.

§ 301.7122-1T Compromises (temporary).

- (a) In general.
- (b) Grounds for compromise.
- (c) Procedures for submission and consideration of offers.
- (d) Acceptance of an offer to compromise a tax liability.
- (e) Rejection of an offer to compromise.
- (f) Effect of offer to compromise on collection activity
- (g) Deposits.
- (h) Statute of limitations.
- (i) Inspection with respect to accepted offers to compromise.
- (j) Effective date.

§ 301.7122-1T Compromises (temporary).

(a) *In general.* (1) The Secretary may exercise his discretion to compromise any civil or criminal liability arising under the internal revenue laws prior to reference of a case involving such a liability to the Department of Justice for prosecution or defense.

(2) An agreement to compromise may relate to a civil or criminal liability for taxes, interest, or penalties. Unless the terms of the offer and acceptance expressly provide otherwise, acceptance of an offer to compromise a civil liability does not remit a criminal liability, nor does acceptance of an offer to compromise a criminal liability remit a civil liability.

(b) *Grounds for compromise.* (1) *In general.* The Secretary may compromise a liability on any of the following three grounds.

(2) *Doubt as to liability.* Doubt as to liability exists where there is a genuine dispute as to the existence or amount of the correct tax liability under the law. Doubt as to liability does not exist where the liability has been established by a final court decision or judgment concerning the existence or amount of the liability. See § 301.7122(e)(4) for special rules applicable to rejection of offers in cases where the IRS is unable to locate the taxpayer's return or return information to verify the liability.

(3) *Doubt as to collectibility.* (i) *In general.* Doubt as to collectibility exists in any case where the taxpayer's assets and income are less than the full amount of the assessed liability.

(ii) *Allowable expenses.* A determination of doubt as to collectibility will include a

determination of ability to pay. In determining ability to pay, the Secretary will permit taxpayers to retain sufficient funds to pay basic living expenses. The determination of the amount of such basic living expenses will be founded upon an evaluation of the individual facts and circumstances presented by the taxpayer's case. To guide this determination, guidelines published by the Secretary on national and local living expense standards will be taken into account.

(iii) *Nonliable spouses.* (A) *In general.* Where a taxpayer is offering to compromise a liability for which the taxpayer's spouse has no liability, the assets and income of the nonliable spouse will not be considered in determining the amount of an adequate offer, except to the extent property has been transferred by the taxpayer to the nonliable spouse under circumstances that would permit the IRS to effect collection of the taxpayer's liability from such property, e.g., property that was conveyed in fraud of creditors, or as provided in paragraph (b)(3)(iii) (B) of this section. The IRS may, however, request information regarding the assets and/or income of the nonliable spouse for the sole purpose of verifying the amount of and responsibility for expenses claimed by the taxpayer.

(B) *Exception.* Where collection of the taxpayer's liability from the assets and/or income of the nonliable spouse is permitted by applicable state law (e.g., under state community property laws), the assets and income of the nonliable spouse will be considered in determining the amount of an adequate offer except to the extent that the taxpayer and the nonliable spouse demonstrate that collection of such assets and income would have a material and adverse impact on the standard of living of the taxpayer, the nonliable spouse, and their dependents.

(4) *Promote effective tax administration.* If there are no grounds for compromise under paragraphs (b)(2) and (3) of this temporary regulation, a compromise may be entered into to promote effective tax administration when—

(i) Collection of the full liability will create economic hardship within the meaning of § 301.6343-1; or

(ii) Regardless of the taxpayer's financial circumstances, exceptional circumstances exist such that collection of the full liability will be detrimental to voluntary compliance by taxpayers; and

(iii) Compromise of the liability will not undermine compliance by taxpayers with the tax laws.

(iv) *Special rules for evaluating offers to promote effective tax administration.* (A) The determination to accept or reject an offer to compromise made on the ground that acceptance would promote effective tax administration within the meaning of this section will be based upon consideration of all the facts and circumstances, including the taxpayer's record of overall compliance with the tax laws.

(B) Factors supporting (but not conclusive of) a determination of economic hardship under paragraph (b)(4)(i) include—

(1) Taxpayer is incapable of earning a living because of a long term illness, medical condition, or disability and it is reasonably foreseeable that taxpayer's financial resources will be exhausted providing for care and support during the course of the condition;

(2) Although taxpayer has certain assets, liquidation of those assets to pay outstanding tax liabilities would render the taxpayer unable to meet basic living expenses; and

(3) Although taxpayer has certain assets, the taxpayer is unable to borrow against the equity in those assets and disposition by seizure or sale of the assets would have sufficient adverse consequences such that enforced collection is unlikely.

(C) Factors supporting (but not conclusive of) a determination that compromise would not undermine compliance by taxpayers with the tax laws include—

(1) Taxpayer does not have a history of noncompliance with the filing and payment requirements of the Internal Revenue Code;

(2) Taxpayer has not taken deliberate actions to avoid the payment of taxes; and

(3) Taxpayer has not encouraged others to refuse to comply with the tax laws.

(D) *Examples.* The following examples illustrate cases that may be compromised under the provisions of paragraph (b)(4)(i):

Example 1. Taxpayer has assets sufficient to satisfy the tax liability. Taxpayer provides full time care and assistance to her dependent child, who has a serious long-term illness. It is expected that the taxpayer will need to use the equity in her assets to provide for adequate basic living expenses and medical care for her child. Taxpayer's overall compliance history does not weigh against compromise.

Example 2. Taxpayer is retired and his only income is from a pension. The taxpayer's only asset is a retirement account, and the funds in the account are sufficient to satisfy the liability. Liquidation of the retirement account would leave the taxpayer without an adequate means to provide for

basic living expenses. Taxpayer's overall compliance history does not weigh against compromise.

Example 3. Taxpayer is disabled and lives on a fixed income that will not, after allowance of adequate basic living expenses, permit full payment of his liability under an installment agreement. Taxpayer also owns a modest house that has been specially equipped to accommodate his disability. Taxpayer's equity in the house is sufficient to permit payment of the liability he owes. However, because of his disability and limited earning potential, taxpayer is unable to obtain a mortgage or otherwise borrow against this equity. In addition, because the taxpayer's home has been specially equipped to accommodate his disability, forced sale of the taxpayer's residence would create severe adverse consequences for the taxpayer, making such a sale unlikely. Taxpayer's overall compliance history does not weigh against compromise.

Example 4. Taxpayer is a business that despite the adoption of a wide array of precautions, including the employment of outside auditors, suffered an embezzlement loss. Although the taxpayer reviewed and signed employment tax returns and signed checks for payment of all employment tax liabilities, the embezzling employee successfully intercepted these checks and diverted the funds. At the time taxpayer discovers the diversions, taxpayer promptly contacts the IRS and begins proceedings to obtain recovery from the employee and the auditor. Taxpayer is unsuccessful in obtaining any recovery from either the employee or the auditor. While taxpayer has accounts receivable that will satisfy the tax delinquencies, taxpayer would be unable to remain in business if those receivables were seized by the IRS. Further, while taxpayer will continue to generate some profit if permitted to remain in business, those profits would not be sufficient to pay the accrued liabilities prior to the time collection of the liabilities became barred by the statute of limitations. Taxpayer's overall compliance history does not weigh against compromise.

(E) The following examples illustrate cases that may be compromised under paragraph (b)(4)(ii):

Example 1. In October of 1986, taxpayer developed a serious illness that resulted in almost continuous hospitalizations for a number of years. The taxpayer's medical condition was such that during this period the taxpayer was unable to manage any of his financial affairs. The taxpayer has not filed tax returns since that time. The taxpayer's health has now improved and he has promptly begun to attend to his tax affairs. He discovers that the IRS prepared a substitute for return for the 1986 tax year on the basis of information returns it had received and had assessed a tax deficiency. When the taxpayer discovered the liability, with penalties and interest, the tax bill is more than three times the original tax liability. Taxpayer's overall compliance history does not weigh against compromise.

Example 2. Taxpayer is a salaried sales manager at a department store who has been able to place \$2,000 in a tax-deductible IRA

account for each of the last two years. Taxpayer learns that he can earn a higher rate of interest on his IRA savings by moving those savings from a money management account to a certificate of deposit at a different financial institution. Prior to transferring his savings, taxpayer submits an E-Mail inquiry to the IRS at its Web Page, requesting information about the steps he must take to preserve the tax benefits he has enjoyed and to avoid penalties. The IRS responds in an answering E-Mail that the taxpayer may withdraw his IRA savings from his neighborhood bank, but he must redeposit those savings in a new IRA account within 90 days. Taxpayer withdraws the funds and redeposits them in a new IRA account 63 days later. Upon audit, taxpayer learns that he has been misinformed about the required rollover period and that he is liable for additional taxes, penalties and additions to tax for not having redeposited the amount within 60 days. Had it not been for the erroneous advice that is reflected in the taxpayer's retained copy of the IRS E-Mail response to his inquiry, taxpayer would have redeposited the amount within the required 60-day period. Taxpayer's overall compliance history does not weigh against compromise.

(c) *Procedures for submission and consideration of offers.* (1) *In general.* An offer to compromise a tax liability pursuant to section 7122 must be submitted according to the procedures, and in the form and manner, prescribed by the Secretary. An offer to compromise a tax liability must be signed by the taxpayer under penalty of perjury and must contain the information prescribed or requested by the Secretary. However, taxpayers submitting offers to compromise liabilities solely on the basis of doubt as to liability will not be required to provide financial statements.

(2) *When offers become pending and return of offers.* An offer to compromise becomes pending when it is accepted for processing. If an offer accepted for processing does not contain sufficient information to permit the IRS to evaluate whether the offer should be accepted, the IRS will request the taxpayer to provide the needed additional information. If the taxpayer does not submit the additional information that the IRS has requested within a reasonable time period after such a request, the IRS may return the offer to the taxpayer. The IRS may also return an offer to compromise a tax liability if it determines that the offer was submitted solely to delay collection or was otherwise nonprocessable. An offer returned following acceptance for processing is deemed pending only for the period between the date the offer is accepted for processing and the date the IRS returns the offer to the taxpayer. See paragraphs (e)(5)(ii) and (f)(2)(iv) of this

temporary regulation for rules regarding the effect of such returns of offers.

(3) *Withdrawal.* An offer to compromise a tax liability may be withdrawn by the taxpayer or the taxpayer's representative at any time prior to the IRS' acceptance of the offer to compromise. An offer will be considered withdrawn upon the IRS' receipt of written notification of the withdrawal of the offer by personal delivery, or by certified mail, or upon issuance of a letter by the IRS confirming the taxpayer's intent to withdraw the offer.

(d) *Acceptance of an offer to compromise a tax liability.* (1) An offer to compromise has not been accepted until the IRS issues a written notification of acceptance to the taxpayer or the taxpayer's representative.

(2) As additional consideration for the acceptance of an offer to compromise, the IRS may request that taxpayer enter into any collateral agreement or post any security which is deemed necessary for the protection of the interests of the United States.

(3) Offers may be accepted when they provide for payment of compromised amounts in one or more equal or unequal installments.

(4) If the final payment on an accepted offer to compromise is contingent upon the immediate and simultaneous release of a tax lien in whole or in part, such payment must be made in accordance with the forms, instructions, or procedures prescribed by the Secretary.

(5) Acceptance of an offer to compromise will conclusively settle the liability of the taxpayer specified in the offer. Neither the taxpayer nor the Government will, following acceptance of an offer to compromise, be permitted to reopen the case except in instances where—

(i) False information or documents are supplied in conjunction with the offer;

(ii) The ability to pay and/or the assets of the taxpayer are concealed; or

(iii) A mutual mistake of material fact sufficient to cause the offer agreement to be reformed or set aside is discovered.

(6) *Opinion of Chief Counsel.* Except as otherwise provided in this paragraph (d)(6), if an offer to compromise is accepted, there will be placed on file the opinion of the Chief Counsel for the IRS with respect to such compromise, along with the reasons therefor. However, no such opinion will be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including any interest, additional amount, addition to the tax, or assessable penalty) is less than

\$50,000. Also placed on file will be a statement of—

(i) The amount of tax assessed;
(ii) The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed; and

(iii) The amount actually paid in accordance with the terms of the compromise.

(e) *Rejection of an offer to compromise.* (1) An offer to compromise has not been rejected until the IRS issues a written notice to the taxpayer or his representative, advising of the rejection, the reason(s) for rejection, and the right to an appeal.

(2) The IRS may not notify a taxpayer or taxpayer's representative of the rejection of an offer to compromise until an independent administrative review of the proposed rejection is completed.

(3) *Low income taxpayers.* No offer to compromise received from a low income taxpayer may be rejected solely on the basis of the amount of the offer without evaluating whether that offer meets the criteria in paragraph (b) of this section. For purposes of this paragraph (e)(3), a low income taxpayer is a taxpayer who falls at or below the dollar criteria established by the poverty guidelines updated annually in the **Federal Register** by the U.S. Department of Health and Human Services under authority of section 673(2) of the Omnibus Budget Reconciliation Act of 1981 or such other measure that is adopted by the Secretary.

(4) *Offers based upon doubt as to liability.* Offers submitted on the basis of doubt as to liability cannot be rejected solely because the IRS is unable to locate the taxpayer's return or return information for verification of the liability.

(5) *Appeal of rejection of an offer in compromise.* (i) *In general.* The taxpayer may administratively appeal a rejection of an offer to compromise to the IRS Office of Appeals (Appeals) if, within the 30-day period commencing the day after the date on the letter of rejection, the taxpayer requests such an administrative review in the manner provided by the Secretary.

(ii) *Offer to compromise returned following a determination that the offer was nonprocessable, a failure by the taxpayer to provide requested information, or a determination that the offer was submitted for purposes of delay.* Where a determination is made to return offer documents because the offer to compromise was nonprocessable, because the taxpayer failed to provide requested information, or because the IRS determined that the offer to

compromise was submitted solely for purposes of delay under paragraph (c)(2) of this section, the return of the offer does not constitute a rejection of the offer for purposes of this provision and does not entitle the taxpayer to appeal the matter to Appeals under the provisions of this paragraph (e)(5). However, if the offer is returned because the taxpayer failed to provide requested financial information, the offer will not be returned until an independent administrative review of the proposed return is completed.

(f) *Effect of offer to compromise on collection activity.* (1) *Offers submitted prior to and not pending on or after December 31, 1999.* For offers to compromise submitted prior to and not pending on or after December 31, 1999, the submission of an offer to compromise will not automatically operate to stay the collection of any liability. Enforcement of collection may, however, be deferred if the interests of the United States will not be jeopardized thereby.

(2) *Offers pending on or made on or after December 31, 1999.* (i) *In general.* For offers pending on or made on or after December 31, 1999, the IRS will not make any levies to collect the liability that is the subject of the compromise during the period the IRS is evaluating whether such offer will be accepted or rejected, for 30 days immediately following the rejection of the offer, and for any period when a timely filed appeal from the rejection is being considered by Appeals.

(ii) *Revised offers submitted following rejection.* If, following the rejection of an offer to compromise pending on or made on or after December 31, 1999, the taxpayer makes a good faith revision of that offer and submits the revised offer within 30 days after the date of rejection, the IRS will not levy to collect the liability that is the subject of the revised offer to compromise while the IRS is evaluating whether to accept or reject the revised offer.

(iii) *Jeopardy.* The IRS may levy to collect the liability that is the subject of an offer to compromise during the period the IRS is evaluating whether that offer will be accepted if it determines that collection of the liability is in jeopardy.

(iv) *Offers to compromise determined by IRS to be nonprocessable or submitted solely for purposes of delay.* The IRS may levy to collect the liability that is the subject of an offer to compromise at any time after it determines, under paragraph (c)(2) of this section, that a pending offer did not contain sufficient information to permit evaluation of whether the offer should

be accepted, that the offer was submitted solely to delay collection, or that the offer was otherwise nonprocessable.

(v) *Offsets under section 6402.* Notwithstanding the evaluation and processing of an offer to compromise, the IRS may, in accordance with section 6402, credit any overpayments made by the taxpayer against a liability that is the subject of an offer to compromise and may offset such overpayments against other liabilities owed by the taxpayer to the extent authorized by section 6402.

(g) *Deposits.* Sums submitted with an offer to compromise a liability or during the pendency of an offer to compromise are considered deposits and will not be applied to the liability until the offer is accepted unless the taxpayer provides written authorization for application of the payments. If an offer to compromise is withdrawn, is determined to be nonprocessable, or is submitted solely for purposes of delay and returned to the taxpayer, any amount tendered with the offer, including all installments paid on the offer, will be refunded without interest. If an offer is rejected, any amount tendered with the offer, including all installments paid on the offer, will be refunded, without interest, after the conclusion of any review sought by the taxpayer with Appeals. Refund will not be required if the taxpayer has agreed in writing that amounts tendered pursuant to the offer may be applied to the liability for which the offer was submitted.

(h) *Statute of limitations.* (1) *Offers submitted prior to and not pending on or after December 31, 1999.* For offers to compromise submitted prior to and not pending on or after December 31, 1999—

(i) If the 10-year period specified in section 6502(a) will expire prior to December 31, 2002, and

(ii) Payments due under the agreement are scheduled to be made after the date upon which the 10-year period specified in section 6502(a) will expire—

no offer will be accepted unless the taxpayer executes a consent to extend the statutory period of limitations on the collection of the liability involved until the date one year subsequent to the date of the last scheduled payment or until December 31, 2002, whichever is earlier.

(2) *Offers pending on or made on or after December 31, 1999.* For offers pending on or made on or after December 31, 1999, the statute of limitations on collection will be suspended while collection is prohibited under paragraph (f)(2) of this section.

(3) For any offer to compromise, the IRS may continue to require, where appropriate, the extension of the statute of limitations on assessment. However, in any case where waiver of the running of the statutory period of limitations on assessment is sought, the taxpayer must be notified of the right to refuse to extend the period of limitations or to limit the extension to particular issues or particular periods of time.

(i) *Inspection with respect to accepted offers to compromise.* For provisions relating to the inspection of returns and accepted offers to compromise, see section 6103(k)(1).

(j) *Effective date.* Except as otherwise provided, this section applies to offers to compromise submitted on or after July 21, 1999, through July 19, 2002.

Charles O. Rossotti,
Commissioner of Internal Revenue.

Approved: July 14, 1999.

Donald C. Lubick,
Assistant Secretary of the Treasury.
[FR Doc. 99-18456 Filed 7-19-99; 8:45 am]
BILLING CODE 4830-01-U

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Parts 100 and 165

[CGD11-99-007]

RIN 2115-AE46

Special Local Regulations and Safety Zone; Northern California Annual Marine Events

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is removing a number of outdated sections of Special Local Regulations, the marine events regulations, and replacing them with a single section containing an updated master list of recurring marine events in Northern California, for which Special Local Regulations are required. The Special Local Regulations are necessary to control vessel traffic within the immediate vicinity of these marine events to ensure the safety of life and property during each event. The Coast Guard is also adding a master list of recurring fireworks events to the Code of Federal Regulations. These comprehensive, permanent listings will enable mariners and members of the public to better anticipate major marine events and fireworks displays and will also greatly ease the administration of these events by the Coast Guard.

DATES: July 2, 1999.

ADDRESSES: U.S. Coast Guard Group San Francisco, Yerba Buena Island, San Francisco, California 94130-9309, Commander, Coast Guard Group San Francisco maintains the public docket for this rulemaking. The docket will be available for inspection and copying at Group San Francisco between 9 a.m. and 5 p.m., Monday through Friday, except holidays. Please call before visiting.

FOR FURTHER INFORMATION CONTACT: Petty Officer Doug Adams of Coast Guard Group San Francisco, telephone number (415) 399-3440.

SUPPLEMENTARY INFORMATION:

Regulatory History

On August 31, 1998, the Coast Guard published a Notice of Proposed Rulemaking (NPRM) for this regulation in the **Federal Register** (63 FR 46206). The comment period ended October 30, 1998. The Coast Guard received no comments on the proposal. A public hearing was not requested and no hearing was held.

Good cause exists for making this rule effective prior to publication of the Final Rule because the events necessitating these Special Local Regulations will occur throughout the summer beginning with various firework displays in July. Consequently, the marine events and fireworks events would occur prior to the effective date of this regulation if the regulation did not become effective until 30 days after publication of this Final Rule in the **Federal Register**, jeopardizing the safety of lives and property of event participants and spectators.

The Coast Guard has made two minor changes to the final rule that were initiated at the request of sponsors after the publication of the NPRM (CGD11-98-007) in 63 FR 46206. The Coast Guard has changed Table 1 of 33 CFR part 100 to reflect the new name of the fireworks event sponsored annually on the last Saturday of May by KFOG Radio, San Francisco. The Coast Guard has changed the table to reflect the change in event name from "KFOG Sky Concert" to "KFOG KaBoom." The Coast Guard has also changed the location of the safety zone for San Francisco Chronicle Fireworks Display sponsored annually by the San Francisco Chronicle on July 4. The Coast Guard was notified by the San Francisco Chronicle that there was a need for safety zone around a second barge located in the vicinity of Aquatic Park. Rather than increase the size of the safety zone published in the NPRM to include the waters surrounding Aquatic Park, the Coast Guard has replaced the

safety zone with two smaller safety zones. Each zone will encompass the navigable waters within 1,000 feet of each launch platform, thereby decreasing the burden on the boating public. The safety zone around the barge near Pier 39 will encompass the waters within a 1,000 foot radius of the barge, which will be located at approximately 37°48'49.0"N, 122°24'46.5"W. The safety zone near Aquatic Park will encompass the navigable waters within a 1,000 foot radius of the launch platform which will be located at the end of the San Francisco Municipal Pier at Aquatic Park at approximately: 37°48'38.5"N, 122°25'30.0"W. The Coast Guard has added these minor changes to the final rule. The Coast Guard expects that these changes will not impose any burden on the public.

The Coast Guard has also moved the regulations pertaining to fireworks events, previously listed under 33 CFR 100.1103 in the Notice of Proposed Rulemaking, to a separate listing under 33 CFR part 165. The Coast Guard has created a separate listing for the fireworks events previously listed under 33 CFR 100.1103 to ensure that the general regulations for safety zones, 33 CFR 165.23, apply to the fireworks events. No substantive change has been made in the regulatory provisions for these fireworks events. The Coast Guard is making this minor technical change from the text of the NPRM in order to incorporate the general regulations that are more closely tailored to ensuring the safety of the public during fireworks events.

Background and Purpose

In accordance with the Coast Guard's responsibility to promulgate special local regulations and safety zones to insure the safety of life and protection of property on the navigable waters where marine events are held, Commander, Eleventh Coast Guard District, is replacing the outdated text of 33 CFR 100.1103 with a complete table of the annually recurring marine events in the Northern California area and is adding a table of recurring fireworks events to 33 CFR Part 165. The regulations currently contained in 33 CFR 100.1104 and 33 CFR 100.1203, which have also become outdated, will be deleted and superseded by the new text of 33 CFR 100.1103 as part of this revision as well.

Discussion

To streamline the administration of its safety enforcement responsibilities the Coast Guard has revised 33 CFR 100.1103. The former text in 33 CFR 100.1103 is deleted and new Special

Local Regulations will replace its content. Within this section will be a listing of recurring marine regattas and races, non-competitive marine parades, for which Special Local Regulations are required. This listing will be placed under the heading "Table 1."

Generic requirements for all Special Local Regulations will be explained in the paragraphs that precede Table 1 in 33 CFR 100.1103. Any requirements that are event-specific will accompany the individual listings in Table 1.

Notification of the implementation of these Special Local Regulations for the duration of each individual event will be effectuated by announcement in the Local Notice to Marines. This list of regulated events does not necessarily reflect all recurring marine events in the Northern California area. Only those recurring events that the Coast Guard has knowledge of and that are necessary to insure the safety of life and protection of property on the navigable waters of Northern California are listed.

Commander, Coast Guard Group San Francisco, is designated Patrol Commander for the events listed in 33 CFR 100.1103; he has the authority to delegate this responsibility to any commissioned, warrant, or petty officer of the Coast Guard. Once the zone is established, authorization to remain within the zone is subject to termination by the Patrol Commander at any time. The Patrol Commander may impose other restrictions within this zone if circumstances dictate. Restrictions will be tailored to impose the least impact on maritime interests yet provide the level of security deemed necessary to safely conduct these events.

The Coast Guard is also adding a new section 33 CFR 165.1112. This section will contain a listing of recurring fireworks events that will be placed in Table 1 of 33 CFR 165.1112. The general requirements for fireworks events will be explained in the paragraphs that precede Table 1 in 33 CFR 100.1112. Notification of the implementation of these safety zones for the duration of each individual event will be effectuated by announcement in the Local Notice to Mariners. This list of regulated events does not necessarily reflect all recurring fireworks events in the Northern California area. Only those recurring events that the Coast Guard has knowledge of and that are necessary to insure the safety of life and protection of property on the navigable waters of Northern California are listed.

Commander, Coast Guard Group San Francisco, is designated Patrol Commander for the events listed under Table 1 of 33 CFR 165.1112. He has the authority to delegate this responsibility

to any commissioned, warrant, or petty officer of the Coast Guard. Once the safety zone is established, no person may enter the safety zone unless authorized by the Patrol Commander. No person may remain in the safety zone or allow any vehicle, vessel or object to remain in the safety zone unless authorized by the Patrol Commander. Each person in the safety zone who has notice of a lawful order or direction shall obey the order of the Patrol Commander.

Discussion of Comments

No comments were received.

Regulatory Evaluation

This regulation is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require assessment of potential cost and benefits under section 6(a)(3) of that order. It has been exempted from review 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). Due to the short duration of these marine events and fireworks events and the advance notice provided to the maritime community, the Coast Guard expects the economic impact of this regulation to be so minimal that a full Regulatory Evaluation under paragraph 10(e) of the regulatory policies and procedures of the Department of Transportation is unnecessary.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this rule will have a significant economic impact on a substantial number of small entities. "Small entities" may include small businesses and not-for-profit organizations that are not dominant in their fields and governmental jurisdictions with populations less than 50,000. Because it expects the impact of this rule to be so minimal, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this rule will not have a substantial impact on a significant number of small entities.

Assistance For Small Entities

In accordance with § 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), the Coast Guard wants to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking process. If your small

business or organization is affected by this rule and you have questions concerning its provisions or options for compliance, please contact Lieutenant Andrew B. Cheney, U.S. Coast Guard Marine Office San Francisco Bay at (510) 437-3073.

Collection of Information

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

Federalism

The Coast Guard has analyzed this rule under the principles and criteria in Executive Order 12612 and has determined that this rule does not have 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.B.2 of Commandant Instruction M16475.1C, figure 2-1, paragraphs (34) (g) and (h), it will have no significant environmental impact and it is categorically excluded from further environmental documentation. A Categorical Exclusion Determination and environmental analysis checklist will be available for inspection and copying in the docket to be maintained by Group San Francisco at the address listed under ADDRESSES.

Unfunded Mandates

Under the Unfunded Mandates Reform Act of 1995 (Public Law 104-4), the Coast Guard must consider whether this rule will result in an annual expenditure by state, local, and tribal governments, in the aggregate of \$100 million (adjusted annually for inflation). If so, the Act requires that a reasonable number of regulatory alternatives be considered, and that from those alternatives, the least costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule be selected.

No state, local, or tribal government entities will be effected by this rule, so this rule will not result in annual or aggregate costs of \$100 million or more. Therefore, the Coast Guard is exempt from any further regulatory requirements under the Unfunded Mandates Act.

Other Executive Orders on the Regulatory Process

In addition to the statutes and Executive Orders already addressed in its preamble, the Coast Guard

considered the following executive orders in developing this final rule and reached the following conclusions:

E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. This Rule will not effect a taking of private property or otherwise have taking implications under this Order.

E.O. 12875, Enhancing the Intergovernmental Partnership. This Rule will not impose, on any State, local, or tribal government, a mandate that is not required by statute and that is not funded by the Federal government.

E.O. 12988, Civil Justice Reform. This Rule meets applicable standards in section 3(a) and 3(b)(2) of this Order to minimize litigation, eliminate ambiguity, and reduce burden.

E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks. This Rule is not an economically significant rule and does not concern an environmental risk to safety disproportionately affecting children.

List of Subjects

33 CFR Part 100

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

33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

Regulation

For the reasons set out in the preamble, the Coast Guard amends parts 100 and 165 of Title 33, Code of Federal Regulations, as follows:

PART 100—[AMENDED]

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

Authority: 33 U.S.C. 1233 through 1236; 49 CFR 1.46; 33 CFR 100.35.

2. Revise 33 CFR 100.1103 to read as follows:

§ 100.1103 Northern California annual marine events.

(a) *General.* Special local regulations are established for the events listed in table 1 of this section. Further information on exact dates, times, and other details concerning the number and type of participants and an exact geographical description of the areas are published by the Eleventh Coast Guard District in the Local Notice to Mariners at least 20 days prior to each event. To be placed on the mailing list contact: Commander (oan), Eleventh Coast Guard District, Coast Guard Island, Building 50–6, Alameda, CA 94501–5100.

Note to Paragraph (a): Sponsors of events listed in Table 1 of this section must submit an application each year as required by 33 CFR Part 100, Subpart A, to Commander, Coast Guard Group San Francisco, Yerba Buena Island, San Francisco, CA 94130–9309.

(b) *Special local regulations.* All persons and vessels not registered with the sponsor as participants or with Commander, Coast Guard Group San

Francisco as official patrol vessels are considered spectators. The “official patrol” consists of any Coast Guard, other Federal, state or local law enforcement, and any public or sponsor-provided vessels assigned or approved by Commander, Coast Guard Group San Francisco, to patrol each event.

(1) No spectator shall anchor, block, loiter, nor impede the through transit of participants or official patrol vessels, in the regulated areas during all applicable effective dates and times, unless cleared to do so by or through an official patrol vessel.

(2) When hailed and/or signaled by an official patrol vessel, any spectator located within a regulated area during all applicable effective dates and times shall come to an immediate stop.

(3) The Patrol Commander (PATCOM) is empowered to forbid and control the movement of all vessels in the regulated area. The Patrol Commander shall be designated by the Commander, Coast Guard Group San Francisco; will be a U.S. Coast Guard commissioned officer, warrant officer or petty officer to act as the Group Commander's official representative; and will be located aboard the lead official patrol vessel. As the Group Commander's representative, the PATCOM may terminate the event any time it is deemed necessary for the protection of life and property. PATCOM may be reached on VHF–FM Channel 13 (156.65MHz) when required, by the call sign “PATCOM”.

(4) The Patrol Commander may, upon request, allow the transit of commercial vessels through regulated areas when it is safe to do so.

TABLE 1 TO § 100.1103

[All coordinates referenced use datum NAD 83.]

San Francisco Grand Prix

Sponsor	Pacific Offshore Powerboat Racing Association.
Event Description	Professional High-speed powerboat race.
Date	Saturday or Sunday in April.
Location	San Francisco Waterfront to South Tower of Golden Gate Bridge.
Regulated Area	37°–49′–10″N, 122°–24′–07″W; thence to 37°–48′–50″N, 122°–24′–07″W; thence to 37°–48′–56″N, 122°–28′–48″W; thence to 37°–48′–48″N, 122°–28′–48″W; thence returning to the point of origin.

Blessing of the Fleet

Sponsor	Corinthian Yacht Club.
Event Description	Boat parade during which vessels pass by a pre-designated platform or vessel.
Date	Last Sunday in April.
Location	Raccoon Strait.
Regulated Area	The area between a line drawn from Bluff Point on the southeastern side of Tiburon Peninsula to Point Campbell on the northern edge of Angel Island, and a line drawn from Peninsula Point on the southern edge of Tiburon Peninsula to Point Stuart on the western edge of Angel Island.

TABLE 1 TO § 100.1103—Continued
[All coordinates referenced use datum NAD 83.]

Opening Day on San Francisco Bay	
Sponsor	Pacific inter-Club Yacht Association and Corinthian Yacht Club.
Event Description	Boat parade during which vessels pass by a pre-designated platform or vessel.
Date	Sunday in April.
Location	San Francisco waterfront, Crissy Field to Pier 35.
Regulated Area	The area defined by a line drawn from Fort Point (37°48.66N, 122°28.64W); thence easterly approximately 5,000 yards to a point located at 37°49.15N, 122°25.61'W; thence easterly to the Blossom Rock Bell Buoy (37°49.10N 122°24.20W); thence westerly to the Northeast corner of Pier 35; thence returning along the shoreline to the point of origin. Special Requirements. All vessels entering the regulated area shall follow the parade route established by the sponsor and be capable of maintaining an approximate speed of 6 knots. Commercial Vessel Traffic Allowances. The parade will be interrupted, as necessary, to permit the passage of commercial vessel traffic. Commercial traffic must cross the parade route at a no-wake speed and perpendicular to the parade route.
Race the Straits Offshore Grand Prix Festival	
Sponsor	Pacific Offshore Powerboat Racing Association.
Event Description	Professional high-speed powerboat race.
Date	Sunday in July.
Location	Carquinez Strait and San Pablo Strait.
Regulated Area	38°02'12"N, 122°08'31"W thence to 38°02'38"N, 122°10'00"W thence to 38°03'20"N, 122°10'20"W thence to 38°03'48"N, 122°13'32"W thence to 38°03'36"N, 122°17'37"W thence to 38°03'19"N, 122°17'34"W thence to 38°03'35"N, 122°13'32"W thence to 38°03'24"N, 122°12'01"W thence to 38°02'58"N, 122°10'58"W thence to 38°01'55"N, 122°09'47"W thence to 38°01'58"N, 122°08'31"W thence returning to the point of origin.
Delta Thunder Powerboat Race	
Sponsor	Pacific Offshore Power Racing Association.
Event Description	Professional high-speed powerboat race.
Date	Sunday in September.
Location	Off Pittsburg, CA in the waters around Winter Island and Brown Island.
Regulated Area	The water area of Suisun Bay commencing at Simmons Point on Chipps Island; thence southwesterly to Stake Point on the southern shore of Suisun Bay; thence easterly following the southern shoreline of Suisun Bay and New York Slough to New York Slough Buoy 13; thence north-northwesterly to the Northwestern corner of Fraser Shoal; thence northwesterly to the western tip of Chain Island; thence west-northwesterly to the northeast tip of Van Sickle Island; thence following the shoreline of Van Sickle Island and Chipps Island and returning to the point of origin.
Festival of the Sea	
Sponsor	San Francisco Maritime National Historical Park.
Event Description	Tugboat Race.
Date	Sunday in September.
Location	From Crissy Field to Aquatic Park.
Regulated Area	San Francisco Bay approximately 500 yards offshore of Golden Gate Yacht club, Gas house Cove, and extending east to Pier 45. All mariners may proceed with caution but must keep at least 500 foot distance from the competing tugboats.

§ 100.1104 [Removed]

3. Remove 33 CFR 100.1104.

§ 100.1203 [Removed]

4. Remove 33 CFR 100.1203.

PART 165—[AMENDED]

5. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, 160.5; 49 CFR 1.46.

6. A new § 165.1112 is added to read as follows:

§ 165.1112 Safety zones: Northern California annual fireworks events.

(a) *General.* Safety zones are established for the events listed in Table 1 of this section. Further information on exact dates, times, and other details

concerning the exact geographical description of the areas are published by the Eleventh Coast Guard District in the Local Notice to Mariners prior to each event.

(b) *Regulations.* “Official Patrol Vessels” consist of any Coast Guard, other Federal, state or local law enforcement, and any public or sponsor-provided vessels assigned or approved

by Commander, Coast Guard Group San Francisco, to patrol each event.

(1) In accordance with the general regulations in § 165.23 of this part, entering into, transiting through, or anchoring within these zones is prohibited, unless authorized by the Patrol Commander.

(2) Each person in a safety zone who receives notice of a lawful order or

direction issued by an official patrol vessel shall obey the order or direction.

(3) The Patrol Commander (PATCOM) is empowered to forbid and control the movement of all vessels in the regulated area. The Patrol Commander shall be designated by the Commander, Coast Guard Group San Francisco; will be a U.S. Coast Guard commissioned officer, warrant officer or petty officer to act as

the Group Commander's official representative; and will be located aboard the lead official patrol vessel.

(4) The Patrol Commander may, upon request, allow the transit of commercial vessels through regulated areas when it is safe to do so.

TABLE 1 to § 165.1112

[All coordinates referenced use datum NAD 83]

KFOG KaBoom	
Sponsor	KFOG Radio, San Francisco.
Event Description	Fireworks display.
Date	Last Saturday in May.
Location	1,000 feet off Pier 30/32.
Regulated Area	That area of navigable waters within a 1,000 foot radius of the launch platform.
Fourth of July Fireworks, City of Monterey	
Sponsor	City of Monterey, Recreation & Community Services Department.
Event Description	Fireworks Display.
Date	July 4th.
Location	Monterey Bay, East of Municipal Wharf #2.
Regulated Area	That area of navigable waters within a 1,000 foot radius of the launch platform.
Fourth of July Fireworks, City of Sausalito	
Sponsor	City of Sausalito.
Event Description	Fireworks Display.
Date	July 4th.
Location	1,000 feet off-shore from Sausalito waterfront, North of Spinnaker Rest.
Regulated Area	That area of navigable waters within a 1,000 foot radius of the launch platform.
Fourth of July Fireworks, Lake Tahoe	
Sponsor	Anchor Trust.
Event Description	Fireworks Display.
Date	July 4th.
Location	1,000 feet off Incline Village, Nevada in Crystal Bay.
Regulated Area	That area of navigable waters within a 1,000 foot radius of the launch platform.
Fourth of July Fireworks, South Lake Tahoe Gaming Alliance	
Sponsor	Harrah's Lake Tahoe.
Event Description	Fireworks Display.
Date	July 4th.
Location	Off South Lake Tahoe, California near Nevada border.
Regulated Area	That area of navigable waters within a 1,000 foot radius of the launch platform.
Independence Day Fireworks	
Sponsor	North Tahoe Fire Protection District.
Event Description	Fireworks Display.
Date	July 4th.
Location	Offshore from Kings Beach State Beach.
Regulated Area	That area of navigable waters within a 1,000 foot radius of the launch platform.
July 4th Fireworks Display	
Sponsor	North Tahoe Fire Protection District.
Event Description	Fireworks Display.
Date	July 4th.
Location	Offshore of Common Beach, Tahoe City, CA.
Regulated Area	That area of navigable waters within a 1,000 foot radius of the launch platform.
San Francisco Chronicle Fireworks Display	
Sponsor	San Francisco Chronicle.
Event Description	Fireworks Display.

TABLE 1 to § 165.1112—Continued
[All coordinates referenced use datum NAD 83]

Date	July 4th.
Location 1	A barge located approximately 1,000 feet off of San Francisco Pier 39 at approximately: 37°48'49.0" N, 122°24'46.5" W.
Regulated Area	The area of navigable waters within a 1,000 foot radius of the launch platform.
Location 2	The end of the San Francisco Municipal Pier at Aquatic Park at approximately: 37°48'38.5" N, 122°25'30.0" W.
Regulated Area	The area of navigable waters within a 1,000 foot radius of the launch platform.
Vallejo Fourth of July Fireworks	
Sponsor	Vallejo Marina.
Event Description	Fireworks Display.
Date	July 4th.
Location	Mare Island Strait.
Regulated Area	That area of navigable waters within a 1,000 foot radius of the launch platform.

Dated: July 1, 1999.

T.H. Collins,

*Vice Admiral, U.S. Coast Guard, Commander,
Eleventh Coast Guard District.*

[FR Doc. 99-18486 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-15-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[CGD01-99-104]

RIN 2115-AA97

Safety Zone: Gloucester Schooner Fest, Gloucester, MA

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the waters of Gloucester Harbor in a four hundred (400) yard radius around a fireworks launch site located at Stage Head Point in Gloucester, MA. The safety zone is in effect from 8:00 p.m. until 11:00 p.m., on Saturday, September 4, 1999. This safety zone prevents entry into or movement within this portion of Gloucester Harbor and it is needed to protect the boating public from the dangers posed by a fireworks display.

DATES: This rule is effective from 8:00 p.m. until 11:00 p.m., Saturday, September 4, 1999.

ADDRESSES: Documents as indicated in this preamble are available for inspection or copying at Marine Safety Office Boston, 455 Commercial Street, Boston, MA between the hours of 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: ENS Rebecca Montleon, Waterways

Management Division, Coast Guard Marine Safety Office Boston, (617) 223-3000.

SUPPLEMENTARY INFORMATION:

Regulatory History

Pursuant to 5 U.S.C. 553, a notice of proposed rulemaking (NPRM) was not published for this regulation. Good cause exists for not publishing an NPRM. Conclusive information about this event was not provided to the Coast Guard until June 4, 1999, making it impossible to draft or publish an NPRM with sufficient comment period for the public. Publishing an NPRM and delaying its effective date would be contrary to the public interest since immediate action is needed to close a portion of the waterway and protect the maritime public from the hazards associated with this fireworks display, which is intended for public entertainment.

Background and Purpose

One June 4, 1999 the Gloucester Fireworks Fund, Gloucester, MA, field a marine event permit with the Coast Guard to hold a fireworks program over the waters of Gloucester Harbor, Gloucester, MA. This regulation establishes a safety zone on the waters of Gloucester Harbor in a four hundred (400) yard radius around a firework launch site located at Stage Head Point in Gloucester, MA. The safety zone is in effect from 8:00 p.m. until 11:00 p.m. on Saturday, September 4, 1999. This safety zone prevents entry into or movement within this portion of Gloucester Harbor and it is needed to protect the boating public from the dangers posed by a fireworks display.

Regulatory Evaluation

This final 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 regulation to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary since the safety zone will be limited in duration, marine advisories will be made in advance of the implementation of the safety zone, and the safety zone will not restrict the entire harbor, allowing traffic to continue without obstruction.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the Coast Guard considered whether this rule would have a significant economic impact on a substantial number of small entities. *Small entities* may include (1) small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields and (2) governmental jurisdictions with populations or less than 50,000.

For the reasons discussed in the Regulatory Evaluation above, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) that this rule will not have a significant impact on a substantial number of small entities.

Collection of Information

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

Federalism

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

Environment

The Coast Guard has considered the environmental impact of this final rule and concluded that, under Figure 2-1, paragraph 34(g), of Commandant Instruction M16475.1C, this final rule is categorically excluded from further environmental documentation. A "Categorical Exclusion Determination" is available in the docket for inspection or copying where indicated under ADDRESSES.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

Regulation

For reasons set out in the preamble, the Coast Guard amends 33 CFR Part 165 as follows:

PART 165—[AMENDED]

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

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05-1(g), 6.04-1, 6.04-6, 160.5; 49 CFR 1.46.

2. Add temporary § 165.T01-104 to read as follows:

§ 165.T01-104 Safety zone; Gloucester Schoonerfest, Gloucester, MA.

(a) *Location.* The following area is a safety zone: all waters of Gloucester Harbor in a four hundred (400) yard radius around a fireworks launch site located at Stage Head Point in Gloucester, MA.

(b) *Effective date.* This section is effective from 8:00 p.m. until 11:00 p.m., Saturday, September 4, 1999.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23, entry into or movement within this zone is prohibited unless authorized by the Captain of the Port Boston.

(2) All persons and vessels shall comply with the instructions of the COTP or the designated on-scene U.S. Coast Guard patrol personnel. U.S. Coast Guard patrol personnel include commissioned, warrant, and petty officers of the U.S. Coast Guard.

(3) The general regulations covering safety zones in § 165.23 apply.

Dated: July 8, 1999.

J.L. Grenier,

Captain, U.S. Coast Guard, Captain of the Port, Boston, Massachusetts.

[FR Doc. 99-18485 Filed 7-20-99; 8:45 am]

BILLING CODE 4901-15-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[CGD01-99-110]

RIN 2115-AA97

Safety Zone: Fireworks, Parade of Lights, Boston, MA

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the waters of Boston Harbor in a four hundred (400) yard radius around a fireworks barge located off the U.S. Coast Guard Base at an approximate position of 42°22'12" N, 071°02'53" W (NAD 1983) Boston, MA. The safety zone is in effect from 9:00 p.m. until 11:00 p.m., Saturday, July 24, 1999. This safety zone prevents entry into or movement within this portion of Boston Harbor and it is needed to protect the boating public from the dangers posed by a fireworks display.

DATES: This rule is effective from 9:00 p.m. until 11:00 p.m., Saturday, July 24, 1999.

ADDRESSES: Documents as indicated in this preamble are available for inspection or copying at Marine Safety Office Boston, 455 Commercial Street, Boston, MA between the hours of 8 a.m. and 3 p.m., Monday through Saturday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: ENS Rebecca Montleon, Waterways Management Division, Coast Guard Marine Safety Office Boston, (617) 223-3000.

SUPPLEMENTARY INFORMATION:

Regulatory History

Pursuant to 5 U.S.C. 553, a notice of proposed rulemaking (NPRM) was not published for this regulation. Good cause exists for not publishing an NPRM and for making this regulation effective in less than 30 days after **Federal Register** publication. Conclusive information about this event was not provided to the Coast Guard until June 14, 1999, making it impossible to draft or publish an NPRM or a final rule 30 days in advance. Publishing an NPRM and delaying its effective date would be

contrary to the public interest since immediate action is needed to close a portion of the waterway and protect the maritime public from the hazards associated with this fireworks display, which is intended for public entertainment.

Background and Purpose

On June 14, 1999, Conventures Inc., Boston, MA, filed a marine event permit with the Coast Guard to hold a fireworks program over the waters of Boston Harbor, Boston, MA. This regulation establishes a safety zone on the waters of Boston Harbor in a four hundred (400) yard radius around a fireworks barge located off the U.S. Coast Guard Base in approximate position 42°22'12" N, 071°02'53" W (NAD 1983), Boston Harbor, MA. The safety zone is in effect from 9:00 p.m. until 11:00 p.m. Saturday, July 24, 1999. This safety zone prevents entry into or movement within this portion of Boston Harbor and it is needed to protect the boating public from the dangers posed by a fireworks display.

Regulatory Evaluation

This final 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 regulation to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary since the safety zone will be limited in duration, marine advisories will be made in advance of the implementation of the safety zone.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard considered whether this rule would have a significant economic impact on a substantial number of small entities. "Small entities" may include (1) small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields and (2) governmental jurisdictions with populations of less than 50,000.

For the reasons discussed in the Regulatory Evaluation above, the coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this rule will not have

a significant impact on a substantial number of small entities.

Collection of Information

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

Federalism

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

Environment

The Coast Guard has considered the environmental impact of this final rule and concluded that, under Figure 2-1, paragraph 34(g), of Commandant Instruction M16475.1C, this final rule is categorically excluded from further environmental documentation. A "Categorical Exclusion Determination" is available in the docket for inspection or copying where indicated under ADDRESSES.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

Regulation

For reasons set out in the preamble, the Coast Guard amends, 33 CFR Part 165 as follows:

PART 165—[AMENDED]

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

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05-1(g), 6.04-1, 6.04-6, 160.5; 49 CFR 1.46.

Add temporary § 165.T01-110 to read as follows:

§ 165.T01-110 Safety zone; Fireworks, Parade of Lights, Boston, MA.

(a) *Location.* The following area is a safety zone: all waters of Boston Harbor in a four hundred (400) yard radius around a fireworks barge located off of the U.S. Coast Guard Base in approximate position 42°22'12"N, 071°02'53"W (NAD 1983), Boston, MA.

(b) *Effective date.* This section is effective from 9:00 p.m. until 11:00 p.m., Saturday, July 24, 1999.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 entry into or movement within this zone is prohibited unless authorized by the Captain of the Port Boston.

(2) All persons and vessels shall comply with the instructions of the COTP or the designated on-scene U.S. Coast Guard patrol personnel. U.S. Coast Guard patrol personnel include commissioned, warrant, and petty officers of the U.S. Coast Guard.

(3) The general regulations covering safety zones in § 165.23 of this part apply.

Dated: July 9, 1999.

M.A. Skordinski,

Commander, U.S. Coast Guard, Alternate Captain of the Port, Boston, Massachusetts.
[FR Doc. 99-18484 Filed 7-20-99; 8:45 am]
BILLING CODE 4910-15-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[M169-01-7277a; FRL-6357-3]

Approval and Promulgation of State Implementation Plans; Michigan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is approving several rule revisions and rescissions for incorporation into Michigan's State Implementation Plan (SIP). The Michigan Department of Environmental Quality (MDEQ) submitted these revisions on August 20, 1998 and supplemented them with a November 3, 1998, letter. They include revisions to degreasing, perchloroethylene dry cleaning, petroleum refinery, synthetic organic chemical manufacturing, and delivery vessel loading rules, and a number of rule rescissions.

DATES: This direct final rule is effective on September 20, 1999, without further notice, unless EPA receives adverse comment by August 20, 1999. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: You may send written comments to: Carlton T. Nash, Chief, Regulation Development Section, Air Programs Branch (AR-18J), United States Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Copies of the SIP revision and EPA's analysis are available for inspection at the following location: United States Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. (Please telephone

Kathleen D'Agostino at (312) 886-1767 before visiting the Region 5 Office.)

FOR FURTHER INFORMATION CONTACT:

Kathleen D'Agostino, Environmental Engineer, Regulation Development Section (AR-18J), Air Programs Branch, Air and Radiation Division, United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-1767.

SUPPLEMENTARY INFORMATION:

A. Background Information
B. Contents of State Submittal
C. EPA's Evaluation of State Submittal and Final Action

A. Background Information

On August 20, 1998, the MDEQ submitted to EPA a proposed revision to the Michigan SIP. MDEQ supplemented this revision with a November 3, 1998, letter from Robert Irvine. This submittal included revisions to degreasing, perchloroethylene dry cleaning, petroleum refinery, synthetic organic chemical, and delivery vessel loading rules, as well as a number of rule rescissions. These rule revisions and rescissions are described briefly below. This rulemaking action does not address the following rules, which were also part of Michigan's SIP submittal: R 336.1118, R 336.1122(f), R 336.1278, R 336.1283 to R 336.1287, and R 336.1290. We will address the remaining rule revisions in separate rulemaking actions.

B. Contents of State Submittal

The following is a brief description of the sections of the SIP revision that we are addressing in this rulemaking action.

R 336.1611 to R 336.1614 and R 336.1707 to R 336.1710—These rules address existing and new cold cleaner and degreaser equipment. Michigan is proposing to revise these rules to exempt sources subject to the Halogenated Solvent Cleaner National Emission Standards for Hazardous Air Pollutants from the provisions of the respective rules.

R 336.1619—The State has replaced this rule with the National Emission Standard for Hazardous Air Pollutants for Perchloroethylene Dry Cleaners, and therefore proposes to remove this rule from the SIP.

R 336.1622—The proposed revision to this rule allows sources to comply by complying with EPA's Standards of Performance for Equipment Leaks of Volatile Organic Compound in Petroleum Refineries.

R 336.1628—The proposed revision to this rule allows sources to comply by complying with EPA's Standards of

Performance for Equipment Leaks of Volatile Organic Compound in Synthetic Organic Chemicals Manufacturing Industry.

R 336.1651—The State proposes to add to the SIP a rule for degreasers that incorporates the Halogenated Solvents Cleaning National Emission Standard for Hazardous Air Pollutants.

R 336.1706—The state has removed the word "new" in the text of this rule which applies to the loading of delivery vessels with VOCs.

R 336.91 to R 336.97—The State has rescinded these rules, because the State deleted the statute providing for a suspension of state enforcement and replaced it with provisions for delegating authority to a local pollution control agency. This rendered these rules obsolete.

R 336.601 to R 336.603—These Vehicle Inspection and Maintenance Rules reference a law no longer in existence. The State has rescinded these rules as obsolete.

R 336.1373—The State has rescinded this rule pertaining to fugitive dust because it has been superseded by Section 5525 of Act 451 of the Public Acts of 1994, as amended.

R 336.1501 to R 336.1507—The State has rescinded these rules pertaining to extending sulfur dioxide compliance dates for power plants. These compliance dates have now passed, and the rules to which they pertain have been fully implemented.

R 336.1603—The State has rescinded this rule, which establishes compliance dates for regulations relating to VOC emissions. These compliance dates have now passed, and the rules to which they pertain have been fully implemented.

R 336.2010—The State has rescinded this rule because it describes a test method that is not applicable to any current emission limit.

R 336.2199(c)—The State has rescinded this subsection, which refers to sources scheduled to be shut down by October 1980.

R 336.2601—The State has rescinded this rule describing the make-up of the Air Pollution Control Commission, which is no longer in existence.

R 336.2602 to R 336.2605—The State has rescinded these rules describing the organization, procedures and meeting schedule of the Air Pollution Control Commission, which is no longer in existence.

R 336.2608—The State has rescinded this rule which describes the involvement of the now defunct Air Pollution Control Commission in public and contested case hearings.

R 336.2301 to R 336.2308—These rules pertain to air pollution episodes.

The rules have never been used to declare an episode as the requirements for declaration have never been reached. Further, the highest monitored concentration of the air contaminants is far below the concentrations required to declare episodes. Therefore, the State has rescinded these rules.

C. EPA's Evaluation of State Submittal and Final Action

EPA finds all of these revisions and rescissions acceptable. Therefore, we are approving the following rules for incorporation into Michigan's SIP: R 336.1611, R 336.1612, R 336.1613, R 336.1614, R 336.1619, R 336.1622, R 336.1628, R 336.1651, R 336.1706, R 336.1707, R 336.1708, R 336.1709 and R 336.1710. We are also approving the removal of the following rules from Michigan's SIP: R 336.91, R 336.92, R 336.93, R 336.94, R 336.95, R 336.96, R 336.97, R 336.601, R 336.602, R 336.603, R 336.1373, R 336.1501, R 336.1502, R 336.1503, R 336.1504, R 336.1505, R 336.1506, R 336.1507, R 336.1603, R 336.2010, R 336.2199(c), R 336.2601, R 336.2602, R 336.2603, R 336.2604, R 336.2605, R 336.2608, R 336.2301, R 336.2302, R 336.2303, R 336.2304, R 336.2305, R 336.2306, R 336.2307, and R 336.2308.

We are publishing this action without prior proposal because we view this as a noncontroversial revision and anticipate no adverse comments. However, in a separate document in this **Federal Register** publication, we are proposing to approve the State Plan if someone files adverse written comments. This action will be effective without further notice unless we receive relevant adverse written comment by August 20, 1999. Should we receive such comments, we will publish a final rule informing the public that this action will not take effect. Any parties interested in commenting on this action should do so at this time. If we do not receive adverse comments, this action will be effective on September 20, 1999.

D. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order (E.O.) 12866, entitled "Regulatory Planning and Review."

B. Executive Order 12875

Under E.O. 12875, 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 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, E.O. 12875 requires EPA to develop an effective process permitting elective 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." This rule does not create a 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 E.O. 12875 do not apply to this rule.

C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have 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 reasonably feasible alternatives considered by the Agency.

This rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13084

Under E.O. 13084, EPA may not issue a regulation that is not required by statute, that significantly affects 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 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, E.O. 13084 requires EPA to develop an effective process permitting elected officials and other representatives of tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." This rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

E. 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 businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act (CAA) do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co., v. U.S. EPA*, 427 U.S. 246, 255-66 (1976); 42 U.S.C. 7410(a)(2).

F. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to State, local, or tribal governments in the aggregate; or to private sector, of \$100 million or more. Under section 205, 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 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 approval action promulgated does not include a Federal mandate that may result in estimated annual costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

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 the 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).

H. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 20, 1999. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon dioxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 28, 1999.

Francis X. Lyons,

Regional Administrator, Region 5.

For the reasons stated in the preamble, part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart X—Michigan

2. Section 52.1170 is amended by adding paragraph (c)(112) to read as follows:

§ 52.1170 Identification of plan.

* * * * *

(c) * * *

(112) The Michigan Department of Environmental Quality (MDEQ) submitted a revision to Michigan's State Implementation Plan (SIP) on August 20, 1998, and supplemented it on November 3, 1998. The revision removed from the SIP the following rules, which the State rescinded effective May 28, 1997: R 336.91 Purpose; R 336.92 Suspension of enforcement; requests by local agencies; R 336.93 Local agency requirements prior to suspension of enforcement; R 336.94 Commission public hearings on applications; R 336.95 Suspension of enforcement; procedures and public notice; R 336.96 Suspension of enforcement; conditions; R 336.97 Commission review of local agency programs; renewal of suspended enforcement; R 336.601 Affected counties and areas; R 336.602 Attainment of national ambient air quality standards; exemption from inspection and maintenance program requirements; R 336.603 Ozone and carbon monoxide attainment status determination; R 336.1373 Fugitive dust control requirements; areas listed in table 36; R 336.1501 Emission limits; extension of compliance date past January 1, 1980, generally; R 336.1502 Application; copies; R 336.1503 Application; contents; R 336.1504 Denial of request for extension past January 1, 1980; R 336.1505 Grant of extension past January 1, 1980; R 336.1506 Receipt of full and complete application; public notice; inspection; public hearing; R 336.1507 Modification or revocation of order granting extension; immediate effect; R 336.1603 Compliance program; R 336.2010 Reference test method 5A; R 336.2199(c); R 336.2601 Organization; R 336.2602 Offices and meetings; R

336.2603 Documents available for inspection and copying; R 336.2604 Document inspection and copying procedures; tape recording transcriptions; R 336.2605 Functions; R 336.2608 Hearings and informal conferences; R 336.2301 Definition of air pollution episode; R 336.2302 Definition of air pollution forecast; R 336.2303 Definition of air pollution alert; R 336.2304 Definition of air pollution warning; R 336.2305 Definition of air pollution emergency; R 336.2306 Declaration of air pollution episodes; R 336.2307 Episode emission abatement programs; and R 336.2308 Episode orders. The rules incorporated below contain revisions to degreasing, perchloroethylene dry cleaning, petroleum refinery, synthetic organic chemical manufacturing, and delivery vessel loading rules.

(i) *Incorporation by reference.* The following sections of the Michigan Administrative Code are incorporated by reference.

(A) R 336.1611 Existing cold cleaners, effective June 13, 1997.

(B) R 336.1612 Existing open top vapor degreasers, effective June 13, 1997.

(C) R 336.1613 Existing conveyorized cold cleaners, effective June 13, 1997.

(D) R 336.1614 Existing conveyorized vapor degreasers, effective June 13, 1997.

(E) R 336.1619 Standards for perchloroethylene dry cleaning equipment, effective June 13, 1997.

(F) R 336.1622 Emission of volatile organic compounds from existing components of petroleum refineries; refinery monitoring program, effective June 13, 1997.

(G) R 336.1628 Emission of volatile organic compounds from components of existing process equipment used in manufacturing synthetic organic chemicals and polymers; monitoring program, effective June 13, 1997.

(H) R 336.1651 Standards for Degreasers, effective June 13, 1997.

(I) R 336.1706 Loading delivery vessels with organic compounds having a true vapor pressure of more than 1.5 psia at new loading facilities handling 5,000,000 or more gallons of such compounds per year, effective June 13, 1997.

(J) R 336.1707 New cold cleaners, effective June 13, 1997.

(K) R 336.1708 New open top vapor degreasers, effective June 13, 1997.

(L) R 336.1709 New conveyorized cold cleaners, effective June 13, 1997.

(M) R 336.1710 New conveyorized vapor degreasers, effective June 13, 1997.

[FR Doc. 99-18474 Filed 7-20-99; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 226-0159a FRL-6376-3]

Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision, South Coast Air Quality Management District and Yolo-Solano Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the California State Implementation Plan. The revisions concern rules from the following: South Coast Air Quality Management District (SCAQMD) and Yolo-Solano Air Quality Management District (YSAQMD). This approval action will incorporate these rules into the federally approved SIP. The intended effect of approving these rules is to regulate emissions of volatile organic compounds (VOCs) in accordance with the requirements of the Clean Air Act, as amended in 1990 (CAA or the Act). The revised rules control VOC emissions from organic liquid loading, pharmaceutical and cosmetics manufacturing operations, and polyester resin operations. Thus, EPA is finalizing the approval of these revisions into the California SIP under provisions of the CAA regarding EPA action on SIP submittals, SIPs for national primary and secondary ambient air quality standards and plan requirements for nonattainment areas.

DATES: This rule is effective on September 20, 1999 without further notice, unless EPA receives adverse comments by August 20, 1999. If EPA receives such comment, it will publish a timely withdrawal **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Written comments must be submitted to Andrew Steckel at the Region IX office listed below. Copies of the rule revisions and EPA's evaluation report for each rule are available for public inspection at EPA's Region IX office during normal business hours. Copies of the submitted rule revisions are available for inspection at the following locations:

Rulemaking Office (AIR-4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901.

Environmental Protection Agency, Air Docket (6102), 401 "M" Street, S.W., Washington, D.C. 20460.

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 "L" Street, Sacramento, CA 95812.

South Coast Air Quality Management District, 21865 East Copley Drive, Diamond Bar, CA 91765.

Yolo-Solano Air Pollution Control District, 1947 Galileo Court, Suite 103, Davis, CA 95616.

FOR FURTHER INFORMATION CONTACT: Al Petersen, Rulemaking Office, AIR-4, Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901, Telephone: (415) 744-1135.

SUPPLEMENTARY INFORMATION:

I. Applicability

The rules being approved into the California SIP include: SCAQMD Rule 462, Organic Liquid Loading, SCAQMD rule 1103, Pharmaceuticals and Cosmetics Manufacturing Operations, and YSAQMD rule 2.30, Polyester Resin Operations. These rules were submitted by the California Air Resources Board to EPA on June 3, 1999, May 13, 1999, and June 3, 1999, respectively.

II. Background

On March 3, 1978, EPA promulgated a list of ozone nonattainment areas under the provisions of the Clean Air Act, as amended in 1977 (1977 Act or pre-amended Act), that included the South Coast Air Basin Area (SCABA) and Yolo County and part of Solano County (43 FR 8964, 40 CFR 81.305). On May 26, 1988, EPA notified the Governor of California, pursuant to section 110(a)(2)(H) of the 1977 Act, that the above districts' portions of the California SIP were inadequate to attain and maintain the ozone standard and requested that deficiencies in the existing SIP be corrected (EPA's SIP-Call). On November 15, 1990, the Clean Air Act Amendments of 1990 were enacted. Pub. L. 101-549, 104 Stat. 2399, codified at 42 U.S.C. 7401-7671q. In amended section 182(a)(2)(A) of the CAA, Congress statutorily adopted the requirement that nonattainment areas fix their deficient reasonably available control technology (RACT) rules for ozone and established a deadline of May 15, 1991 for states to submit corrections of those deficiencies.

Section 182(a)(2)(A) applies to areas designated as nonattainment prior to enactment of the amendments and classified as marginal or above as of the date of enactment. It requires such areas to adopt and correct RACT rules

pursuant to pre-amended section 172 (b) as interpreted in pre-amendment guidance.¹ EPA's SIP-Call used that guidance to indicate the necessary corrections for specific nonattainment areas. SCABA, which includes the SCAQMD, is classified as extreme nonattainment for ozone. Yolo County and part of Solano County are classified as severe-15 nonattainment for ozone.² Therefore, these areas were subject to the RACT fix-up requirement and the May 15, 1991 deadline. u

The State of California submitted many revised RACT rules for incorporation into its SIP, including the rules being acted on in this document. This document addresses EPA's direct-final action for SCAQMD rule 462, Organic Liquid Loading, adopted on May 14, 1999, and found to be complete on June 24, 1999 pursuant to EPA's completeness criteria that are set forth in 40 CFR part 51, Appendix V³ and is being finalized for approval into the SIP; SCAQMD rule 1103, Pharmaceuticals and Cosmetics Manufacturing Operations, adopted on March 12, 1999, and found to be complete on June 10, 1999; and YSAQMD Rule 2.30, Polyester Resin Operations, adopted on April 14, 1999, and found to be complete on June 24, 1999.

SCAQMD rule 462 is intended to control emissions of VOCs of greater than 1.5 psia (77.5 mm Hg) from loading into tank trucks, trailers, or railroad tank cars. SCAQMD Rule 1103 is intended to control VOC emissions from the manufacture of pharmaceuticals, cosmetics, antibiotics, vitamins, botanic and biological products, tablets, and capsules. EPA granted limited approval and limited disapproval to SCAQMD rules 462 and 1103 on November 13, 1997, 62 FR 60784. Today's direct final rule approves revisions to these rules, that have been amended to address the deficiencies identified in the 1997 disapprovals. Any sanctions now in effect as a result of the 1997 action will

be terminated on the effective date of this direct final rule.

YSAQMD rule 2.30 is intended to control VOC emissions from fabrication operations using polyester resin. EPA proposed limited approval and limited disapproval of a version of YSAQMD rule 2.30 on December 8, 1994, 49 FR 63286. This action was never finalized. Today's direct final rule approves the rule after being corrected for the deficiencies that were identified in the proposed limited disapproval.

VOCs contribute to the production of ground level ozone and smog. These rules were originally adopted as part of California's effort to achieve the National Ambient Air Quality Standard (NAAQS) for ozone and in response to EPA's SIP-Call and the section 182(a)(2)(A) CAA requirement. The following is EPA's evaluation and final action for these rules.

III. EPA Evaluation and Action

In determining the approvability of a VOC rule, EPA must evaluate the rule for consistency with the requirements of the CAA and EPA regulations, as found in section 110 and part D of the CAA and 40 CFR part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans). The EPA interpretation of these requirements, which forms the basis for today's action, appears in the various EPA policy guidance documents listed in footnote 1. Among those provisions is the requirement that a VOC rule must, at a minimum, provide for the implementation of RACT for stationary sources of VOC emissions. This requirement was carried forth from the pre-amended Act.

For the purpose of assisting state and local agencies in developing RACT rules, EPA prepared a series of Control Technique Guideline (CTG) documents that are applicable to certain VOC rules. The CTGs are based on the underlying requirements of the Act and specify the presumptive norms for what is RACT for specific source categories. Under the CAA, Congress ratified EPA's use of these documents, as well as other Agency policy, for requiring States to "fix-up" their RACT rules according to section 182(a)(2)(A). The CTG applicable to SCAQMD rule 1103 is entitled, "Control of Volatile Organic Emissions from Manufacture of Synthesized Pharmaceutical Products", EPA 450/2-78-029. CTGs applicable to SCAQMD rule 462 are entitled, "Control of Hydrocarbons from Tank Truck Gasoline Loading Terminals", EPA-450/2-77-026; "Control of Volatile Organic Compound Leaks from Gasoline Tank Trucks and Vapor Collection Systems",

EPA-450/2-78-051; and "Control of Volatile Organic Emissions from Bulk Gasoline Plants", EPA 450/2-77-035. There are no CTGs applicable to YSAQMD. Further interpretations of EPA policy are found in the Blue Book, referred to in footnote 1. In general, these guidance documents have been set forth to ensure that VOC rules are fully enforceable and strengthen or maintain the SIP.

On November 13, 1997 (62 FR 60784), EPA granted limited approval and limited disapproval a version of SCAQMD rule 462, Organic Liquid Loading, that had been adopted by SCAQMD on June 9, 1995. Submitted SCAQMD rule 462 includes the following significant changes from the current SIP rule:

- The definition of "facility vapor leak" and other definitions were revised for clarity.
- Methods were provided for determining vapor leak and compliance to emission limits.
- Obsolete compliance dates were eliminated.

On November 13, 1997 (62 FR 60784), EPA granted limited approval and limited disapproval a version of SCAQMD rule 1103, Pharmaceuticals and Cosmetics Manufacturing Operations, that had been adopted by SCAQMD on December 7, 1990. Submitted SCAQMD rule 1103 includes the following significant changes from the current SIP rule:

- Methods were described for determination of control device efficiency and of surface condenser efficiency, instead of director's discretion.
- Operating requirements were specified and vacuum vents were required over 1.5 psia, instead of director's discretion.
- The calculation method for composite total pressure and the test method for weight of VOC were added.
- "Leak" is defined relative to the allowed time from detection to repair.

On December 8, 1994 (59 FR 63286), EPA proposed limited approval and limited disapproval a version of YSAQMD Rule 2.30, Polyester Resin Operations, that had been adopted by YSAQMD on August 25, 1993. This action was never finalized. Submitted YSAQMD Rule 2.30 includes the following significant change from the proposed rule:

- The test method for monomer content is specified as the SCAQMD Test Method 312, Percent Monomer in Polyester Resins, for restricting the monomer content to no more than 35 percent by weight.

¹ Among other things, the pre-amendment guidance consists of those portions of the proposed Post-1987 ozone and carbon monoxide policy that concern RACT, 52 FR 45044 (November 24, 1987); "Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations, Clarification to Appendix D of November 24, 1987 Federal Register Notice" (Blue Book) (notice of availability was published in the Federal Register on May 25, 1988); and the existing control technique guidelines (CTGs).

² SCAQMD and YSAQMD, respectively, retained their designation of nonattainment and were classified by operation of law pursuant to sections 107(d) and 181(a) upon the date of enactment of the CAA. See 56 FR 56694 (November 6, 1991).

³ EPA adopted the completeness criteria on February 16, 1990 (55 FR 5830) and, pursuant to section 110(k)(1)(A) of the CAA, revised the criteria on August 26, 1991 (56 FR 42216).

EPA has evaluated the submitted rules and has determined that they are consistent with the CAA, EPA regulations, and EPA policy. Therefore, SCAQMD rule 462, Organic Liquid Loading; SCAQMD rule 1103, Pharmaceutical and Cosmetics Manufacturing Operations; and YSAQMD rule 2.30, Polyester Resin Operations, are being approved under section 110(k)(3) of the CAA as meeting the requirements of section 110(a) and part D.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comments be filed. This rule will be effective September 20, 1999 without further notice unless the Agency receives adverse comments by August 20, 1999.

If the EPA receives such comments, then EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule did not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period. Any parties interested in commenting on this rule should do so at this time. If no such comments are received, the public is advised that this rule is effective on September 20, 1999 and no further action will be taken on the proposed rule.

IV. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order (E.O.) 12866, Regulatory Planning and Review.

B. Executive Order 12875

Under Executive Order 12875, Enhancing the Intergovernmental Partnership, 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, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget 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 a 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 E.O. 12875 do not apply to this rule.

C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have 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 reasonably feasible alternatives considered by the Agency. This rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13084

Under Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, 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 EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to 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 officials 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 E.O. 13084 do not apply to this rule.

E. Regulatory Flexibility Act

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 businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co., v. U.S. EPA*, 427 U.S. 246, 255-66 (1976); 42 U.S.C. 7410(a)(2).

F. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to State, local, or tribal governments in the aggregate; or to private sector, of \$100 million or more. Under Section 205, 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 EPA

to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated annual costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

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. 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).

H. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 20, 1999. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone, Particulate matter, Reporting and recordkeeping requirements, and Volatile Organic Compounds. Note: Incorporation by reference of the State Implementation Plan for the State of

California was approved by the Director of the Federal Register on July 1, 1982.

Dated: June 29, 1999.

Laura Yoshii,

Acting Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart F—California

2. Section 52.220 is amended by adding paragraphs (c) (263) and (264) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(263) New and amended regulations for the following APCDs were submitted on May 13, 1999, by the Governor's designee.

(i) Incorporation by reference.

(A) South Coast Air Quality Management District.

(1) Rule 1103, adopted on March 12, 1999.

* * * * *

(264) New and amended regulations for the following APCDs were submitted on June 3, 1999, by the Governor's designee.

(i) Incorporation by reference.

(A) South Coast Air Quality Management District.

(1) Rule 462, adopted on May 14, 1999.

(B) Yolo-Solano Air Quality Management District.

(1) Rule 2.30, adopted on April 14, 1999.

* * * * *

[FR Doc. 99-18472 Filed 7-20-99; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[AD-FRL-6400-9]

Technical Correction to Partial Withdrawal of Direct Final Rule, "Protection of Stratospheric Ozone: Reconsideration of Petition Criteria and Incorporation of Montreal Protocol Decisions"

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule, technical correction.

SUMMARY: This technical action corrects two typographical errors in the October 5, 1998, partial withdrawal of a direct final rule (63 FR 53290). The errors are in the CFR citations referring to the Part affected by that paragraph. 40 CFR 80.4 was printed instead of 40 CFR 82.4, the part of the Code which addresses stratospheric ozone protection.

EFFECTIVE DATE: July 21, 1999.

ADDRESSES: Comments and materials supporting the rulemaking are contained in Public Docket No. A-92-13. The docket is available for public inspection and copying between 8:00 a.m. and 5:30 p.m., Monday through Friday, at the EPA's Air and Radiation Docket and Information Center, Waterside Mall, Room M-1500, first floor, 401 M Street SW, Washington, DC 20460, or by calling 202/260-7548 or 260-7549. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Tom Land, U.S. Environmental Protection Agency, Program Implementation Branch, Stratospheric Protection Division, Office of Atmospheric Programs, 6205J 401 M Street, SW, Washington, DC 20460, 202/564-9185.

SUPPLEMENTARY INFORMATION:

I. Background

On August 4, 1998, EPA promulgated a direct final rule consisting of a variety of amendments to the accelerated phaseout regulation, intended to: reflect changes in U.S. obligations under the Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol); ensure compliance through the petition system for importation of used ozone-depleting substances; and change various requirements to ease the burden on affected companies. EPA received numerous comments on various sections of the rule. Where adverse comments were received, EPA withdrew those specific provisions, proposed the withdrawn provisions, and will ultimately promulgate a final rule that addresses the provisions. The **Federal Register** notice withdrawing the provisions was published on October 5, 1998, through a Partial Withdrawal of Direct Final Rule.

II. Correction to 63 FR 53290

In the October 5, 1998 withdrawal, 63 FR 53290, paragraphs (6) and (7) under the section entitled, **DATES**, the Code of Federal Regulations (CFR) cite is incorrectly published as 40 CFR 80.4. The numbers after "CFR" indicate the part of the Code of Federal Regulations where the regulation can be found. The corrected part is 82.4 in both (6) and (7).

Therefore, the corrected version should read:

“(6) The addition of paragraph (t)(3) in newly designated 40 CFR 82.4(t).

(7) The addition of paragraph (u)(3) in newly designated 40 CFR 82.4 (u).”

III. Administrative Requirements

A. Good Cause Finding

By promulgating these technical corrections directly as a final rule, the EPA is foregoing an opportunity for public comment on a notice of proposed rulemaking Section 553(b) of title 5 of the United States Code and section 307(b) of the CAA permit an agency to forego notice and comment when “the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issues) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” The EPA finds that notice and comment regarding these minor technical corrections are unnecessary due to their noncontroversial nature and because they do not substantively change the requirements of the partial withdrawal, the direct final amendment from which the provisions were withdrawn, or the accelerated phaseout regulation for which the amendments are intended, once promulgated. The EPA finds that this constitutes good cause under 5 U.S.C. 553(b) for a determination that the issuance of a notice of proposed rulemaking is unnecessary.

B. Executive Orders 12866, 13045, 13083, 13084, Unfunded Mandates Reform Act, Regulatory Flexibility Act, and Administrative Procedure Act

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a “significant regulatory action” and is therefore not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty, contain any unfunded mandate, or impose any significant or unique impact on small governments as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This rule also does not require prior consultation with State, local, and tribal government officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993) or Executive Order 13084 (63 FR 27655, May 10, 1998), or involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act

or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This rule is not subject to E.O. 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory 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. Section 808 allows the issuing agency to make a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public’s interest. This determination must be supported by a brief statement, 5 U.S.C. 802(2). As stated previously, EPA has made such a good cause finding, including the reasons therefor, and established an effective date of April 26, 1999. 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 action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (the NTAA), Pub. L. 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 NTAA requires the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This regulatory action makes technical corrections to errors in

citation and does not involve any technical standards that would require the Agency to consider voluntary consensus standards pursuant to section 12(d) of the NTAA.

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Chlorofluorocarbons, Exports, Hydrochlorofluorocarbons, Imports, Ozone layer, Reporting and recordkeeping requirements.

Dated: July 10, 1999.

Robert Perciasepe,

Assistant Administrator for the Office of Air and Radiation.

[FR Doc. 99–18481 Filed 7–20–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300884; FRL–6088–3]

RIN 2070–AB78

Imidacloprid; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes time-limited tolerances for the combined residues of imidacloprid and its metabolites containing the 6-chloropyridinyl moiety, all expressed as parent in or on blueberries and cranberries. This action is in response to EPA’s granting of emergency exemptions under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide on blueberries and cranberries. This regulation establishes maximum permissible levels for residues of imidacloprid in these food 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 June 1, 2001.

DATES: This regulation is effective July 21, 1999. Objections and requests for hearings must be received by EPA on or before September 20, 1999.

ADDRESSES: Written objections and hearing requests, identified by the docket control number [OPP–300884], 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-300884], 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@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 objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All copies of electronic objections and hearing requests must be identified by the docket control number [OPP-300884]. 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: Andrew Ertman, 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: Rm. 280, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 308-9367, ertman.andrew@epa.gov.

SUPPLEMENTARY INFORMATION: EPA, on its own initiative, pursuant to section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, is establishing a tolerance for combined residues of the insecticide imidacloprid and its metabolites containing the 6-chloropyridinyl moiety, all expressed as parent, in or on blueberries at 1.0 part per million (ppm) and cranberries at 0.5 ppm. This tolerance will expire and is revoked on June 1, 2001. EPA will publish a document in the **Federal Register** to remove the revoked tolerance from the Code of Federal Regulations.

I. Background and Statutory Findings

The Food Quality Protection Act of 1996 (FQPA) (Public Law 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 in this preamble 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 tolerances to set binding precedents for the application of section 408 and the new safety standard to other tolerances and exemptions.

II. Emergency Exemption for Imidacloprid on Blueberries and Cranberries and FFDCA Tolerances

Cranberries. The applicant states that the cranberry rootworm is becoming a serious pest of cranberries in New Jersey. The infestations of this insect are spreading from few acres in 1995 to several hundreds of acres in 1998. Prior to 1995, cranberry rootworm was considered a minor pest rarely requiring insecticide interventions. However, in 1997 and in 1998, severe infestations were seen in approximately 500 acres around Chatsworth, Burlington County.

Most of the cranberry rootworm grubs are found in the top 6-8 inches from the ground surface area available for absorption of water and nutrients. The affected vines become weak, often produce fewer berries, and are easily rolled back as a mat. Severe infestations of cranberry rootworm can kill the vines and reduce fruit yield. The effect of cranberry rootworm feeding on roots is more severe under moisture stress during summer months as vines are unable to uptake the limited moisture available with reduced root systems. Replanting is often necessary to fill dead patches as a result of rootworm injury. Newly planted vines may take as long as 5 years to reach full yield potential. Adults also skeletonize the foliage and affect the process of photosynthesis.

Currently there are no soil insecticides registered for managing cranberry rootworm in New Jersey. Lack of effective materials for use against the grub stage has resulted in the present emergency condition which left unchecked will cause significant crop losses to growers.

Blueberries (Oriental Beetle). The applicant states that the Oriental beetle has recently become a serious pest of commercial highbush blueberries. In surveys undertaken during 1995 and 1996, the Oriental beetle was found to be the predominant grub species found in a majority of locations surveyed in Atlantic and Burlington Counties. The damage to blueberries is caused by grub stages feeding on fine fibrous root hairs. Bushes that have sustained damage to the root system by grubs show reduced vigor, are twiggy, have smaller leaves, and support fewer berries than

uninfested bushes of the same age. Infested bushes can be easily pulled off and growers often replace them with newer, younger bushes. In contrast to the grubs feeding on the root system, adults do not feed and therefore are not vulnerable to insecticide applications made above the ground.

In blueberry fields in New Jersey, larvae become active and begin feeding by late March. The majority of these grubs are found in the top 8 inches of soil. Pupation occurs during the last week of May to early June with adults first appearing in the second week of June.

The most effective strategy in managing the Oriental beetle is to apply insecticides targeting early instar grubs which are closer to the soil surface. However, there are currently no soil insecticides registered for use against any insect pest in blueberries. Out of desperation, some growers have attempted the use of organophosphate and carbamate insecticides targeting the adult stage. This strategy is generally effective in killing the adults only if the adults come in direct contact with the insecticide. Applications of insecticides targeting adults have proven to be very ineffective and resulted in unwarranted applications of organophosphate and carbamate insecticides.

Lack of effective materials for use against the grub stage has resulted in the present emergency situation. Availability of effective insecticides targeting the early instar grubs will alleviate this problem and improve the management of Oriental beetle populations in blueberries.

Blueberries (Blueberry Aphid). According to the applicant, blueberry aphids, *Fimbriaphis fimbriata* and *Illinoia peiperi* are the most important pests of highbush blueberries in New Jersey. The green peach aphid *Myzus persicae* also occurs on blueberries on a regular basis, but is of less significance. All of these species feed on plant sap and reduce the vigor of the bushes. But more importantly, these three species of aphids have recently been shown to be the vectors of the Blueberry Scorch virus (BBSV), the most important viral disease of blueberries in New Jersey. This virus is transmitted in a non-persistent fashion, and in greenhouse experiments, the applicant has shown that as little as 5 minutes of feeding any of the above three species is sufficient to transmit the BBSV from an infected plant to a non-infected plant.

The Blueberry Scorch disease (also known as Sheep Pen Hill disease) was first detected in the early eighties. For several years this disease was restricted to a few areas in Burlington County, but

during the past 3-4 years, there have been numerous fields that have become 100% infected with BBSV and showing visible symptoms of the disease. This disease is now firmly established in all major blueberry producing areas in Atlantic and Burlington counties. Primary symptoms of Blueberry Scorch disease are blighting of both flowers and new vegetative growth at full bloom and appearance of necrotic line pattern just prior to leaf drop in autumn. The blighted blossoms are often retained throughout the summer but fail to develop into fruit and infected plants are less vigorous than healthy plants. The major problem in containing this disease is the inability to aggressively rogue out infected bushes because disease symptoms may not manifest for several years after the transmission of the causal agent (BBSV). This allows for the rapid spread of the disease if infected plants (symptom free) and aphids are present in a given location. Growers have no option but to completely destroy or kill the bushes and replant with new, clean bushes. Accurate estimates of total losses due to this disease in New Jersey are yet to be determined.

Effective management of the aphid vectors is the only viable strategy to contain the spread of the Blueberry Scorch disease; there are no other methods available at the present time. Inadequate control of aphids with the existing insecticides has resulted in the present emergency situation which could cause severe crop loss to blueberry growers if left unchecked. EPA has authorized under FIFRA section 18 the use of imidacloprid on blueberries for control of blueberry aphids and the oriental beetle and cranberries for control of the cranberry rootworm in New Jersey. 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 imidacloprid in or on blueberries and cranberries. In doing so, EPA considered the safety standard in FFDCA section 408(b)(2), and EPA decided that the necessary tolerances under FFDCA section 408(l)(6) would be consistent with the safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemptions 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 June 1, 2001, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerances remaining in or on blueberries and cranberries 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 imidacloprid meets EPA's registration requirements for use on blueberries and cranberries or whether permanent tolerances for these uses would be appropriate. Under these circumstances, EPA does not believe that these tolerances serve as a basis for registration of imidacloprid 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 New Jersey to use this pesticide on this crop under section 18 of FIFRA without following all provisions of EPA's regulations implementing section 18 as identified in 40 CFR part 166. For additional information regarding the emergency exemption for imidacloprid, contact the Agency's Registration Division at the address provided under the "ADDRESSES" section.

III. Aggregate Risk Assessment and Determination of Safety

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. For further discussion of the regulatory requirements of section 408 and a complete description of the risk assessment process, see the final rule on Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997) (FRL-5754-7).

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 imidacloprid and to make a determination on aggregate exposure, consistent with section 408(b)(2), for a time-limited tolerance for combined residues of imidacloprid and its metabolites containing the 6-chloropyridinyl moiety, all expressed as parent on blueberries at 1.0 ppm and cranberries at 0.5 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 imidacloprid are discussed in this unit.

B. Toxicological Endpoint

Only acute and chronic dietary endpoints were defined. The 10X FQPA factor was reduced to 3X for acute and chronic exposure, and applies to all population subgroups.

1. *Acute toxicity.* The acute Reference Dose (RfD) is 0.42 mg/kg bwt/day based on a lowest observed adverse effect level (LOAEL) of 42 mg/kg body weight/day (bwt/day) based on decreased motor activity in female rats. An additional 3X FQPA factor was incorporated for all population subgroups to account for neurotoxicity, structure-activity concerns, and lack of a no observed adverse effect level (NOAEL). The acute Population Adjusted Dose (aPAD), which is the RfD/3 was calculated to be 0.14 mg/kg bwt/day. Acceptable acute dietary exposure (food plus water) of 100% or less of the aPAD is required for all population subgroups.

2. *Short- and intermediate-term toxicity.* Dermal and inhalation short- and intermediate-term risk assessments are not required for imidacloprid as dermal and inhalation exposure endpoints were not identified due to the demonstrated absence of toxicity. However, because imidacloprid is registered for use on turf, home gardens and pets, EPA has identified potential short-term oral exposures to children for these uses.

A short-term oral endpoint was not identified for imidacloprid. According to current OPP policy, if an oral endpoint is needed for short-term risk assessment (for incorporation of food, water, or oral hand-to-mouth type exposures into an aggregate risk assessment), the acute oral endpoint (LOAEL = 42 mg/kg bwt/day) will be used to incorporate the oral component into aggregate risk.

3. *Chronic toxicity.* EPA has established the RfD for imidacloprid at 0.057 milligrams/kilograms/day (mg/kg/day). This RfD is based on increased number of thyroid lesions at the LOAEL of 16.9/24.9 mg/kg bwt/day (males and

females, respectively). An additional 3X FQPA factor was used for all population subgroups. The chronic Population Adjusted Dose (cPAD), which is the RfD/3 was calculated to be 0.019 mg/kg bwt/day. Acceptable chronic dietary exposure (food plus water) of 100% or less of the cPAD is required for all population subgroups.

4. *Carcinogenicity.* Imidacloprid has been classified by the Agency as a Group E chemical, no evidence of carcinogenicity for humans, thus, a cancer risk assessment is not required.

C. Exposures and Risks

1. From food and feed uses.

Tolerances, some time-limited, are currently established (40 CFR 180.472) for the combined residues of the insecticide imidacloprid and its metabolites containing the 6-chloropyridinyl moiety, all expressed as parent, in or on a variety of raw agricultural and animal commodities at levels ranging from 0.02 ppm in eggs to 15 ppm in raisins, waste. Risk assessments were conducted by EPA to assess dietary exposures and risks from imidacloprid 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.

In conducting the acute dietary (food) risk assessment, EPA used the Theoretical Maximum Residue Contribution (TMRC) which assumes tolerance level residues and 100% crop-treated (Tier 1). The analysis evaluates individual food consumption as reported by respondents in the USDA Continuing Surveys of Food Intake by Individuals conducted in 1989 through 1992. The model accumulates exposure to the chemical for each commodity and expresses risk as a function of dietary exposure. Resulting exposure values (at the 95th percentile) and percentage of aPAD utilized ranged from 22% for the U.S. population to 44% for children 1-6 years old.

ii. *Chronic exposure and risk.* In conducting the chronic dietary (food only) risk assessment, EPA used tolerance level residues for imidacloprid and percent crop-treated (%CT) information for some of these crops. The analysis evaluates individual food consumption as reported by respondents in the USDA Continuing Surveys of Food Intake by Individuals conducted in 1989 through 1992. The percentages of cPAD consumed for the general population and subgroups of interest ranged from 9.2% for nursing

infants <1 year old to 48.5% for children 1-6 years old.

Section 408(b)(2)(E) authorizes EPA to use 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. As required by section 408(b)(2)(E), EPA will issue a data call-in for information relating to anticipated residues to be submitted no later than 5 years from the date of issuance of this tolerance.

Section 408(b)(2)(F) states that the Agency may use data on the actual percent of crop treated (PCT) for assessing chronic dietary risk only if the Agency can make the following findings: That the data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain such pesticide residue; that the exposure estimate does not underestimate exposure for any significant subpopulation group; and if data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area. In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of percent crop treated as required by the section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

As noted above, the Agency used an analysis that evaluated individual food consumption as reported by respondents in the USDA Continuing Surveys of Food Intake by Individuals conducted in 1989 through 1992.

The Agency believes that the three conditions, discussed in section 408(b)(2)(F) concerning the Agency's responsibilities in assessing chronic dietary risk findings, have been met. The PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. 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 the PCT, the Agency is reasonably certain that the percentage of the food treated is not likely to be underestimated. The regional consumption information and

consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available information on the regional consumption of food to which imidacloprid may be applied in a particular area.

2. *From drinking water.* There is no established Maximum Contaminant Level for residues of imidacloprid in drinking water. No health advisory levels for imidacloprid in drinking water have been established.

Imidacloprid is persistent, water soluble, and fairly mobile. Thus, residues of imidacloprid may be transported to both surface and ground waters. As a condition of registration, the Agency is requiring the submission of the results of two prospective ground water monitoring studies. Results from these studies are not yet available.

i. *Acute exposure and risk.* Estimated concentrations of imidacloprid in surface and ground water used for the acute exposure analysis were 4.1 and 1.1 µg/L (ppb), respectively. These estimated concentrations of imidacloprid in surface and ground water were based upon an application rate of 0.5 lbs ai/A/year.

For purposes of risk assessment, the estimated maximum concentration for imidacloprid in surface and ground waters (which is 4.1 µg/L) should be used for comparison to the back-calculated human health drinking water levels of concern (DWLOCs) for the acute endpoint. The DWLOCs ranged from 780 µg/L for children 1-6 years old to 3,900 µg/L for the U.S. population. These figures are well above the drinking water estimate concentration (DWEc) of 4.1 µg/L.

ii. *Chronic exposure and risk.* Estimated concentrations of imidacloprid in surface and ground water for chronic exposure analysis were 0.1 and 1.1 µg/L (ppb), respectively. These estimated concentrations of imidacloprid in surface and ground water were based upon an application rate of 0.5 lbs ai/A/year.

For purposes of chronic risk assessment, the estimated maximum concentration for imidacloprid in ground waters (which is 1.1 µg/L) should be used for comparison to the back-calculated human health DWLOCs for the chronic (non-cancer) endpoint. The DWLOCs ranged from 98 µg/L for children 1-6 years old to 490 µg/L for Non-hispanic males (other than black or white). These figures are well above the DWEc of 1.1 µg/L.

3. *From non-dietary exposure.* Imidacloprid is currently registered for use on the following residential non-food sites: ornamentals (e.g., flowering and foliage plants, ground covers, turf, and lawns), tobacco, golf courses, walkways, recreational areas, household or domestic dwellings (indoor/outdoor), and cats/dogs.

i. *Acute exposure and risk.* Occupational/residential exposure risk assessments (namely, short-term dermal, intermediate-term dermal, long-term dermal, and inhalation) are not required owing to the demonstrated absence of dermal and inhalation toxicity.

ii. *Chronic exposure and risk.* Occupational/residential exposure risk assessments (namely, short-term dermal, intermediate-term dermal, long-term dermal, and inhalation) are not required owing to the demonstrated absence of dermal and inhalation toxicity.

iii. *Short- and intermediate-term exposure and risk.* Short- and intermediate-term oral exposure are not expected for adult population subgroups. However, since imidacloprid is registered for use on turf, home gardens and pets, EPA has identified potential short-term oral exposures to children for these uses. Thus, a residential short-term risk assessment via the oral route is required.

4. *Cumulative exposure to substances with a 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."

EPA does not have, at this time, available data to determine whether imidacloprid 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, imidacloprid 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 imidacloprid has a common mechanism of toxicity with other substances. For more information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the final rule for Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997).

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

1. *Acute risk.* EPA has determined that the acute exposure to imidacloprid from food will utilize 22% of the aPAD (95th percentile) for the most highly exposed population subgroup (U.S. population - all seasons). Despite the potential for exposure to imidacloprid in drinking water, the Agency does not expect the aggregate exposure to exceed 100% of the aPAD. The DWLOC calculated for the U.S. population was 3,900 µg/L, which is well above the DWEc of 4.1 µg/L.

2. *Chronic risk.* In conducting the chronic dietary (food only) risk assessment, EPA used tolerance level residues for imidacloprid and percent crop-treated (%CT) information for some of these crops. The analysis evaluates individual food consumption as reported by respondents in the USDA Continuing Surveys of Food Intake by Individuals conducted in 1989 through 1992. The percentage of cPAD consumed for the U.S. population was 22%. 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 imidacloprid in drinking water, the Agency does not expect the aggregate exposure to exceed 100% of the cPAD. The DWLOC calculated for the U.S. population was well above the DWEc of 1.1 µg/L.

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.

Dermal and inhalation short- and intermediate-term risk assessments are not required for imidacloprid as dermal and inhalation exposure endpoints were not identified due to the demonstrated absence of toxicity. Short- and intermediate-term oral exposure are not expected for adult population subgroups.

4. *Aggregate cancer risk for U.S. population.* Imidacloprid has been

classified as a Group E chemical, no evidence of carcinogenicity for humans, thus, a cancer risk assessment is not required.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result from aggregate exposure to imidacloprid 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 imidacloprid, 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 postnatal 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 margin of exposure (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 a developmental toxicity study with Sprague-Dawley rats, groups of pregnant animals (25/group) received oral administration of imidacloprid (94.2%) at 0, 10, 30, or 100 mg/kg bwt/day during gestation days 6 through 16. Maternal toxicity was manifested as decreased body weight gain at all dose levels and reduced food consumption at 100 mg/kg bwt/day. No treatment-related effects were seen in any of the reproductive parameters (i.e., Cesarean

section evaluation). At 100 mg/kg bwt/day, developmental toxicity manifested as wavy ribs (fetus = 7/149 in treated vs. 2/158 in controls and litters, 4/25 vs. 1/25). For maternal toxicity, the LOAEL was 10 mg/kg bwt/day (LDT) based on decreased body weight gain; a NOAEL was not established. For developmental toxicity, the NOAEL was 30 mg/kg bwt/day and the LOAEL was 100 mg/kg bwt/day based on increased wavy ribs.

In a developmental toxicity study with Chinchilla rabbits, groups of 16 pregnant does were given oral doses of imidacloprid (94.2%) at 0, 8, 24, or 72 mg/kg bwt/day during gestation days 6 through 18. For maternal toxicity, the NOAEL was 24 mg/kg bwt/day and the LOEL was 72 mg/kg bwt/day based on mortality, decreased body weight gain, increased resorptions, and increased abortions. For developmental toxicity, the NOAEL was 24 mg/kg bwt/day and the LOEL was 72 mg/kg bwt/day based on decreased fetal body weight, increased resorptions, and increased skeletal abnormalities.

iii. *Reproductive toxicity study.* In a 2-generation reproductive toxicity study, imidacloprid (95.3%) was administered to Wistar/Han rats at dietary levels of 0, 100, 250, or 700 ppm (0, 7.3, 18.3, or 52.0 mg/kg bwt/day for males and 0, 8.0, 20.5, or 57.4 mg/kg bwt/day for females). For parental/systemic/reproductive toxicity, the NOAEL was 250 ppm (18.3 mg/kg bwt/day) and the LOEL was 750 ppm (52 mg/kg bwt/day), based on decreases in body weight in both sexes in both generations. Based on these factors, the Agency determined that the review be revised to indicate the parental/systemic/reproductive NOAEL and LOEL to be 250 and 700 ppm, respectively, based upon the body weight decrements observed in both sexes in both generations.

iv. *Pre- and postnatal sensitivity.* The developmental toxicity data demonstrated no increased sensitivity of rats or rabbits to *in utero* exposure to imidacloprid. In addition, the multi-generation reproductive toxicity study data did not identify any increased sensitivity of rats to *in utero* or postnatal exposure. Parental NOAELs were lower or equivalent to developmental or offspring NOAELs.

v. *Conclusion.* There is a need for a developmental neurotoxicity study for assessment of potential alterations of functional development. However, the Agency has determined that this data gap does not preclude the establishment/continuance of tolerances. The 10X safety factor to account for enhanced sensitivity of infants and children (as required by

FQPA) was reduced to 3X and the factor applies to all population subgroups.

2. *Acute risk.* Using the conservative TMRC exposure assumptions described above, and taking into account the completeness and reliability of the toxicity data, EPA has estimated the acute exposure to imidacloprid from food for the most highly exposed population subgroup (Children 1 - 6 yrs) will utilize 44% of the aPAD. It was determined that an acceptable acute dietary exposure (food plus water) of 100% or less of the aPAD is needed to protect the safety of all population subgroups. Despite the potential for exposure to imidacloprid in drinking water, EPA does not expect the aggregate exposure to exceed 100% of the aPAD for children 1-6 years old. The maximum concentration of imidacloprid in surface and ground water for acute exposure is very small (4.1 µg/L) compared to the DWEC of 780 µg/L.

3. *Chronic risk.* Using the exposure assumptions described in this unit, EPA has concluded that aggregate exposure to imidacloprid from food will utilize 48% of the cPAD for infants and children. EPA generally has no concern for exposures below 100% of the cPAD because the cPAD 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 imidacloprid in drinking water, EPA does not expect the aggregate exposure to exceed 100% of the cPAD for children 1-6 years old. The maximum concentration of imidacloprid in surface and ground water for acute exposure is very small (1.1 µg/L) compared to the DWEC of 98 µg/L.

4. *Short- or intermediate-term risk.* As noted earlier in this document, dermal and inhalation short- and intermediate-term risk assessments are not required for imidacloprid as dermal and inhalation exposure endpoints were not identified due to the demonstrated absence of toxicity. Short- and intermediate-term oral exposure are not expected for adult population subgroups. However, since imidacloprid is registered for use on turf, home gardens and pets, EPA has identified potential short-term oral exposures to children for these uses.

A short-term oral endpoint was not identified for imidacloprid. According to current OPP policy, if an oral endpoint is needed for short-term risk assessment (for incorporation of food, water, or oral hand-to-mouth type exposures into an aggregate risk assessment), the acute oral endpoint (LOAEL = 42 mg/kg bwt/day) will be

used to incorporate the oral component into aggregate risk.

The margin of exposure for chronic dietary exposure (food only) and residential exposure (hand-to-mouth from turf, garden, and pet uses) for children age 1-6 was calculated to be 302. The safe level for imidacloprid is 300.

Potential short-term exposure from drinking water is at a level below the Agency's level of concern with the DWLOC (10 µg/L) being greater than the DWEC of 1.1 µg/L.

The Agency concludes the short-term aggregate risk to the highest exposed population subgroup (children, 1 to 6 years old) from home garden, turf, and pet uses of imidacloprid does not exceed EPA's level of concern.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to imidacloprid residues.

IV. Other Considerations

A. Metabolism in Plants and Animals

The nature of imidacloprid residues in plants and in animals is adequately understood. The residue of concern is imidacloprid and its metabolites containing the 6-chloropyridinyl moiety, all expressed as parent, as specified in 40 CFR 180.472.

B. Analytical Enforcement Methodology

Adequate enforcement methodology (example - gas chromatography) is available to enforce the tolerance expression. The method may be requested from: Calvin Furlow, PRRIB, IRSD (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm 101FF, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 305-5229.

C. Magnitude of Residues

Based on data submitted by the Applicant, the Agency is establishing time-limited tolerances for residues of imidacloprid and its metabolites containing the 6-chloropyridinyl moiety, all expressed as parent in or on blueberries at 1.0 ppm and cranberries at 0.5 ppm.

D. International Residue Limits

There are no CODEX, Canadian, or Mexican Maximum Residue Limits (MRL) for imidacloprid on cranberry and blueberries. Thus, harmonization is not an issue for these time-limited tolerances.

E. Rotational Crop Restrictions

The rotational crop restrictions follow the original section 3 labels. For the use of Provado 1.6 Flowable and Admire 2 Flowable, most vegetables can be immediately planted back while all other crops have a 12-month plantback interval.

V. Conclusion

Therefore, the tolerance is established for the combined residues of imidacloprid and its metabolites containing the 6-chloropyridinyl moiety, all expressed as parent, in or on blueberries at 1.0 ppm and cranberries at 0.5 ppm.

VI. 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(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 September 20, 1999, 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). EPA is authorized to waive any fee requirement "when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection." For additional information regarding tolerance objection fee waivers, contact James 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: Rm. 239, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 305-5697, tomkins.jim@epa.gov. Requests

for waiver of tolerance objection fees should be sent to James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

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.

VII. Public Record and Electronic Submissions

EPA has established a record for this regulation under docket control number [OPP-300884] (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.

Objections and hearing requests may be sent by e-mail directly to EPA at: opp-docket@epa.gov

E-mailed objections and hearing requests must be submitted as an ASCII

file avoiding the use of special characters and any form of encryption.

The official record for this regulation, as well as the public version, as described in this unit 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 record which will also include all comments submitted directly in writing. The official record is the paper record maintained at the Virginia address in "ADDRESSES" at the beginning of this document.

VIII. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

This final rule establishes tolerances under section 408 of the FFDCA. 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) (Public Law 104-4). Nor does it require 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 tolerances and exemptions that are established on the basis of a petition 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 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 the Intergovernmental Partnership* (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 officials 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.

IX. 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 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: July 1, 1999.

Peter Caulkins,

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, 321q and 371.

2. In § 180.472, in paragraph (b), by alphabetically inserting the following commodities to the table.

§ 180.472 Imidacloprid; tolerance for residues.

* * * * *

(b)* * *

Commodity	Parts per million	Expiration/revocation date
Blueberries	1.0	6/1/01
* * *	* *	*
Cranberries	0.5	6/1/01

Commodity	Parts per mil- lion	Expiration/ revocation date
* * *	* *	*

* * * * *

[FR Doc. 99-18190 Filed 7-20-99; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 180**

[OPP-300898; FRL-6092-7]

RIN 2070-AB78

Biphenyl, Calcium cyanide, and Captafol, et al.; Final Tolerance Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule revokes specific tolerances and/or exemptions for residues of the herbicides chloramben, 2-chloro-*N,N*-diallylacetamide, chloroxuron, diethatyl-ethyl, terbutryn, and 2,3,6-trichlorophenylacetic acid; the fungicides biphenyl, captafol, chlorosulfamic acid, and sulfur dioxide; and the insecticides calcium cyanide, 2-chloro-1-(2,4,5-trichlorophenyl) vinyl dimethyl phosphate, chlorthiophos, and ethyl 4,4'-dichlorobenzilate [chlorobenzilate]; as listed in the regulatory text. The regulatory actions in this document are part of the Agency's reregistration program under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and the tolerance reassessment requirements of the Federal Food, Drug, and Cosmetic Act (FFDCA). By law, EPA is required to reassess 33% of the tolerances in existence on August 2, 1996, by August 1999, or about 3,200 tolerances. This document revokes 138 tolerances and/or exemptions which would be counted among reassessments made toward the August, 1999 review deadline of FFDCA section 408(q), as amended by the Food Quality Protection Act (FQPA) of 1996. **DATES:** This final rule becomes effective October 19, 1999. Objections and requests for hearings, identified by docket control number [OPP-300898] must be received by EPA on or before September 20, 1999. **ADDRESSES:** Objections and hearing requests can be submitted by mail or in person. Please follow the detailed instructions provided in Unit V of the "SUPPLEMENTARY INFORMATION" section of this document. To ensure

proper identification of your objection or hearing request, you must identify the docket control number [OPP-300898] in the subject line on the first page of your request.

FOR FURTHER INFORMATION CONTACT: For technical information contact: Joseph Nevola, Special Review Branch, (7508C), Special Review and Reregistration Division, Office of Pesticide Programs, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location: Special Review Branch, CM#2, 6th floor, 1921 Jefferson Davis Hwy., Arlington, VA. Telephone: (703) 308-8037; e-mail: nevola.joseph@epa.gov.

SUPPLEMENTARY INFORMATION:**I. Does this Action Apply to Me?**

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected categories and entities may include, but are not limited to:

Categories	NAICS	Examples of Potentially Affected Entities
Industry ...	111 112 311 32532	Crop production Animal production Food manufacturing Pesticide manufacturing

This listing is not exhaustive, but is a guide to entities likely to be regulated by this action. The North American Industrial Classification System (NAICS) codes will assist you in determining whether this action applies to you. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the "FOR FURTHER INFORMATION CONTACT" section.

II. How Can I Get Additional Information or Copies of this or Other Support Documents?**A. Electronically**

You may obtain electronic copies of this document and various support documents from the EPA Internet Home Page at <http://www.epa.gov/>. On the Home Page select "Laws and Regulations" and then look up the entry for this document under "**Federal Register** - Environmental Documents." You can also go directly to the "**Federal Register**" listings at <http://www.epa.gov/homepage/fedrgstr/>.

B. In Person or by Phone

If you have any questions or need additional information about this action, please contact the technical person identified in the "FOR FURTHER

INFORMATION CONTACT" section. In addition, the official record for this final rule, including the public version, has been established under docket control number [OPP-300898], (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of any electronic comments, which does not include any information claimed as Confidential Business Information (CBI), is available for inspection in Room 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Public Information and Records Integrity Branch telephone number is (703) 305-5805.

III. What Action is being Taken?

This final rule revokes specific FFDCA tolerances and/or exemptions for residues of the herbicides chloramben, 2-chloro-*N,N*-diallylacetamide, chloroxuron, diethatyl-ethyl, terbutryn, and 2,3,6-trichlorophenylacetic acid; the fungicides biphenyl, captafol, chlorosulfamic acid, and sulfur dioxide; and the insecticides calcium cyanide, 2-chloro-1-(2,4,5-trichlorophenyl) vinyl dimethyl phosphate, chlorthiophos, and ethyl 4,4'-dichlorobenzilate [Chlorobenzilate] in or on certain specified commodities.

EPA is revoking these tolerances because they are not necessary to cover residues of the relevant pesticides in or on domestically treated commodities or commodities treated outside but imported into the United States. These pesticides are no longer used on commodities within the United States and no person has provided comment identifying a need for EPA to retain the tolerances to cover residues in or on imported foods. EPA has historically expressed a concern that retention of tolerances that are not necessary to cover residues in or on legally treated foods has the potential to encourage misuse of pesticides within the United States. Thus, it is EPA's policy to issue a final rule revoking those tolerances for residues of pesticide chemicals for which there are no active registrations under FIFRA, unless any person in comments on the proposal demonstrates a need for the tolerance to cover residues in or on imported commodities or domestic commodities legally treated.

EPA is not issuing today a final rule to revoke those tolerances for which EPA received comments demonstrating a need for the tolerance to be retained. Generally, EPA will proceed with the revocation of these tolerances on the grounds discussed above only if, (1)

prior to EPA's issuance of a section 408(f) order requesting additional data or issuance of a section 408(d) or (e) order revoking the tolerances on other grounds, commenters retract the comment identifying a need for the tolerance to be retained, (2) EPA independently verifies that the tolerance is no longer needed, (3) the tolerance is not supported by data, or (4) the tolerance does not meet the requirements under FQPA. EPA had proposed these revocations since the registrations for these pesticide chemicals were canceled because the registrant failed to pay the required maintenance fee and/or the registrant voluntarily canceled all registered uses associated with the tolerance revocations for these pesticides.

1. *Captafol and ethyl 4,4'-dichlorobenzilate [chlorobenzilate]*. In the **Federal Register** on June 9, 1993 (58 FR 32320) (FRL-4183-6) (OPP-300273), EPA issued a document which proposed to revoke tolerances for captafol, ethyl 4,4'-dichlorobenzilate (chlorobenzilate) and monocrotophos. Monocrotophos was addressed in a final rule (64 FR 19489, April 21, 1999) (FRL-6074-4).

i. *Captafol*. EPA published a Registration Standard for captafol on September 30, 1984. In that document, the Agency's concerns about captafol's carcinogenic effects and hazard to fish are summarized. In the **Federal Register** of January 9, 1985 (50 FR 1103), EPA issued a notice initiating Special Review for captafol. This resulted in the voluntary cancellation of all captafol registrations, effective April 30, 1987, with the exception of one intrastate registration that was canceled in March, 1991. The sale of existing stocks of captafol by registrants was permitted until December 31, 1987. Other persons were allowed to continue to distribute, sell, and use existing stocks until exhausted. Generally, a tolerance is not necessary for a pesticide chemical which is not registered for the particular food use. Therefore, in the **Federal Register** of June 9, 1993 (58 FR 32320), EPA proposed to revoke the tolerances listed in 40 CFR 180.267 for residues of captafol. The Agency revoked the tolerance for captafol residues in or on peanuts, hulls in the **Federal Register** of December 17, 1997 (62 FR 66020) (FRL-5753-1).

Today's document revokes the tolerances in 40 CFR 180.267 for captafol residues in or on apples; apricots; blueberries; cherries, sour; cherries, sweet; citrus fruits; corn, fresh (inc sweet K+CWHR); cranberries; cucumbers; macadamia nuts; melons; nectarines; peanuts, meats (hulls

removed); peaches; pineapples; plums (fresh prunes); and taro (corm).

ii. *Ethyl 4,4'-dichlorobenzilate (chlorobenzilate)*. This document also revokes the tolerances in 40 CFR 180.109 for ethyl 4,4'-dichlorobenzilate (chlorobenzilate) residues in or on cattle, fat; cattle, mby; cattle, meat; citrus fruits; sheep, fat; sheep, mby; and sheep, meat; by removing § 180.109.

2. *Sulfur dioxide*. The proposal to revoke the exemptions in 40 CFR 180.1013 for sulfur dioxide was published in the **Federal Register** on June 22, 1994 (59 FR 32172) (FRL-4776-9) (OPP-300336). Today's document revokes the exemptions in 40 CFR 180.1013(a) for sulfur dioxide residues in or on barley; buckwheat; corn; oats; popcorn; rice; rye; sorghum, grain (milo); wheat; and in 40 CFR 180.1013(b) for sulfur dioxide residues in or on corn (for feed use), by removing § 180.1013.

3. *2-Chloro-1-(2,4,5-trichlorophenyl) vinyl dimethyl phosphate and terbutryn*. The proposal to revoke the tolerances for 2-Chloro-1-(2,4,5-trichlorophenyl) vinyl dimethyl phosphate and terbutryn was published in the **Federal Register** on July 20, 1994 (59 FR 37019) (FRL-4868-7) (OPP-300346).

i. *2-Chloro-1-(2,4,5-trichlorophenyl) vinyl dimethyl phosphate*. Today's document revokes the tolerances in 40 CFR 180.252 for residues 2-Chloro-1-(2,4,5-trichlorophenyl) vinyl dimethyl phosphate in or on apples; cherries; corn, field, fodder; corn, field, forage; corn, fresh (inc. sweet K+CWHR); corn, grain; corn, pop, fodder; corn, pop, forage; corn, sweet, fodder; corn, sweet, forage; cranberries; peaches; pears; and tomatoes. EPA will revise commodity terminology to conform to current practice.

ii. *Terbutryn*. This document also revokes the tolerances in 40 CFR 180.265 for terbutryn residues in or on barley, fodder; barley, grain; barley, green; barley, straw; sorghum, grain; wheat, fodder; wheat, grain; wheat, green; and wheat, straw, by removing § 180.265.

4. *Biphenyl; calcium cyanide; 2-chloro-N,N-diallylacetamide; chlorosulfamic acid; chlorthiophos; 2,3,6-trichlorophenylacetic acid; chloramben; chloroxuron; and diethatyl-ethyl*. The proposal to revoke the tolerances for the herbicides 2-chloro-N,N-diallylacetamide, chloramben, chloroxuron, 2,3,6-trichlorophenylacetic acid, and diethatyl-ethyl; the fungicides biphenyl and chlorosulfamic acid; and the insecticides calcium cyanide and chlorthiophos was published in the

Federal Register on April 3, 1996 (61 FR 14694) (FRL-4971-1) (OPP-300396).

i. *Biphenyl*. In this document, EPA is revoking the tolerance in 40 CFR 180.141 for biphenyl residues in or on fruits, citrus (and hybrids thereof), by removing § 180.141.

ii. *Calcium cyanide*. In this document, EPA is revoking the tolerances in 40 CFR 180.125 for calcium cyanide residues in or on barley, grain (POST-H); buckwheat, grain (POST-H); corn, grain (POST-H); cucumbers; lettuce; oats, grain (POST-H); radishes; rice, grain (POST-H); rye, grain (POST-H); sorghum, grain (POST-H); tomatoes; and wheat, grain (POST-H), by removing § 180.125.

iii. *2-Chloro-N,N-diallylacetamide*. In this document, EPA is revoking the tolerances in 40 CFR 180.282 for 2-Chloro-N,N-diallylacetamide residues in or on beans, dried; beans, lima; beans, lima, forage; beans, snap; beans, snap, forage; cabbage; castor beans; celery; corn, field, fodder; corn, field, forage; corn, fresh (inc sweet K+ CWHR); corn, grain (inc popcorn); corn, pop, fodder; corn, pop, forage; corn, sweet, fodder; corn, sweet, forage; onions; peas; peas, forage; potatoes; sorghum, forage; sorghum, grain; soybeans; soybeans, forage; sugarcane; sweet potatoes; and tomatoes; by removing § 180.282.

iv. *Chlorosulfamic acid*. In this document, EPA is revoking the tolerances in 40 CFR 180.201 for chlorosulfamic acid residues in or on asparagus (POST-H); carrots (POST-H); cauliflower (POST-H); celery (POST-H); potatoes (POST-H); and radishes (POST-H); by removing § 180.201.

v. *Chlorthiophos*. In this document, EPA is revoking the tolerance in 40 CFR 180.398 for chlorthiophos residues in or on tomatoes, by removing § 180.398.

vi. *2,3,6-Trichlorophenylacetic acid*. In this document, EPA is revoking the tolerance in 40 CFR 180.283 for 2,3,6-Trichlorophenylacetic acid residues in or on sugarcane, by removing § 180.283.

vii. *Chloramben; Chloroxuron; and Diethatyl-ethyl*. Since chloramben, chloroxuron, and diethatyl-ethyl still had usages on certain crops as late as 1994 and 1995, EPA proposed to delay the revocation of chloramben, chloroxuron, and diethatyl-ethyl until March 1, 1999, to allow domestic growers, who may have had stocks, to use up their supplies and to permit any treated raw commodities and products processed from such commodities to move through marketing channels. The time-limited tolerances for chloramben, chloroxuron, and diethatyl-ethyl, which were proposed in the **Federal Register** of April 3, 1996 (61 FR 14694), are no longer needed because the proposed

expiration date of March 1, 1999 has passed.

In this document, EPA is revoking the tolerances in 40 CFR 180.266 for chloramben residues in or on beans, dried; beans, lima; beans, snap; beans, vines; cantaloupes; corn, field, fodder; corn, field, forage; corn, field, grain; cucumbers; peanuts; peanuts, forage; peas, pigeon; peas, pigeon, forage; peppers; pumpkins; soybeans; soybeans, forage; squash, summer; squash, winter; sunflower seed; sweet potatoes; and tomatoes; by removing § 180.266. The Agency revokes the tolerances in 40 CFR 180.216 for chloroxuron residues in or on carrots; celery; onions (dry bulb); soybeans; soybeans, forage; and strawberries; by removing § 180.216. Also, the Agency revokes the tolerances in 40 CFR 180.402 for diethatyl-ethyl residues in or on red beet, roots; red beet, tops; spinach; sugar beets, roots; and sugar beets, tops; by removing § 180.402.

Response to comments. EPA issued proposed rules for the specific pesticides mentioned herein announcing the proposed revocation of certain tolerances and/or exemptions and invited public comment for consideration and for support of tolerance retention under FFDCA standards. With the exception of captafol, no comments were received by the Agency concerning the pesticides mentioned in this final rule.

In response to the proposed rule published in the **Federal Register** of June 9, 1993 (58 FR 32320), the following comments were received regarding captafol:

1. *Comments from Citrus Grower Groups, Citrus Growers, and the Florida Cooperative Extension Service at the University of Florida.* In general, comments requested that the revocation of the tolerance for captafol residues on citrus fruits be postponed for 1 to 2 years (until June, 1994 or June, 1995) to allow growers enough time to exhaust existing stocks of captafol for use on citrus.

2. *Comment from Maberry Enfield Maberry Berry Associates (MEMBA).* A comment was received by the Agency from MEMBA, which cited the occasional use of captafol to control Godronia canker in blueberries. MEMBA acknowledged that they have not needed captafol for several years and that little material remains in the hands of growers and pesticide brokers.

3. *Comment from Nestle Peru S.A.* A comment was received by the Agency from Nestle Peru S.A. which stated that captafol was used in combination with other active materials such as

thiophanate-methyl (Cercobin-M) and triadimefon (Bayleton).

4. *Comment from Ministry of Agriculture, Republic of Indonesia.* A comment received by the Agency from the Embassy of the Republic of Indonesia mentioned that the captafol tolerances on commodities, including onions, potatoes, and tomatoes were too small in comparison with Codex Alimentarius Commission/Food and Agriculture Organization of the United Nations (CAC/FAO) MRLs. The Ministry of Agriculture of the Republic of Indonesia claimed that capatafol was being reevaluated due to its potential negative impact on man or the environment. Also, the Ministry stated there is a possibility of phasing out captafol in the future.

Agency response. EPA will not revoke the tolerances in 40 CFR 180.267 for captafol use on onions, potatoes, and tomatoes at this time. EPA will follow-up with the Republic of Indonesia to see if Indonesia has taken further actions on captafol and whether the proposed U.S. tolerance revocation for onions, potatoes, and tomatoes should be finalized. If Indonesia desires any import tolerances, then certain data requirements need to be met. EPA has developed guidance on import tolerances that is available to interested persons. The Agency will revise commodity terminology for onions; potatoes; and tomatoes; to conform to current practice; i.e., change to onion, potato, and tomato, respectively. In addition, EPA is removing the "(N)" designation to conform to current Agency administrative practice ("N" designation means negligible residues).

Regarding the comments on citrus fruits and blueberries, 6 years have passed since the proposed revocation of all captafol tolerances in the **Federal Register** of June 9, 1993 (58 FR 32320). EPA now believes that more than enough time has transpired for existing stocks to be used and/or legally treated agricultural commodities to have gone through the channels of trade. Therefore, EPA is revoking the other tolerances for captafol listed in 40 CFR 180.267 for residues on apples; apricots; blueberries; cherries, sour; cherries, sweet; citrus fruits; corn, fresh (inc sweet K+CWHR); cranberries; cucumbers; macadamia nuts; melons; nectarines; peanuts, meats (hulls removed); peaches; pineapples; plums (fresh prunes); and taro (corm).

IV. When Do these Actions Become Effective?

These actions become effective 90 days after publication in the **Federal Register**. EPA has delayed the

effectiveness of these revocations for 90 days following publication to ensure that all affected parties receive notice of EPA's action. Consequently, the effective date is October 19, 1999. For this particular final rule, the actions will affect uses which have been canceled for more than a year. Therefore, commodities should have cleared the channels of trade.

Any commodities listed in the regulatory text of this document that are treated with the pesticides subject to this final rule, and that are in the channels of trade following the tolerance revocations, shall be subject to FFDCA section 408(l)(5), as established by the FQPA. Under this section, any residue of these pesticides in or on such food shall not render the food adulterated so long as it is shown to the satisfaction of FDA that, (1) the residue is present as the result of an application or use of the pesticide at a time and in a manner that was lawful under FIFRA, and (2) the residue does not exceed the level that was authorized at the time of the application or use to be present on the food under a tolerance or exemption from tolerance. Evidence to show that food was lawfully treated may include records that verify the dates that the pesticide was applied to such food.

V. Can I Submit Objections or Hearing Requests?

Yes. Any person can file written objections to any aspect of this regulation and can also request a hearing on those objections. Objections and hearing requests are currently governed by the procedures in 40 CFR part 178, modified as needed to reflect the requirements of FFDCA section 408(g).

A. When and Where to Submit

Objections and hearing requests must be mailed or delivered to the Hearing Clerk no later than September 20, 1999. The address of the Hearing Clerk is Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St. SW, Washington, DC 20460.

B. Fees for Submission

1. Each objection must be accompanied by a fee of \$3,275 or a request for waiver of fees. Fees accompanying objections and hearing requests must be labeled "Tolerance Petition Fees" and forwarded to EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251.

2. EPA may waive any fee when a waiver or refund is equitable and not contrary to the purposes of the Act. A request for a waiver of objection fees

should be submitted to James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW, Washington, DC 20460. The request for a waiver must be accompanied by a fee of \$1,650, unless the objector has no financial interest in the matter. The fee, if required, must be submitted to the address in Unit V.B.1 of this document. For additional information on tolerance objection fee waivers, contact James Tompkins, Registration Division (7505C), at the same mailing address, or by phone at 703-305-5697 or e-mail at tompkins.jim@epa.gov.

C. Information to be Submitted

Objections must specify the provisions of the regulation considered objectionable and the grounds for the objections. If a hearing is requested, the objections must include a statement of the factual issue(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. You may claim information that you submit in response to this document as 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.

D. Granting a Hearing Request

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following:

1. There is a genuine and substantial issue of fact.
2. 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.
3. Resolution of the factual issue(s) in the manner sought by the requestor would be adequate to justify the action requested.

VI. How Do the Regulatory Assessment Requirements Apply to this Final Action?

A. Is this a "Significant Regulatory Action"?

No. Under Executive Order 12866, entitled "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), this final action is not a "significant regulatory action." The Office of Management and Budget (OMB) has determined that tolerance actions, in general, are not "significant" unless the action involves the revocation of a

tolerance that may result in a substantial adverse and material effect on the economy. In addition, 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 this final action is not an economically significant regulatory action as defined by Executive Order 12866. Nonetheless, environmental health and safety risks to children are considered by the Agency when determining appropriate tolerances. Under FQPA, EPA is required to apply an additional 10-fold safety factor to risk assessments, in order to ensure the protection of infants and children, unless reliable data support a different safety factor.

B. Does this Final Action Contain Any Reporting or Recordkeeping Requirements?

No. This final action does not impose any information collection requirements subject to OMB review or approval pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

C. Does this Final Action Involve Any "Unfunded Mandates"?

No. This final action does not impose any enforceable duty, or contain any "unfunded mandates" as described in Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4).

D. Do Executive Orders 12875 and 13084 Require EPA to Consult with States and Indian Tribal Governments Prior to Taking the Final Action in this Document?

No. Under Executive Order 12875, entitled "Enhancing the Intergovernmental Partnership" (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 final 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.

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 final rule does not significantly or uniquely affect the communities of Indian tribal governments. This final rule 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.

E. Does this Final Action Involve Any Environmental Justice Issues?

No. This action does not involve special considerations of environmental-justice related issues pursuant to Executive Order 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (59 FR 7629, February 16, 1994).

F. Does this Final Action Have a Potentially Significant Impact on a Substantial Number of Small Entities?

No. The Agency has certified that tolerance actions, including the

tolerance final actions in this document, are not likely to result in a significant adverse economic impact on a substantial number of small entities. The factual basis for the Agency's determination, along with its generic certification under section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), appears at 63 FR 55565, October 16, 1998 (FRL-6035-7). This generic certification has been provided to the Chief Counsel for Advocacy of the Small Business Administration.

G. Does this Final Action Involve Technical Standards?

No. This tolerance final action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note). Section 12(d) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standards bodies. The NTTAA requires EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

H. Are there Any International Trade Issues Raised by this Final Action?

EPA is working to ensure that the U.S. tolerance reassessment program under FQPA does not disrupt international trade. EPA considers Codex Maximum Residue Limits (MRLs) in setting U.S. tolerances and in reassessing them. MRLs are established by the Codex Committee on Pesticide Residues, a committee within the Codex Alimentarius Commission, an international organization formed to promote the coordination of international food standards. When possible, EPA seeks to harmonize U.S. tolerances with Codex MRLs. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain in a **Federal Register** document the reasons for departing from the Codex level. EPA's effort to harmonize with Codex MRLs is summarized in the tolerance reassessment section of individual Reregistration Eligibility Decisions. The U.S. EPA has developed

guidance concerning submissions for import tolerance support. This guidance will be made available to interested persons.

I. Is this Final Action Subject to Review under the Congressional Review Act?

Yes. The Congressional Review Act, 5 U.S.C. Sec. 801 *et seq.*, as amended 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 action 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.

Dated: July 13, 1999.

Jack E. Housenger,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

Therefore, 40 CFR part 180 is amended to read as follows:

PART 180—[AMENDED]

1. In part 180:

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

Authority: 21 U.S.C. 321(q), 346a and 371.

§§ 180.109, 180.125, 180.141, 180.201, and 180.216 [Removed]

b. By removing §§ 180.109, 180.125, 180.141, 180.201, and 180.216.

c. By revising § 180.252 to read as follows:

§ 180.252 2-Chloro-1-(2,4,5-trichlorophenyl) vinyl dimethyl phosphate; tolerances for residues.

(a) *General.* Tolerances are established for residues of the insecticide 2-chloro-1-(2,4,5-trichlorophenyl) vinyl dimethyl phosphate in or on the following food commodities:

Commodity	Parts per million
Alfalfa	110

Commodity	Parts per million
Cattle, fat	1.5
Egg	0.1
Goat, fat	0.5
Hog, fat	1.5
Horse, fat	0.5
Milk, fat (reflecting negligible residues in whole milk)	0.5
Poultry, fat	0.75
Sheep, fat	0.5

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

§§ 180.265 and 180.266 [Removed]

d. By removing §§ 180.265 and 180.266.

e. By revising § 180.267 to read as follows:

§ 180.267 Captafol; tolerances for residues.

(a) *General.* Tolerances are established for residues of the fungicide captafol (cis-N-[(1,1,2,2-tetrachloroethyl)thio]-4-cyclohexene-1,2-dicarboximide) in or on the following food commodities:

Commodity	Parts per million
Onion	0.1
Potato	0.5
Tomato	15

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

§§ 180.282, 180.283, 180.398, 180.402, and 180.1013 [Removed]

f. By removing §§ 180.282, 180.283, 180.398, 180.402, and 180.1013.

[FR Doc. 99-18611 Filed 7-20-99; 8:45 am]

BILLING CODE 6560-50-F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP-300882; FRL-6086-7]

RIN 2070-AB78

Spinosad; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a time-limited tolerance for residues of spinosad in or on all commodities in connection with quarantine eradication programs against exotic, non-indigenous, fruit fly species, where a separate higher tolerance is not already established. In this same action, EPA is also establishing a time-limited tolerance for use of spinosad on cranberries. These actions are in response to EPA's granting of emergency exemptions under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act authorizing use of the pesticide under the conditions described above. This regulation establishes a maximum permissible level for residues of spinosad on these food 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 tolerance in connection with the use of spinosad in quarantine eradication programs will expire and is revoked on December 1, 2002. The time-limited tolerance for spinosad on cranberries will expire and is revoked on June 1, 2001.

DATES: This regulation is effective July 21, 1999. Objections and requests for hearings must be received by EPA on or before September 20, 1999.

ADDRESSES: Written objections and hearing requests, identified by the docket control number [OPP-300882], 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-300882], 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@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 objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All copies of electronic objections and hearing requests must be identified by the docket control number [OPP-300882]. 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: Daniel J. Rosenblatt, 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: Rm. 286, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, 703-308-9375; rosenblatt.dan@epa.gov.

SUPPLEMENTARY INFORMATION: EPA, on its own initiative, pursuant to sections 408(l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, is establishing tolerances for residues of the insecticide spinosad on all commodities at 0.02 parts per million (ppm) when used in connection with quarantine eradication programs against exotic, non-indigenous, fruit fly species, where a separate higher tolerance is not already established. This tolerance will expire and is revoked on December 1, 2002. EPA is also establishing a tolerance for residues of spinosad on cranberries when used under a section 18 emergency exemption. The tolerance for cranberries will expire and is revoked on June 1, 2001. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations.

I. Background and Statutory Findings

The Food Quality Protection Act of 1996 (FQPA) (Public Law 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 in this preamble 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 tolerances to set binding precedents for the application of section 408 and the new safety standard to other tolerances and exemptions.

II. Emergency Exemption for Spinosad

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (USDA/APHIS) is responsible for ensuring that new and invasive pest species do not become established in the United States. In order to engage in emergency eradication programs should an infestation of a quarantined fruit fly

pest be discovered, USDA/APHIS applied for section 18 quarantine exemptions to use, among other things, the pesticide spinosad against these species in Florida.

Florida is vulnerable to outbreaks of non-indigenous fruit fly species in the Tephritidae family. USDA/APHIS, working in conjunction with the Florida Department of Agriculture and Consumer Services, has eradicated numerous incipient populations of the Mediterranean fruit fly over the past two seasons. The discovery of an outbreak of a population of a new or non-established pest species carries significant trade implications. The economic losses associated with an established population of Mediterranean fruit flies or other Tephritidae pests would be severe.

EPA concurs that an emergency situation exists in relation to these pests and has authorized a section 18 quarantine exemption for use of spinosad in quarantine programs against exotic, non-indigenous, quarantined, fruit fly species. Time-limited tolerances are also needed to support this exemption in a generic manner because outbreaks of these pest species are possible in nearly all commercial agricultural settings.

Separately, EPA also authorized an emergency exemption for the use of spinosad on cranberries in order to control the sparganothis fruit worm. Growers are experiencing loss of efficacy connected with use of the historic pesticide controls and may be faced with yield loss at 20% of the crop over previous growing seasons. On heavily fruiting, early cultivars, damage may approach 35% crop loss. EPA concurs that emergency conditions exist and has authorized spinosad's use on cranberries in Massachusetts.

As part of its assessment of these emergency exemptions, EPA assessed the potential risks presented by residues of spinosad in or on cranberries and also on all commodities where a separate higher tolerance is not already established. In doing so, EPA considered the safety standard in FFDCA section 408(b)(2), and EPA decided that the necessary tolerance under FFDCA section 408(l)(6) would be consistent with the 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 the dates specified elsewhere in this document, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on cranberries or all commodities where a separate higher tolerance is not established after that date will not be unlawful, provided the pesticide was applied in a manner that was lawful under FIFRA, and the residues do not exceed a level that was authorized by this tolerance at the time of that application. EPA will take action to revoke this tolerance earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because this tolerance is being approved under emergency conditions, EPA has not made any decisions about whether spinosad meets EPA's registration requirements for use on cranberries or all commodities where a separate higher tolerance is not established or whether a permanent tolerance for this use would be appropriate. Under these circumstances, EPA does not believe that these tolerances serve as a basis for registration of spinosad by a State for special local needs under FIFRA section 24(c). Nor does this tolerance serve as the basis for any States other than those where the exemptions were issued to use this pesticide on these crops under section 18 of FIFRA without following all provisions of EPA's regulations implementing section 18 as identified in 40 CFR part 166. For additional information regarding the emergency exemption, contact the Agency's Registration Division at the address provided under the "ADDRESSES" section.

III. Aggregate Risk Assessment and Determination of Safety

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. For further discussion of the regulatory requirements of section 408 and a complete description of the risk assessment process, see the final rule on Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997) (FRL-5754-7).

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 spinosad and to make a determination on aggregate exposure, consistent with section 408(b)(2), for a time-limited tolerance for residues of spinosad on cranberries and all

commodities where a separate higher tolerance is not established at 0.02 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 spinosad are discussed in this unit.

B. Toxicological Endpoint

1. *Acute toxicity.* No acute toxicity endpoint was selected by EPA because a single exposure dose did not produce toxicological effects.

2. *Short- and intermediate-term toxicity.* No toxicology endpoint was selected by EPA for these exposure durations.

3. *Chronic toxicity.* EPA has established the Reference Dose (RfD) for spinosad at 0.0268 milligram/kilogram/day (mg/kg/day). This RfD is based on a no observed adverse effect level (NOAEL) of 2.68 mg/kg/day established in a chronic toxicity study in dogs. The lowest observed adverse effect level (LOAEL) was 8.46 mg/kg/day based on vacuolation in glandular cells and lymphatic tissues, arteritis and increases in serum enzymes such as alanine aminotransferase, and aspartate aminotransferase, and triglyceride levels in dogs fed spinosad in the diet at dose levels 1.44, 2.68, or 8.46 mg/kg/day for 52 weeks. A 100-fold uncertainty factor (UF) was applied to the NOAEL of 2.68 mg/kg/day to account for inter- and intraspecies variation.

4. *Carcinogenicity.* EPA has determined that there is no evidence of carcinogenicity in studies involving spinosad in either the mouse or rat. Therefore, a carcinogenic risk assessment is not required.

C. Exposures and Risks

1. *From food and feed uses.* Tolerances have been established (40 CFR 180.495) for the residues of spinosad, in or on a variety of raw agricultural commodities. For example, tolerances have been established for the citrus fruits group, the fruiting vegetables group, and on meat and milk. Risk assessments were conducted by EPA to assess dietary exposures and risks from 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. EPA did not identify a toxicity endpoint for this exposure duration. Therefore, a risk assessment for this exposure scenario is not needed.

ii. *Chronic exposure and risk.* Based on a NOAEL of 2.68 mg/kg/day and an uncertainty factor of 100, EPA performed a dietary risk assessment which considered exposure that may result from use under this section 18 as well as all other registered uses. The highest exposed population subgroup based on a Tier 1 exposure analysis from the dietary exposure evaluation system (DEEM) was children ages 1–6 years. This risk assessment also took into account the available information on spinosad concerning the additional safety factor called for by FQPA in order to protect infants and children. This calculation builds additional safety factors, as needed, into the risk assessment by using a ratio that compares the reference dose against the FQPA safety factor that is appropriate for a particular pesticide. This ratio is known as the population adjusted dose (PAD). In this case, EPA concluded that the additional 10x safety factor for spinosad could be removed. Section E of this unit contains the rationale for reducing the 10x safety factor for spinosad. EPA calculated that chronic dietary (food only) exposure at tolerance levels will occupy 39% of the PAD. Exposure estimates for adult populations are less than 29% of the PAD.

2. *From drinking water.* No chemical-specific drinking water monitoring data are available. However, EPA used modeling data involving both ground and surface water situations to determine conservative estimated environmental concentrations (EECs). Also, EPA back-calculated drinking water levels of comparison (DWLOCs) to determine whether exposure to spinosad via drinking water is likely to be of concern given the modeled EECs. EPA has concluded that drinking water is not expected to be a significant source of exposure to spinosad.

Data suggests that spinosad is not mobile or persistent, and therefore, has little potential to leach to ground water or to be transported to surface water in high concentrations. Although spinosad has been shown to photolyze rapidly, EPA used the conservative soil photolysis value of 82 days in modeling the persistence of the chemical in surface waters.

i. *Acute exposure and risk.* The high-end EEC is based on the highest registered application rate and results in an EEC of 0.092 micrograms/liter. The highest exposed population subgroup is children 1–6 years. The calculated DWLOC for that population subgroup is 165 micrograms/liter. This EEC value is over 1,000 times less than the lowest DWLOC. Therefore, EPA concludes that drinking water is not expected to be a significant source of exposure to spinosad.

ii. *Chronic exposure and risk.* The characteristics of spinosad suggest that the exposure and risks from spinosad in drinking water are analogous for acute and chronic exposures. No separate chronic analysis is needed.

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 (RfDs or acute dietary NOAELs) 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 it 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 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.* Spinosad is currently registered for use on the following residential non-food site: turf grass. This registration creates the possibility of exposure to children involved in pica behavior with the ingestion of grass or treated dirt. EPA performed a qualitative analysis of the risks connected with this type of exposure and concluded that based on the toxicology profile of spinosad as well as a reasonable exposure situation that risk to children from the turf use

does not exceed the Agency's level of concern.

i. *Acute exposure and risk.* Because no toxicological endpoint was selected for acute exposures to spinosad, it is not necessary to calculate a risk assessment to evaluate the acute non-dietary exposure scenario.

ii. *Chronic exposure and risk.* EPA's Health Effect Division (HED) performed a qualitative risk assessment to characterize the chronic risks from non-dietary exposure to spinosad. Based on the low application rate on turf (0.41 lb./A.), its non-systemic nature, its short half-life (especially in sunlight), and the rapid incorporation of spinosad metabolites into the general carbon pool, EPA believes that residues of spinosad on turf grass after application would be low and decrease rapidly over time. EPA believes that a quantitative risk assessment for this exposure duration is not reasonable as it is unlikely that children would eat grass/dirt for greater than 6 months continuously. Therefore, EPA believes it is appropriate to use a qualitative assessment of this situation. EPA believes that the risk from children eating turf grass does not exceed the level of concern.

iii. *Short- and intermediate-term exposure and risk.* Because no toxicological endpoint was selected for short- and intermediate-term exposures to spinosad, it is not necessary to calculate a risk assessment to evaluate this non-dietary exposure scenario.

4. *Cumulative exposure to substances with a 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."

EPA does not have, at this time, available data to determine whether spinosad 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, spinosad 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 spinosad has a common mechanism of toxicity with other substances. For more information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such

chemicals, see the final rule for Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997).

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

1. *Acute risk.* As mentioned previously, no toxicology endpoint was identified for this exposure duration. Thus, an aggregate risk assessment for this situation is not needed.

2. *Chronic risk.* Using the theoretical maximum residue contribution (TMRC) exposure assumptions described in this unit, EPA has concluded that aggregate exposure to spinosad from food will utilize 29% of the chronic PAD for the U.S. population. The major identifiable subgroup with the highest aggregate exposure is children ages 1–6 years. A separate risk assessment for this population subgroup is described in section E of this unit. EPA generally has no concern for exposures below 100% of the RfD or PAD 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 spinosad in drinking water and from non-dietary, non-occupational exposure, EPA does not expect the aggregate exposure to exceed 100% of the RfD or the PAD.

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.

No toxicology endpoint was selected for spinosad for these exposure durations. Thus, a separate risk assessment for this exposure duration for the U.S. population was not conducted by EPA.

4. *Aggregate cancer risk for U.S. population.* Toxicology data suggest that spinosad does not induce cancer. Thus, a cancer risk assessment was not performed and is not necessary.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result from aggregate exposure to 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 spinosad, 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 prenatal and postnatal 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 margin of exposure (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 intraspecies 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 in rabbits, the NOAEL for maternal toxicity is ≥ 50 mg/kg/day. There were no developmental effects that could be attributed to administration of spinosad. The NOAEL for developmental toxicity is ≥ 50 mg/kg/day (highest dose tested).

In a prenatal developmental toxicity study in rats, the NOAEL for maternal toxicity is ≥ 200 mg/kg/day (highest dose tested). There were no developmental effects that could be attributed to administration of spinosad. The NOAEL for developmental toxicity is ≥ 200 mg/kg/day (highest dose tested).

iii. *Reproductive toxicity study.* In a 2-generation reproduction study, for parental systemic toxicity, the NOAEL was 10 mg/kg/day and the LOAEL was 100 mg/kg/day, based on increased heart, kidney, liver, spleen and thyroid weights. For offspring toxicity, the NOAEL was 10 mg/kg/day and the LOAEL was 100 mg/kg/day, based on decreased litter size, survival (F_2), and body weights. Reproductive effects at that dose level included increased incidence of dystocia and or vaginal bleeding after parturition with associated increase in mortality of dams.

iv. *Pre- and postnatal sensitivity.* There was no increased susceptibility to

rats or rabbits following *in utero* and or postnatal exposure to spinosad.

v. *Conclusion.* Based on the existing toxicological data base, no indication of increased susceptibility of rat or rabbit fetuses to *in utero* and or postnatal exposure, and that there is no requirement for a developmental neurotoxicity study, EPA determined that the 10x safety factor for increased sensitivity of infants and children can be removed (i.e., 1x).

2. *Acute risk.* No toxicology endpoint was selected for exposure to spinosad based on acute exposure. Thus, EPA did not calculate a risk assessment for this exposure duration for infants and children.

3. *Chronic risk.* Using the exposure assumptions described in this unit, EPA has concluded that aggregate exposure to spinosad from food will utilize 39% of the chronic PAD for infants and children. EPA generally has no concern for exposures below 100% of the chronic PAD because the RfD or PAD 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 spinosad 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.* No toxicology endpoint was selected for exposure to spinosad based on short- or intermediate-term exposure. Thus, EPA did not calculate a risk assessment for these exposure durations for infants and children.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to spinosad residues.

IV. Other Considerations

A. Metabolism in Plants and Animals

EPA has reviewed the results of plant and animal metabolism studies in numerous crops and animals. The metabolism of spinosad is adequately understood. EPA has concluded that the metabolism and fermentation impurities of spinosad were of no more toxicological concern than the two parent compounds (spinosyns Factor A and Factor D).

B. Analytical Enforcement Methodology

Enforcement methods have already been accepted and published to enforce tolerances for spinosad.

C. Magnitude of Residues

No field trial data are available from the proposed use of spinosad against the exotic fruit flies. However, based on the low use rate and photodegradability of spinosad, EPA does not expect residues to be detectable. An analysis of the expected residue level was calculated based on the highest registered use rate for spinosad. Based on its rapid incorporation into the general carbon pool, EPA believes that residues will be most strongly influenced by the last application rather than the seasonal rate. The low use rate suggests that residues will be at or below 0.02 ppm, the level of quantitation.

D. International Residue Limits

No international tolerances for spinosad have been established that correspond to these actions.

E. Rotational Crop Restrictions

There are no rotational crop restrictions connected with these actions.

VI. Conclusion

Therefore, the tolerances are established for residues of spinosad in or on all commodities at 0.02 ppm when its use is associated with quarantine eradication programs against exotic, non-indigenous, fruit fly species where a separate higher tolerance is not already established. Also, a tolerance of 0.02 ppm is established for spinosad on cranberries when it is used in accordance with a FIFRA section 18 exemption.

VI. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to "object" to a tolerance regulation 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 September 20, 1999, 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). EPA is authorized to waive any fee requirement "when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection." For additional information regarding tolerance objection fee waivers, contact James 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: Rm. 239, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 305-5697, tompkins.jim@epa.gov. Requests for waiver of tolerance objection fees should be sent to James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

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.

VII. Public Record and Electronic Submissions

EPA has established a record for this regulation under docket control number

[OPP-300882] (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.

Objections and hearing requests may be sent by e-mail directly to EPA at: opp-docket@epa.gov

E-mailed objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this regulation, as well as the public version, as described in this unit 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 record which will also include all comments submitted directly in writing. The official record is the paper record maintained at the Virginia address in "ADDRESSES" at the beginning of this document.

VIII. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

This final rule establishes a tolerance under section 408 of the FFDCA. 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) (Public Law 104-4). Nor does it require 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 tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(l)(6), 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 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 the Intergovernmental Partnership* (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 officials 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.

IX. 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 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: June 30, 1999.

Peter Caulkins,

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. 321(q), 346(a), and 371.

2. Section 180.495, is amended, by adding new paragraph (b) to read as follows:

§180.495 Spinosad; tolerances for residues.

* * * * *

(b) *Section 18 emergency exemptions.* Factor A is 2-[(6-deoxy-2,3,4-tri-O-methyl-o-L-mannopyranosyl)oxy]-13-[[5-(dimethylamino)-tetrahydro-6-methyl-2H-pyran-2-yl]oxy]-9-ethyl-2,3,3a,5a,6,9,10,11,12,13,14,16a,6b,tetradecahydro-14-methyl-1H-as-Indaceno[3,2d]oxacyclododecin-7,15-dione. Factor D is 2-[6-deoxy-2,3,4-tri-O-methyl-o-L-mannopyranosyl)oxy]-13-[[5-(dimethylamino)-tetrahydro-6-methyl-2H-pyran-2-yl]oxy]-9-ethyl-2,3,3a,5a,5b,6,9,10,11,12,13,14,16a,16b-tetradecahydro-4,14-dimethyl-1H-as-Indaceno[3,2d]oxacyclododecin-7,15-dione.

Commodity	Parts per million	Expiration/Revocation date
Cranberries	0.02	06/01/01
All commodities in connection with quarantine eradication programs against exotic, non-indigenous, fruit fly species, where a separate higher tolerance is not already established	0.02	12/01/02

* * * * *

[FR Doc. 99-18482 Filed 7-20-99; 8:45 am]

BILLING CODE 6560-50-F

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 180**

[OPP-300896; FRL-6092-1]

RIN 2070-AB78

Tebufenozide; Benzoic Acid, 3,5-dimethyl-1-(1,1-dimethylethyl)-2-(4-ethylbenzoyl)hydrazide; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of tebufenozide in or on pome fruit, apple pomace, cotton and cotton gin byproducts and tolerances for the combined residues of tebufenozide and the metabolites benzoic acid, 3,5-dimethyl-1-(1,1-dimethylethyl)-2-((4-carboxymethyl)benzoyl)hydrazide, benzoic acid, 3-hydroxymethyl-5-methyl-1-(1,1-dimethylethyl)-2-(4-ethylbenzoyl)hydrazide, the stearic acid conjugate of benzoic acid, 3-hydroxymethyl-5-methyl-1-(1,1-dimethylethyl)-2-(4-ethylbenzoyl)hydrazide and benzoic acid, 3-hydroxymethyl-5-methyl-1-(1,1-dimethylethyl)-2-(4-(1-hydroxyethyl)benzoyl)hydrazide in or on the meat of cattle, goats, hogs, horses, and sheep; the fat of cattle, goats, hogs, horses, and sheep; meat byproducts of cattle, goats, hogs, horses, and sheep; and milk. Rohm and Haas Company requested these tolerances under the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act of 1996.

DATES: This regulation is effective July 21, 1999. Objections and requests for hearings must be received by EPA on or before September 20, 1999.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, [OPP-300896], 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-300896], 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 (CM #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@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-300896]. 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: Joseph Tavano, 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: Rm. 222, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 305-6411, tavano.joseph@epa.gov.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of August 19, 1998 (63 FR 44439) (FRL-6019-6) and February 17, 1999 (64 FR 7883) (FRL-6060-1), EPA issued notices pursuant to section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a as amended by the Food Quality Protection Act of 1996 (FQPA) (Public Law 104-170) announcing the filing of a pesticide petition (PP) for tolerance by Rohm and Haas Company, 100 Independence Mall West, Philadelphia, PA 19106-2399. These notices included a summary of the petition prepared by Rohm and Haas Company, the registrant. There were no comments received in response to these notices of filing.

The petitions requested that 40 CFR 180.482 be amended by establishing a tolerance for residues of the insecticide tebufenozide, in or on pome fruit, apple pomace, cotton, and cotton gin byproducts at 1.25, 3.0, 1.5, and 30 part per million (ppm) respectively. Tebufenozide is a reduced risk pesticide sold under the trade names of Confirm 2F and Confirm 70 WSP. Tebufenozide controls beet armyworm, cabbage

looper, fall armyworm, Southern armyworm, true armyworm, and yellowstriped armyworm on cotton. On pome fruit it controls codling moth, lesser appleworm, obliquebanded leafroller, tufted apple bud moth, eyespotted bud moth, fruitree leafroller, green fruitworm, pandemis leafroller, redbanded leafroller, and variegated leafroller.

I. Background and Statutory Findings

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. For further discussion of the regulatory requirements of section 408 and a complete description of the risk assessment process, see the final rule on Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997) (FRL-5754-7).

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 tebufenozide and to make a determination on aggregate exposure, consistent with section 408(b)(2), for a tolerance for residues of tebufenozide on pome fruit, apple pomace, cotton, and cotton gin byproducts at 1.5, 3.0, 1.5, and 30 ppm respectively and tolerances for the combined residues of tebufenozide and its metabolites benzoic acid, 3,5-dimethyl-1-(1,1-dimethylethyl)-2-((4-carboxymethyl)benzoyl)hydrazide, benzoic acid, 3-hydroxymethyl-5-methyl-1-(1,1-dimethylethyl)-2-(4-

ethylbenzoyl)hydrazide, the stearic acid conjugate of benzoic acid, 3-hydroxymethyl-5-methyl-1-(1,1-dimethylethyl)-2-(4-(ethylbenzoyl)hydrazide and benzoic acid, 3-hydroxymethyl-5-methyl-1-(1,1-dimethylethyl)-2-(4-(1-hydroxyethyl)benzoyl)hydrazide in or on the meat of cattle, goats, hogs, horses, and sheep; the fat of cattle, goats, hogs, horses, and sheep; meat byproducts of cattle, goats, hogs, horses, and sheep; and milk at 0.08, 0.1, 0.08, and 0.04 ppm respectively. 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 tebufenozide are discussed in this unit.

1. *Acute toxicity studies with technical grade.* Oral LD₅₀ in the rat is >5 grams for males and females - Toxicity Category IV; dermal LD₅₀ in the rat is = 5,000 milligrams/kilograms (mg/kg) for males and females - Toxicity Category III; inhalation LC₅₀ in the rat is >4.5 mg/l - Toxicity Category III; primary eye irritation study in the rabbit is a non-irritant; primary skin irritation in the rabbit >5mg - Toxicity Category IV. Tebufenozide is not a sensitizer.

2. In a 21-day dermal toxicity study, Crl:CD rats (6/sex/dose) received repeated dermal administration of either the technical (96.1%) product (RH-75,992) at 1,000 mg/kg/day (Limit-Dose) or the formulation (23.1% a.i.) product (RH-755,992 2F) at 0, 62.5, 250, or 1,000 mg/kg/day, 6 hours/day, 5 days/week for 21 days. Under conditions of this study, RH-75,992 Technical or RH-75,992 2F demonstrated no systemic toxicity or dermal irritation at the highest dose tested (HDT) (1,000 mg/kg/day) during the 21-day study. Based on these results, the no observable adverse effect level (NOAEL) for systemic toxicity and dermal irritation in both sexes is 1,000 mg/kg/day HDT. A lowest observable adverse effect level (LOAEL) for systemic toxicity and dermal irritation was not established.

3. A 1-year dog feeding study with a LOAEL of 250 ppm (9 mg/kg/day for males and females dogs) based on decreases in red blood cells (RBC), hematocrit (HCT), and hemoglobin

(HGB), increases in Heinz bodies, methemoglobin, mean corpuscular volume (MCV), mean corpuscular hematocrit (MCH), reticulocytes, platelets, plasma total bilirubin, spleen weight, and spleen/body weight ratio, and liver/body weight ratio. Hematopoiesis and sinusoidal engorgement occurred in the spleen, and hyperplasia occurred in the marrow of the femur and sternum. The liver showed an increased pigment in the Kupffer cells. The NOAEL for systemic toxicity in both sexes is 50 ppm (1.9 mg/kg/day).

4. An 18-month mouse carcinogenicity study with no carcinogenicity observed at dosage levels up to and including 1,000 ppm.

5. A 2-year rat carcinogenicity with no carcinogenicity observed at dosage levels up to and including 2,000 ppm (97 mg/kg/day and 125 mg/kg/day for males and females, respectively).

6. In a prenatal developmental toxicity study in Sprague-Dawley rats (25/group), tebufenozide was administered on gestation days 6-15 by gavage in aqueous methyl cellulose at dose levels of 50, 250, or 1,000 mg/kg/day and a dose volume of 10 milliliter (ml)/kg. There was no evidence of maternal or developmental toxicity; the maternal and developmental toxicity NOAEL was 1,000 mg/kg/day.

7. In a prenatal developmental toxicity study conducted in New Zealand white rabbits (20/group), tebufenozide was administered in 5 ml/kg of aqueous methyl cellulose at gavage doses of 50, 250, or 1,000 mg/kg/day on gestation days 7-19. No evidence of maternal or developmental toxicity was observed; the maternal and developmental toxicity NOAEL was 1,000 mg/kg/day.

8. In a 1993 2-generation reproduction study in Sprague-Dawley rats, tebufenozide was administered at dietary concentrations of 0, 10, 150, or 1,000 ppm (0, 0.8, 11.5, or 154.8 mg/kg/day for males and 0, 0.9, 12.8, or 171.1 mg/kg/day for females). The parental systemic NOAEL was 10 ppm (0.8/0.9 mg/kg/day for males and females, respectively) and the LOAEL was 150 ppm (11.5/12.8 mg/kg/day for males and females, respectively) based on decreased body weight, body weight gain, and food consumption in males, and increased incidence and/or severity of splenic pigmentation. In addition, there was an increased incidence and severity of extramedullary hematopoiesis at 2,000 ppm. The reproductive NOAEL was 150 ppm (11.5/12.8 mg/kg/day for males and females, respectively) and the LOAEL was 2,000 ppm (154.8/171.1 mg/kg/day

for males and females, respectively) based on an increase in the number of pregnant females with increased gestation duration and dystocia. Effects in the offspring consisted of decreased number of pups per litter on postnatal days 0 and/or 4 at 2,000 ppm (154.8/171.1 mg/kg/day for males and females, respectively) with a NOAEL of 150 ppm (11.5/12.8 mg/kg/day for males and females, respectively).

9. In a 1995 2-generation reproduction study in rats, tebufenozide was administered at dietary concentrations of 0, 25, 200, or 2,000 ppm (0, 1.6, 12.6, or 126.0 mg/kg/day for males and 0, 1.8, 14.6, or 143.2 mg/kg/day for females). For parental systemic toxicity, the NOAEL was 25 ppm (1.6/1.8 mg/kg/day in males and females, respectively), and the LOAEL was 200 ppm (12.6/14.6 mg/kg/day in males and females), based on histopathological findings (congestion and extramedullary hematopoiesis) in the spleen. Additionally, at 2,000 ppm (126.0/143.2 mg/kg/day in males and females), treatment-related findings included reduced parental body weight gain and increased incidence of hemosiderin-laden cells in the spleen. Columnar changes in the vaginal squamous epithelium and reduced uterine and ovarian weights were also observed at 2,000 ppm, but the toxicological significance was unknown. For offspring, the systemic NOAEL was 200 ppm (12.6/14.6 mg/kg/day in males and females), and the LOAEL was 2,000 ppm (126.0/143.2 mg/kg/day in males and females) based on decreased body weight on postnatal days 14 and 21.

10. Several mutagenicity tests were all negative. These include an Ames assay with and without metabolic activation, an *in vivo* cytogenetic assay in rat bone marrow cells, and *in vitro* chromosome aberration assay in Chinese Hamster Ovary (CHO) cells, a CHO/Hypoxanthine guanine phosphoribosyl transferase (HGPRT) assay, a reverse mutation assay with *E. Coli*, and an unscheduled DNA synthesis assay (UDS) in rat hepatocytes.

11. The pharmacokinetics and metabolism of tebufenozide were studied in females Sprague-Dawley rats (3-6/sex/group) receiving a single oral dose of 3 or 250 mg/kg of RH-5992, ¹⁴C labeled in one of three positions (A-ring, B-ring, or N-butylcarbon). The extent of absorption was not established. The majority of the radiolabeled material was eliminated or excreted in the feces within 48 hours; small amounts (1 to 7% of the administered dose) were excreted in the urine and only traces were excreted in expired air or remained in the tissues. There was no

tendency for bioaccumulation.

Absorption and excretion were rapid.

A total of 11 metabolites, in addition to the parent compound, were identified in the feces; the parent compound accounted for 96 to 99% of the administered radioactivity in the high dose group and 35 to 43% in the low dose group. No parent compound was found in the urine; urinary metabolites were not characterized. The identity of several fecal metabolites was confirmed by mass spectral analysis and other fecal metabolites were tentatively identified by chromatography with synthetic standards. A pathway of metabolism was proposed based on these data. Metabolism proceeded primarily by oxidation of the three benzyl carbons, two methyl groups on the B-ring and an ethyl group on the A-ring to alcohols, aldehydes or acids. The type of metabolite produced varies depending on the position oxidized and extent of oxidation. The butyl group on the quaternary nitrogen also can be leaved (minor), but there was no fragmentation of the molecule between the benzyl rings.

No qualitative differences in metabolism were observed between sexes, when high or low dose groups were compared or when different labeled versions of the molecule were compared.

12. The absorption and metabolism of tebufenozide were studied in a group of males and females bile-duct cannulated rats. Over a 72-hour period, biliary excretion accounted for 30% (females) to 34% (males) of the administered dose while urinary excretion accounted for equivalent to 5% of the administered dose and the carcass accounted for <0.5% of the administered dose for both males and females. Thus systemic absorption (percent of dose recovered in the bile, urine and carcass) was 35% (females) to 39% (males). The majority of the radioactivity in the bile (20% (females) to 24% (males) of the administered dose) was excreted within the first 6 hours postdosing indicating rapid absorption. Furthermore, urinary excretion of the metabolites was essentially complete within 24 hours postdosing. A large amount (67% (males) to 70% (females)) of the administered dose was unabsorbed and excreted in the feces by 72 hours. Total recovery of radioactivity was 105% of the administered dose.

A total of 13 metabolites were identified in the bile; the parent compound was not identified (i.e. - unabsorbed compound) nor were the primary oxidation products seen in the feces in the pharmacokinetics study. The proposed metabolic pathway

proceeded primarily by oxidation of the benzylic carbons to alcohols, aldehydes, or acids. Bile contained most of the other highly oxidized products found in the feces. The most significant individual bile metabolites accounted for 5% to 18% of the total radioactivity (males and/or females). Bile also contained the previously undetected (in the pharmacokinetics study) "A" ring ketone and the "B" ring diol. The other major components were characterized as high molecular weight conjugates. No individual bile metabolite accounted for >5% of the total administered dose. Total bile radioactivity accounted for equivalent to 17% of the total administered dose.

No major qualitative differences in biliary metabolites were observed between sexes. The metabolic profile in the bile was similar to the metabolic profile in the feces and urine.

B. Toxicological Endpoints

1. *Acute toxicity.* Toxicity observed in oral toxicity studies were not attributable to a single dose (exposure). No neuro or systemic toxicity was observed in rats given a single oral administration of tebufenozide at 0, 500, 1,000, or 2,000 mg/kg. No maternal or developmental toxicity was observed following oral administration of tebufenozide at 1,000 mg/kg/day (Limit-Dose) during gestation to pregnant rats or rabbits. Thus, the risk from acute exposure is considered negligible.

2. *Short- and intermediate-term toxicity.* No dermal or systemic toxicity was seen in rats receiving 15 repeated dermal applications of the technical (97.2%) product at 1,000 mg/kg/day (Limit-Dose) as well as a formulated (23% active ingredient (a.i.)) product at 0, 62.5, 250, or 1,000 mg/kg/day over a 21-day period. The Agency noted that in spite of the hematological effects seen in the dog study, similar effects were not seen in the rats receiving the compound via the dermal route indicating poor dermal absorption. Also, no developmental endpoints of concern were evident due to the lack of developmental toxicity in either rat or rabbit studies. This risk is considered to be negligible.

3. *Chronic toxicity.* EPA has established the chronic population adjusted dose (cPAD) for tebufenozide at 0.018 mg/kg/day. This RfD is based on a NOAEL of 1.8 mg/kg/day and an uncertainty factor (UF) of 100. The NOAEL was established from the chronic toxicity study in dogs where the NOAEL was 1.8 mg/kg/day based on growth retardation, alterations in hematology parameters, changes in organ weights, and histopathological

lesions in the bone, spleen, and liver at 8.7 mg/kg/day. EPA determined that the 10x factor to protect children and infants (as required by FQPA) should be reduced to 1x. Therefore, the cPAD is the same as the RfD: 0.018 mg/kg/day. Reducing the 10x factor to 1x is supported by the following factors.

i. Developmental toxicity studies showed no increased sensitivity in fetuses when compared to maternal animals following *in utero* exposures in rats and rabbits.

ii. Multi-generation reproduction toxicity studies in rats showed no increased sensitivity in pups as compared to adults and offspring.

iii. There are no data gaps.

4. *Carcinogenicity.* Tebufenozide has been classified as a Group E, "no evidence of carcinogenicity for humans," chemical by EPA.

C. Exposures and Risks

1. *From food and feed uses.* Tolerances have been established (40 CFR 180.482) for the residues of tebufenozide, in or on a variety of raw agricultural commodities. In today's action, tolerances will be established for the residues of tebufenozide in or on pome fruit, apple pomace, cotton, and cotton gin byproducts at 1.5, 3.0, 1.5, and 30 ppm respectively and tolerances for the combined residues of tebufenozide and its metabolites benzoic acid, 3,5-dimethyl-1-(1,1-dimethylethyl)-2-((4-carboxymethyl)benzoyl)hydrazide), benzoic acid, 3-hydroxymethyl,5-methyl-1-(1,1-dimethylethyl)-2-(4-ethylbenzoyl)hydrazide, the stearic acid conjugate of benzoic acid, 3-hydroxymethyl,5-methyl-1-(1,1-dimethylethyl)-2-(4-ethylbenzoyl)hydrazide and benzoic acid, 3-hydroxymethyl-5-methyl-1-(1,1-dimethylethyl)-2-(4-(1-hydroxyethyl)benzoyl)hydrazide in or on the meat of cattle, goats, hogs, horses, and sheep; the fat of cattle, goats, hogs, horses, and sheep; meat byproducts of cattle, goats, hogs, horses, and sheep; and milk at 0.08, 0.1, 0.08, and 0.04 ppm respectively. Risk assessments were conducted by EPA to assess dietary exposures from tebufenozide as follows.

Section 408(b)(2)(F) states that the Agency may use data on the actual percent of crop treated (PCT) for assessing chronic dietary risk only if the Agency can make the following findings: That the data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain such pesticide residue; that the exposure estimate does not underestimate

exposure for any significant subpopulation group; and if data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such

area. In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by section 408(b)(2)(F),

EPA may require registrants to submit data on PCT.

Estimates of PCT were used as follows. In all cases the maximum estimates were used.

Crop	Average	Maximum
Almonds	<1%	<1%
Beans/Peas, Dry	<0%	<1%
Cole Crops	<1%	<2%
Spinach, Fresh	<2%	<3%
Spinach, Processed	<20%	<29%
Sugarcane	<3%	<5%
Walnuts	<10%	<16%

The following market share data obtained from Rohm and Haas was also used:

Crop	Market Share (%)
Sugarcane	81.8
Fruiting Vegetables	9.9
Leafy Vegetables ..	14.2
Blueberries	25

Where market share information was available, it was used in preference over PCT, since it is the larger more conservative number and therefore more protective of human health.

The Agency believes that the three conditions, discussed in section 408 (b)(2)(F) concerning the Agency's responsibilities in assessing chronic dietary risk findings, have been met. The PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. 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 the PCT, the Agency is reasonably certain that the percentage of the food treated is not likely to be underestimated. The regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the

data available through national food consumption surveys, EPA does not have available information on the regional consumption of food to which tebufenozide may be applied in a particular area.

i. *Acute exposure and risk.* Acute 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. No neuro or systemic toxicity was observed in rats given a single oral administration of tebufenozide at 0, 500, 1,000 or 2,000 mg/kg. No maternal or developmental toxicity was observed following oral administration of tebufenozide at 1,000 mg/kg/day (Limit-Dose) during gestation to pregnant rats or rabbits. This risk is considered to be negligible.

ii. *Chronic exposure and risk.* EPA used the Dietary Exposure Evaluation Model (DEEM), which incorporates data from the Continuing Survey of Food Intakes by Individuals (CSFII), 1989 to 1992. In conducting this exposure assessment, EPA has made very conservative assumptions -- 100% of pome fruit and cotton commodities and all other commodities having tebufenozide tolerances will contain tebufenozide residues and those residues would be at the level of the tolerance, and some PCT and market share data for selected commodities -- which result in an overestimate of human dietary exposure from food. Thus, in making a safety determination for this tolerance, EPA is taking into account this conservative exposure assessment. The resulting estimated food exposures for the U.S. population and various DEEM population subgroups are shown in the following table. Of these subgroups, the highest exposure is projected for children ages 1-6, whose chronic intake is estimated at 18% of the cPAD. Generally, in the

absence of additional safety factors, EPA is not concerned with exposures less than 100% of the cPAD. Thus, for all populations, the chronic human health risk from exposure to tebufenozide in foods is below EPA's level of concern.

Population Sub-group	ARC _{food} (mg/kg/day)	%PAD
U.S. Population	0.001433	8
U.S. Population (autumn season).	0.001461	8
U.S. Population (winter season).	0.001478	8
Northeast region ...	0.001510	8
Pacific region	0.001624	9
Western region	0.001576	9
Non-Hispanic Blacks.	0.001469	8
Non-Hispanic/non-white/non-black).	0.001709	10
All infants (< 1 year).	0.002109	12
Nursing infants	0.000871	5
Non-nursing infants	0.002631	15
Children 1-6 yrs	0.003251	18
Children 7-12 yrs ..	0.001899	11
Females 13+ (nursing).	0.001552	9
Males 13-19 yrs	0.001139	6

The subgroups listed above are: (1) The U.S. population (48 contiguous States); (2) those for infants and children; (3) the other subgroups for which the percentage of the PAD occupied is greater than that occupied by the subgroup U.S. population (48 contiguous States); and, (4) other population subgroups of particular regulatory interest.

2. *From drinking water* — i. *Acute exposure and risk.* Because no acute dietary endpoint was determined, the Agency concludes that there is a reasonable certainty of no harm from acute exposure from drinking water.

ii. *Chronic exposure and risk.*

Submitted environmental fate studies suggest that tebufenozide ranges from moderately persistent to persistent and is mobile; thus, tebufenozide could potentially leach to ground water and runoff to surface water under certain environmental conditions. There is no established Maximum Contaminant Level (MCL) for residues of tebufenozide in drinking water. No drinking water Health Advisories have been issued for tebufenozide. There is no entry for tebufenozide in the "Pesticides in Groundwater Database."

Monitoring data are not available to assess the human exposure to tebufenozide via drinking water. In lieu of these, EPA has calculated the Tier I estimated environmental concentrations in water (EECs) for tebufenozide using GENEEC (surface water) and SCIGROW (ground water) for use in the human health risk assessment. The maximum application rate for tebufenozide is 0.25 lb a.i. 5 applications per year on pecans. This application scenario was used to calculate the EEC for the human health risk assessment. Due to the wide range of aerobic soil half-life values, GENEEC and SCIGROW were run based on aerobic half-lives of 66 (California Loam) and 729 (worst-case soil with low microbial activity) days. For surface water, the chronic (56-day) values are 13.3 parts per billion (ppb) and 16.5 ppb for the half-lives of 66 and 729 days, respectively. The ground water screening concentrations are 0.16 ppb and 1.04 ppb for the half-lives of 66 and 729 days, respectively. These values represent upper-bound estimates of the concentrations that might be found in surface and ground water due to the use of tebufenozide on pecans.

In performing this risk assessment, EPA has calculated drinking water levels of comparison (DWLOCs) for each of the Dietary Exposure Evaluation Model (DEEM) population subgroups. Within each subgroup, the population with the highest estimated exposure was used to determine the maximum concentration of tebufenozide that can occur in drinking water without causing an unacceptable human health risk. As a comparison value, EPA has used the 16.5-ppb value in this risk assessment, as this represents a worst-case scenario. The DWLOCs for tebufenozide are above the drinking water estimated concentrations (DWECS) of 16.5 ppb for all population subgroups. Therefore, the human health risk from exposure to tebufenozide through drinking water is not likely to exceed EPA's level of concern.

3. *From non-dietary exposure.*

Tebufenozide is not currently registered

for use on any residential non-food sites. Therefore there are no non-dietary acute, chronic, short- or intermediate-term exposure scenarios.

4. *Cumulative exposure to substances with a 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."

EPA does not have, at this time, available data to determine whether tebufenozide 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, tebufenozide 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 tebufenozide has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the final rule for Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997).

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

1. *Acute risk.* Since no acute toxicological endpoints were established, no acute aggregate risk exists.

2. *Chronic risk.* Using the anticipated residue contribution (ARC) exposure assumptions described in this unit, EPA has concluded that aggregate exposure to tebufenozide from food will utilize 8% of the cPAD for the U.S. population. The major identifiable subgroup with the highest aggregate exposure is children (1–6 years old) at 18% of the cPAD and is discussed below. Submitted environmental fate studies suggest that tebufenozide is moderately persistent to persistent and mobile; thus, tebufenozide could potentially leach to ground water and runoff to surface water under certain environmental conditions. The modeling data for tebufenozide indicate levels less than EPA's DWLOC. EPA generally has no concern for exposures below 100% of the PAD because the PAD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. There are no

registered residential uses of tebufenozide. Since there is no potential for exposure to tebufenozide from residential uses, EPA does not expect the aggregate exposure to exceed 100% of the cPAD.

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.

Since there are currently no registered indoor or outdoor residential non-dietary uses of tebufenozide and no short- or intermediate-term toxic endpoints, short- or intermediate-term aggregate risks do not exist.

4. *Aggregate cancer risk for U.S. population.* Since tebufenozide has been classified as a Group E, "no evidence of carcinogenicity for humans," this risk does not exist.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result from aggregate exposure to tebufenozide residues.

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

1. *Safety factor for infants and children.* In assessing the potential for additional sensitivity of infants and children to residues of tebufenozide, 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 prenatal and postnatal 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 margin of exposure (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 intraspecies 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.

Prenatal and postnatal sensitivity.

The toxicology data base for tebufenozide included acceptable developmental toxicity studies in both rats and rabbits as well as a 2-generation reproductive toxicity study in rats. The data provided no indication of increased sensitivity of rats or rabbits to *in utero* and/or postnatal exposure to tebufenozide. No maternal or developmental findings were observed in the prenatal developmental toxicity studies at doses up to 1,000 mg/kg/day in rats and rabbits. In the 2-generation reproduction studies in rats, effects occurred at the same or lower treatment levels in the adults as in the offspring.

Conclusion. There is a complete toxicity data base for tebufenozide and exposure data are complete and reasonably accounts for potential exposures. For the reasons summarized above, EPA concluded that an additional safety factor is not needed to protect the safety of infants and children.

2. **Acute risk.** Since no acute toxicological endpoints were established, no acute aggregate risk exists.

3. **Chronic risk.** Using the exposure assumptions described in this unit, EPA has concluded that aggregate exposure to tebufenozide from food will utilize no more than 18% of the cPAD for infants and children. EPA generally has no concern for exposures below 100% of the cPAD because the cPAD represents the level at or below which daily aggregate dietary exposure over a lifetime will not pose appreciable risks to human health. The modeling data for tebufenozide indicate levels less than EPA's DWLOC. Despite the potential for exposure to tebufenozide in drinking water, EPA does not expect the aggregate exposure to exceed 100% of the PAD.

4. **Short- or intermediate-term risk.** Short and intermediate-term risks are judged to be negligible due to the lack of significant toxicological effects observed.

5. **Determination of safety.** Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to tebufenozide residues.

III. Other Considerations

A. Metabolism in Plants and Animals

The qualitative nature of the residue in plants is adequately understood based upon acceptable apple, sugar beet, and rice metabolism studies. EPA has concluded that the residue of regulatory concern is tebufenozide per se. The qualitative nature of the residues in animals is also adequately understood based on acceptable poultry and ruminant metabolism studies. For animals, EPA has concluded that the residues of regulatory concern are tebufenozide and its metabolites benzoic acid, 3,5-dimethyl-1-(1,1-dimethylethyl)-2-(4-carboxymethyl)benzoylhydrazide), benzoic acid, 3-hydroxymethyl-5-methyl-1-(1,1-dimethylethyl)-2-(4-ethylbenzoyl)hydrazide, the stearic acid conjugate of benzoic acid, 3-hydroxymethyl-5-methyl-1-(1,1-dimethylethyl)-2-(4-ethylbenzoyl)hydrazide and benzoic acid, 3-hydroxymethyl-5-methyl-1-(1,1-dimethylethyl)-2-(4-(1-hydroxyethyl)benzoyl)hydrazide.

B. Analytical Enforcement Methodology

The high pressure liquid chromatography/ultraviolet detection (HPLC/UV) or mass spectrometry detection (MS) method, Rohm and Haas Method TR 34-96-135, and its earlier versions TR 34-95-154, TR 34-96-33, and TR 34-97-002 used for determining residues of tebufenozide in/on cotton matrices from the submitted residue field trials and processing study are adequate for collection of residue data. Adequate method validation and concurrent method recovery data have been submitted for these methods. The limit of quantitation (LOQ) for tebufenozide is 0.01 ppm in/on cottonseed, meal and hull. The LOQ for tebufenozide is 0.025 ppm in/on refined oil, and 0.10 ppm in/on cotton gin byproducts. The reported limit of detection (LOD) for tebufenozide is 0.003 ppm for cottonseed, meal and hull, 0.008 ppm for refined oil, and 0.03 ppm for cotton gin byproducts.

The proposed enforcement method (Rohm and Haas Method TR 34-96-135) has undergone an adequate Independent Laboratory Validation. As similar methods for walnuts and apples have been validated by the Agency's Analytical Chemistry Laboratory, further Agency validation of method TR-34-96-135 is not required.

The HPLC/UV methods, Rohm and Haas Methods TR 34-94-38 (the original enforcement method designation), 34-95-66, and 34-95-188, each versions of the proposed enforcement method for

apples and used for determining residues of tebufenozide in/on pome fruits, are adequate for collection of residue data. Adequate method validation and concurrent method recovery data have been submitted for these methods. The validated LOQ is 0.02 ppm for residues of tebufenozide in/on pears and apples.

The HPLC/UV Method, Rohm and Haas Method TR 34-96-109 is adequate for collecting data on residues of tebufenozide in animal tissues and milk. The validated LOQ for tebufenozide in animal tissue and milk are 0.02 and 0.01 ppm, respectively. The LOQ for each of the metabolites studied are as follows: RH-9526 and RH-0282 in milk, 0.01 ppm; RH-2703 in liver, 0.02 ppm; RH-9886 and RH-0282 in meat 0.02 ppm; RH-9526 in fat, 0.02 ppm. The LODs for the analytes are 0.003 ppm in milk and 0.006 ppm in tissues.

This method has been adequately radiovalidated using samples from the goat metabolism study and has undergone a successful ILV trial. A copy of Method 34-96-109 has been forwarded to the Analytical Chemistry Branch (ACB) for evaluation as a possible enforcement method. The proposed enforcement method has not been subjected to a complete Agency method validation at this time. EPA has conducted a preliminary review of the method that indicates that it appears to be suitable for enforcement purposes pending the outcome of the actual method validation. Given that the registrant has provided concurrent fortification data to demonstrate that the method is adequate for data collection purposes and has provided the Agency with a successful Independent Laboratory Validation, coupled with EPA's preliminary review, EPA concludes that the methods are suitable as enforcement methods to support tolerances associated with a conditional registration only. As a condition of the registration, the Agency will require a successful method validation and the registrant will be required to make any necessary modifications to the method resulting from the laboratory validation.

These methods may be requested from: Calvin Furlow, PRRIB, IRSD (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm 101FF, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 305-5229.

C. Magnitude of Residues

The submitted data from 15 tests on cotton depicting residues of tebufenozide in/on undelinted cottonseed and cotton gin byproducts

are adequate. Residues of tebufenozide were 0.02 to 1.43 ppm in/on 27 samples of undelinted cottonseed, and 1.23 to 30.10 ppm in/on 12 samples of cotton gin byproducts harvested 13 or 14 days following four applications totaling 1.04 lb ai/acre/season (1x proposed rate).

The available data support the proposed 1.5 ppm tolerance for residues of tebufenozide in/on undelinted cottonseed. In addition, the available data support the proposed 30.0 ppm tolerance for residues of tebufenozide in/on cotton gin byproducts.

The submitted apple and pear residue data are adequate; the petitioner submitted data from 19 tests on apples and pears, representative commodities of the pome fruits crop group. Residues of tebufenozide were 0.183 to 1.040 ppm in/on apples and pears harvested 14 or 15 days following the last of six foliar applications of tebufenozide (70% WP or 2 lb/gal) at 0.308 lb a.i./acre/application (1.85 lb a.i./acre/season; 1x the proposed seasonal rate).

EPA determined that the crop group tolerance for pome fruit should be raised to 1.5 ppm based on the field trial data.

The submitted cow feeding study is adequate. The proposed 0.05 ppm tolerances for residues in kidney, meat, and meat byproducts are not adequate. The combined residues of the parent and four metabolites are to be regulated in all livestock commodities. For tissues, the sum of the LOQs for parent and metabolites is 0.08 ppm. In milk, the combined LOQs would be 0.04 ppm. The appropriate tolerances for meat and meat byproducts (of cattle, goats, hogs, horses, and sheep) are 0.08 ppm (sum of method LOQs), based on the results of the feeding study for muscle and liver/kidney, respectively. In the case of fat, a slightly higher tolerance of 0.10 ppm is needed. In the case of milk, each residue measured in the feeding study was below its LOQ of 0.01 ppm at the 0.84x level. A milk tolerance of 0.04 ppm representing the sum of all the LOQs is appropriate. Horses need to be added to the tissue tolerances.

The current dietary burden for poultry indicates that finite residues are not expected in eggs or poultry at this time.

Tebufenozide residues do not concentrate in apple juice or cotton oil, meal and hulls.

D. International Residue Limits

Codex MRLs have been established for residues of tebufenozide in/on pome fruit (1.0 ppm), husked rice (0.1 ppm), and walnuts (0.05 ppm). Tebufenozide is registered in Canada, and a tolerance for residues in/on apples is established at 1.0 ppm. The U.S. field trial data that

were submitted in support of the proposed U.S. label do not allow the U.S. tolerance of 1.5 ppm to be in harmony with the Codex and Canadian levels of 1.0 ppm.

No Codex MRLs have been established on cotton commodities.

E. Rotational Crop Restrictions

Since pome fruit crops perennial crops, rotational crop restrictions are not required for pome fruit.

In the case of cotton, EPA has determined that crops which the label allows to be treated directly can be planted at any time. The following crops can be planted 30 days after application: root/tuber/bulb vegetables, leafy/Brassica (cole) vegetables, fruiting/cucurbit vegetables. All other crops cannot be planted within 12 months of application. The latter would include legume vegetables, cereal grains, grasses and non-grass animal feeds.

IV. Conclusion

Therefore, the tolerance is established for residues of tebufenozide in pome fruit, apple pomace, cotton, and cotton gin byproducts at 1.5, 3.0, 1.5, and 30 ppm respectively and tolerances for the combined residues of tebufenozide and its metabolites benzoic acid, 3,5-dimethyl-1-(1,1-dimethylethyl)-2-((4-carboxymethyl)benzoyl)hydrazide), benzoic acid, 3-hydroxymethyl,5-methyl-1-(1,1-dimethylethyl)-2-(4-ethylbenzoyl)hydrazide, the stearic acid conjugate of benzoic acid, 3-hydroxymethyl,5-methyl-1-(1,1-dimethylethyl)-2-(4-ethylbenzoyl)hydrazide and benzoic acid, 3-hydroxymethyl-5-methyl-1-(1,1-dimethylethyl)-2-(4-(1-hydroxyethyl)benzoyl)hydrazide in or on the meat of cattle, goats, hogs, horses, and sheep; the fat of cattle, goats, hogs, horses, and sheep; meat byproducts of cattle, goats, hogs, horses, and sheep; and milk at 0.08, 0.1, 0.08, and 0.04 ppm respectively.

V. Objections and Hearing Requests

The new FFDCA section 408(g) provides essentially the same process for persons to "object" to a tolerance regulation 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 September 20, 1999, 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 regulation. 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). EPA is authorized to waive any fee requirement "when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection." For additional information regarding tolerance objection fee waivers, contact James 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: Rm. 239, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 305-5697, tompkins.jim@epa.gov. Requests for waiver of tolerance objection fees should be sent to James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

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 regulation under docket control number [OPP-300896] (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 Rm. 119 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

Objections and hearing requests may be sent by e-mail directly to EPA at: opp-docket@epa.gov

E-mailed objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

The official record for this regulation, as well as the public version, as described in this unit 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 record which will also include all comments submitted directly in writing. The official 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 section 408(d) of the FFDCA 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) (Public Law 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).

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 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 the Intergovernmental Partnership* (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 officials 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.

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 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: July 9, 1999.

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. 321(q), 346a and 371.

2. In § 180.482, paragraph (a) is amended by redesignating the introductory text to paragraph (a) as paragraph (a)(1); by adding alphabetically four commodities to the table in newly designated paragraph (a)(1); and adding paragraph (a)(2) to read as follows:

§ 180.482 Tebufenozide; tolerances for residues.

(a) *General.* (1) * * *

Commodity	Parts per million
* * *	* * *
Apple pomace	3.0
Cotton	1.5
Cotton, gin byproducts	30
* * *	* * *
Pome Fruit	1.5
* * *	* * *

(2) Tolerances are established for the combined residues of tebufenozide and its metabolites benzoic acid, 3,5-dimethyl-1-(1,1-dimethylethyl)-2-((4-carboxymethyl)benzoyl)hydrazide, benzoic acid, 3-hydroxymethyl,5-methyl-1-(1,1-dimethylethyl)-2-(4-ethylbenzoyl)hydrazide, the stearic acid conjugate of benzoic acid, 3-hydroxymethyl,5-methyl-1-(1,1-dimethylethyl)-2-(4-ethylbenzoyl)hydrazide and benzoic acid, 3-hydroxymethyl-5-methyl-1-(1,1-dimethylethyl)-2-(4-(1-hydroxyethyl)benzoyl)hydrazide.

Commodity	Parts per million
Fat of cattle, goats, hogs, horses, and sheep	0.1
Meat of cattle, goats, hogs, horses and sheep	0.08
Meat byproducts of cattle, goats, hogs, horses and sheep	0.08
Milk	0.04

* * * * *

[FR Doc. 99-18483 Filed 7-20-99; 8:45 am]

BILLING CODE 6560-50-F

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 180 and 185**

[OPP-300891; FRL-6089-7]

RIN 2070-AB78

Propargite; Revocation of Certain Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule revokes tolerances for residues of the pesticide propargite in or on the following commodities: apples; apricots; beans, succulent; cranberries; figs; figs, dried; peaches; pears; plums (fresh prunes); and strawberries. EPA is revoking these tolerances because the uses associated with the tolerances have been canceled voluntarily from propargite labels by Uniroyal Chemical Company. Uniroyal deleted the uses to address dietary risk concerns raised by EPA. The regulatory actions in this document are part of the Agency's reregistration program under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and the tolerance reassessment requirements of the Federal Food, Drug, and Cosmetic Act (FFDCA). By law, EPA is required to reassess 33% of the tolerances in existence on August 2, 1996, by August 1999, or about 3,200 tolerances. This document revokes 10 tolerances which will be counted among reassessments made toward the August 1999 review deadline of FFDCA section 408(q), as amended by the Food Quality Protection Act (FQPA) of 1996.

DATES: This final rule becomes effective October 19, 1999. Objections and requests for hearings, identified by docket control number [OPP-300891]

must be received by EPA on or before September 20, 1999.

ADDRESSES: Objections and hearing requests can be submitted by mail or in person. Please follow the detailed instructions provided in Unit V, of the SUPPLEMENTARY INFORMATION section of this document. To ensure proper identification of your objection or hearing request, you must identify the docket control number [OPP-300891] in the subject line on the first page of your request.

FOR FURTHER INFORMATION CONTACT: For technical information contact: Joseph Nevola, Special Review Branch (7508C), Special Review and Reregistration Division, Office of Pesticide Programs, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Special Review Branch, CM#2, 6th floor, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 308-8037; e-mail: nevola.joseph@epa.gov.

SUPPLEMENTARY INFORMATION:**I. Does this Action Apply to Me?**

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected categories and entities may include, but are not limited to:

Categories	NAICS	Examples of Potentially Affected Entities
Industry	111	Crop production
.....	112	Animal production
.....	311	Food manufacturing
.....	32532	Pesticide manufacturing

This listing is not exhaustive, but is a guide to entities likely to be regulated by this action. The North American Industrial Classification System (NAICS) codes will assist you in determining whether this action applies to you. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the FOR FURTHER INFORMATION CONTACT section.

II. How Can I Get Additional Information or Copies of this or Other Support Documents?**A. Electronically**

You may obtain electronic copies of this document and various support documents from the EPA Internet Home

Page at <http://www.epa.gov/>. On the Home Page select "Laws and Regulations" and then look up the entry for this document under "Federal Register Environmental Documents." You can also go directly to the "Federal Register" listings at <http://www.epa.gov/homepage/fedrgrstr/>.

B. In Person or by Phone

If you have any questions or need additional information about this action, please contact the technical person identified in the "FOR FURTHER INFORMATION CONTACT" section. In addition, the official record for this action, including the public version, has been established under docket control number [OPP-300891], (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of any electronic comments, which does not include any information claimed as Confidential Business Information (CBI), is available for inspection in Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Public Information and Records Integrity Branch telephone number is 703-305-5805.

III. What Action is being Taken?

A. Action in this Document

In this final rule, EPA is revoking the FFDCA tolerances in 40 CFR 180.259 for residues of propargite in or on apples; apricots; beans, succulent; cranberries; figs; peaches; pears; plums (fresh prunes); and strawberries; and in 40 CFR 185.5000 for residues of propargite in or on figs, dried, by removing 185.5000 and transferring the remaining tolerances for hops, dried; and tea, dried into section 180.259. EPA is revoking these tolerances because registered uses for propargite on these commodities have been voluntarily canceled. Thus, the tolerances for these commodities are no longer necessary to cover residues of propargite in or on domestically treated commodities or commodities treated outside but imported into the United States. Propargite is no longer used on those specified commodities within the United States and no person has provided comment identifying a need for EPA to retain the tolerances to cover residues in or on imported foods. EPA has historically expressed a concern that retention of tolerances that are not necessary to cover residues in or on legally treated foods has the potential to encourage misuse of pesticides within the United States. Thus, it is EPA's policy to issue a final rule revoking

those tolerances for residues of pesticide chemicals for which there are no active registrations under FIFRA, unless any person in comments on the proposal demonstrates a need for the tolerance to cover residues in or on imported commodities or domestic commodities legally treated.

EPA is not issuing today a final rule to revoke those tolerances for which EPA received comments demonstrating a need for the tolerance to be retained. Generally, EPA will proceed with the revocation of these tolerances on the grounds discussed above only if, 1) prior to EPA's issuance of a section 408(f) order requesting additional data or issuance of a section 408(d) or (e) order revoking the tolerances on other grounds, commenters retract the comment identifying a need for the tolerance to be retained, 2) EPA independently verifies that the tolerance is no longer needed, 3) the tolerance is not supported by data, or 4) the tolerance does not meet the requirements under FQPA.

B. Background

Propargite (trade names Comite and Omite) is a pesticide that was registered in 1969 for the control of mites on a number of agricultural commodities and ornamental plants. EPA classifies propargite as a B₂ (probable) human carcinogen.

EPA published a Registration Standard for propargite in 1986, and FIFRA reregistration is ongoing. Through the reregistration process, in 1992 EPA received from Uniroyal Chemical Company, the sole propargite registrant in the United States, a market basket survey examining residue levels in selected commodities in a nationwide cross section of grocery stores. The survey attempted to better reflect propargite residues in these commodities as purchased by consumers. Uniroyal's market basket survey, as well as other sampling data used by EPA, indicated propargite residues on certain foods such as apples and peaches that were far below tolerance levels but nevertheless resulted in dietary risks of concern for those foods. Based on this and other information, EPA conducted an intensive dietary risk assessment and concluded that long-term exposure to propargite posed an unreasonable dietary cancer risk to persons who consume propargite-treated foods.

EPA discussed its risk findings with Uniroyal, which responded in an April 5, 1996 letter by requesting, among other things, voluntary deletion of the following uses from all applicable propargite labels: apples, apricots,

cranberries, figs, green beans, lima beans, peaches, pears, plums (including plums grown for prune production), and strawberries. EPA agreed to this request, and the deletions were announced in a **Federal Register** notice dated May 3, 1996 (61 FR 19936) (FRL-5367-4). EPA received comments both supporting and opposing the use deletions; those comments were considered prior to the requested use deletions taking effect on August 1, 1996. The comments are available in the public record under docket number OPP-64029. As part of its use-deletion agreement with EPA, Uniroyal also agreed not to challenge revocation of tolerances for any of the deleted uses.

In the **Federal Register** of February 13, 1997 (62 FR 6750) (FRL-5381-9), EPA issued a proposed rule for propargite announcing the proposed revocation of tolerances for canceled food uses and inviting public comment for consideration and for support of tolerance retention under FFDCA standards. The tolerance for propargite residues in or on figs, dried was among the tolerances proposed for revocation. Although food additive regulations for propargite use in or on figs, dried and tea, dried had been revoked pursuant to pre-FQPA provisions of FFDCA, (61 FR 11994, March 22, 1996) (FRL-5357-7), those revocations were stayed (61 FR 25153, May 20, 1996) (FRL-5372-2), and later withdrawn (61 FR 50684, September 26, 1996) (FRL-5397-4) subsequent to the passage of FQPA. However, not until recently were the tolerances for figs, dried and tea, dried reinstated in 40 CFR 185.5000 (64 FR 3044, January 20, 1999). Also, proposed tolerance revocations of February 13, 1997 (62 FR 6750) included a tolerance in 40 CFR 186.5000 for propargite residues in or on apple pomace, dried, which has been revoked (62 FR 66020, December 17, 1997) (FRL-5753-1).

The following comments were received by the Agency in response to the document published in the **Federal Register** of February 13, 1997:

EPA received comments from Uniroyal Chemical and several grower groups in response to the proposed rule. All comments, and EPA's response to each individual comment, are located in the OPP Docket under docket number OPP-300432. In general, the comments stated that EPA should use the pre-FQPA approach of setting an effective date (such as 3 years from publication of the final rule) for tolerance revocations in order to allow legally treated commodities to clear the channels of trade, instead of following the approach outlined in FFDCA section 408(l)(5) of revoking immediately and

allowing legally treated foods to clear trade channels.

Comments cited EPA's statement at the time of the cancellation that EPA "will propose effective dates for the revocations that provide the time needed for appropriate and orderly movement of crops already legally treated with propargite through the channels of trade." Immediate revocation, some commenters argued, will cause confusion in the marketplace and impose a burden on growers and processors, because section 408(l)(5) would require growers and processors to provide evidence showing that propargite residues on their commodities resulted from legal application. Uniroyal Chemical was particularly concerned with the effect of the channels of trade provision on foreign growers and processors. Uniroyal contended that requiring such growers to document that pesticide applications are lawful under FIFRA is a retroactive regulatory requirement.

EPA believes that revoking the tolerances at this time is consistent with its statement at the time of the use deletions. A delayed effective date is no longer needed because the statute, as amended, provides for the orderly movement through the channels of trade of legally treated commodities. Further, EPA does not believe that this approach is unduly burdensome to growers. EPA is revoking the tolerances almost 3 years after the uses were deleted from propargite labels and over 2 years from when the Agency proposed revoking the propargite tolerances for these commodities on February 13, 1997 (62 FR 6750). EPA believes this should be more than adequate, given that very few stocks of propargite existed for use even in the 1996 growing season. EPA acknowledges that processed commodities may not have cleared the channels of trade within that timeframe. However, the provisions of FFDCA section 408(l)(5) will provide for the legal movement of those commodities through the channels of trade. Additionally, it is fairly easy to identify the date the commodity was processed. If the commodity was processed before the effective date of the tolerance revocation, the presumption will be that any residue of propargite is the result of legal application.

Uniroyal has also raised concerns that this tolerance revocation will have unfair impacts on foreign growers and processors. EPA does not believe this action will unfairly affect foreign growers and processors. When EPA published its May 3, 1996 use deletion notice for propargite, foreign and domestic growers and processors were

notified that EPA intended to revoke the tolerances associated with the deleted uses and that such revocation would make unlawful distribution of any of the specified foods (including import) containing residues of propargite. Subsequent adoption of section 408(l)(5) of the FQPA assures that residues of propargite on the specified commodities are permitted if the commodities are legally treated under FIFRA, are treated prior to expiration of the tolerance, and residues are consistent with the tolerance in place at the time of treatment. The requirement that food be legally treated under FIFRA imposes no obligation on foreign growers because FIFRA does not impose requirements on application of pesticides outside the United States. Thus, such applications are, by operation of statute, lawful under FIFRA. The second requirement, that food be treated prior to expiration of the tolerance and be consistent with the tolerance, applies equally to domestic and foreign commodities, resulting from time to time in different consequences. For example, EPA anticipates that there will be no legally treated domestic fresh produce in commerce after the tolerance expires. Therefore, after the tolerance expiration date, the presence of propargite residues on the subject fresh commodities treated in the United States will be presumptively unlawful under section 408(l)(5). In contrast, for imported fresh commodities, there is no such presumption. Propargite residues on imported fresh commodities may be present on imported food after the expiration date and may be legal because there is no foreign restriction on use of propargite similar to that imposed by the United States. This is because propargite residues may be present as the result of a legal application prior to expiration of the tolerance. For purposes of processed commodities containing residues of propargite, as noted earlier, such commodities, whether domestic or imported, will be presumptively legal if processed before the expiration date of the tolerance.

IV. When Do these Actions Become Effective?

These actions become effective 90 days following publication in the **Federal Register**. EPA has delayed the effectiveness of these revocations for 90 days following publication to ensure that all affected parties receive notice of EPA's action. Consequently, the effective date is October 19, 1999. For this particular final rule, the actions will affect uses which have been canceled for almost 3 years. Therefore,

commodities should have cleared the channels of trade.

Any commodities listed in the regulatory text of this document that are treated with the pesticides subject to this final rule, and that are in the channels of trade following the tolerance revocations, shall be subject to FFDCA section 408(l)(5), as established by the FQPA. Under section 408(l)(5), any residue of these pesticides in or on such food shall not render the food adulterated so long as it is shown to the satisfaction of FDA that the residue is present as the result of an application or use of the pesticide at a time and in a manner that was lawful under FIFRA, and the residue does not exceed the level that was authorized at the time of the application, or use to be present on the food under a tolerance or exemption from a tolerance. Evidence to show that food was lawfully treated may include records that verify the dates that the pesticide was applied to such food.

V. Can I Submit Objections or Hearing Requests?

Yes. Any person can file written objections to any aspect of this regulation and can also request a hearing on those objections. Objections and hearing requests are currently governed by the procedures in 40 CFR part 178, modified as needed to reflect the requirements of FFDCA section 408(g).

A. When and Where to Submit

Objections and hearing requests must be mailed or delivered to the Hearing Clerk no later than September 20, 1999. The address of the Hearing Clerk is Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460.

B. Fees for Submission

1. Each objection must be accompanied by a fee of \$3,275 or a request for waiver of fees. Fees accompanying objections and hearing requests must be labeled "Tolerance Petition Fees" and forwarded to EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251.

2. EPA may waive any fee when a waiver or refund is equitable and not contrary to the purposes of the Act. A request for a waiver of objection fees should be submitted to James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. The request for a waiver must be accompanied by a fee of \$1,650, unless the objector has no financial

interest in the matter. The fee, if required, must be submitted to the address in B.1 of this unit. For additional information on tolerance objection fee waivers, contact James Tompkins, Registration Division (7505C), at the same mailing address, or by phone at 703-305-5697; or e-mail: tompkins.jim@epa.gov.

C. Information to be Submitted

Objections must specify the provisions of the regulation considered objectionable and the grounds for the objections. If a hearing is requested, the objections must include a statement of the factual issue(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. You may claim information that you submit in response to this document as 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.

D. Granting a Hearing Request

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following:

1. There is a genuine and substantial issue of fact.
2. 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.
3. Resolution of the factual issue(s) in the manner sought by the requestor would be adequate to justify the action requested.

VI. How Do the Regulatory Assessment Requirements Apply to this Final Action?

A. Is this a "Significant Regulatory Action"?

No. Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action." The Office of Management and Budget (OMB) has determined that tolerance actions, in general, are not "significant" unless the action involves the revocation of a tolerance that may result in a substantial adverse and material affect on the economy. In addition, this 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 this action is not an

economically significant regulatory action as defined by Executive Order 12866. Nonetheless, environmental health and safety risks to children are considered by the Agency when determining appropriate tolerances. Under FQPA, EPA is required to apply an additional 10-fold safety factor to risk assessments in order to ensure the protection of infants and children unless reliable data supports a different safety factor.

B. Does this Action Contain Any Reporting or Recordkeeping Requirements?

No. This action does not impose any information collection requirements subject to OMB review or approval pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

C. Does this Action Involve Any "Unfunded Mandates"?

No. This action does not impose any enforceable duty, or contain any "unfunded mandates" as described in Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4).

D. Do Executive Orders 12875 and 13084 Require EPA to Consult with States and Indian Tribal Governments Prior to Taking the Action in this Document?

No. Under Executive Order 12875, entitled *Enhancing the Intergovernmental Partnership* (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.

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.

E. Does this Action Involve Any Environmental Justice Issues?

No. This final rule does not involve special considerations of environmental-justice related issues pursuant to Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

F. Does this Action Have a Potentially Significant Impact on a Substantial Number of Small Entities?

No. The Agency has certified that tolerance actions, including the tolerance actions in this document, are not likely to result in a significant adverse economic impact on a substantial number of small entities. The factual basis for the Agency's determination, along with its generic certification under section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), appears at 63 FR

55565, October 16, 1998. This generic certification has been provided to the Chief Counsel for Advocacy of the Small Business Administration.

G. Does this Action Involve Technical Standards?

No. This tolerance action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note). Section 12(d) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standards bodies. The NTTAA requires EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

H. Are There Any International Trade Issues Raised by this Action?

EPA is working to ensure that the U.S. tolerance reassessment program under FQPA does not disrupt international trade. EPA considers Codex Maximum Residue Limits (MRLs) in setting U.S. tolerances and in reassessing them. MRLs are established by the Codex Committee on Pesticide Residues, a committee within the Codex Alimentarius Commission, an international organization formed to promote the coordination of international food standards. When possible, EPA seeks to harmonize U.S. tolerances with Codex MRLs. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain in a **Federal Register** document the reasons for departing from the Codex level. EPA's effort to harmonize with Codex MRLs is summarized in the tolerance reassessment section of individual REDs. The U.S. EPA has developed guidance concerning submissions for import tolerance support. This guidance will be made available to interested persons.

I. Is this Action Subject to Review under the Congressional Review Act?

Yes. The Congressional Review Act, 5 U.S.C. Sec. 801 *et seq.*, as amended 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 action 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: July 13, 1999.

Jack E. Housenger,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

Therefore, 40 CFR parts 180 and 185 are amended to read as follows:

PART 180—[AMENDED]

1. In part 180:

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

Authority: 21 U.S.C. 321(q), 346a and 371.

§ 180.259 [Amended]

b. Section 180.259, is amended as follows:

i. By adding a heading to paragraph (a).

ii. By redesignating the text after the heading as paragraph (a)(1).

iii. By removing from the table in newly designated paragraph (a)(1), the entries for Apples; Apricots; Beans, succulent; Cranberries; Figs; Peaches; Pears; Plums (fresh prunes); and Strawberries.

iv. By adding paragraph (a)(2).

v. By redesignating paragraph (b) as paragraph (c) and revising newly designated paragraph (c).

vi. By adding and reserving with headings paragraphs (b) and (d).

§180.259 Propargite; tolerances for residues.

(a) *General.* (1) * * *

(2) Tolerances are established for residues of the insecticide propargite (2-

(*p*-tert-butylphenoxy)cyclohexyl 2-propynyl sulfite) in or on the following processed foods when present therein as a result of the application of this insecticide to growing crops:

Food	Parts per million
Hops, dried	30
Tea, dried	10

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* Tolerances with regional registration, as defined in §180.1(n), are established for residues of propargite in or on the following raw agricultural commodities:

Commodity	Parts per million
Corn, sweet, kernel plus cob with husks removed	0.1

(d) *Indirect or inadvertent residues.* [Reserved]

PART 185—[AMENDED]

2. In part 185:

a. The authority citation for part 185 continues to read as follows:

Authority: 21 U.S.C. 348.

§185.5000 [Removed]

b. By removing §185.5000.

[FR Doc. 99-18610 Filed 7-20-99; 8:45 am]

BILLING CODE 6560-50-F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 180, 185 and 186

[OPP-300841A; FRL-6093-6]

RIN 2070-AB78

Dalapon, Fluchloralin, et al.; Various Tolerance Revocations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule announces the revocation of tolerances for residues of the pesticides listed in the regulatory text for the herbicides dalapon, fluchloralin, metobromuron, paraquat,

and sesone; the fungicides zinc sulfate, glyodin, and manganous dimethyldithiocarbamate (manam); the insecticides coumaphos, hydrogen cyanide and *O*-Ethyl *S*-phenyl ethylphosphonodithioate (fonofos); the plant growth regulator *N,N*-dimethylpiperidinium chloride (mepiquat chloride); and the food additive ethyl formate. Also, this rule revokes the tolerance for residues of the nematocide and insecticide ethoprop in or on mushrooms; and the food additive tolerance for residues of the fungicide paraformaldehyde in maple syrup. The regulatory actions in this rule are part of the Agency's reregistration program under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and the tolerance reassessment requirements of the Federal Food, Drug, and Cosmetic Act (FFDCA). By law, EPA is required to reassess 33% of the tolerances in existence on August 2, 1996, by August 1999, or about 3,200 tolerances. This document revokes 202 tolerances and/or exemptions. Since 18 tolerances were previously reassessed, 184 are counted as reassessments made toward the August 1999 review deadline of FFDCA section 408(q), as amended by the Food Quality Protection Act (FQPA) of 1996.

DATES: This final rule becomes effective October 19, 1999. Objections and requests for hearings, identified by docket control number [OPP-300841A] must be received by EPA on or before September 20, 1999.

ADDRESSES: Objections and hearing requests can be submitted by mail or in person. Please follow the detailed instructions provided in Unit V of the "SUPPLEMENTARY INFORMATION" section of this document. To ensure proper identification of your objection or hearing request, you must identify the docket control number [OPP-300841A] in the subject line on the first page of your request.

FOR FURTHER INFORMATION CONTACT: Amy Caicedo, Special Review Branch (7508C), Special Review and Reregistration Division, Office of Pesticide Programs, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location: Special Review Branch, Crystal Mall #2, 6th floor, 1921 Jefferson Davis Highway, Arlington, Virginia. Telephone: (703) 308-9399; email: caicedo.amy@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially

affected categories and entities may include but are not limited to:

Categories	NAICS	Examples of Potentially Affected Entities
Industry	111	Crop production
.....	112	Animal production
.....	311	Food manufacturing
.....	32532	Pesticide manufacturing

This listing is not exhaustive, but is a guide to entities likely to be regulated by this action. The North American Industrial Classification System (NAICS) codes will assist you in determining whether this action applies to you. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the "FOR FURTHER INFORMATION CONTACT" section.

II. How Can I Get Additional Information or Copies of this or Other Support Documents?

A. Electronically

You may obtain electronic copies of this document and various support documents from the EPA Internet Home Page at <http://www.epa.gov/>. On the Home Page select "Laws and Regulations" and then look up the entry for this document under "Federal Register - Environmental Documents." You can also go directly to the "Federal Register" listings at <http://www.epa.gov/fedrgstr/>.

B. In Person or by Phone

If you have any questions or need additional information about this action, please contact the technical person identified in the "FOR FURTHER INFORMATION CONTACT" section. In addition, the official record for this final rule, including the public version, has been established under docket control number [OPP-300841A], (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of any electronic comments, which does not include any information claimed as Confidential Business Information (CBI), is available for inspection in Room 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington VA, from 8:30 am to 4 pm, Monday through Friday, excluding legal holidays. The Public Information and Records Integrity Branch telephone number is 703-305-5805.

III. What Action is Being Taken?

This final rule announces the revocation of tolerances for residues of

the pesticides listed in the regulatory text for the herbicides dalapon, fluchloralin, metobromuron, paraquat, and sesone; the fungicides zinc sulfate, glyodin, and manganous dimethyldithiocarbamate (manam); the insecticides coumaphos, hydrogen cyanide and *O*-Ethyl *S*-phenyl ethylphosphonodithioate (fonofos); the plant growth regulator *N,N*-dimethylpiperidinium chloride (mepiquat chloride); and the food additive ethyl formate. Also, this rule revokes the tolerance for residues of the nematocide and insecticide ethoprop in or on mushrooms; and the food additive tolerance for residues of the fungicide paraformaldehyde in maple syrup.

EPA is revoking these tolerances because they are not necessary to cover residues of the relevant pesticides in or on domestically treated commodities or commodities treated outside but imported into the United States. These pesticides are no longer used on commodities within the United States and no person has provided comment identifying a need for EPA to retain the tolerances to cover residues in or on imported foods. EPA has historically expressed a concern that retention of tolerances that are not necessary to cover residues in or on legally treated foods has the potential to encourage misuse of pesticides within the United States. Thus it is EPA's policy to issue a final rule revoking those tolerances for residues of pesticide chemicals for which there are no active registrations under FIFRA, unless any person commenting on the proposal demonstrates a need for the tolerance to cover residues in or on imported commodities or domestic commodities legally treated.

EPA is not issuing today a final rule to revoke those tolerances for which EPA received comments demonstrating a need for the tolerance to be retained. Generally, EPA will proceed with the revocation of these tolerances on the grounds discussed above only if, (1) prior to EPA's issuance of a section 408(f) order requesting additional data or issuance of a section 408(d) or (e) order revoking the tolerances on other grounds, commenters retract the comment identifying a need for the tolerance to be retained, (2) EPA independently verifies that the tolerance is no longer needed, (3) the tolerance is not supported by data, or (4) the tolerance does not meet the requirements under FQPA.

In the **Federal Register** of April 7, 1999 (64 FR 16874) (FRL 6075-1), EPA issued a proposed rule for specific pesticides announcing the proposed revocation of tolerances for canceled

food uses inviting public comment for consideration and for support of tolerance retention under FFDCA standards. The following comments were received by the Agency in response to the document published in the **Federal Register** of April 7, 1999:

A. Coumaphos

No comments were received concerning this chemical. The tolerances in 40 CFR 180.189 for residues of coumaphos on eggs; poultry, fat; poultry, mby; and poultry, meat are revoked because these uses were voluntarily canceled by the registrant.

B. Dalapon

Comment from Dow AgroSciences. A comment was received by the Agency from Dow AgroSciences requesting that the tolerances for dalapon in 40 CFR 180.150(a) and (b) not be revoked for the following commodities: apples; apricots; bananas; citrus pulp, dehydrated (ct feed); cottonseed; fruits, stone; fruits, pome; grain crops (exc wheat); grapefruit; grapes; lemons; limes; oranges; peaches; pears; plums; sorghum, forage; sorghum; sugarcane; tangerines; and from § 186.1500 citrus pulp, dehydrated (ct feed). The company requested that these tolerances be maintained as import tolerances because dalapon is still used in a number of countries such as Jamaica, Kazakhstan, Azerbaijan, and Zimbabwe, suggesting that the United States could potentially import products that contain residues of dalapon from these countries. DowAgro felt that the revocation of these tolerances could have a negative economic impact on these countries.

Agency response. Dow AgroSciences presented information suggesting that some countries use Dalapon on the commodities cited in Unit III.B.1. above for international trade. No information was provided which indicated any likely import of dalapon-treated commodities into the United States. Dow did not indicate any interest in supporting these tolerances for import purposes. Moreover, EPA has not received any comments from the countries cited by Dow in support of these tolerances. Thus a need for retention of the dalapon tolerances has not been demonstrated. Therefore, all of the tolerances for dalapon are revoked from §§ 180.105, 185.1500 and 186.1500.

C. Ethoprop

No comments were received concerning this chemical. The tolerance for residues in 40 CFR 180.262(a) on mushrooms is revoked for Ethoprop

because this chemical is no longer registered for use on mushrooms.

D. O-Ethyl S-phenyl ethylphosphonodithioate (Fonofos)

1. *Comment from the Mint Industry Research Council.* A comment was received by the Agency from the Mint Industry Research Council requesting that the Agency retain the tolerance for residues of fonofos on the commodities: peppermint; peppermint, hay; spearmint; and spearmint, hay. The Mint Industry Research Council indicated that there is a 3-year supply of Fonofos available to growers. The Council also believes that these tolerances are necessary to cover Fonofos residues in mint oil, which can have up to a 20-year shelf life. The Mint Industry Research Council also believes the peppermint, hay and spearmint, hay tolerances are necessary for use of these commodities in tea.

2. *Comment from Zeneca.* A comment was received by the Agency from Zeneca requesting that the Agency retain the tolerance for residues of fonofos on all commodities listed in 40 CFR 180.221 for a period of 2 years in order to allow existing stocks to be used and to allow the treated commodity to clear the channels of trade.

3. *Comment from J. DeFrancesco, on behalf of the Oregon Strawberry Commission.* A comment was received by the Agency requesting that the Agency retain the tolerance for residues of fonofos on strawberries for a period of 2 to 3 years in order to control symphyllans.

Agency response. Although EPA will still revoke 30 of these tolerances, the tolerances for residues of O-Ethyl S-phenyl ethylphosphonodithioate (fonofos) on the commodities in 40 CFR 180.221 will not expire until December 31, 2002, with the exception of the 4 commodities listed in the following paragraph, in order to allow for the exhaustion of the existing stocks and to allow the fresh commodity to pass through the channels of trade. EPA acknowledges that processed commodities such as mint oil may not have cleared the channels of trade within that time frame. However, the provisions of FFDCA section 408(l)(5) provide for the legal movement of those commodities through the channels of trade provided that they are treated prior to the expiration of the appropriate tolerance and that the actual residues on the commodities are within those allowed by the appropriate tolerance. It is fairly easy to identify the date the commodity was processed. If the commodity was processed before the effective date of the tolerance

revocation, the presumption will be that any residue of fonofos is the result of legal application.

The tolerances for residues of fonofos on peppermint, hay; spearmint, hay; beans, forage; beans, vine hay; corn, pop, forage; and peanuts, forage, however, are revoked effective 90 days following publication of this rule because they are no longer considered significant feed items. The parts of the peppermint and spearmint used in tea are covered by the peppermint, tops and spearmint, tops tolerances.

The agency also revises commodity terminology to conform to current practice: bananas to banana; beets, sugar, tops to beet, sugar, tops; corn field fodder to corn, field, stover; corn fresh (incl sweet) (K + CWHR) to corn sweet, kernel plus cob with husks removed; corn, grain (including pop) to corn, field grain and to corn, pop, grain; corn, pop, fodder to corn, pop, stover; corn, sweet, fodder to corn sweet, stover; peas, forage to pea, field, vine; peas, vines hay to pea, field, hay; peanuts to peanut; peanuts, hay to peanut, hay; plantains to plantain; sorghum, fodder to sorghum, grain, stover; sorghum, forage to sorghum, grain, forage; sorghum, grain to sorghum, grain, grain; soybeans, forage to soybean, forage; soybeans, hay to soybean, hay; strawberries to strawberry; sugarcane to sugarcane, cane; vegetables, fruiting to vegetable, fruiting group; vegetables, root crop to vegetable, root crop; vegetables, seed and pod to vegetable, seed and pod; peppermint to peppermint, tops; and spearmint to spearmint, tops.

E. Hydrogen Cyanide

Comments from the Arizona Department of Agriculture and various growers. Comments were received by the Agency requesting that the tolerance on citrus fruits, § 180.130, be retained. This request is due to the use of sodium cyanide as a fumigant on citrus products which results in residues of hydrogen cyanide in or on citrus fruits. The pesticide is used to control California red scale *Aonidiella auranti* on citrus fruits that are imported to the state of Arizona.

Agency response. As a result of the need for retaining this tolerance, the tolerance for residues of hydrogen cyanide on citrus fruits will remain in effect. All other tolerances for residues of hydrogen cyanide are revoked from § 180.130.

F. N,N-dimethylpiperidinium chloride

Comment received from BASF Products. A comment was received by the Agency that cottonseed should not

be revoked because there are still registered uses of *N,N*-dimethylpiperidinium chloride which could lead to residues on this commodity.

Agency response. Cottonseed was inadvertently listed in the **Federal Register** proposed rule, April 7, 1999 (64 FR 16874) (FRL 6075-1) in the codification section as being proposed for removal. The tolerance for cottonseed is not revoked from 40 CFR 180.384. However, the tolerance in 40 CFR 180.384 for cottonseed meal is revoked because it is now covered by the tolerance for cottonseed. This rule also revokes FFDCA tolerances in 40 CFR 180.384 for residues of the plant growth regulator *N,N*-dimethylpiperidinium chloride (mepiquat chloride) in or on cotton, forage because it is no longer considered a significant livestock feed item. Tolerances on eggs; milk; poultry, fat; poultry, mby; poultry, meat are revoked because EPA has determined there is no reasonable expectation of finite residues and therefore a tolerance is unnecessary (See 40 CFR 180.6(b)).

G. Paraformaldehyde

No comments were received regarding this chemical. The paraformaldehyde tolerance in 40 CFR 185.4650 for residues in maple syrup is revoked because the use was voluntarily canceled by the registrant.

H. Paraquat

No comments were received regarding this chemical. This final rule revokes FFDCA tolerances for residues of the herbicide paraquat in or on the commodities listed below under 40 CFR 180.205(a). Rye grain and oat grain are revoked because there are presently no registered uses of paraquat for these commodities. The following tolerances are revoked because data indicate that no residues are expected, and in such cases the Agency revokes the existing tolerances because they are unnecessary: bean, straw; hops, fresh; hop vines; lentil hay; peanut vines; poultry fat; poultry meat; poultry meat byproducts; and sunflower seed hulls.

I. Fluchloralin, Metobromuron, Sesone, Basic Zinc Sulfate, Glyodin, Manganous Dimethyldithiocarbamate, and Ethyl Formate

No comments were received concerning these chemicals. This final rule revokes all FFDCA tolerances for residues of the herbicides fluchloralin, § 180.363; metobromuron § 180.250; and sesone, § 180.102; the fungicides basic zinc sulfate, § 180.244; glyodin, § 180.124; and manganous

dimethyldithiocarbamate, § 180.161; and the food additive ethyl formate, § 180.520, because no registered uses exist. The registrations for these pesticide chemicals were canceled because the registrant either failed to pay the required maintenance fee and/or the registrant voluntarily canceled all registered uses of the pesticide.

IV. When do These Actions Become Effective?

These actions become effective 90 days following publication in the **Federal Register**. All tolerances will expire once the rule becomes effective, with the exception of the fonofos tolerances which will not expire until December 31, 2002. EPA has delayed the effectiveness of these revocations for 90 days following publication to ensure that all affected parties receive notice of EPA's action. Consequently, the effective date is October 19, 1999. For this particular final rule, the actions will affect uses which have been canceled for more than a year. Therefore, commodities should have cleared the channels of trade.

Any commodities listed in the regulatory text of this document that are treated with the pesticides subject to this final rule, and that are in the channels of trade following the tolerance revocations, shall be subject to FFDCA section 408(1)(5), as established by the Food Quality Protection Act (FQPA). Under this section, any residue of these pesticides in or on such food shall not render the food adulterated so long as it is shown to the satisfaction of FDA that (1) the residue is present as the result of an application or use of the pesticide at a time and in a manner that was lawful under FIFRA, and (2) the residue does not exceed the level that was authorized at the time of the application or use to be present on the food under a tolerance or exemption from a tolerance. Evidence to show that food was lawfully treated may include records that verify the dates that the pesticide was applied to such food.

V. Can I Submit Objections or Hearing Requests?

Yes. Any person can file written objections to any aspect of this regulation and can also request a hearing on those objections. Objections and hearing requests are currently governed by the procedures in 40 CFR part 178, modified as needed to reflect the requirements of FFDCA section 408(g).

A. When and Where to Submit

Objections and hearing requests must be mailed or delivered to the Hearing

Clerk no later than September 20, 1999. The address of the Hearing Clerk is Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St. SW, Washington, DC 20460.

B. Fees for Submission

1. Each objection must be accompanied by a fee of \$3,275 or a request for waiver of fees. Fees accompanying objections and hearing requests must be labeled "Tolerance Petition Fees" and forwarded to EPA Headquarters Accounting, Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, Pennsylvania 15251.

2. EPA may waive any fee when a waiver or refund is equitable and not contrary to the purposes of the Act. A request for a waiver of objection fees should be submitted to James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW, Washington, DC 20460. The request for a waiver must be accompanied by a fee of \$1,650 unless the objector has no financial interest in the matter. The fee, if required, must be submitted to the address in Unit B.1. For additional information on tolerance objection fee waivers, contact James Tompkins, Registration Division (7505C), at the same mailing address, or by phone at (703) 305-5697 or e-mail at tompkins.jim@epa.gov.

C. Information to be Submitted

Objections must specify the provisions of the regulation considered objectionable and the grounds for the objections. If a hearing is requested, the objections must include a statement of the factual issue(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. You may claim information that you submit in response to this document as 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.

D. Granting a Hearing Request

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following:

1. There is a genuine and substantial issue of fact.

2. 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.

3. Resolution of the factual issue(s) in the manner sought by the requestor would be adequate to justify the action requested.

VI. How do the Regulatory Assessment Requirements Apply to this Action?

A. Is this a "Significant Regulatory Action"?

No. Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action." The Office of Management and Budget (OMB) has determined that tolerance actions, in general, are not "significant" unless the action involves the revocation of a tolerance that may result in a substantial adverse and material affect on the economy. In addition, this 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 this action is not an economically significant regulatory action as defined by Executive Order 12866. Nonetheless, environmental health and safety risks to children are considered by the Agency when determining appropriate tolerances. Under FQPA, EPA is required to apply an additional 10-fold safety factor to risk assessments in order to ensure the protection of infants and children unless reliable data supports a different safety factor.

B. Does this Final Action Contain any Reporting or Recordkeeping Requirements?

No. This final action does not impose any information collection requirements subject to OMB review or approval pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

C. Does this Final Action Involve any "Unfunded Mandates"?

No. This final action does not impose any enforceable duty, or contain any "unfunded mandates" as described in Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4).

D. Do Executive Orders 12875 and 13084 Require EPA to Consult with States and Indian Tribal Governments Prior to Taking the Action in this Document?

No. Under Executive Order 12875, entitled *Enhancing the Intergovernmental Partnership* (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 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.

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.

E. Does this Action Involve any Environmental Justice Issues?

No. This action is not expected to have any potential impacts on minorities and low income communities. Special consideration of environmental justice issues is not required under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

F. Does this Action have a Potentially Significant Impact on a Substantial Number of Small Entities?

No. The Agency has certified that tolerance actions, including the tolerance actions in this document, are not likely to result in a significant adverse economic impact on a substantial number of small entities. The factual basis for the Agency's determination, along with its generic certification under section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), appears at 63 FR 55565, October 16, 1998 (FRL-6035-7). This generic certification has been provided to the Chief Counsel for Advocacy of the Small Business Administration.

G. Does this Action Involve Technical Standards?

No. This tolerance action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note). Section 12(d) directs EPA to use voluntary consensus standards in its regulatory activities unless doing 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 standards bodies. The NTTAA requires EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

H. Are there Any International Trade Issues Raised by this Action?

EPA is working to ensure that the U.S. tolerance reassessment program under FQPA does not disrupt international trade. EPA considers Codex Maximum Residue Limits (MRLs) in setting U.S. tolerances and in reassessing them.

MRLs are established by the Codex Committee on Pesticide Residues, a committee within the Codex Alimentarius Commission, an international organization formed to promote the coordination of international food standards. When possible, EPA seeks to harmonize U.S. tolerances with Codex MRLs. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain in a **Federal Register** document the reasons for departing from the Codex level. EPA's effort to harmonize with Codex MRLs is summarized in the tolerance reassessment section of individual REDs. The U.S. EPA has developed a guidance concerning submissions for import tolerance support. This guidance will be made available to interested stakeholders.

I. Is this Action Subject to Review under the Congressional Review Act?

Yes. The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as amended 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 action 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, Pesticide and pest.

40 CFR Part 186

Environmental Protection, Animal feeds, Pesticide and pest.

Dated: July 14, 1999.

Jack E. Housenger,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

Therefore, 40 CFR parts 180, 185 and 186 are amended to read as follows:

PART 180—[AMENDED]

1. In part 180:

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

Authority: 21 U.S.C. 321(q), 346a and 371.

§§ 180.102, 180.124, 180.150, and 180.161 [Removed]

b. By removing §§ 180.102, 180.124, 180.150, and 180.161.

c. Section 180.130 is revised to read as follows:

§ 180.130 Hydrogen Cyanide; tolerances for residues.

(a) *General.* A tolerance for residues of the insecticide hydrogen cyanide from postharvest fumigation as a result of application of sodium cyanide is established as follows: 50 parts per million in or on citrus fruits.

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

d. Section 180.189 is revised to read as follows:

§ 180.189 Coumaphos; tolerances for residues.

(a) *General.* Tolerances for residues of the insecticide coumaphos (*O,O*-diethyl *O*-3-chloro-4-methyl-2-oxo-2H-1-benzopyran-7-yl phosphorothioate and its oxygen analog (*O,O*-diethyl *O*-3-chloro-4-methyl-2-oxo-2H-1-benzopyran-7-yl phosphate) in or on food commodities as follows:

Commodity	Parts per million
Cattle, fat	1.0
Cattle, meat	1.0
Cattle, mbyb	1.0
Goat, fat	1.0
Goat, meat	1.0
Goat, mbyb	1.0
Hog, fat	1.0
Hog, meat	1.0
Hog, mbyb	1.0
Horse, fat	1.0
Horse, meat	1.0
Horse, mbyb	1.0
Milk, fat (=n in whole milk)	0.5
Sheep, fat	1.0
Sheep, meat	1.0
Sheep, mbyb	1.0

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

§ 180.205 [Amended]

e. By removing from § 180.205(a), *Paraquat*, the entries for bean straw; hops, fresh; hop, vines; lentil, hay; oat grain; peanut, vines; poultry, fat;

poultry, meat; poultry, mbyb; rye grain, and sunflower seed hulls.

f. Section 180.221 is revised to read as follows:

§ 180.221 O-Ethyl S-phenyl ethylphosphonodithioate; tolerances for residues.

(a) *General.* Time limited tolerances are established for residues of the insecticide *O*-Ethyl S-phenylethylphosphonodithioate, including its oxygen analog (*O*-ethyl S-phenyl ethylphosphonothioate, in or on the following food commodities:

Commodities	Parts per million	Expiration/Revocation date
Asparagus	0.5	12/31/02
Banana	0.1	Do.
Beet, sugar, tops	0.1	Do.
Corn, field, stover	0.1	Do.
Corn, field, forage	0.1	Do.
Corn, sweet kernel plus cob with husks removed	0.1	Do.
Corn field, grain	0.1	Do.
Corn, pop, grain	0.1	Do.
Corn, pop, stover	0.1	Do.
Corn, sweet, stover	0.1	Do.
Corn, sweet, forage	0.1	Do.
Peanut	0.1	Do.
Peanut, hay	0.1	Do.
Pea, field, hay ...	0.1	Do.
Pea, field, vines	0.1	Do.
Peppermint, tops	0.1	Do.
Plantain	0.1	Do.
Sorghum, grain, stover	0.1	Do.
Sorghum, grain, forage	0.1	Do.
Sorghum, grain, grain	0.1	Do.
Soybean, forage	0.1	Do.
Soybean, hay	0.1	Do.
Spearmint, tops	0.1	Do.
Strawberry	0.1	Do.
Sugarcane, cane	0.1	Do.
Vegetable, leafy	0.1	Do.
Vegetable, fruiting group	0.1	Do.
Vegetable, root crop	0.1	Do.
Vegetable, seed and pod	0.1	Do.

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

§ 180.244, and § 180.250 [Removed]

g. By removing § 180.244, and § 180.250.

§ 180.262 [Amended]

h. By removing, from § 180.262(a), *Ethoprop*; *tolerances for residues*, the entry for mushrooms.

§ 180.363 [Removed]

i. By removing § 180.363.

§ 180.384 [Amended]

j. By removing from § 180.384, *N,N-dimethylpiperidinium chloride*, the entries for cotton forage; cottonseed meal; eggs; milk; poultry, fat; poultry, mbypp; and poultry, meat.

§ 180.520 [Removed]

k. By removing § 180.520.

PART 185—[AMENDED]

2. In part 185:

a. The authority citation for part 185 continues to read as follows:

Authority: 21 U.S.C. 346a and 348.

§ 185.1500 and § 185.4650 [Removed]

b. By removing § 185.1500 and § 185.4650.

PART 186—[AMENDED]

3. In part 186:

a. The authority citation for part 186 continues to read as follows:

Authority: 21 U.S.C. 342, 348 and 371.

§ 186.1500 [Removed]

b. By removing § 186.1500.

[FR Doc. 99-18609 Filed 7-20-99; 8:45 am]

BILLING CODE 6560-50-F

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 180, 185, and 186**

[OPP-300847A; FRL-6093-9]

RIN 2070-AB78

Bentazon, Cyanazine, Dicrotophos, Diquat, Ethephon, Oryzalin, Oxadiazon, Picloram, Prometryn, and Trifluralin; Tolerance Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule revokes specific tolerances for the herbicides bentazon, diquat, oxadiazon, picloram, prometryn, and trifluralin; the plant

growth regulator ethephon; and the insecticide dimethyl phosphate of 3-hydroxy-*N,N*-dimethyl-*cis*-crotonamide [Dicrotophos]. EPA is revoking these tolerances because EPA has canceled the food uses associated with them. In addition, EPA is revising commodity terminology for oryzalin, bentazon, diquat, ethephon, picloram, and trifluralin to conform to current Agency practice. Due to a comment, EPA will not finalize an action on 2-[[4-chloro-6-(ethylamino)-*s*-triazin-2-yl]amino]-2-methylpropionitrile [Cyanazine], at this time. The regulatory actions in this final rule are part of the Agency's reregistration program under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and the tolerance reassessment requirements of the Federal Food, Drug, and Cosmetic Act (FFDCA). By law, EPA is required to reassess 33% of the tolerances in existence on August 2, 1996, by August 1999, or about 3,200 tolerances. This document revokes 17 tolerances and/or exemptions. Since three tolerances were previously reassessed, 14 of the 17 revocations are counted here as reassessments made toward the August 1999 review deadline of FFDCA section 408(q), as amended by the Food Quality Protection Act (FQPA) of 1996.

DATES: This final rule becomes effective October 19, 1999. Objections and requests for hearings, identified by docket control number [OPP-300847A], must be received by EPA on or before September 20, 1999.

ADDRESSES: Objections and hearing requests can be submitted by mail or in person. Please follow the detailed instructions provided in Unit V. of the SUPPLEMENTARY INFORMATION section of this document. To ensure proper identification of your objection or hearing request, you must identify the docket control number [OPP-300847A] in the subject line on the first page of your request.

FOR FURTHER INFORMATION CONTACT:

Joseph Nevola, Special Review Branch (7508C), Special Review and Reregistration Division, Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location: CM #2, 6th floor, 1921 Jefferson Davis Hwy., Arlington, VA. Telephone: (703) 308-8037; e-mail: nevola.joseph@epa.gov.

SUPPLEMENTARY INFORMATION:**I. Does this Action Apply to Me?**

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially

affected categories and entities may include, but are not limited to:

Categories	NAICS	Examples of Potentially Affected Entities
Industry	111	Crop production Animal production Food manufacturing Pesticide manufacturing
	112	
	311	
	32532	

This listing is not exhaustive, but is a guide to entities likely to be regulated by this action. The North American Industrial Classification System (NAICS) codes will assist you in determining whether this action applies to you. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the FOR FURTHER INFORMATION CONTACT section.

II. How Can I Get Additional Information or Copies of this or Other Support Documents?**A. Electronically**

You may obtain electronic copies of this document and various support documents from the EPA Internet Home Page at <http://www.epa.gov/>. On the Home Page select "Laws and Regulations," and then look up the entry for this document under "Federal Register--Environmental Documents." You can also go directly to the "Federal Register" listings at <http://www.epa.gov/fedrgstr/>.

B. In Person or by Phone

If you have any questions or need additional information about this action, please contact the person identified in the "FOR FURTHER INFORMATION CONTACT" section. In addition, the official record for this notice, including the public version, has been established under docket control number [OPP-300847A] including comments and data submitted electronically as described below. A public version of this record, including printed, paper versions of any electronic comments, which does not include any information claimed as Confidential Business Information (CBI), is available for inspection in Room 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Public Information and Records Integrity Branch telephone number is (703) 305-5805.

III. What Action is being Taken?

This final rule revokes the FFDCA tolerances for residues of certain specified pesticides in or on certain specified commodities. EPA is revoking those tolerances because they are not necessary to cover residues of the relevant pesticides in or on domestically treated commodities or commodities treated outside but imported into the United States. These pesticides are no longer used on commodities within the United States and no person has provided comment identifying a need for EPA to retain the tolerances to cover residues in or on imported foods. EPA has historically expressed a concern that retention of tolerances that are not necessary to cover residues in or on legally treated foods has the potential to encourage misuse of pesticides within the United States. Thus, it is EPA's policy to issue a final rule revoking those tolerances for residues of pesticide chemicals for which there are no active registrations under FIFRA, unless any person in comments on the proposal demonstrates a need for the tolerance to cover residues in or on imported commodities or domestic commodities legally treated.

EPA is not issuing today a final rule to revoke those tolerances for which EPA received comments demonstrating a need for the tolerance to be retained. Generally, EPA will proceed with the revocation of these tolerances on the grounds discussed above only if: (1) Prior to EPA's issuance of a section 408(f) order requesting additional data or issuance of a section 408(d) or (e) order revoking the tolerances on other grounds, commenters retract the comment identifying a need for the tolerance to be retained; (2) EPA independently verifies that the tolerance is no longer needed; (3) the tolerance is not supported by data; or (4) the tolerance does not meet the requirements under FQPA.

In the **Federal Register** of April 23, 1999 (64 FR 19961) (FRL-6076-4), EPA issued a document which proposed the revocation of tolerances for residues of the herbicides bentazon, 2-[[4-chloro-6-(ethylamino)-s-triazin-2-yl]amino]-2-methylpropionitrile [Cyanazine], diquat, oxadiazon, picloram, prometryn, and trifluralin; the plant growth regulator ethephon; and the insecticide dimethyl phosphate of 3-hydroxy-*N,N*-dimethyl-*cis*-crotonamide [Dicrotophos]. EPA also proposed to revise commodity terminology for oryzalin, bentazon, cyanazine, diquat, ethephon, picloram, and trifluralin to conform to current Agency practice. In that document, the Agency invited public comment for

consideration and for support of tolerance retention under FFDCA standards.

A. Significant Comment Received

Only one significant comment was received by the Agency in response to the document published in the **Federal Register** of April 23, 1999:

1. 2-[[4-Chloro-6-(ethylamino)-s-triazin-2-yl]amino]-2-methylpropionitrile [Cyanazine]

Comment from Griffin L.L.C. (Griffin). Griffin Corporation commented that it produces 2-[[4-chloro-6-(ethylamino)-s-triazin-2-yl]amino]-2-methylpropionitrile [Cyanazine] for export to, and use in other nations. Griffin requested that EPA not revoke the existing tolerances for cyanazine, because Griffin plans maintenance of import tolerances for cyanazine. Griffin declared that it anticipates working with EPA to achieve compliance with the Agency's final guidance on import tolerances and its data requirements.

Agency response. 2-[[4-Chloro-6-(ethylamino)-s-triazin-2-yl]amino]-2-methylpropionitrile [Cyanazine] production for use in the United States remains terminated by December 31, 1999, with cyanazine registrations canceled on January 1, 2000, authorized sale and distribution of such products in the channels of trade in accordance with their labels is permitted through September 30, 2002, and use of cyanazine products after December 31, 2002 is prohibited (61 FR 39023) (FRL-5385-7). However, due to Griffin's interest in maintaining import tolerances, at this time, EPA will not take action on cyanazine. Instead, EPA will follow-up on this comment with Griffin and any final action that EPA takes will be published in a future **Federal Register** document.

B. No Significant Comment Received

As for the other tolerances proposed for revocation in the **Federal Register** of April 23, 1999, no significant comments were received. Therefore, EPA is revoking tolerances for the herbicides bentazon, diquat, oxadiazon, picloram, prometryn, and trifluralin; the plant growth regulator ethephon; and the insecticide dimethyl phosphate of 3-hydroxy-*N,N*-dimethyl-*cis*-crotonamide [Dicrotophos]. In addition, EPA is revising commodity terminology for bentazon, diquat, ethephon, oryzalin, picloram, prometryn, and trifluralin to conform to current Agency practice.

1. *Bentazon.* EPA is revoking the tolerances in 40 CFR 180.355 for bentazon residues in or on beans, lima (succulent); mint, spent hay; and peanuts, forage. In 40 CFR 180.355, the

Agency is revising commodity terminology for beans (except soybeans), dried to bean, dry, seed; beans (exc. soybeans), dried, vine hays to cowpea, hay; beans (exc. soybeans), forage to cowpea, forage; beans, succulent to bean, succulent; Bohemian chili peppers to pepper, nonbell; cattle, mbyp to cattle, meat byproducts; corn, fodder to corn, field, stover; corn, forage to corn, field, forage; corn, grain to corn, field, grain and corn, pop, grain; corn, fresh (inc. sweet K+CWHR) to corn, sweet, kernel plus cob with husks removed; eggs to egg; peanuts to peanut; peanuts, hay to peanut, hay; peas (dried) to pea, dry, seed; peas (dried), vine hays to pea, field, hay; peas, forage to pea, field, vines; peas, succulent to pea, succulent; poultry, mbyp to poultry, meat byproducts; and rice to rice, grain.

2. *Dimethyl phosphate of 3-hydroxy-*N,N*-dimethyl-*cis*-crotonamide* [Dicrotophos]. EPA is revoking the tolerance in 40 CFR 180.299 for dimethyl phosphate of 3-hydroxy-*N,N*-dimethyl-*cis*-crotonamide residues in or on pecans.

3. *Diquat.* EPA is revoking the tolerance in 40 CFR 180.226(a) for diquat residues in or on sugarcane and the tolerance in 40 CFR 185.2500(a) and (b) for diquat residues in or on water, potable. In 180.226(a), the Agency is revising commodity terminology for potatoes to potato; and in 180.226(b), commodity terminology for avocados to avocado; cottonseed to cotton, undelinted seed; cucurbits to vegetable, cucurbit, group; fruits, citrus to fruit, citrus, group; fruits, pome to fruit, pome, group; fruits, stone to fruit, stone, group; grasses, forage to grass, forage; hops to hop, dried cones; legumes, forage to vegetable, foliage of legume, group; nuts to nut, tree, group; sugarcane to sugarcane, cane; vegetables, fruiting to vegetable, fruiting, group; and vegetables, root crop to vegetable, root and tuber, group. In 185.2500, the terminology is revised for processed potatoes (includes potato chips) to potato, granules/flakes and potato, chips.

4. *Ethephon.* EPA is revoking the tolerances in 40 CFR 180.300 for ethephon residues in or on filberts; lemons; pineapple fodder; pineapple forage; tangerines; and tangerine hybrids. In 40 CFR 180.300(a), the Agency is revising commodity terminology for figs to fig; goats, fat to goat, fat; horses, meat to horse, meat; macadamia nuts to nut, macadamia; pineapples to pineapple; pumpkins to pumpkin; and tomatoes to tomato. Also, in 40 CFR 185.2700, the terminology is revised for barley, milling fractions, except flour to barley, pearled barley

and barley, bran; and wheat, milling fractions, except flour to wheat, bran, wheat, middlings, and wheat, shorts; and in 186.2700(a) for wheat, milling fractions, except flour to wheat, milled byproducts.

5. *Oryzalin*. In 40 CFR 180.304(a), the Agency is revising commodity terminology for figs to fig; kiwifruits to kiwifruit; nuts to nut, tree, group; and olives to olive.

6. *Oxadiazon*. EPA is revoking the tolerance in 40 CFR 180.346 for oxadiazon residues in or on rice straw.

7. *Picloram*. EPA is revoking the tolerances in 40 CFR 180.292 for picloram residues in or on flax, seed; and flax, straw. In 40 CFR 180.292, the Agency is revising commodity terminology for cattle, mbyp (exc. kidney and liver) to cattle, meat byproducts except kidney and liver; eggs to egg; goats, fat to goat, fat; goats, mbyp (exc. kidney and liver) to goat, meat byproducts except kidney and liver; goats, meat to goat, meat; grasses, forage to grass, forage; hogs, mbyp (exc. kidney and liver) to hog, meat byproducts except kidney and liver; horses, mbyp (exc. kidney and liver) to horse, meat byproducts except kidney and liver; oats, green forage to oat, forage; sheep, mbyp (exc. kidney and liver) to sheep, meat byproducts except kidney and liver; and wheat, green forage to wheat, forage.

8. *Prometryn*. EPA is revising the commodity "cotton" in 40 CFR 180.222 to "cotton, forage" because this is the more accurate description of what that tolerance should cover. However, because "cotton, forage" is no longer considered a significant livestock feed commodity according to Table I "Raw Agricultural and Processed Commodities and Feedstuffs Derived from Crops," August 1996, in the Residue Chemistry Test Guidelines: OPPTS 860.1000, EPA 721-C-96-169, the Agency is revoking the tolerance.

9. *Trifluralin*. EPA is revoking the tolerance in 40 CFR 180.207 for trifluralin residues in or on barley, fodder. In 40 CFR 180.207, EPA is removing the "(N)" designation from all entries to conform to current Agency administrative practice. The Agency is revising commodity terminology for carrots to carrot, roots; citrus fruits to fruit, citrus, group; corn, grain (exc. popcorn) to corn, field, grain; corn, grain (exc. popcorn), forage to corn, field, forage; corn, grain (exc. popcorn), fodder to corn, field, stover; cottonseed to cotton, undelinted seed; cucurbits to vegetable, cucurbit, group; grain, crops (except fresh corn and rice grain) to grain, crops, except corn, sweet and rice grain; mung bean sprouts to bean, mung,

sprouts; nuts to nut, tree, group; peanuts to peanut; peppermint, hay to peppermint, tops; rape, seed to rapeseed, seed; spearmint, hay to spearmint, tops; stone fruits to fruit, stone, group; sugarcane to sugarcane, cane; sunflower seed to sunflower, seed; upland cress to cress, upland; and vegetables, fruiting to vegetable, fruiting, group.

IV. When Do These Actions Become Effective?

These actions become effective 90 days following publication of this final rule in the **Federal Register**. EPA has delayed the effectiveness of these revocations for 90 days following publication of the final rule to ensure that all affected parties receive notice of EPA's actions. Consequently, the effective date is October 19, 1999. For this particular final rule, the revocation actions will affect uses which have been canceled for more than a year. Therefore, commodities should have cleared the channels of trade.

Any commodities listed in the regulatory text of this document that are treated with the pesticides subject to this final rule, and that are in the channels of trade following the tolerance revocations, shall be subject to FFDCA section 408(1)(5), as established by the FQPA. Under this section, any residue of these pesticides in or on such food shall not render the food adulterated so long as it is shown to the satisfaction of FDA that: (1) The residue is present as the result of an application or use of the pesticide at a time and in a manner that was lawful under FIFRA, and (2) the residue does not exceed the level that was authorized at the time of the application or use to be present on the food under a tolerance or exemption from a tolerance. Evidence to show that food was lawfully treated may include records that verify the dates that the pesticide was applied to such food.

V. Can I Submit Objections or Hearing Requests?

Yes. Any person can file written objections to any aspect of this regulation and can also request a hearing on those objections. Objections and hearing requests are currently governed by the procedures in 40 CFR part 178, modified as needed to reflect the requirements of FFDCA section 408(g).

A. When and Where to Submit

Objections and hearing requests must be mailed or delivered to the Hearing Clerk no later than September 20, 1999. The address of the Hearing Clerk is Hearing Clerk (1900), Environmental

Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460.

B. Fees for Submission

1. Each objection must be accompanied by a fee of \$3,275 or a request for waiver of fees. Fees accompanying objections and hearing requests must be labeled "Tolerance Petition Fees," and forwarded to EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251.

2. EPA may waive any fee when a waiver or refund is equitable and not contrary to the purposes of the Act. A request for a waiver of objection fees should be submitted to James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. The request for a waiver must be accompanied by a fee of \$1,650, unless the objector has no financial interest in the matter. The fee, if required, must be submitted to the address in Unit V.B.1. of this document. For additional information on tolerance objection fee waivers, contact James Tompkins, Registration Division (7505C), at the same mailing address, or by phone at (703) 305-5697, or e-mail at tompkins.jim@epa.gov.

C. Information to be Submitted

Objections must specify the provisions of the regulation considered objectionable and the grounds for the objections. If a hearing is requested, the objections must include a statement of the factual issue(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. You may claim information that you submit in response to this document as 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.

D. Granting a Hearing Request

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following:

1. There is a genuine and substantial issue of fact.

2. 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.

3. Resolution of the factual issue(s) in the manner sought by the requestor

would be adequate to justify the action requested.

VI. How Do the Regulatory Assessment Requirements Apply to this Final Action?

A. Is this a "Significant Regulatory Action"?

No. Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action." The Office of Management and Budget (OMB) has determined that tolerance actions, in general, are not "significant" unless the action involves the revocation of a tolerance that may result in a substantial adverse and material effect on the economy. In addition, this 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 this action is not an economically significant regulatory action as defined by Executive Order 12866. Nonetheless, environmental health and safety risks to children are considered by the Agency when determining appropriate tolerances. Under FQPA, EPA is required to apply an additional 10-fold safety factor to risk assessments, in order to ensure the protection of infants and children, unless reliable data supports a different safety factor.

B. Does this Action Contain Any Reporting or Recordkeeping Requirements?

No. This final action does not impose any information collection requirements subject to OMB review or approval pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

C. Does this Action Involve Any "Unfunded Mandates"?

No. This final action does not impose any enforceable duty, or contain any "unfunded mandates," as described in Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4).

D. Do Executive Orders 12875 and 13084 Require EPA to Consult with States and Indian Tribal Governments Prior to Taking the Action in this Document?

No. Under Executive Order 12875, entitled *Enhancing the Intergovernmental Partnership* (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 final 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.

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 final 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.

E. Does this Action Involve Any Environmental Justice Issues?

No. This action does not involve special considerations of environmental-justice related issues pursuant to Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

F. Does this Action Have a Potentially Significant Impact on a Substantial Number of Small Entities?

No. The Agency has certified that tolerance actions, including the tolerance actions in this document, are not likely to result in a significant adverse economic impact on a substantial number of small entities. The factual basis for the Agency's determination, along with its generic certification under section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), appears at 63 FR 55565, October 16, 1998 (FRL-6035-7). This generic certification has been provided to the Chief Counsel for Advocacy of the Small Business Administration.

G. Does this Action Involve Technical Standards?

No. This tolerance final action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note). Section 12(d) directs EPA to use voluntary consensus standards in its regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA requires EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

H. Are There Any International Trade Issues Raised by this Action?

EPA is working to ensure that the U.S. tolerance reassessment program under FQPA does not disrupt international trade. EPA considers Codex Maximum Residue Limits (MRLs) in setting U.S. tolerances and in reassessing them. MRLs are established by the Codex Committee on Pesticide Residues, a committee within the Codex

Alimentarius Commission, an international organization formed to promote the coordination of international food standards. When possible, EPA seeks to harmonize U.S. tolerances with Codex MRLs. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain in a **Federal Register** document the reasons for departing from the Codex level. EPA's effort to harmonize with Codex MRLs is summarized in the tolerance reassessment section of individual Reregistration Eligibility Decisions (REDs). EPA has developed guidance concerning submissions for import tolerance support. This guidance will be made available to interested persons.

I. Is this Action Subject to Review under the Congressional Review Act?

Yes. The Congressional Review Act, 5 U.S.C. Sec. 801 *et seq.*, as amended 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 action 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.

40 CFR Part 186

Environmental protection, Animal feeds, Pesticides and pests.

Dated: July 15, 1999.

Jack E. Housenger,

Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.

Therefore, 40 CFR parts 180, 185, and 186 are amended to read as follows:

PART 180—[AMENDED]

1. In part 180:

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

Authority: 21 U.S.C. 321(q), 346a and 371.

§ 180.207 [Amended]

b. In § 180.207 paragraph (a), remove the "(N)" designation from all entries and remove the entry for "barley, fodder." Also, remove the terms listed in the first column below and add in their place in alphabetical order the terms listed in the second column:

Remove	Add
Carrots	Carrot, roots
Citrus fruits	Fruit, citrus, group
Corn, grain (exc. pop-corn)	Corn, field, grain
Corn, grain (exc. pop-corn), fodder	Corn, field, stover
Corn, grain (exc. pop-corn), forage	Corn, field, forage
Cottonseed	Cotton, undelinted seed
Cucurbits	Vegetable, cucurbit, group
Grain, crops (except fresh corn and rice grain)	Grain, crops, except corn, sweet and rice grain
Mung bean sprouts ...	Bean, mung, sprouts
Nuts	Nut, tree, group
Peanuts	Peanut
Peppermint, hay	Peppermint, tops
Rape, seed	Rapeseed, seed
Spearmint, hay	Spearmint, tops
Stone fruits	Fruit, stone, group
Sugarcane	Sugarcane, cane
Sunflower seed	Sunflower, seed
Upland cress	Cress, upland
Vegetables, fruiting ...	Vegetable, fruiting, group

§ 180.222 [Amended]

c. In § 180.222, in paragraph (a), the table is amended by removing the entry for "cotton."

§ 180.226 [Amended]

d. Section 180.226 is amended as follows:

i. In paragraph (a), the table is amended by removing the entry for "sugarcane" and revising the term "potatoes" to read "potato".

ii. In the table to paragraph (b), remove the terms listed in the first column below and add in their place in alphabetical order the terms listed in the second column:

Remove	Add
Avocados	Avocado
Cottonseed	Cotton, undelinted seed

Remove	Add
Cucurbits	Vegetable, cucurbit, group
Fruits, citrus	Fruit, citrus, group
Fruits, pome	Fruit, pome, group
Fruits, stone	Fruit, stone, group
Grasses, forage	Grass, forage
Hops	Hop, dried cones
Legumes, forage	Vegetable, foliage of legume, group
Nuts	Nut, tree, group
Sugarcane	Sugarcane, cane
Vegetables, fruiting ...	Vegetable, fruiting, group
Vegetables, root crop	Vegetable, root and tuber, group.

§ 180.292 [Amended]

e. In § 180.292, in the table to paragraph (a)(1), remove the entries for "flax, seed"; and "flax, straw" and remove the entries listed in the first column of the table below and add the entries listed in the second column in place thereof in alphabetical order.

Remove	Add
Cattle, mbyp (exc kidney and liver)	Cattle, meat byproducts except kidney and liver
Eggs	Egg
Goats, fat	Goat, fat
Goats, mbyp (exc kidney and liver)	Goat, meat byproducts except kidney and liver
Goats, meat	Goat, meat
Grasses, forage	Grass, forage
Hogs, mbyp (exc kidney and liver)	Hog, meat byproducts except kidney and liver
Horses, mbyp (exc kidney and liver)	Horse, meat byproducts except kidney and liver
Oats, green forage	Oat, forage
Sheep, mbyp (exc kidney and liver)	Sheep, meat byproducts except kidney and liver
Wheat, green forage	Wheat, forage

§ 180.299 [Amended]

f. In § 180.299, remove the entry for "pecans" from the table.

§ 180.300 [Amended]

g. In § 180.300(a), remove from the table the entries for "filberts," "lemons," "pineapple fodder," "pineapple forage," "tangerines," and "tangerine hybrids" and remove the terms listed in the first column of the table below and add the terms listed in the second column in place thereof in alphabetical order.

Remove	Add
Figs	Fig
Goats, fat	Goat, fat
Horses, meat	Horse, meat
Macadamia nuts	Nut, macadamia
Pineapples	Pineapple
Pumpkins	Pumpkin
Tomatoes	Tomato

h. Section 180.304 is amended as follows:

i. By revising paragraph (a) introductory text.

§ 180.304 Oryzalin; tolerances for residues.

(a) Tolerances are established for residues of the herbicide oryzalin (3,5-dinitro-N⁴,N⁴-dipropylsulfanilamide) in or on the following raw agricultural commodities:

* * * * *

ii. In the table in paragraph (a), by removing the terms listed in the first column below and adding in place thereof in alphabetical order the term listed in the second column to read as follows:

Remove	Add
Figs	Fig
Kiwifruits	Kiwifruit
Nuts	Nut, tree, group
Olives	Olive

§ 180.346 [Amended]

i. In § 180.346(a) by removing the entry for "rice straw."

§ 180.355 [Amended]

j. Section 180.355 is amended as follows:

i. In the table to paragraph (a), by removing the entries for "beans, lima (succulent)"; "mint, spent hay"; and "peanuts, forage"; and removing the terms listed in the first column below and adding in place thereof in alphabetical order the terms listed in the second column.

Remove	Add
Beans (except soy-beans), dried.	Bean, dry, seed
Beans (exc. soy-beans), dried, vine	Cowpea, hay
Beans (exc. soy-beans), forage.	Cowpea, forage
Beans, succulent	Bean, succulent
Bohemian chili pep-	Pepper, nonbell
pers.	

Remove	Add
Cattle, mbyp	Cattle, meat byprod- ucts
Corn, fodder	Corn, field, stover
Corn, forage	Corn, field, forage
Corn, fresh (inc. sweet K+CWHR).	Corn, sweet, kernel plus cob with husks removed
Corn, grain	Corn, field, grain
Eggs	Egg
Peanuts	Peanut
Peanuts, hay	Peanut, hay
Peas (dried)	Pea, dry, seed
Peas (dried), vine hays.	Pea, field, hay
Peas, forage	Pea, field, vines
Peas, succulent	Pea, succulent
Poultry, mbyp	Poultry, meat byprod- ucts
Rice	Rice, grain

ii. Section 180.355 is further amended by adding alphabetically an entry to the table in paragraph (a) for corn, pop, grain to read as follows:

§ 180.355 Bentazon; tolerances for residues.

(a) * * *

Commodity	Parts per million
* * *	* *
Corn, pop, grain	0.05
* * *	* *

PART 185—[AMENDED]

2. In part 185:

a. The authority citation for part 185 continues to read as follows:

Authority: 21 U.S.C. 346a and 348.

b. By revising § 185.2500 to read as follows:

§ 185.2500 Diquat.

A food additive regulation of 0.5 part per million is established for residues of diquat in potato, granules/flakes and potato, chips.

c. In § 185.2700, the table is revised to read as follows:

§ 185.2700 Ethephon.

* * * * *

Food	Parts per million
Barley, pearled barley and bar- ley, bran	5.0
Sugarcane, molasses	1.5

Food	Parts per million
Wheat, bran, wheat, middlings, and wheat, shorts	5.0

PART 186—[AMENDED]

3. In part 186:

a. The authority citation for part 186 continues to read as follows:

Authority: 21 U.S.C. 342, 348, and 371.

§ 186.2700 [Amended]

b. In § 186.2700(a) by revising the term "wheat, milling fractions, except flour" to read "wheat, milled byproducts".

[FR Doc. 99-18608 Filed 7-20-99; 8:45 am]

BILLING CODE 6560-50-F

**GENERAL SERVICES
ADMINISTRATION**

41 CFR Part 102-2

RIN 3090-AG83

Federal Management Regulation (FMR)

AGENCY: Office of Governmentwide Policy, GSA.

ACTION: Interim rule.

SUMMARY: This year marks the 50th anniversary of the Federal Property and Administrative Services Act of 1949 (the Act), as amended. In support of the Act's original intent of efficiently managing Government assets, GSA is improving its regulatory system by establishing the Federal Management Regulation (FMR) as the successor regulation to the Federal Property Management Regulations (FPMR). The FMR will provide Federal managers with the regulatory materials they need to efficiently manage real and personal property and administrative services. Non-regulatory FMR bulletins will provide related FMR materials.

DATES: *Effective Date:* July 21, 1999.

Comment Date: Your comments must reach us by September 20, 1999 to be considered in the formulation of a final rule.

ADDRESSES: Send written comments to: Ms. Sharon A. Kiser, Regulatory Secretariat (MVRs), Federal Acquisition Policy Division, General Services Administration, 1800 F Street, NW, Washington, DC 20405.

Send comments by e-mail to: RIN.3090-AG83@gsa.gov.

FOR FURTHER INFORMATION CONTACT: Ms. Sharon A. Kiser, Regulatory Secretariat, 202-208-7312.

SUPPLEMENTARY INFORMATION:

A. Background

What Content Changes Will Be Part of the Transition From the FPMR to the FMR?

GSA will update, streamline, eliminate and clarify FPMR contents before transferring them to the FMR. The FMR will then contain a refined set of policies and regulatory requirements on managing property and administrative services.

Non-regulatory materials, such as guidance, procedures, information and standards now in the FPMR, will be removed from the regulation and will be available in separate documents, such as customer service guides, handbooks, brochures, Internet websites, and FMR bulletins. The FMR will specify how to find this additional information; e.g., ordering and billing information. Content changes will bring the FMR into conformance with recommendations from the National Partnership for Reinventing Government to reduce regulations and to use plain language.

Is the FMR's Style Different From That in the FPMR?

Yes, the FMR is written in a "plain language" regulatory style. This style is directed at the reader and uses a question and answer format, active voice, shorter sentences, and, where appropriate, pronouns such as, but not limited to, we, you and I. These changes comply with the National Partnership for Reinventing Government's recommendations to make regulations more efficient and easier to understand.

Does the Deviation Policy in the FMR Differ From That in the FPMR?

Yes, there are changes in the deviation policy. The new approach consists of both informal discussions about deviating from the FMR and formal correspondence requesting deviation authority. Because the FMR consists primarily of set policies and mandatory requirements, FMR deviations should occur infrequently and under unique circumstances. Agencies should pursue deviations first by informally consulting with appropriate GSA officials about whether a deviation is needed and whether it would be in accordance with governing statutes, Executive orders, or other controlling policies. If informal consultations indicate that a formal deviation is needed and can be allowed, agencies must request it from GSA in

writing. The written request must fully explain the reasons for the deviation and how it will be in the Government's best interests.

Will the Conversion From the FPMR to the FMR Occur All at Once or Incrementally?

The conversion from the FPMR to the FMR will occur incrementally as the regulations are rewritten.

Must Agencies Reference Both the FPMR and the FMR During This Conversion?

Yes. Given an incremental conversion of content from the FPMR to the FMR, both regulations will exist concurrently. Depending on the subject matter, you may need to read both documents to obtain all related material. However, except for parts 101-1 of the FPMR and 102-2 of the FMR, the same content will not appear in both regulations. These two parts will exist concurrently. The general provisions of part 101-1 of the FPMR (including the FPMR deviation procedures) will apply to any aspects of the FPMR not yet replaced by the FMR. The general provisions at 102-2 (including the rewritten deviation procedures) will apply to new material in the FMR.

B. Executive Order 12866

GSA has determined that this interim rule is not a significant regulatory action for the purposes of Executive Order 12866 of September 30, 1993.

C. Regulatory Flexibility Act

Since its primary purpose is to establish the structure for a new regulation, the FMR, the interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601-612. Additionally, since this interim rule applies to matters concerning agency management and personnel, no proposed rule is required.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the interim rule does not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 501-517.

E. Small Business Regulatory Enforcement Fairness Act

This interim rule is exempt from Congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

F. Determination to Issue an Interim Rule

Publication for public comment is not required under the Administrative Procedures Act because the rule relates solely to agency management and personnel, and, therefore, GSA could issue it as a final rule. However, GSA would like to receive comments about this action before publishing it as a final rule. An interim rule provides two benefits. First, it gives agencies a chance to comment on aspects of the new regulation. Second, by making the FMR's contents effective immediately, it establishes the structure for use by GSA in publishing additional parts of the regulation that have already been approved.

List of Subjects in 41 CFR Part 102

Government property management.

Dated: June 24, 1999.

David J. Barram,

Administrator of General Services.

For the reasons set forth in the preamble and under the authority of 40 U.S.C. 486(c), Title 41 of the Code of Federal Regulations is amended by establishing chapter 102 to read as follows:

CHAPTER 102—FEDERAL MANAGEMENT REGULATION

SUBCHAPTER A—GENERAL

- Part
- 102-1 General [Reserved]
- 102-2 Federal management regulation system
- 102-3 Advisory committee management [Reserved]
- 102-4 Nondiscrimination in Federal financial assistance programs [Reserved]
- 102-5-102-30 [Reserved]

SUBCHAPTER B—PERSONAL PROPERTY

- 102-31 General [Reserved]
- 102-32 Management of personal property [Reserved]
- 102-33 Management of aircraft [Reserved]
- 102-34 Motor vehicle management [Reserved]
- 102-35 Disposition of personal property [Reserved]
- 102-36 Transfer of excess personal property [Reserved]
- 102-37-102-70 [Reserved]

SUBCHAPTER C—REAL PROPERTY

- 102-71 General [Reserved]
- 102-72 Delegation of authority [Reserved]
- 102-73 Real estate acquisition [Reserved]
- 102-74 Facility management [Reserved]
- 102-75 Disposition of real property [Reserved]
- 102-76 Design and construction [Reserved]
- 102-77 Art-in-architecture [Reserved]
- 102-78 Historic preservation [Reserved]
- 102-79 Assignment and utilization of space [Reserved]
- 102-80 Safety and environmental management [Reserved]

- 102-81 Security [Reserved]
- 102-82 Utility services [Reserved]
- 102-83 Centralized services in Federal buildings and complexes [Reserved]
- 102-84 Annual real property inventories [Reserved]
- 102-85—102-115 [Reserved]

SUBCHAPTER D—TRANSPORTATION

- 102-116 General [Reserved]
- 102-117 Transportation management [Reserved]
- 102-118—102-140 [Reserved]

SUBCHAPTER E—TRAVEL MANAGEMENT

- 102-141 General [Reserved]
- 102-142—102-170 [Reserved]

SUBCHAPTER F—TELECOMMUNICATIONS

- 102-171 General [Reserved]
- 102-172 Telecommunications management policy [Reserved]
- 102-173—102-190 [Reserved]

SUBCHAPTER G—ADMINISTRATIVE PROGRAMS

- 102-191 General [Reserved]
- 102-192 Mail management [Reserved]
- 102-193 Records management [Reserved]
- 102-194 Standard and optional forms program [Reserved]
- 102-195 Interagency reports management program [Reserved]
- 102-196 Federal facility ridesharing [Reserved]
- 102-197—102-220 [Reserved]

SUBCHAPTER H—SUBCHAPTER Z [RESERVED]

SUBCHAPTER A—GENERAL

PART 102-2—FEDERAL MANAGEMENT REGULATION SYSTEM

Subpart A—Regulation System

Sec.

General

- 102-2.5 What is the Federal Management Regulation (FMR)?
- 102-2.10 What is the FMR's purpose?
- 102-2.15 What is the authority for the FMR system?
- 102-2.20 Which agencies are subject to the FMR?
- 102-2.25 When are other agencies involved in developing the FMR?
- 102-2.30 Where and in what formats is the FMR published?
- 102-2.35 How is the FMR distributed?
- 102-2.40 May an agency issue implementing and supplementing regulations for the FMR?

Numbering

- 102-2.45 How is the FMR numbered?
- 102-2.50 How do I number my agency's implementing regulations?
- 102-2.55 How do I number my agency's supplementing regulations?

Deviations

- 102-2.60 What is a deviation from the FMR?
- 102-2.65 When may agencies deviate from the FMR?

- 102-2.70 What are individual and class deviations?
- 102-2.75 What timeframes apply to deviations?
- 102-2.80 What steps must an agency take to deviate from the FMR?
- 102-2.85 What are the reasons for writing to GSA about FMR deviations?
- 102-2.90 Where should my agency send its correspondence on an FMR deviation?
- 102-2.95 What information must agencies include in their deviation letters to GSA?
- 102-2.100 Must agencies provide GSA with a follow-up analysis of their experience in deviating from the FMR?
- 102-2.105 What information must agencies include in their follow-up analysis?
- 102-2.110 When must agencies provide their follow-up analysis?

Non-Regulatory Material

- 102-2.115 What kinds of non-regulatory material does GSA publish outside of the FMR?
- 102-2.120 How do I know whom to contact to discuss the regulatory requirements of programs addressed in the FMR?
- 102-2.125 What source of information can my agency use to identify materials that describe how to do business with GSA?

Subpart B—Forms

- 102-2.130 Where are FMR forms prescribed?
- 102-2.135 How do agencies obtain forms prescribed by the FMR?

Subpart C—Plain Language Regulatory Style

- 102-2.140 What elements of plain language appear in the FMR?
- 102-2.145 To what do pronouns refer when used in the FMR?

Authority: 40 U.S.C. 486(c).

Subpart A—Regulation System

General

§ 102-2.5 What is the Federal Management Regulation (FMR)?

The Federal Management Regulation (FMR) is the successor regulation to the Federal Property Management Regulations (FPMR). It contains updated regulatory policies originally found in the FPMR. However, it does not contain FPMR material that described how to do business with the General Services Administration (GSA). "How to" materials on this and other subjects are available in customer service guides, handbooks, brochures and Internet websites provided by GSA. (See § 102-2.125.)

§ 102-2.10 What is the FMR's purpose?

The FMR prescribes policies concerning property management and related administrative activities. GSA issues the FMR to carry out the Administrator of General Services' functional responsibilities, as established by statutes, Executive

orders, Presidential memoranda, Circulars and bulletins issued by the Office of Management and Budget (OMB), and other policy directives.

§ 102-2.15 What is the authority for the FMR system?

The Administrator of General Services prescribes and issues the FMR under the authority of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 486(c), as well as other applicable Federal laws and authorities.

§ 102-2.20 Which agencies are subject to the FMR?

The FMR applies to executive agencies unless otherwise extended to Federal agencies in various parts of this chapter. The difference between the two terms is that Federal agencies include executive agencies plus establishments in the legislative or judicial branch of the Government. See paragraphs (a) and (b) of this section for the definitions of each term.

(a) *What is an executive agency?* An executive agency is any executive department or independent establishment in the executive branch of the Government, including any wholly-owned Government corporation. (See 40 U.S.C. 472(a).)

(b) *What is a Federal agency?* A Federal agency is any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under that person's direction). (See 40 U.S.C. 472(b).)

§ 102-2.25 When are other agencies involved in developing the FMR?

Normally, GSA will ask agencies to collaborate in developing parts of the FMR.

§ 102-2.30 Where and in what formats is the FMR published?

Proposed rules are published in the **Federal Register**. FMR bulletins are published in looseleaf format. FMR interim and final rules are published in the following formats—

(a) **Federal Register** under the "Rules and Regulations" section.

(b) Loose-leaf. (See § 102-2.35.)

(c) Code of Federal Regulations (CFR), which is an annual codification of the general and permanent rules published in the **Federal Register**. The CFR is available on line and in a bound-volume format.

(d) Electronically on the Internet.

§ 102-2.35 How is the FMR distributed?

(a) A liaison appointed by each agency provides GSA with their

agency's distribution requirements of the looseleaf version of the FMR. Agencies must submit GSA Form 2053, Agency Consolidated Requirements for GSA Regulations and Other External Issuances, to—General Services Administration, Office of Communications (X), 1800 F Street, NW, Washington, DC 20405.

(b) Order **Federal Register** and Code of Federal Regulations copies of FMR

material through your agency's authorizing officer.

§ 102–2.40 May an agency issue implementing and supplementing regulations for the FMR?

Yes, an agency may issue implementing regulations (see § 102–2.50) to expand upon related FMR material and supplementing regulations (see § 102–2.55) to address subject material not covered in the FMR. The Office of the Federal Register assigns

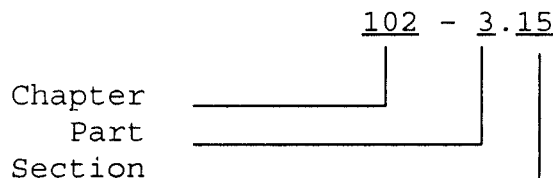
chapters in Title 41 of the Code of Federal Regulations for agency publication of implementing and supplementing regulations.

Numbering

§ 102–2.45 How is the FMR numbered?

(a) All FMR sections are designated by three numbers. The following example illustrates the chapter (it's always 102), part, and section designations:

BILLING CODE 6820–34–P



BILLING CODE 6820–34–C

(b) In the looseleaf version, the month, year, and number of FMR amendments appear at the bottom of each page.

§ 102–2.50 How do I number my agency's implementing regulations?

The first three-digit number represents the chapter number assigned to your agency in Title 41 of the CFR. The part and section numbers correspond to FMR material. For example, if your agency is assigned Chapter 130 in Title 41 of the CFR and you are implementing § 102–2.60 of the FMR, your implementing section would be numbered § 130–2.60.

§ 102–2.55 How do I number my agency's supplementing regulations?

Since there is no corresponding FMR material, number the supplementing material "601" or higher. For example, your agency's supplementing regulations governing special services to states might start with § 130–601.5.

Deviations

§ 102–2.60 What is a deviation from the FMR?

A deviation from the FMR is an agency action or policy that is inconsistent with the regulation. (The deviation policy for the FPMR is in 41 CFR part 101–1.)

§ 102–2.65 When may agencies deviate from the FMR?

Because, it consists primarily of set policies and mandatory requirements, deviation from the FMR should occur infrequently. However, to address unique circumstances or to test the effectiveness of potential policy changes, agencies may be able to deviate

from the FMR after following the steps described in § 102–2.80.

§ 102–2.70 What are individual and class deviations?

An individual deviation is intended to affect only one action. A class deviation is intended to affect more than one action (e.g., multiple actions, the actions of more than one agency, or individual agency actions that are expected to recur).

§ 102–2.75 What timeframes apply to deviations?

Timeframes vary based on the nature of the deviation. However, deviations cannot be open-ended. When consulting with GSA about using an individual or class deviation, you must set a timeframe for the deviation's duration.

§ 102–2.80 What steps must an agency take to deviate from the FMR?

(a) Consult informally with appropriate GSA program personnel to learn more about how your agency can work within the FMR's requirements instead of deviating from them. The consultation process may also highlight reasons why an agency would not be permitted to deviate from the FMR; e.g., statutory constraints.

(b) Formally request a deviation, if consultations indicate that your agency needs one. The head of your agency or a designated official should write to GSA's Regulatory Secretariat to the attention of a GSA official in the program office that is likely to consider the deviation. (See the FMR bulletin that lists contacts in GSA's program offices and § 102–2.90.) The written request must fully explain the reasons for the deviation, including the benefits that the agency expects to achieve.

§ 102–2.85 What are the reasons for writing to GSA about FMR deviations?

The reasons for writing are to:

(a) Explain your agency's rationale for the deviation. Before it can adequately comment on a potential deviation from the FMR, GSA must know why it is needed. GSA will compare your need against the applicable policies and regulations.

(b) Obtain clarification from GSA as to whether statutes, Executive orders, or other controlling policies, which may not be evident in the regulation, preclude deviating from the FMR for the reasons stated.

(c) Establish a timeframe for using a deviation.

(d) Identify potential changes to the FMR.

(e) Identify the benefits and other results that the agency expects to achieve.

§ 102–2.90 Where should my agency send its correspondence on an FMR deviation?

Send correspondence to: General Services Administration, Regulatory Secretariat (MVRs), Office of Governmentwide Policy, 1800 F Street, NW, Washington, DC 20405.

§ 102–2.95 What information must agencies include in their deviation letters to GSA?

Agencies must include:

(a) The title and citation of the FMR provision from which the agency wishes to deviate;

(b) The name and telephone number of an agency contact who can discuss the reason for the deviation;

(c) The reason for the deviation;

(d) A statement about the expected benefits of using the deviation (to the extent possible, expected benefits should be stated in measurable terms);

(e) A statement about possible use of the deviation in other agencies or Governmentwide; and

(f) The duration of the deviation.

§ 102–2.100 Must agencies provide GSA with a follow-up analysis of their experience in deviating from the FMR?

Yes, agencies that deviate from the FMR must also write to the relevant GSA program office at the Regulatory Secretariat's address (see § 102–2.90) to describe their experiences in using a deviation.

§ 102–2.105 What information must agencies include in their follow-up analysis?

In your follow-up analysis, provide information that may include, but should not be limited to, specific actions taken or not taken as a result of the deviation, outcomes, impacts, anticipated versus actual results, and the advantages and disadvantages of taking an alternative course of action.

§ 102–2.110 When must agencies provide their follow-up letters?

(a) For an individual deviation, once the action is complete.

(b) For a class deviation, at the end of each twelve-month period from the time you first took the deviation and at the end of the deviation period.

Non-Regulatory Material

§ 102–2.115 What kinds of non-regulatory material does GSA publish outside of the FMR?

As GSA converts the FPMR to the FMR, non-regulatory materials in the FPMR, such as guidance, procedures, standards, and information, that describe how to do business with GSA, will become available in separate documents. These documents may include customer service guides, handbooks, brochures, Internet websites, and FMR bulletins. GSA will eliminate non-regulatory material that is no longer needed.

§ 102–2.120 How do I know whom to contact to discuss the regulatory requirements of programs addressed in the FMR?

Periodically, GSA will issue for your reference an FMR bulletin that lists program contacts with whom agencies can discuss regulatory requirements. At a minimum, the list will contain organization names and telephone numbers for each program addressed in the FMR.

§ 102–2.125 What source of information can my agency use to identify materials that describe how to do business with GSA?

The FMR establishes policy; it does not specify procedures for the

acquisition of GSA services. However, as a service to users during the transition from the FPMR to the FMR and as needed thereafter, GSA will issue FMR bulletins to identify where to find information on how to do business with GSA. References include customer service guides, handbooks, brochures, Internet websites, etc.

Subpart B—Forms

§ 102–2.130 Where are FMR forms prescribed?

In any of its parts, the FMR may prescribe forms and the requirements for using them.

§ 102–2.135 How do agencies obtain forms prescribed by the FMR?

For copies of the forms prescribed by in the FMR, do any of the following:

(a) Write to us at: General Services Administration, National Forms and Publications Center (7CPN), Warehouse 4, Dock No. 1, 501 West Felix Street, Fort Worth, TX 76115.

(b) Send e-mail messages to: NFPC@gsa-7FDepot.

(c) Visit our web site at: www.gsa.gov/forms/forms.htm.

Subpart C—Plain Language Regulatory Style

§ 102–2.140 What elements of plain language appear in the FMR?

The FMR is written in a “plain language” regulatory style. This style is easy to read and uses a question and answer format directed at the reader, active voice, shorter sentences, and, where appropriate, personal pronouns.

§ 102–2.145 To what do pronouns refer when used in the FMR?

Throughout its text, the FMR may contain pronouns such as, but not limited to, we, you, and I. When pronouns are used, each subchapter of the FMR will indicate whether they refer to the reader, an agency, GSA, or some other entity. In general, pronouns refer to who or what must perform a required action.

[FR Doc. 99–18556 Filed 7–20–99; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 990115017–9193–02; I.D. 011199A]

RIN 0648–AM08

Fisheries of the Exclusive Economic Zone Off Alaska; Steller Sea Lion Protection Measures for the Pollock Fisheries off Alaska; Extension of an Expiration Date

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

ACTION: Extension and revision of emergency interim rule; revision to 1999 final harvest specifications; request for comments.

SUMMARY: On January 22, 1999, NMFS published an emergency rule, effective through July 19, 1999, that implemented reasonable and prudent alternatives (RPAs) identified by NMFS to avoid the likelihood that the pollock fisheries off Alaska will jeopardize the continued existence of the western population of Steller sea lions, or adversely modify its critical habitat. This action revises and extends the emergency rule through December 31, 1999. This action also revises the 1999 final harvest specifications for the pollock fisheries off Alaska. This emergency rule extension is necessary to prevent the pollock fisheries from jeopardizing the western population of Steller sea lions or adversely modifying its critical habitat until permanent protection measures can be implemented.

DATES: The expiration date of the emergency interim rule published January 22, 1999 (64 FR 3437) is extended from July 19, 1999, to December 31, 1999. The amendments in this action are effective from January 20, 1999, to December 31, 1999. Comments must be received by August 16, 1999.

ADDRESSES: Comments may be sent to Sue Salvesson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802, Attn: Lori Gravel, or delivered to the Federal Building, 709 West 9th Street, Juneau, AK. Copies of the Biological Opinion (BO) on the Bering Sea and Aleutian Islands Management Area (BSAI) and Gulf of Alaska (GOA) pollock fisheries, the Atka mackerel fishery of the Aleutian Islands Subarea (AIS), and the revised Environmental Assessment

prepared for the emergency rule extension may be obtained from the same address. The BO is also available on the Alaska Region home page at <http://www.fakr.noaa.gov>.

FOR FURTHER INFORMATION CONTACT: Shane Capron, 907-586-7228 or shane.capron@noaa.gov.

SUPPLEMENTARY INFORMATION: NMFS issued a BO dated December 3, 1998, and revised RPAs dated December 16, 1998, on the pollock fisheries of the BSAI and GOA, and the Atka mackerel fishery of the AIS. The BO concluded that the BSAI and GOA pollock trawl fisheries, as projected for 1999 through 2002, were likely to jeopardize the continued existence of the western population of Steller sea lions and adversely modify its critical habitat. The BO also determined that the Atka mackerel fishery, as modified by recent regulatory changes, was not likely to jeopardize the continued existence of Steller sea lions or adversely modify their critical habitat.

To avoid the likelihood of jeopardizing the continued existence of the western population of Steller sea lions or adversely modifying its critical habitat, the BO established principles for RPAs to the existing pollock trawl fisheries in the BSAI and GOA, that adhere to three basic principles: (1) Temporal dispersion of fishing effort, (2) spatial dispersion of fishing effort, and (3) pollock trawl exclusion zones around Steller sea lion rookeries and haulouts.

NMFS published an emergency interim rule implementing RPAs in the **Federal Register** on January 22, 1999 (64 FR 3437), corrected on February 17, 1999 (64 FR 7814), and February 25, 1999 (64 FR 9375), and effective through

July 19, 1999. The preamble to the original emergency interim rule provides a detailed description of the purpose and need for the action. This action extends the original emergency rule through December 31, 1999. This action also makes two changes to the original emergency rule that (1) correct the mothership B and C season dates, and (2) add spatial dispersion measures to limit critical habitat/catcher vessel operation area (CH/CVOA) catch. These revisions and associated changes to the 1999 BSAI final harvest specifications are described here.

Revisions to the Original Emergency Rule

Correction to Mothership Sector Seasonal Dates

The original emergency rule (64 FR 3437, January 22, 1999), contained incorrect B and C season harvest dates for the mothership sector. The North Pacific Fishery Management Council's (Council) December 1998 emergency rule recommendation contained a combined B/C season from September 1 through November 1 for the mothership sector. However, the original emergency rule inadvertently applied inshore sector B and C season dates to the mothership sector. This error is corrected in this emergency rule extension. The mothership sector now has a combined B/C season from September 1 through November 1, rather than separate B and C seasons as printed in the original emergency rule. B and C season CH/CVOA Catch Limits and Technical Amendment to the 1999 BSAI Final Harvest Specifications

The original emergency rule did not contain spatial dispersion measures for

the BSAI pollock B and C seasons as required by the BO. These provisions were reserved in the original emergency rule pending further consideration by the Council which occurred at its June 1999 meeting. This emergency rule extension revises the original rule to include overall CH/CVOA catch limits of 25 percent in the B season and 35 percent in the C season. These catch percentages are achieved using an allocation formula recommended by the Council that would exclude the catcher/processor and mothership sectors from the CH/CVOA during the B and C seasons, and would proportionally reduce the CH/CVOA catch percentages for the inshore and Community Development Quota (CDQ) sectors to achieve the overall B and C season catch objectives. Under the revised emergency rule, the inshore sector will have a CH/CVOA limit of 45 percent during the B season and 63 percent during the C season. The CDQ sector will have a CH/CVOA limit of 56 percent for its combined B/C season.

The specification of CH/CVOA catch limits in the B and C seasons in the extension of this emergency rule require revision of the 1999 final harvest specifications of pollock TAC for the Bering Sea Subarea. Table 3 of the 1999 BSAI final harvest specifications (64 FR 12103, March 11, 1999) listed CH/CVOA catch limits for the A1 and A2 seasons. However, CH/CVOA catch limits were not specified for the B and C seasons. To accommodate these new CH/CVOA limits for Bering Sea Subarea pollock under the revised emergency rule, the 1999 BSAI final harvest specifications are amended by adding the following table 3A.

TABLE 3A.—FINAL 1999 TAC AMOUNTS FOR B AND C SEASON POLLOCK IN THE BERING SEA SUBAREA

Sector	B Season		C Season	
	Total	CH/CVOA limit	Total	CH/CVOA limit
Bering Sea Subarea:				
Inshore	125,885	56,648	125,885	79,307
Offshore C/Ps	100,708	0	100,708	0
Catch by C/Ps	92,148	0	92,148	0
Catch by C/Vs	8,560	0	8,560	0
Sec. 208(e)(21) vessels	504	0	504	0
Mothership ¹	50,354	0	n/a	n/a
Incidental Catch	n/a	n/a	n/a	n/a
CDQ ¹	54,560	30,554	n/a	n/a

¹ The mothership and CDQ sectors have a combined B/C season and CH/CVOA catch limit.

NMFS intends to initiate rulemaking later in 1999 to propose and implement permanent Steller sea lion conservation measures for 2000. This extension of the emergency interim rule is necessary to

protect the western population of Steller sea lions and its critical habitat while allowing the continued prosecution of the 1999 pollock fishery.

Details concerning the basis for this action are contained in the preamble to the original emergency rule and are not repeated here.

Classification

The Assistant Administrator for Fisheries, NOAA (AA), has determined that an extension of this emergency interim rule is necessary to respond to an emergency situation and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

The extension of this emergency interim rule is exempt from review under E.O. 12866.

Failure to have the measures contained in this rule in place by July 19, 1999, would result in a lapse of necessary Steller sea lion protective measures in the Alaska pollock fisheries. The measures must be in place because of the likelihood that without the measures, the pollock fisheries would jeopardize the Western population of Steller sea lions and adversely modify its critical habitat. Without these measures, the December 3, 1998 BO would require that to protect Steller sea lions, no pollock fishing occur.

Delay of the pollock season openings to provide for prior notice and public comment would impose significant economic cost on the fishing industry for two reasons. First, by regulation, the ending date for pollock fishing is November 1 of each year to prevent pollock fishing during a winter time period that is critical to Steller sea lions.

If the August 1 pollock openings are delayed for a significant period of time, the fleet may have insufficient time to harvest the remaining TAC prior to November 1 and a significant portion of the TAC could go unharvested. Second, any delay in the season opening will impose significant operational costs on vessels, processors, employees, and other support industries that must plan for and deploy equipment and crews to remote parts of Alaska well in advance of the season opening date.

Accordingly, the AA finds that the need not to delay the pollock season openings constitutes good cause to waive the requirement to provide prior notice and an opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B), as such procedures would be impracticable and contrary to the public interest. For the same reasons, the AA finds good cause pursuant to the authority set forth at in 5 U.S.C. 553(d)(3) to waive the requirement for a 30-day delay in effective date.

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable.

The President has directed Federal agencies to use plain language in their communications with the public,

including regulations. To comply with that directive, we seek public comment on any ambiguity or unnecessary complexity arising from the language used in this emergency interim rule.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: July 16, 1999.

Andrew A. Rosenberg,

Deputy Asst. Administrator for Fisheries, National Marine Fisheries Service.

For reasons set out in the preamble, 50 CFR part 679 is amended as follows:

50 CFR CHAPTER VI**PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA**

1. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*

2. In § 679.22(a)(11)(iv)(C)(I), the table is revised to read as follows:

§ 679.22 Closures.

- (a) * * *
- (11) * * *
- (iv) * * *
- (C) * * *
- (I) * * *

Fishing Season	Industry Sector (in percent)			
	Inshore	Catcher/ processor	Mothership	CDQ
A1 Season	70	40	50	100
A2 Season	70	40	50	100
B Season	45	0	0	56
C Season	63	0	0	56

3. Section 679.23(e)(5)(ii)(B) is revised and § 679.23(e)(5)(ii)(C) is removed to read as follows:

§ 679.23 Seasons.

* * * * *

(e) * * *

(5) * * *

(ii) * * *

(B) *Combined B/C season.* From 1200 hours, A.l.t., September 1, through 1200 hours, A.l.t., November 1.

* * * * *

[FR Doc. 99-18612 Filed 7-16-99; 4:32pm]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 679**

[Docket No. 990304062-9062-01; I.D. 071699C]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch in the Western Regulatory Area of the Gulf of Alaska

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

ACTION: Closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific ocean perch in the

Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 1999 total allowable catch (TAC) of Pacific ocean perch in this area.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 20, 1999, through 2400 hrs, A.l.t., December 31, 1999.

FOR FURTHER INFORMATION CONTACT:

Thomas Pearson, 907-481-1780 or tom.pearson@noaa.gov.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing

fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 1999 TAC of Pacific ocean perch in the Western Regulatory Area of the Gulf of Alaska was established by the Final 1999 Harvest Specifications of Groundfish for the GOA (64 FR 12094, March 11, 1999) as 1,850 metric tons (mt), determined in accordance with § 679.20(c)(3)(ii).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 1999 TAC for Pacific ocean perch will be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 1,650 mt, and is setting aside the remaining 200 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific ocean perch in the Western Regulatory Area of the GOA.

Maximum retainable bycatch amounts may be found in the regulations at § 679.20(e) and (f).

Classification

This action responds to the best available information recently obtained from the fishery. It must be implemented immediately to prevent overharvesting the 1999 TAC of Pacific ocean perch for the Western Regulatory Area of the GOA. A delay in the effective date is impracticable and contrary to the public interest. Further delay would only result in overharvest. NMFS finds for good cause that the implementation of this action should not be delayed for 30 days. Accordingly, under 5 U.S.C. 553(d), a delay in the effective date is hereby waived.

This action is required by 50 CFR 679.20 and is exempt from review under E.O. 12866.

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

Dated: July 16, 1999.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. 99-18615 Filed 7-16-99; 4:10 pm]

BILLING CODE 3510-22-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 990304062-9062-01; I.D. 071699B]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch in the West Yakutat District of the Gulf of Alaska

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

ACTION: Closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific ocean perch in the West Yakutat District of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 1999 total allowable catch (TAC) of Pacific ocean perch in this area.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 19, 1999, through 2400 hrs, A.l.t., December 31, 1999.

FOR FURTHER INFORMATION CONTACT: Thomas Pearson, 907-481-1780 or tom.pearson@noaa.gov.

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

The 1999 TAC of Pacific ocean perch in the West Yakutat District of the Gulf of Alaska was established by the Final 1999 Harvest Specifications of Groundfish for the GOA (64 FR 12094, March 11, 1999) as 820 metric tons (mt), determined in accordance with § 679.20(c)(3)(ii).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 1999 TAC for Pacific ocean perch has been reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 670 mt, and is setting aside the remaining 150 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting

directed fishing for Pacific ocean perch in the West Yakutat District.

Maximum retainable bycatch amounts may be found in the regulations at § 679.20(e) and (f).

Classification

This action responds to the best available information recently obtained from the fishery. It must be implemented immediately to prevent overharvesting the 1999 TAC of Pacific ocean perch for the West Yakutat District of the GOA. A delay in the effective date is impracticable and contrary to the public interest. Further delay would only result in overharvest. NMFS finds for good cause that the implementation of this action should not be delayed for 30 days. Accordingly, under 5 U.S.C. 553(d), a delay in the effective date is hereby waived.

This action is required by 50 CFR 679.20 and is exempt from review under E.O. 12866.

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

Dated: July 16, 1999.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. 99-18614 Filed 7-16-99; 4:10 pm]

BILLING CODE 3510-22-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 990304062-9062-01; I.D. 071699A]

Fisheries of the Exclusive Economic Zone Off Alaska; Northern Rockfish in the Central Regulatory Area of the Gulf of Alaska

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

ACTION: Closure.

SUMMARY: NMFS is prohibiting directed fishing for northern rockfish in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 1999 total allowable catch (TAC) of northern rockfish in this area.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 19, 1999, through 2400 hrs, A.l.t., December 31, 1999.

FOR FURTHER INFORMATION CONTACT: Thomas Pearson, 907-481-1780 or tom.pearson@noaa.gov.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the

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

The 1999 TAC of northern rockfish in the Central Regulatory Area of the Gulf of Alaska was established by the Final 1999 Harvest Specifications of Groundfish for the GOA (64 FR 12094, March 11, 1999) as 4,150 metric tons (mt), determined in accordance with § 679.20(c)(3)(ii).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has

determined that the 1999 TAC of northern rockfish will be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 3,650 mt, and is setting aside the remaining 500 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for northern rockfish in the Central Regulatory Area of the GOA.

Maximum retainable bycatch amounts may be found in the regulations at § 679.20(e) and (f).

Classification

This action responds to the best available information recently obtained from the fishery. It must be implemented immediately to prevent

overharvesting the 1999 TAC of northern rockfish for the Central Regulatory Area of the GOA. A delay in the effective date is impracticable and contrary to the public interest. Further delay would only result in overharvest. NMFS finds for good cause that the implementation of this action should not be delayed for 30 days. Accordingly, under 5 U.S.C. 553(d), a delay in the effective date is hereby waived.

This action is required by 50 CFR 679.20 and is exempt from review under E.O. 12866.

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

Dated: July 16, 1999.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. 99-18613 Filed 7-16-99; 4:10 pm]

BILLING CODE 3510-22-F

Proposed Rules

Federal Register

Vol. 64, No. 139

Wednesday, July 21, 1999

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1000, 1001, 1002, 1004, 1005, 1006, 1007, 1012, 1013, 1030, 1032, 1033, 1036, 1040, 1044, 1046, 1049, 1050, 1064, 1065, 1068, 1076, 1079, 1106, 1124, 1126, 1131, 1134, 1135, 1137, 1138, and 1139

[DA-97-12]

Milk in the New England and Other Marketing Areas; Notice of Referenda; Determination of Representative Periods and Designation of Referendum Agents

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of referenda.

7 CFR part	Marketing area
1000	General Provisions of Federal Milk Marketing Orders.
1001	New England.
1002	New York-New Jersey.
1004	Middle Atlantic.
1005	Carolina.
1006	Upper Florida.
1007	Southeast.
1012	Tampa Bay.
1013	Southeastern Florida.
1030	Chicago Regional.
1032	Southern Illinois-Eastern Missouri.
1033	Ohio Valley.
1036	Eastern Ohio-Western Pennsylvania.
1040	Southern Michigan.
1044	Michigan Upper Peninsula.
1046	Louisville-Lexington-Evansville.
1049	Indiana.
1050	Central Illinois.
1064	Greater Kansas City.
1065	Nebraska-Western Iowa.
1068	Upper Midwest.
1076	Eastern South Dakota.
1079	Iowa.
1106	Southwest Plains.
1124	Pacific Northwest.
1126	Texas.
1131	Central Arizona.
1134	Western Colorado.

7 CFR part	Marketing area
1135	Southwestern Idaho-Eastern Oregon.
1137	Eastern Colorado.
1138	New Mexico-West Texas.
1139	Great Basin.

SUMMARY: This document announces that referenda will be conducted to determine whether producers favor issuance of the orders regulating the handling of milk in the 11 consolidated marketing areas formed from the current 31 Federal milk marketing orders pursuant to Section 143 of the Federal Agriculture Improvement and Reform Act of 1996 (Farm Bill), 7 U.S.C. 7253. The 31 current Federal milk order marketing areas are merged and, in some cases, expanded and/or divided, to create 11 order areas, and the provisions of the Federal milk marketing orders regulating the handling of milk in the merged areas are set forth in the final decision issued by the Under Secretary on March 12, 1999 (64 FR 16026), as corrected by a document issued by the Administrator, Agricultural Marketing Service, on July 8, 1999 (64 FR 37892).

DATES: Each referendum is to be completed on or before 60 days after the issuance of this order.

FOR FURTHER INFORMATION CONTACT: John F. Borovics, Branch Chief, USDA/AMS/Dairy Programs, Order Formulation Branch, Room 2968 South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 720-6274, e-mail address John.Borovics@usda.gov.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding:
Proposed Rule: Issued January 21, 1998; published January 30, 1998 (63 FR 4802).

Correction: Issued February 19, 1998; published February 25, 1998 (63 FR 9686).

Extension of Time: Issued March 10, 1998; published March 13, 1998 (63 FR 12417).

Final Decision on Proposed Amendments: Issued March 12, 1999; published April 2, 1999 (64 FR 16026).

Correction: Issued July 8, 1999; published July 14, 1999 (64 FR 37892).

On March 12, 1999, the Under Secretary, Marketing and Regulatory Programs, issued a final decision on the proposed consolidation of Federal milk marketing areas and amendments to the

consolidated Federal milk orders, as required by Section 143 of the Federal Agriculture Improvement and Reform Act of 1996 (Farm Bill), 7 U.S.C. 7253. Each of the consolidated orders, as corrected by a document issued July 8, 1999 (64 FR 37892), must be approved by the producers whose milk would be pooled under the order.

In addition to announcing that referenda will be conducted to determine producer approval of the consolidated orders, this notice contains a referendum order for each of the consolidated milk marketing orders, as merged and amended, pursuant to the requirements of the Agricultural Marketing Agreement Act of 1937. For each of the consolidated orders, at least two-thirds of the producers defined under the order, or such producers who produced at least two-thirds of the total milk produced under the order, during the representative period must approve the order before it becomes effective.

Referendum Orders To Determine Producer Approval; Determination of Representative Period(s); and Designation of Referendum Agents

Northeast

It is hereby directed that a referendum be conducted to determine whether the issuance of the order regulating the handling of milk in the Northeast marketing area, which amends and merges the orders, as amended, regulating the handling of milk in the New England, New York-New Jersey and Middle Atlantic marketing areas, and adds contiguous unregulated areas of Massachusetts, New Hampshire, and northern New York and Vermont, is approved or favored by producers as defined under the terms of the Northeast order as contained in the decision issued on March 12, 1999 (64 FR 16016), who during the representative period were engaged in the production of milk for sale within the marketing area defined in the merged Northeast order.

The month of March 1999 is hereby determined to be the representative period for the conduct of such referendum.

Erik F. Rasmussen is hereby designated agent of the Secretary to conduct such referendum in accordance with the procedure for the conduct of referenda (7 CFR 900.300 *et seq.*)

Appalachian

It is hereby directed that a referendum be conducted to determine whether the issuance of the order regulating the handling of milk in the Appalachian marketing area, which amends and merges the orders, as amended, regulating the handling of milk in the Carolina and Louisville-Lexington-Evansville marketing areas, and adds the marketing area of the former Tennessee Valley order and 21 currently-unregulated counties in Indiana and Kentucky, is approved or favored by producers as defined under the terms of the Appalachian order as contained in the decision issued on March 12, 1999 (64 FR 16016), who during the representative period were engaged in the production of milk for sale within the marketing area defined in the merged Appalachian order.

The month of March 1999 is hereby determined to be the representative period for the conduct of such referendum.

Arnold M. Stallings is hereby designated agent of the Secretary to conduct such referendum in accordance with the procedure for the conduct of referenda (7 CFR 900.300 *et seq.*).

Florida

It is hereby directed that a referendum be conducted to determine whether the issuance of the order regulating the handling of milk in the Florida marketing area, which amends and merges the orders, as amended, regulating the handling of milk in the Upper Florida, Tampa Bay and Southeastern Florida marketing areas, is approved or favored by producers as defined under the terms of the Florida order as contained in the decision issued on March 12, 1999 (64 FR 16016), who during the representative period were engaged in the production of milk for sale within the marketing area defined in the merged Florida order.

The month of March 1999 is hereby determined to be the representative period for the conduct of such referendum.

Sue L. Mosley is hereby designated agent of the Secretary to conduct such referendum in accordance with the procedure for the conduct of referenda (7 CFR 900.300 *et seq.*).

Southeast

It is hereby directed that a referendum be conducted to determine whether the issuance of the order regulating the handling of milk in the consolidated Southeast marketing area is approved or favored by producers, as defined under

the terms of the Southeast order as contained in the decision issued on March 12, 1999 (64 FR 16016), who during the representative period were engaged in the production of milk for sale within the marketing area defined in the consolidated Southeast order. The proposed Southeast order amends and combines the order, as amended, regulating the handling of milk in the current Southeast marketing area with 1 county from the current Louisville-Lexington-Evansville order area, 11 northwest Arkansas counties and 22 southern Missouri counties that currently are part of the Southwest Plains order area, and 6 Missouri counties that currently are part of the Southern Illinois-Eastern Missouri order area. In addition, 36 currently-unregulated Missouri and Kentucky counties are included in the proposed Southeast order area.

The month of March 1999 is hereby determined to be the representative period for the conduct of such referendum.

Sue L. Mosley is hereby designated agent of the Secretary to conduct such referendum in accordance with the procedure for the conduct of referenda (7 CFR 900.300 *et seq.*).

Mideast

It is hereby directed that a referendum be conducted to determine whether the issuance of the order regulating the handling of milk in the Mideast marketing area, which amends and merges the orders, as amended, regulating the handling of milk in the Ohio Valley, Eastern Ohio-Western Pennsylvania, Southern Michigan and Indiana Federal milk marketing areas, and adds the area designated as Zone 2 of the current Michigan Upper Peninsula milk order and most currently-unregulated counties in Michigan, Indiana and Ohio, is approved or favored by producers as defined under the terms of the Mideast order as contained in the decision issued on March 12, 1999 (64 FR 16016), who during the representative period were engaged in the production of milk for sale within the marketing area defined in the merged Mideast order.

The month of March 1999 is hereby determined to be the representative period for the conduct of such referendum.

Marvin A. Baumer is hereby designated agent of the Secretary to conduct such referendum in accordance with the procedure for the conduct of referenda (7 CFR 900.300 *et seq.*).

Upper Midwest

It is hereby directed that a referendum be conducted to determine whether the issuance of the order regulating the handling of milk in the Upper Midwest marketing area, which amends and merges the orders, as amended, regulating the handling of milk in the current Upper Midwest and Chicago Regional Federal milk marketing areas, and adds the areas designated as Zones I and Ia) of the Michigan Upper Peninsula Federal order area and unregulated portions of Wisconsin, is approved or favored by producers as defined under the terms of the Upper Midwest order as contained in the decision issued on March 12, 1999 (64 FR 16016), who during the representative period were engaged in the production of milk for sale within the marketing area defined in the merged Upper Midwest order.

The month of March 1999 is hereby determined to be the representative period for the conduct of such referendum.

H. Paul Kyburz is hereby designated agent of the Secretary to conduct such referendum in accordance with the procedure for the conduct of referenda (7 CFR 900.300 *et seq.*).

Central

It is hereby directed that a referendum be conducted to determine whether the issuance of the order regulating the handling of milk in the Central marketing area, which amends and merges the orders, as amended, regulating the handling of milk in the current Southern Illinois-Eastern Missouri, Central Illinois, Greater Kansas City, Southwest Plains (except for the portions included in the consolidated Southeast order area), Western Colorado, Eastern Colorado, Nebraska-Western Iowa, Eastern South Dakota, and Iowa Federal milk order marketing areas, with the addition of 69 currently-unregulated counties in Kansas, Missouri, Illinois, Iowa, Nebraska and Colorado, is approved or favored by producers as defined under the terms of the Central order as contained in the decision issued on March 12, 1999 (64 FR 16016), who during the representative period were engaged in the production of milk for sale within the marketing area defined in the merged Central order.

The month of March 1999 is hereby determined to be the representative period for the conduct of such referendum.

Donald R. Nicholson is hereby designated agent of the Secretary to conduct such referendum in accordance

with the procedure for the conduct of referenda (7 CFR 900.300 *et seq.*).

Southwest

It is hereby directed that a referendum be conducted to determine whether the issuance of the order regulating the handling of milk in the Southwest marketing area, which amends and merges the orders, as amended, regulating the handling of milk in the current Texas and New Mexico-West Texas Federal milk order marketing areas, with the addition of 49 currently-unregulated Texas counties, is approved or favored by producers as defined under the terms of the Southwest order as contained in the decision issued on March 12, 1999 (64 FR 16016), who during the representative period were engaged in the production of milk for sale within the marketing area defined in the merged Southwest order.

The month of March 1999 is hereby determined to be the representative period for the conduct of such referendum.

J. Richard Fleming is hereby designated agent of the Secretary to conduct such referendum in accordance with the procedure for the conduct of referenda (7 CFR 900.300 *et seq.*).

Arizona-Las Vegas

It is hereby directed that a referendum be conducted to determine whether the issuance of the order regulating the handling of milk in the Arizona-Las Vegas marketing area, which amends and merges the current Central Arizona order, as amended, regulating the handling of milk in that marketing area, with the Clark County, Nevada, portion of the current Great Basin marketing area and adds 8 currently-unregulated Arizona counties, is approved or favored by producers as defined under the terms of the Arizona-Las Vegas order as contained in the decision issued on March 12, 1999 (64 FR 16016), who during the representative period were engaged in the production of milk for sale within the marketing area defined in the Arizona-Las Vegas order.

The month of March 1999 is hereby determined to be the representative period for the conduct of such referendum.

James R. Daugherty is hereby designated agent of the Secretary to conduct such referendum in accordance with the procedure for the conduct of referenda (7 CFR 900.300 *et seq.*).

Western

It is hereby directed that a referendum be conducted to determine whether the issuance of the order regulating the handling of milk in the Western

marketing area, which amends and merges the current Great Basin and Southwestern Idaho-Eastern Oregon orders, as amended, minus the Clark County, Nevada, portion of the current Great Basin marketing area, is approved or favored by producers as defined under the terms of the Western order as contained in the decision issued on March 12, 1999 (64 FR 16016), who during the representative period were engaged in the production of milk for sale within the marketing area defined in the Western order.

The month of March 1999 is hereby determined to be the representative period for the conduct of such referendum.

James R. Daugherty is hereby designated agent of the Secretary to conduct such referendum in accordance with the procedure for the conduct of referenda (7 CFR 900.300 *et seq.*).

Pacific Northwest

It is hereby directed that a referendum be conducted to determine whether the issuance of the order regulating the handling of milk in the Pacific Northwest marketing area, as amended, with the addition of one currently-unregulated Oregon county, is approved or favored by producers as defined under the terms of the Pacific Northwest order as contained in the decision issued on March 12, 1999 (64 FR 16016), who during the representative period were engaged in the production of milk for sale within the marketing area defined in the Pacific Northwest order.

The month of March 1999 is hereby determined to be the representative period for the conduct of such referendum.

James R. Daugherty is hereby designated agent of the Secretary to conduct such referendum in accordance with the procedure for the conduct of referenda (7 CFR 900.300 *et seq.*).

Marketing Agreement and Order

Annexed hereto and made a part hereof is a Marketing Agreement regulating the handling of milk in the aforesaid marketing areas, which has been decided upon as the detailed and appropriate means of effectuating the conclusions reached in the final decision issued March 12, 1999 (64 FR 16026), as corrected in the document issued July 8, 1999 (64 FR 37892). It is hereby ordered that the Marketing Agreement annexed hereto be published in the **Federal Register**.

The Order amending the orders regulating the handling of milk in the 11 consolidated marketing areas was proposed as the detailed and

appropriate means by which the conclusions of the final decision may be carried out, and was published in the final decision issued March 12, 1999 (64 FR 16026), as corrected in the document issued July 8, 1999 (64 FR 37892). This referendum order provides for producer approval of the provisions of the marketing orders for the 11 consolidated areas.

List of Subjects in 7 CFR Parts 1000, 1001, 1002, 1004, 1005, 1006, 1007, 1012, 1013, 1030, 1032, 1033, 1036, 1040, 1044, 1046, 1049, 1050, 1064, 1065, 1068, 1076, 1079, 1106, 1124, 1126, 1131, 1134, 1135, 1137, 1138, and 1139

Milk marketing orders.

Authority: 7 U.S.C. 601-674.

Dated: July 14, 1999.

Enrique E. Figueroa,

Administrator, Agricultural Marketing Service.

Marketing Agreement Regulating the Handling of Milk in Certain Specified Marketing Areas

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR Part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ _____¹ to _____, all inclusive, of the order regulating the handling of milk in the said marketing areas (7 CFR PART _____²) which was issued March 12, 1999 (64 FR 16026) and corrected in a document issued June ____, 1999 (64 FR _____); and

II. The following provisions:

§ _____³. Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of March 1999, _____ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Deputy Administrator, or Acting Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

§ _____³. Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Secretary in accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

¹ First and last sections of order.

² Appropriate Part number.

³ Next consecutive section number.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature _____
By (Name) _____
(Title) _____
(Address) _____
(Seal) _____
Attest _____

[FR Doc. 99-18435 Filed 7-19-99; 8:45 am]

BILLING CODE 3410-02-P

FEDERAL ELECTION COMMISSION

[Notice 1999-11]

11 CFR Part 110

Candidate Debates

AGENCY: Federal Election Commission.

ACTION: Extension of comment period.

SUMMARY: On June 10, 1999, (64 FR 31159) the Commission published a Notice of Availability inviting comments on a Petition for Rulemaking that urges the Commission to amend its rules regarding Presidential and Vice Presidential debates. The Commission has extended the deadline for submitting comments until July 26, 1999.

DATES: Statements in support of or in opposition to the petition must be filed on or before July 26, 1999.

ADDRESS: All comments should be addressed to Rosemary C. Smith, Acting Assistant General Counsel, and must be submitted in either written or electronic form. Written comments should be sent to the Federal Election Commission, 999 E Street, NW, Washington, DC 20463. Faxed comments should be sent to (202) 219-3923, with printed copy follow up. Electronic mail comments should be sent to debates@fec.gov, and should include the full name, electronic mail address and postal service address of the commenter. Additional information on electronic submission is provided below.

FOR FURTHER INFORMATION CONTACT: Rosemary C. Smith, Acting Assistant General Counsel, or Paul Sanford, Staff Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: On May 25, 1999, the Commission received a Petition for Rulemaking regarding its candidate debate regulations at 11 CFR 110.13. The petition urges the Commission to revise these rules to establish mandatory objective criteria to

be used by debate staging organizations to determine who may participate in Presidential and Vice Presidential Debates.

The Commission published a Notice of Availability in the **Federal Register** on June 10, 1999, inviting the public to submit comments on the petition by July 12, 1999. The Commission has decided to extend this comment period until July 26, 1999.

As indicated in the June 10 notice, copies of the petitions are available for public inspection in the Commission's Public Records Office, 999 E Street, NW, Washington, DC 20463, Monday through Friday between the hours of 9:00 a.m. and 5:00 p.m. Copies of the petitions can also be obtained at any time of the day and week from the Commission's home page at www.fec.gov, or from the Commission's FlashFAX service. To obtain copies of the petitions from FlashFAX, dial (202) 501-3413 and follow the FlashFAX service instructions. Request document #239 to receive the petition.

All statements in support of or in opposition to the petitions should be addressed to Rosemary C. Smith, Acting Assistant General Counsel, and must be submitted in either written or electronic form. Written comments should be sent to the Commission's postal service address: Federal Election Commission, 999 E Street, NW, Washington, DC 20463. Faxed comments should be sent to (202) 219-3923. Commenters submitting faxed comments should also submit a printed copy to the Commission's postal service address to ensure legibility. Comments may also be sent by electronic mail to debates@fec.gov. Commenters sending comments by electronic mail should include their full name, electronic mail address and postal service address within the text of their comments. All comments, regardless of form, must be submitted by July 26, 1999.

Consideration of the merits of the petition will be deferred until the close of the comment period. If the Commission decides that the petition has merit, it may begin a rulemaking proceeding. Any subsequent action taken by the Commission will be announced in the **Federal Register**.

Scott E. Thomas,

Chairman, Federal Election Commission.

[FR Doc. 99-18554 Filed 7-20-99; 8:45 am]

BILLING CODE 6715-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM158; Notice No. 25-99-06-SC]

Special Conditions: Boeing Model 767-400ER; High-Intensity Radiated Fields

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Boeing Model 767-400ER airplane. This airplane will utilize new avionics/electronic systems that provide critical data to the flightcrew. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for the protection of these systems from the effects of high-intensity radiated fields. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Comments must be received on or before September 7, 1999.

ADDRESSES: Comments on this proposal may be mailed in duplicate to: Federal Aviation Administration, Transport Airplane Directorate, Attention: Rules Docket (ANM-114), Docket No. NM158, 1601 Lind Avenue SW., Renton, Washington, 98055-4056; or delivered in duplicate to the Transport Airplane Directorate at the above address. Comments must be marked: Docket No. NM158. Comments may be examined in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Massoud Sadeghi, FAA, Transport Airplane Directorate, Aircraft Certification Service, Airplane and Flight Crew Interface Branch, ANM-111, 1601 Lind Avenue SW., Renton, Washington, 98055-4056, telephone (425) 227-2117 or facsimile (425) 227-1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of these proposed special conditions by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the Rules

Docket address specified above. All communications received on or before the closing date for comments will be considered by the Administrator before further rulemaking action on this proposal is taken. The proposals contained in this action may be changed in light of the comments received. All comments received will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested parties. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must include a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. NM158." The postcard will be date stamped and returned to the commenter.

Background

On January 14, 1997, the Boeing Commercial Airplane Group applied for an amendment to Type Certificate No. A1NM to include the new Model 767-400ER, a derivative of the Model 767-200/300 series airplanes. The Model 767-400ER is a swept-wing, conventional-tail, twin-engine, turbofan-powered transport airplane. The airframe has been strengthened to accommodate the increased design loads and weights. The airplane has a seating capacity of up to 375, and a maximum takeoff weight of 450,000 pounds (204,120 kg). Each engine will be capable of delivering 62,000 pounds of thrust. The flight controls are unchanged beyond those changes deemed necessary to accommodate the stretched configuration.

Type Certification Basis

Under the provisions of 14 CFR 21.101, Boeing must show that the Model 767-400ER airplane meets the applicable provisions of the regulations incorporated by reference in Type Certificate No. A1NM, or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type certification basis." The regulations incorporated by reference in Type Certificate No. A1NM include 14 CFR part 25, as amended by Amendments 25-1 through 25-45 with a few exceptions, and certain other later amended sections of part 25 that are not relevant to these proposed special conditions. Except for certain earlier amended sections of part 25 that are not

relevant to these proposed special conditions, Boeing has chosen to comply with part 25 as amended by Amendments 25-1 through 25-89, the applicable regulations in effect on the date of application.

In addition to the applicable airworthiness regulations and special conditions, the Model 767-400ER must comply with the fuel vent and exhaust emission requirements of part 34, effective September 10, 1990, plus any amendments in effect at the time of certification; and the noise certification requirements of part 36, effective December 1, 1969, as amended by Amendment 36-1 through the amendment in effect at the time of certification. The special conditions that may be developed as a result of this notice will form an additional part of the type certification basis.

If the Administrator finds that the applicable airworthiness regulations (i.e., part 25, as amended) do not contain adequate or appropriate safety standards for the Model 767-400ER because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16 to establish a level of safety equivalent to that established in the regulations.

Special conditions, as appropriate, are issued in accordance with § 11.49 of the FAR after public notice, as required by §§ 11.28 and 11.29(b), and become part of the type certification basis in accordance with § 21.101(b)(2).

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of § 21.101(a)(1).

Novel or Unusual Design Features

The Model 767-400ER airplane will utilize electrical and electronic systems that perform critical functions, including the following: primary electronic flight displays and full authority digital engine controls (FADEC). These systems may be vulnerable to high-intensity radiated fields (HIRF) external to the airplane.

Discussion

There is no specific regulation that addresses protection requirements for electrical and electronic systems from HIRF. Increased power levels from

ground based radio transmitters, and the growing use of sensitive electrical and electronic systems to command and control airplanes, have made it necessary to provide adequate protection.

To ensure that a level of safety is achieved equivalent to that intended by the regulations incorporated by reference, special conditions are needed for the Model 767-400ER. The Model 767-400 requires that new technology electrical and electronic systems be designed and installed to preclude component damage and interruption of function due to both the direct and indirect effects of HIRF.

High-Intensity Radiated Fields

With the trend toward increased power levels from ground based transmitters, plus the advent of space and satellite communications, coupled with electronic command and control of the airplane and the use of composite material in the airplane structure, the immunity of critical digital avionics systems to HIRF must be established.

It is not possible to precisely define the HIRF to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF.

Furthermore, coupling of electromagnetic energy to cockpit-installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing HIRF emitters, an adequate level of protection exists when compliance with the HIRF protection special condition is shown with either paragraphs 1 or 2 below:

1. A minimum threat of 100 volts per meter peak electric field strength from 10 KHz to 18 GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. A threat external to the airframe of the following field strengths for the frequency ranges indicated.

Frequency	Field Strength (volts per meter)	
	Peak	Average
10 kHz–100 kHz	50	50
100 kHz–500 kHz	50	50
500 kHz–2 MHz	50	50
2 MHz–30 MHz	100	100
30 MHz–70 MHz	50	50
70 MHz–100 MHz	50	50
100 MHz–200 MHz	100	100
200 MHz–400 MHz	100	100
400 MHz–700 MHz	700	50
700 MHz–1 GHz	700	100

Frequency	Field Strength (volts per meter)	
	Peak	Average
1 GHz–2 GHz	2000	200
2 GHz–4 GHz	3000	200
4 GHz–6 GHz	3000	200
6 GHz–8 GHz	1000	200
8 GHz–12 GHz	3000	300
12 GHz–18 GHz	2000	200
18 GHz–40 GHz	600	200

The field strengths are expressed in terms of peak root-mean-square (rms) values.

The threat levels identified above differ from those used in previous special conditions and are the result of an FAA review of existing studies on the subject of HIRF, in light of the ongoing work of the Electromagnetic Effects Harmonization Working Group of the Aviation Rulemaking Advisory Committee. In general, these standards are less critical than the threat level that was previously used as the basis for earlier special conditions.

Applicability

As discussed above, these special conditions would be applicable initially to the Model 767–400ER airplane. Should Boeing apply at a later date for change to the type certificate to include another model incorporating the same novel or unusual design feature, these special conditions would apply to that model as well under the provisions of § 21.101(a)(1).

Conclusion

This action affects certain design features only on the Model 767–400ER. It is not a rule of general applicability and affects only the manufacturer who applied to the FAA For Approval of these features on the airplane.

List of Subjects In 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these proposed special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for the Boeing 767–400ER series airplanes.

1. *Protection from Unwanted Effects of High-Intensity Radiated Fields (HIRF).* Each electrical and electronic system that performs critical functions must be designed and installed to ensure that the operation and operational capability of these systems

to perform critical functions are not adversely affected when the airplane is exposed to high-intensity radiated fields.

For the purpose of this special condition, the following definition applies:

Critical Functions. Functions whose failure would contribute to or cause a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued In Renton, Washington, on July 13, 1999.

Donald L. Riggins,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service, ANM–100.

[FR Doc. 99–18564 Filed 7–20–99; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–267–AD]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–9–81, –82, –83, and –87 Series Airplanes (MD–81, –82, –83, and –87), and Model MD–88 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 McDonnell Douglas Model DC–9–81, –82, –83, and –87 series airplanes (MD–81, –82, –83, and –87), and Model MD–88 airplanes, that currently requires visual or eddy current inspections to detect cracks of the actuator cylinder support brackets of the slat drive mechanism assembly, and replacement of any cracked brackets. This action would continue to require repetitive eddy current inspections, would add an inspection requirement, and would expand the area of inspection. This action also would provide terminating action for the repetitive inspections. This proposal is prompted by reports indicating that additional cracking was found outside the original inspection area. The actions specified by the proposed AD are intended to prevent inadvertent slat retraction in flight.

DATES: Comments must be received by September 7, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation

Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 98–NM–267–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 Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Technical Publications Business Administration, Dept. C1–L51 (2–60). This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California.

FOR FURTHER INFORMATION CONTACT:

Brent Bandle, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5237; fax (562) 627–5210.

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 98–NM–267–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. 98-NM-267-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

On September 27, 1991, the FAA issued AD 91-21-11, amendment 39-8058 (56 FR 51645, October 15, 1991), applicable to all McDonnell Douglas Model DC-9-81, -82, -83, and -87 series airplanes (MD-81, -82, -83, and -87), and Model MD-88 airplanes, to require visual or eddy current inspections to detect cracks of the actuator cylinder support brackets of the slat drive mechanism assembly, and replacement of any cracked brackets. That action was prompted by reports of failures of the slat drive mechanism. The requirements of that AD are intended to prevent inadvertent slat retraction in flight.

Actions Since Issuance of Previous Rule

In the preamble to AD 91-21-11, the FAA specified that the actions required by that AD were considered to be interim action. The FAA indicated that it may consider further rulemaking action to require only repetitive eddy current inspections for airplanes that have accumulated 10,000 or more landings. The FAA has determined that further rulemaking action is indeed necessary; this proposed AD follows from that determination.

Since the issuance of AD 91-21-11, the FAA has received a report indicating that additional cracking was found outside the original inspection area. The cracking was found on a McDonnell Douglas Model MD-83 series airplane that had accumulated 32,478 total flight hours. The repetitive inspections in AD 91-21-11 were required to be performed on the top of the clevis lug (a U-shaped fitting that has matching holes in the arms of the U) of the actuator cylinder support brackets. The additional cracking was found within the clevis lug in the transition radius between the body of the actuator cylinder support bracket and the clevis lug.

Explanation of Relevant Service Information

The FAA has reviewed and approved McDonnell Douglas Alert Service Bulletin

MD80-27-A322, Revision 03, dated August 4, 1998, which, among other things, describes procedures for a one-

time, visual inspection and repetitive eddy current inspections to detect cracks of the actuator cylinder support brackets of the slat drive mechanism assembly. For certain airplanes, this would involve a one-time, visual and eddy current inspections, followed by repetitive eddy current inspections. For certain other airplanes this would involve repetitive eddy current inspections.

The FAA also has reviewed and approved McDonnell Douglas Service Bulletin MD80-27-322, Revision 02, dated February 11, 1998, which, among other things, describes procedures for modification of the actuator cylinder support bracket of the slat drive mechanism assembly. This modification involves replacing the actuator cylinder support bracket with a new, improved bracket and installing new associated components.

The specific modification of the actuator cylinder support bracket is predicated on whether a previous modification has been installed in accordance with a prior issue of McDonnell Douglas Service Bulletin MD80-27-322. For those airplanes on which a previous modification has been installed, operators would have the option of choosing one of the following:

- Option 1: Replacement and reidentification of the actuator cylinder support bracket assemblies, hydraulic pipe assemblies, and clamp assemblies with new components; or replacement of the hydraulic pipe clamp assemblies with new clamp assemblies; or
- Option 2: Removal and return of the slat drive mechanism to the manufacturer for modification and reidentification; installation of the modified and reidentified slat drive mechanism assembly, replacement of the hydraulic pipe assemblies with new pipe assemblies; or replacement of the hydraulic pipe clamp assemblies with new clamp assemblies.

For those airplanes on which no previous modification has been installed, operators would have the option of the choosing one of the following:

- Option 1: Replacement of the actuator cylinder support bracket assemblies, and hydraulic pipe assemblies and clamp assemblies with new components; and reidentification of the slat drive mechanism.
- Option 2: Removal and return of the slat drive mechanism to the manufacturer for modification and reidentification; installation of the modified and reidentified slat drive mechanism, and replacement of the hydraulic pipe clamp assemblies with new clamp assemblies.

Accomplishment of the modification for both actuator cylinder support brackets would eliminate the need for the repetitive inspections.

Accomplishment of the action specified in the service bulletins is intended to adequately address the identified unsafe condition.

FAA's Determination

The FAA has examined the circumstances and reviewed all the available information related to the additional cracking that was reported. Additionally, the FAA reviewed the requirements of AD 91-21-11, which required that either a visual or an eddy current inspection be performed to detect cracking of the slat drive mechanism. In light of the criticality of the unsafe condition (inadvertent retraction of the slats during flight), the FAA has determined that visual inspection methods may not be as effective in detecting the types of cracks associated the slat drive mechanism. This proposed AD would require a one-time visual inspection and an eddy current inspection be performed on all airplanes on which no previous inspection has been performed in accordance with AD 91-21-11. For airplanes on which the last inspection performed in accordance with AD 91-21-11 was a visual inspection, this proposed AD would require a visual inspection within 1,000 landings and an eddy current inspection within 6 months. All airplanes would be required to repeat the eddy current inspection at intervals not exceeding 3,000 landings, or until the terminating modification is accomplished, which would eliminate the need for the repetitive inspections.

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 91-21-11 to continue to require eddy current inspections for cracks of the actuator cylinder support brackets of the slat drive mechanism assembly, and replacement of any cracked brackets. This action also would add an inspection requirement and expand the area of inspection. This action also would provide terminating action for the repetitive inspections. The actions would be required to be accomplished in accordance with the service bulletins described previously, except as discussed below.

Differences Between Proposed Rule and Service Information

Operators should note that, although McDonnell Douglas Service Bulletin MD80-27-322, Revision 02, provides service information for performing repetitive visual and eddy current inspections, this proposed AD would require an initial visual inspection and repetitive eddy current inspections be performed in accordance with Revision 03 of the McDonnell Douglas Alert Service Bulletin MD80-27-A322. The FAA has determined that Revision 03 of the McDonnell Douglas alert service bulletin provides complete inspection instructions for the expanded inspection area that would be required by this proposed AD.

Additionally, operators should note that, although the McDonnell Douglas alert service bulletin (previously described), recommends that the initial visual inspection be performed within 60 days and that the eddy current inspection be performed within 6 months after receipt of the service bulletin, this proposed AD would require that the initial inspection be performed as described below, as applicable:

- For airplanes on which no inspection has been performed in accordance with AD 91-21-11: Perform visual and eddy current inspections prior to the accumulation of 10,000 total landings or within 30 days after the effective date of this AD, whichever occurs later.
- For airplanes on which the last inspection that was performed in accordance with AD 91-21-11 was a visual inspection: Perform visual inspection within 1,000 landings after the last visual inspection, followed by an eddy current inspection within 6 months.
- For airplanes on which the last inspection that was performed in accordance with AD 91-21-11 was an eddy current inspection: Perform eddy current inspection within 3,000 landings after the last eddy current inspection.

In developing the appropriate compliance time, the FAA considered the manufacturer's recommendation and the degree of urgency associated with addressing the subject unsafe condition. In light of these factors, the FAA finds that the compliance time specified by this proposed AD to be appropriate.

Cost Impact

There are approximately 1,180 airplanes of the affected design in the worldwide fleet. The FAA estimates that 787 airplanes of U.S. registry would be affected by this proposed AD.

The inspections that are currently required by AD 91-21-11 take approximately 3 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 actions on U.S. operators is estimated to be \$141,660, or \$180 per airplane, per inspection cycle.

The one-time visual inspection that is proposed in this AD action would take approximately 1 work hour per airplane to accomplish, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of the proposed requirements of the AD on U.S. operators is estimated to be \$47,220, or \$60 per airplane.

The inspections of the expanded area that are proposed in this AD action would take approximately 2 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 proposed requirements of this AD on U.S. operators is estimated to be \$94,440, or \$120 per airplane, per inspection cycle.

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 be required or elect to accomplish the terminating modification that is provided by this AD action, it would take between 130 and 162 work hours per airplane to accomplish, at an average labor rate of \$60 per work hour. Required parts would cost \$22,574 per airplane. Based on these figures, the cost impact of the optional terminating modification, is estimated to be between \$30,374 and \$32,294 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 39-8058 (56 FR 51645, October 15, 1991), and by adding a new airworthiness directive (AD), to read as follows:

McDonnell Douglas: Docket 98-NM-267-AD. Supersedes AD 91-21-11, Amendment 39-8058.

Applicability: All Model DC-9-81, -82, -83, and -87 series airplanes (MD-81, -82, -83, and -87); and Model MD-88 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 (h)(1) 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 inadvertent slat retraction in flight, accomplish the following:

Restatement of Certain Requirements of AD 91-21-11, Amendment 39-8058

(a) Prior to the accumulation of 10,000 total landings or within 30 days after October 30, 1991 (the effective date of AD 91-21-11), whichever occurs later, perform a visual or eddy current inspection to detect cracks of

the actuator cylinder support brackets of the slat drive mechanism assembly, part numbers 5938886—(any configuration) and 5938887—(any configuration), in accordance with the instructions in McDonnell Douglas MD-80 Alert Service Bulletin A27-322, dated August 22, 1991 (hereinafter referred to as "A27-322").

(b) If no crack is found during the inspection required by paragraph (a) of this AD, repeat the inspection at the following intervals:

(1) If the immediately preceding inspection was accomplished using visual means, conduct the next inspection within 1,000 landings.

(2) If the immediately preceding inspection was accomplished using eddy current means, conduct the next inspection within 3,000 landings.

(c) If any crack is found during any inspection required by paragraph (a) or (b) of this AD, prior to further flight, remove and replace the slat drive mechanism with a new part, part numbers 5938887—(any configuration) and 5938886—(any configuration), in accordance with A27-322.

New Requirements of This AD

Initial and Repetitive Inspections

(d) Perform visual and/or eddy current inspections, as applicable, to detect cracks of the actuator cylinder support brackets of the slat drive mechanism assembly, in accordance with McDonnell Douglas Alert Service Bulletin MD80-27-A322, Revision 03, dated August 4, 1998, at the time specified in paragraph (d)(1), (d)(2), or (d)(3), as applicable, of this AD.

(1) For airplanes on which no inspection has been performed in accordance with AD 91-21-11: Perform both visual and eddy current inspections prior to the accumulation of 10,000 total landings or within 30 days after the effective date of this AD, whichever occurs later.

(2) For airplanes on which the immediately preceding inspection was performed using visual means in accordance with AD 91-21-11, accomplish the requirements of paragraphs (d)(2)(i) and (d)(2)(ii) of this AD.

(i) Within 1,000 landings after the immediately preceding visual inspection, perform a visual inspection; and

(ii) Within 6 months after the last visual inspection required by paragraph (d)(2)(i) of this AD, perform an eddy current inspection.

(3) For airplanes on which the immediately preceding inspection was performed using eddy current means in accordance with AD 91-21-11: Perform an eddy current inspection within 3,000 landings after the last eddy current inspection.

(e) If no crack is found during any inspection required by paragraph (d) of this AD, repeat the eddy current inspection thereafter at intervals not to exceed 3,000 landings until the actions specified in paragraph (g) of this AD are accomplished for both actuator cylinder support brackets of the slat drive mechanism assembly.

Corrective/Terminating Action

(f) If any cracking is found during any inspection required by paragraph (d) or (e) of this AD, prior to further flight, modify the

actuator cylinder support bracket of the slat drive mechanism assembly (Option 1 or 2 for Group 1 or 2 airplanes, as applicable) in accordance with McDonnell Douglas Service Bulletin MD80-27-322, Revision 02, dated February 11, 1998, as specified in paragraph (f)(1) or (f)(2), as applicable, of this AD.

(1) For airplanes identified as Group 1 in the service bulletin: Accomplish the actions as identified in the service bulletin as Group 1 Option 1 or Group 1 Option 2.

(2) For airplanes identified as Group 2 in the service bulletin: Accomplish the actions as identified in the service bulletin as Group 2 Option 1 or Group 2 Option 2.

(g) Accomplishment of the modification of the actuator cylinder support bracket specified in paragraph (f) of this AD constitutes terminating action for the repetitive inspections required by this AD, provided that both actuator cylinder support brackets are modified.

Alternative Methods of Compliance

(h)(1) 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, Los Angeles Aircraft Certification Office (ACO), FAA, Transport 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, Los Angeles ACO.

(2) Alternative methods of compliance, approved previously in accordance with AD 91-21-11, amendment 39-8058, are approved as alternative methods of compliance for this AD.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

Special Flight Permits

(i) Special flight permits may be issued in accordance with §§ 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 July 15, 1999.

D.L. Riggins,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99-18626 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99-CE-25-AD]

RIN 2120-AA64

Airworthiness Directives; Stemme GmbH & Co. KG Models S10-V and S10-VT Sailplanes

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 Stemme GmbH & Co. KG (Stemme) Models S10-V and S10-VT sailplanes that incorporate a certain propeller blade suspension fork. The proposed AD would require repetitively exchanging (through the manufacturer) the propeller blade suspension fork for a propeller blade suspension fork that has passed X-ray crack testing requirements. 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 detect and correct fractured propeller blade suspension forks, which could result in the loss of a propeller blade during flight with possible lateral imbalance and loss of thrust.

DATES: Comments must be received on or before August 30, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 99-CE-25-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 Stemme GmbH & Co. KG, Gustav-Meyer-Allee 25, D-13355 Berlin, Germany; telephone: 49.33.41.31.11.70; facsimile: 49.33.41.31.11.73. This information also may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Kiesov, Aerospace Engineer, FAA, Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106; telephone: (816) 426-6934; 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. 99-CE-25-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. 99-CE-25-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 Stemme Models S10-V and S10-VT sailplanes. The LBA reports the loss of the propeller blade on one of the affected sailplanes during flight. Analysis of this propeller blade reveals a fracture located at the end of the threaded fastening pin.

This condition, if not detected and corrected, could result in lateral imbalance and loss of thrust.

Relevant Service Information

Stemme has issued Service Bulletin No. A31-10-051, Amendment 01.a, pages 3 and 4, dated March 6, 1999, which specifies repetitively exchanging (through the manufacturer) the propeller blade suspension fork for a propeller blade suspension fork that has passed X-ray crack testing requirements.

The LBA classified this service bulletin as mandatory and issued German AD 1999-224, dated June 4, 1999, in order to assure the continued airworthiness of these sailplanes in Germany.

The FAA's Determination

This sailplane model is manufactured in Germany and is type certificated for operation in the United States under the

provisions of § 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 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 Stemme Models S10-V and S10-VT sailplanes of the same type design registered in the United States, the FAA is proposing AD action. The proposed AD would require repetitively exchanging (through the manufacturer) the part number (P/N) A09-10AP-V08 (or FAA-approved equivalent part number) propeller blade suspension fork for one of these P/N forks that has passed X-ray crack testing requirements.

Relationship of the Proposed AD With AD 98-15-24

AD 98-15-24, Amendment 39-10674 (63 FR 39484), requires replacing the P/N 10AP-V08 propeller blade suspension fork with a P/N A09-10AP-V08 propeller blade suspension fork on Stemme Model S10-V sailplanes. The proposed AD is only written against those sailplanes with a P/N A09-10AP-V08 fork installed because the compliance time of the proposed AD is such that all affected sailplanes would have to comply with AD 98-15-24 before the proposed AD (if followed with a final rule) would become effective. With this in mind, none of the affected sailplanes would have a P/N 10AP-V08 propeller blade suspension fork installed at the time the proposed AD would need to be complied with.

Both the P/N A09-10AP-V08 and the P/N 10AP-V08 propeller blade suspension forks are part of the P/N 10AP-V08 propeller system configuration.

Cost Impact

The FAA estimates that 9 sailplanes in the U.S. registry would be affected by the proposed AD, that it would take approximately 12 workhours to remove and re-install the propeller blade suspension forks, and that the average labor rate is approximately \$60 an hour. There is no cost to the operator to

exchange the propeller blade suspension forks other than the labor costs. Based on these figures, the total cost impact of the proposed initial propeller blade suspension fork exchange on U.S. operators is estimated to be \$6,480, or \$720 per sailplane.

These figures only take into the account the costs of the initial propeller blade suspension fork exchange and do not take into account the costs of any repetitive propeller blade suspension fork exchanges. The FAA has no way of determining the number of repetitive propeller blade exchanges each owner/operator would incur over the life of his/her affected sailplane or until a terminating action is developed.

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:

Stemme GMBH & Co. KG: Docket No. 99-CE-25-AD.

Applicability: Models S10-V and S10-VT sailplanes, all serial numbers, certificated in any category.

Note 1: This AD applies to each sailplane 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 sailplanes 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 (c) 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 presented below:

- Initial Compliance:** Upon accumulating 100 hours time-in-service (TIS) on a part number (P/N) A09-10AP-V08 (or FAA-approved equivalent part number) propeller blade suspension fork or within the next 10 hours TIS after the effective date of this AD, whichever occurs later, unless already accomplished; and
- Repetitive Compliance:** Within 50 hours TIS after the initial compliance time and thereafter at intervals not to exceed 50 hours TIS.

Note 2: AD 98-15-24, Amendment 39-10674 (63 FR 39484), requires replacing the P/N 10AP-V08 (or FAA-approved equivalent part number) propeller blade suspension fork with a P/N A09-10AP-V08 fork on Stemme Model S10-V sailplanes. This AD is only applies to those sailplanes with a P/N A09-10AP-V08 fork installed because the compliance time of this AD is such that all the Stemme Model S10-V sailplanes would have to comply with AD 98-15-24 before this AD becomes effective. Both the P/N A09-10AP-V08 and the P/N 10AP-V08 propeller blade suspension forks are part of the P/N 10AP-V08 propeller system configuration.

To detect and correct fractured propeller blade suspension forks, which could result in the loss of a propeller blade during flight with possible lateral imbalance and loss of thrust, accomplish the following:

(a) At the initial and repetitive compliance times, exchange (through the manufacturer) the propeller blade suspension fork for a P/N A09-10AP-V08 propeller blade suspension fork that has passed X-ray crack testing requirements; and install the propeller blade suspension fork received from the manufacturer.

Note 3: Stemme Service Bulletin No. A31-10-051, Amendment 01.a, pages 3 and 4, dated March 6, 1999, pertains to the subject matter of this AD.

(b) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the

Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the sailplane to a location where the requirements of this AD can be accomplished.

(c) An alternative method of compliance or adjustment of the initial or repetitive compliance times that provides an equivalent level of safety may be approved by the Manager, Small Airplane Directorate, FAA, 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 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Small Airplane Directorate.

(d) Questions or technical information related to Stemme Service Bulletin No. A31-10-051, Amendment 01.a, dated March 6, 1999, should be directed to Stemme GmbH & Co. KG, Gustav-Meyer-Allee 25, D-13355 Berlin, Germany; telephone: 49.33.41.31.11.70; facsimile: 49.33.41.31.11.73. 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 5: The subject of this AD is addressed in German AD 1999-224, dated June 4, 1999.

Issued in Kansas City, Missouri, on July 14, 1999.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99-18630 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98-NM-367-AD]

RIN 2120-AA64

Airworthiness Directives; Boeing Model 727-100 and -100C Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 727-100 and -100C series airplanes. This proposal would require replacement of certain skin panels of the lower fuselage with non-bonded skin panels. This proposal is prompted by reports of corrosion of the skin panels of the lower fuselage on airplanes with hot-bonded doublers.

The actions specified by the proposed AD are intended to prevent degradation of the structural integrity of certain skin panels of the lower fuselage, which could result in loss of airplane pressurization.

DATES: Comments must be received by September 7, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 98-NM-367-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 Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207.

This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Walt Sippel, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-2774; fax (425) 227-1181.

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 98-NM-367-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. 98-NM-367-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

In 1990, the FAA issued AD 90-06-09, amendment 39-6488 (55 FR 8370, March 7, 1990), which required incorporation of certain structural modifications on certain Boeing Model 727 series airplanes, in accordance with Boeing Document No. D6-54860, Revision C, dated December 11, 1989, "Aging Airplane Service Bulletin Structural Modification Program—Model 727." One of those modifications was replacement of cold-bonded skin panels of the lower fuselage between body station (BS) 950 and BS 1183 with non-bonded skin panels. That AD was prompted in part by reports of corrosion of the skin panels of the lower fuselage on airplanes with cold-bonded doublers and triplers.

Since the issuance of AD 90-06-09, the FAA has received reports of corrosion of the skin panels of the lower fuselage on airplanes with hot-bonded doublers. Such corrosion causes degradation of the structural integrity of certain skin panels of the lower fuselage, which could result in loss of airplane pressurization.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Service Bulletin 727-53-0085, Revision 4, dated July 11, 1991, which describes procedures for repetitive inspections of the skin panels of the lower fuselage between BS 950 and BS 1183, and repair, if necessary. The service bulletin also describes procedures for a modification that involves replacement of the skin panels with non-bonded skin panels. Such replacement would eliminate the need for the repetitive inspections in that area. Accomplishment of the modification specified in the service bulletin is intended to adequately address the identified unsafe condition.

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 require accomplishment of the actions specified in the service bulletin described previously, except as discussed below.

Differences Between Proposed Rule and Service Bulletin

Operators should note that, although the service bulletin also describes procedures for repetitive inspections of certain skin panels of the lower fuselage, and repair, if necessary, this AD proposes to mandate only the replacement of certain skin panels of the lower fuselage with non-bonded skin panels. The repetitive inspections are mandated by AD 92-19-10, amendment 39-8368 (57 FR 47404, October 16, 1992), and the replacement of the skin panels is allowed in that AD as an optional terminating action. The FAA has determined that long-term continued operational safety will be better assured by modifications or design changes to remove the source of the problem, rather than by repetitive inspections. Long-term inspections may not be providing the degree of safety assurance necessary for the transport airplane fleet. This, coupled with a better understanding of the human factors associated with numerous repetitive inspections, has led the FAA to consider placing less emphasis on special procedures and more emphasis on design improvements. The proposed modification requirement is in consonance with these considerations.

Operators should also note that this proposed AD would be applicable to only some of the airplanes included in the effectivity listing of the service bulletin. AD 90-06-09 mandated the modification of certain skin panels of the lower fuselage for airplanes listed in Boeing Document No. D6-54860, Revision C, dated December 11, 1989, "Aging Airplane Service Bulletin Structural Modification Program—Model 727." The airplanes to which this proposed AD would be applicable are included in the effectivity listing of Revision H, dated May 9, 1996, of that document.

Cost Impact

There are approximately 67 airplanes of the affected design in the worldwide fleet. Based on a records review, the FAA estimates that only 38 of those airplanes are still in service. The FAA estimates that 23 airplanes of U.S. registry still in service would be affected by this proposed AD, that it would take approximately 1,216 work hours per airplane to accomplish the proposed replacement, and that the average labor

rate is \$60 per work hour. Required parts would cost approximately \$12,993 per airplane. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be \$1,976,919, or \$85,953 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

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 adding the following new airworthiness directive:

Boeing: Docket 98-NM-367-AD.

Applicability: Model 727-100 and -100C series airplanes; line numbers 126, 130, 146, 153, 221, 287, 331, 339, 345, 355, 416, 516, 532, 540, 551, 555, 559, 575, 592, 594, 596, 599, 600, 604, 605, 615, 619, 625, 626, 628, 630, 631, 632, 635, 640, 641, 643, 645, 647, 658, 660, 686, 695, 700, 711, 712, 735, 748, 766, 768, 784, 797, 803, 806, 810, 812, 817, 821, 822, 824, 829, 854, 856, 857, 858, 861, and 869; 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 (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 degradation of the structural integrity of certain skin panels of the lower fuselage, which could result in loss of airplane pressurization, accomplish the following:

(a) Within 20 years since original installation, or within 4 years after the effective date of this AD, whichever occurs later, replace the skin panels of the lower fuselage between body station (BS) 950 and BS 1183 with non-bonded skin panels, in accordance with Part VI of the Accomplishment Instructions of Boeing Service Bulletin 727-53-0085, Revision 4, dated July 11, 1991.

Note 2: Accomplishment of the modification specified in Boeing Service Bulletin 727-53-0085, Revision 2, dated July 3, 1975, or Revision 3, dated September 28, 1989, is acceptable for compliance with the replacement required by paragraph (a) of this AD.

Note 3: Accomplishment of the modification specified in paragraph (a) of this AD constitutes terminating action for the inspection requirements of AD 92-19-10, amendment 39-8368 (57 FR 47404, October 16, 1992) for those panels.

Alternative Methods of Compliance

(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, Seattle Aircraft Certification Office (ACO), FAA, Transport 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, Seattle ACO.

Note 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

(c) Special flight permits may be issued in accordance with §§ 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 July 15, 1999.

D.L. Riggins,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99-18628 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. 99-NM-14-AD]

RIN 2120-AA64

Airworthiness Directives; McDonnell Douglas Model DC-10-10, -15, and -30 Airplanes, and KC-10A (Military) Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to revise an existing airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC-10-10, -15, and -30 airplanes and KC-10A (military) airplanes, that currently requires inspections to determine the condition of the lockwires on the forward engine mount bolts and correction of any discrepancies found. That action also provides for termination of the inspections for some airplanes by installing retainers on the bolts. That AD was prompted by reports of stretched or broken lockwires on the forward engine mount bolts. The actions specified by that AD are intended to prevent broken lockwires, which could result in loosening of the engine mount bolts, and subsequent separation of the engine from the airplane. This new action would provide an additional optional terminating modification, clarification of the requirements of the previous optional terminating modification, and would remove the reporting requirements for the repetitive inspections.

DATES: Comments must be received by September 7, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 99-NM-14-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 The Boeing Company, Douglas Products Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Technical Publications Business Administration, Dept. C1-L51 (2-60). This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3936 Paramount Boulevard, Lakewood, California.

FOR FURTHER INFORMATION CONTACT: Ron Atmur, Aerospace Engineer, Airframe Branch, ANM-120L, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712-4137; telephone (562) 627-5224; fax (562) 627-5210.

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 99-NM-14-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. 99-NM-14-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

On February 16, 1995, the FAA issued AD 95-04-07, amendment 39-9159 (60 FR 11617, March 2, 1995), applicable to certain McDonnell Douglas Model DC-10-10, -15, and -30 series airplanes and KC-10A (military) airplanes. That AD required inspections to determine the condition of the lockwires on the forward engine mount bolts and correction of any discrepancies found. That action also provided for termination of the inspections for some airplanes by installing retainers on the bolts. That AD was prompted by reports of stretched or broken lockwires on the forward engine mount bolts. The actions specified by that AD are intended to prevent broken lockwires, which could result in loosening of the engine mount bolts, and subsequent separation of the engine from the airplane.

Actions Since Issuance of Previous Rule

Since the issuance of AD 95-04-07, the FAA issued AD 95-04-07 R1, amendment 39-9317 (60 FR 38477, July 27, 1995), that clarifies the procedures for accomplishing the optional terminating action on engines 1, 2, and 3.

Additionally, since the issuance of that AD, the FAA has received reports indicating that the lockwires of the forward engine mount bolts have failed since the incorporation of McDonnell Douglas DC-10 Service Bulletin 71-133, Revision 6, dated June 30, 1992 (which is referenced in the existing AD as the appropriate source of information for accomplishment of installation of retainers on the engine mount bolts of the engine 1, 2, or 3). The exact cause of the failures has not yet been determined.

That service bulletin segregates the affected airplanes into three groups and provides each group (two of which are relatively similar) with an option for accomplishing the modification of the forward engine mount bolts of engines 1, 2, and 3, as listed below:

- For airplanes listed as Groups I and III, the service bulletin describes procedures for replacing the bolts on pylons 1 and 3; the washers with tabs

on pylon 2 (for Group III—include bolts); and the H-11 steel material bolt, washers, and nuts on the engine 1, 2, and 3 forward and aft mounts with improved material.

- For airplanes listed as Group II, the service bulletin describes procedures for replacing the bolts on pylons 1 and 3; the washers with tabs on pylon 2; and the H-11 steel material bolt, washers, and nuts on the engine 1, 2, and 3 forward and aft mounts with improved material. Additionally, the modification includes installing four retention brackets (retainers) on the aft engine mounts on engines 1, 2, and 3.

As mentioned previously, failed lockwires have been reported. The failed lockwires occurred on airplanes that had incorporated the requirements for Groups I and III of the service bulletin. No reports of failed lockwires have been reported on airplanes that have incorporated the retainers in accordance with the service bulletin. In light of this, the FAA has determined that the installation of the retainers in accordance with the McDonnell Douglas service bulletin (previously described) should be incorporated in order to terminate the repetitive inspections required by this proposed AD. This clarification of the previous optional terminating action is specified in paragraph (b) of this proposed AD.

The FAA has reviewed and approved McDonnell Douglas Service Bulletins DC10-71-159, dated September 6, 1995, and Revision 01, dated July 28, 1997, as additional sources of service information for accomplishment of an optional terminating action. These service bulletins describe procedures for modification of the forward engine mount bolts of engines 1, 2, and 3. This involves removal of the existing lockwires from the forward engine mount bolts, modification and reidentification of the anti-ice duct, and installation of retainers on the forward engine mount bolts.

Accomplishment of this optional terminating modification would eliminate the need for the repetitive inspections.

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 revise AD 95-04-07 R1 to continue to require inspections to determine the condition of the lockwires on the forward engine mount bolts and correction of any discrepancies found. It also would continue to provide for termination of the inspections for some

airplanes by installing retainers on the bolts. This proposed AD would provide an additional optional terminating modification, clarification of the requirements of the previous optional terminating action, and would remove the reporting requirements for the repetitive inspections.

Differences Between Proposed Rule and Service Information

Operators should note that McDonnell Douglas Service Bulletins DC10-71-159, and Revision 01, recommend accomplishment of the modification of the forward engine mount bolts at the earliest practical maintenance period, but not to exceed 18 months from the issue date of the service bulletin. However, this proposed AD would allow operators the option of accomplishing the modification at their discretion.

The FAA has determined that, for this proposed AD, repetitive inspections of the lockwires of the forward engine mount bolts safely addresses the unsafe condition. The FAA has determined that repetitive inspections of an area may be permitted to continue indefinitely, although a positive fix to the problem exists, for the following reasons:

1. The inspection area of the forward engine mount bolts is easily accessible; and
2. In the event of a broken lockwire, it is easily detected; and
3. Since a single broken lockwire would not result in loss of an engine, the consequences of a single broken lockwire are not likely to be catastrophic.

In light of these reasons, the FAA has determined that the circumstances warranting continual repetitive inspections meet these three criteria.

Cost Impact

There are approximately 389 airplanes of the affected design in the worldwide fleet. The FAA estimates that 229 airplanes of U.S. registry would be affected by this proposed AD.

The inspections that are currently required by AD 95-04-07 R1 and retained in this proposed AD, would take approximately 2 work hours per airplane to accomplish, at an average labor rate of \$60 per hour. Based on these figures, the cost impact of the currently required inspections on U.S. operators is estimated to be approximately \$27,480, or \$120 per airplane, per inspection cycle.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the 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 terminating modification as specified in AD 95-04-07 R1, and the requirements clarified in this proposed AD, it would take approximately 4 work hours per airplane to accomplish, at an average labor rate of \$60 per hour. Required parts would cost between \$2,744 and \$2,822 per airplane. Based on these figures, the cost impact of the optional terminating modification specified by AD 95-04-07 R1 on U.S. operators is estimated to be between \$2,984 and \$3,062 per airplane.

Should an operator elect to accomplish the optional terminating modification specified in McDonnell Douglas Service Bulletin DC10-71-159 that would be provided by this AD, it would take approximately 16 work hours per airplane to accomplish the proposed actions, at an average labor rate of \$60 per work hour. Required parts would cost between \$2,744 and \$2,822 per airplane. Based on these figures, the cost impact of the optional terminating modification proposed by this AD on U.S. operators is estimated to be between \$3,704 and \$3,782 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 39-9317 (60 FR 38477, July 27, 1995), and by adding a new airworthiness directive (AD), to read as follows:

McDonnell Douglas: Docket 99-NM-14-AD. Revises AD 95-04-07 R1, Amendment 39-9317.

Applicability: Model DC-10-30 and KC-10A (military) airplanes on which bolt retainers have not been installed on the engine mount in accordance with McDonnell Douglas DC-10 Service Bulletin 71-133, Revision 6, dated June 30, 1992; and all Model DC-10-10 and -15 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 (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 broken lockwires, which could result in loosening of the engine mount bolts, and subsequent separation of the engine from the airplane, accomplish the following:

Restatement of Requirements of AD 95-04-07 R1, Amendment 39-9317

(a) Within 120 days after March 17, 1995 (the effective date of AD 95-04-07 R1, amendment 39-9317), unless accomplished previously within the last 750 flight hours prior to March 17, 1995, perform a visual inspection to detect broken lockwires on the forward engine mount bolts on engines 1, 2, and 3, in accordance with McDonnell Douglas Alert Service Bulletin DC10-71A159, Revision 1, dated January 31, 1995.

(1) If no lockwire is found broken, repeat the inspection thereafter at intervals not to exceed 750 flight hours.

(2) If any lockwire is found broken, prior to further flight: Check the torque of the bolt,

install a new lockwire, and install a torque stripe on the bolt, in accordance with the alert service bulletin. Thereafter at intervals not to exceed 750 flight hours, perform a visual inspection to detect misalignment of the torque stripes, and repeat the inspection to detect broken lockwires, in accordance with the alert service bulletin.

Optional Terminating Actions

(b) For Model DC-10-30 airplanes and KC-10A (military) airplanes only: Installation of retainers on the engine mount bolts of engines 1, 2, or 3 in accordance with the procedures depicted in Figure 6 of Revision 6 of McDonnell Douglas DC-10 Service Bulletin 71-133, dated June 30, 1992, constitutes terminating action for the requirements of this AD for that engine.

(c) For Model DC-10-10, -15, and -30 airplanes and KC-10A (military) airplanes: Modification of the forward engine mount bolts for engine 1, 2, or 3 in accordance with McDonnell Douglas Service Bulletin DC10-71-159, dated September 6, 1995, or Revision 01, dated July 28, 1997, constitutes terminating action for the requirements of this AD for that engine.

Alternative Methods of Compliance

(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, Los Angeles Aircraft Certification Office (ACO), FAA, Transport 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, Los Angeles ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

Special Flight Permits

(e) Special flight permits may be issued in accordance with §§ 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 July 15, 1999.

D.L. Riffin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.
[FR Doc. 99-18629 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG-116991-98]

RIN 1545-AW88

Compromises

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing temporary regulations relating to the compromise of tax liabilities. These regulations provide additional guidance regarding the compromise of internal revenue taxes. The temporary regulations reflect changes to the law made by the Internal Revenue Service Restructuring and Reform Act of 1998 and the Taxpayer bill of Rights II. The text of the temporary regulations also serves as the text of these proposed regulations.

DATES: Written or electronically generated comments and requests for a public hearing must be received by October 19, 1999.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG-116991-98), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044.

Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG-116991-98), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at http://www.irs.gov/prod/tax_regs/comments.html.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Carol A. Campbell, (202) 622-3620 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend the Procedure and Administration Regulations (26 CFR part 301) under section 7122 of the Internal Revenue Code. The temporary regulations reflect the amendment of section 7122 by section 3462 of the Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA 1998") Public Law, 105-206, (112 Stat. 685, 764) and by section 503(a) of Taxpayer Bill of Rights II Public Law 104-168, (110 Stat. 1452, 1461).

The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the regulations.

Special Analyses

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

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronically generated comments that are submitted timely to the IRS. The IRS generally requests any comments on the clarity of the proposed rule and how it may be made easier to understand.

Section 3462 of RRA 1998 and its legislative history provide for the consideration of factors such as equity, hardship, and public policy in the compromise of tax cases, if such consideration would promote effective tax administration. The legislative history also states that the IRS should use this new compromise authority "to resolve longstanding cases by forgoing penalties and interest which have accumulated as a result of delay in determining the taxpayer's liability." H. Conf. Rep. 599, 105th Cong., 2d Sess. 289 (1998). The text of the temporary regulation provides the authority to compromise cases involving issues of equity, hardship, and public policy, if such a compromise would promote effective tax administration. The temporary regulation provides factors to be considered and examples of cases that could be compromised under this authority when collection of the full amount of the tax liability would create economic hardship. The temporary regulation also provides limited examples of cases that could be compromised when the facts and circumstances presented indicate that collection of the full tax liability would be detrimental to voluntary compliance. The temporary regulation does not contain examples of longstanding cases that could be compromised to promote

effective tax administration when penalties and interest have accumulated as the result of delay by the Service in determining the tax liability.

The public is specifically encouraged to make comments or provide examples regarding the particular types of cases or situations in which the Secretary's authority to compromise should be used because: (1) collection of the full amount of tax liability would be detrimental to voluntary compliance or (2) IRS delay in determining the tax liability has resulted in the accumulation of significant interest and penalties. In formulating comments regarding delay in interest and penalty cases, consideration should be given to the possible interplay between cases compromised under this provision and the relief accorded taxpayers under I.R.C. section 6404(e).

All comments will be available for public inspection and copying.

A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information: The principal author of these regulations is Carol A. Campbell, Office of the Assistant Chief Counsel (General Litigation) CC:EL:GL, IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

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

PART 301—PROCEDURE AND ADMINISTRATION

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

Authority: 26 U.S.C. 7805 * * *

Paragraph 2. Section 301.7122-1 is added to read as follows:

§ 301.7122-1 Compromises.

[The text of this proposed section is the same as the text of § 301.7122-1T published elsewhere in this issue of the **Federal Register**.]

Charles O. Rossotti,

Commissioner of Internal Revenue.

[FR Doc. 99-18457 Filed 7-19-99; 8:45 am]

BILLING CODE 4830-01-U

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[COTP Western Alaska 99-002]

RIN 2115-AA97

Safety Zone; Gulf of Alaska, southeast of Narrow Cape, Kodiak Island, AK

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone in the Gulf of Alaska, southeast of Narrow Cape, Kodiak Island, Alaska. The zone is needed to protect the safety of persons and vessels operating in the vicinity of the safety zone during a rocket launch from the Alaska Aerospace Development Corporation, Narrow Cape, Kodiak Island facility. Entry of vessels or persons into this zone would be prohibited unless specifically authorized by the Coast Guard Captain of the Port, Western Alaska, or his on-scene representative. The intended affect of the proposed safety zone is to ensure the safety of human life and property during the rocket launch.

DATES: Comments must be received on or before August 20, 1996. The proposed safety zone would become effective at 6 a.m. on September 15, 1999, and terminate at 10 p.m. on November 15, 1999.

ADDRESSES: Address all comments concerning this proposed rule to LCDR Byron Black, Planning Officer, Coast Guard Captain of the Port Western Alaska, 510 L Street, Suite 100, Anchorage, Alaska 99501.

FOR FURTHER INFORMATION CONTACT: LCDR Byron Black at (907) 271-6723.

SUPPLEMENTARY INFORMATION: .

Background and Purpose

The Alaska Aerospace Development Corporation (AADC), in conjunction with the United States Air Force, will launch an unmanned rocket from their facility at Narrow Cape, Kodiak Island Alaska, some time between September 15, 1999, and November 15, 1999. The safety zone would be necessary to protect spectators and transiting vessels from the potential hazards associated with the launch.

The launch is scheduled to take place sometime between September 15, 1999, and November 15, 1999. The Coast Guard would announce by Broadcast Notice to Mariners the anticipated date and time of the launch and would grant general permission to enter the safety

zone during those times in which the launch did not pose a hazard to mariners. Because the hazardous condition should last for about 4 hours of one day, and because general permission to enter the safety zone would be given during non-hazardous times, the impact of this rule on commercial and recreation traffic would be minimal.

Discussion of the Regulation

The proposed safety zone would encompass an area of about 72 square nautical miles in the Gulf of Alaska, southeast of Narrow Cape, Kodiak Island, Alaska. Specifically the proposed zone would encompass the waters of the Gulf of Alaska within the area bounded by a line drawn from a point located at 57°30.5' North, 152°23.5' West, thence southeast to a point located at 57°21.0' North, 151°53.0' West these southwest to a point located at 57°15.5' North, 151°58.5' West, thence northwest to a point located at 57°25.0' North, 152°29.5' West, and thence northeast to the point located at 57°30.5' North, 152°23.5' West. All coordinates refer to Datum: NAD 1983.

This proposed safety zone is necessary to protect spectators and transiting vessels from the potential hazards associated with the launch of the Alaskan Aerospace rocket. The safety zone would become effective at 6 a.m. on September 15, 1999, and terminate at 10 p.m. on November 15, 1999.

Regulatory Evaluation

This proposed rule is not a significant regulatory action under subsection 3(f) of Executive Order 12866 and does not require an assessment of potential cost and benefits under paragraph 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 10(e) of the regulatory policies and procedures of DOT is unnecessary.

Small Entities

Under the Regulatory Flexibility Act [5 U.S.C., 601 et seq.], the Coast Guard considers whether the proposed rule would have significant economic impacts on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently

owned and operated and are not dominant in their field, an governmental jurisdiction with populations less than 50,000. Because the hazardous condition should last for around four hours of one day, and because general permission to enter the safety zone would be given during non-hazardous times, the impact of this rule on commercial and recreational traffic should be minimal. The Coast Guard believes there would be minimal impact on small entities. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities.

Collection of Information

This proposed rule contains no information-collection requirements under the Paperwork Reduction Act [44 U.S.C. 3501 et seq.].

The Coast Guard has analyzed this proposed rule under the principles and criteria contained in Executive Order 12612 and has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

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

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water). Reporting and recordkeeping requirements, Security measures, Vessels, Waterways.

For the reasons set out in the preamble, the Coast Guard proposes to amend 33 CFR Part 165 as follows:

PART 165—[AMENDED]

1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05-1(g), 6.04-1, 6.04-6, and 160.5; 49 CFR 1.46.

2. Add temporary § 165.T17-002 to read as follows:

§ 165.T17-002 Alaska Aerospace Development Corporation, Narrow Cape, Kodiak Island: safety zones.

(a) *Description.* This safety zone encompasses an area of about 72 square nautical miles in the Gulf of Alaska, southeast of Narrow Cape, Kodiak Island, Alaska. Specifically, it encompasses the waters of the Gulf of Alaska within the area bounded by a

line drawn from a point located at 57°30.5' North, 152°23.5' West, thence southeast to a point located at 57°21.0' North, 151°53.0' West thence southwest to a point located at 57°15.5' North, 151°58.5' West, thence northwesterly to a point located at 57°25.0' North, 152°29.5' West, and thence northeast to the point located at 57°30.5' North, 152°23.5' West. All coordinates refer to Datum: NAD 1983.

(b) *Effective dates.* This section becomes effective at 6 a.m. on September 15, 1999, and terminates at 10 p.m. on November 15, 1999.

(c) *Regulations.* (1) The Captain of the Port Western Alaska, and the Duty Officer at Marine Safety Office, Anchorage, Alaska are available at telephone number (907) 271-6700 or on VHF marine channel 16.

(2) The Captain of the Port may authorize and designate any Coast Guard commissioned, warrant, or petty officer to act on this behalf in enforcing the safety zone.

(3) The general regulations governing safety zones contained in 33 CFR § 165.23 of this part apply. No person or vessel may enter or remain in this safety zone, with the exception of attending vessels, without first obtaining permission from the Captain of the Port, or his on-scene representative is available onboard the U.S. Coast Guard cutter in the vicinity of Narrow Cape on VHF marine channel 16.

Dated: June 2, 1999.

W.J. Hutmacher,

Captain, U.S. Coast Guard, Captain of the Port, Western Alaska.

[FR Doc. 99-18496 Filed 7-20-99 8:45 am]

BILLING CODE 4910-15-M

DATES: The dates for the negotiation sessions are announced in the supplementary information section of this document.

FOR FURTHER INFORMATION CONTACT:

Philip Schulz, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4020, ROB-3, Washington, DC 20202-5243. Telephone: (202) 708-8429. If you use a telecommunications device for the deaf (TDD) you may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION: On June 30, 1999, we published in the **Federal Register** (64 FR 35105) a notice announcing that we would be establishing a negotiated rulemaking committee to develop proposed regulations to implement chapter 2 of subpart 2 of part A of Title IV of the Higher Education Act of 1965 (HEA), "Gaining Early Awareness and Readiness for Undergraduate Programs" (GEAR UP). In that notice, we also solicited nominations from anyone who believed that his or her organization or group should participate in the GEAR UP negotiated rulemaking process.

We list the organizations that we have selected to participate in the GEAR UP negotiated rulemaking process. We have identified the organizations listed as effective representatives of the interests that are significantly affected by the subject matter of the negotiated rulemaking. Organizations not listed that have expressed an interest in participating in the process are encouraged to work with the listed organizations to ensure that their views are known. Please note that participation in the rulemaking process is not limited to members of the committee. Following the negotiated rulemaking process, the Department will publish proposed rules in the **Federal Register** for public comment. The target date of publication of proposed rules developed by the committee is October, 1999.

GEAR UP Negotiated Rulemaking Committee

California State University System
The College Board
Council for Opportunity in Education
Council of the Great City Schools
Ford Foundation
High School Equivalency Program and the College Assistance Migrant Program Association and the National

Association for Migrant Education, Inc. (a coalition)
Hispanic Association of Colleges and Universities
"I Have a Dream" Foundation
National Alliance of Black School Educators
National Association for College Admission Counseling
National Association of Independent Colleges and Universities
National Association of Secondary School Principals and the National Forum on Middle-Grades Reform (a coalition)
National Association of State Student Grant and Aid Programs
National Coalition of Title I/Chapter I Parents
National Collaboration for Youth
National Council of Higher Education Loan Programs
National Education Association
U.S. Chamber of Commerce
United States Student Association

Schedule for Negotiations

We expect that there will be a total of up to 3 meetings of the committee, and we have scheduled the meetings to take place at the Department of Education (FB-6). All meetings will be open to the public. The following is the schedule for negotiations for the committee.

Session 1: July 29-30

Session 2: August 30-31

Session 3: September 22-23

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<http://ocfo.ed.gov/fedreg.htm>

<http://www.ed.gov/news.html>

To use the PDF you must have the Adobe Acrobat Reader Program with Search, which is available free at either of the previous sites. If you have questions about using the PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-888-293-6498; or in the Washington, D.C. area, at (202) 512-1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at:

<http://www.access.gpo.gov/nara/index.html>

(Catalog of Federal Domestic Assistance Number does not apply)

DEPARTMENT OF EDUCATION

Office of Postsecondary Education

34 CFR Part 694

Notice of Negotiated Rulemaking Process for GEAR UP

AGENCY: Department of Education.

ACTION: Notice of negotiated rulemaking process for GEAR UP.

SUMMARY: We are announcing the formation of the negotiated rulemaking committee that will develop proposed regulations to implement chapter 2 of subpart 2 of part A of Title IV of the Higher Education Act of 1965 (HEA), "Gaining Early Awareness and Readiness for Undergraduate Programs" (GEAR UP). We also announce the schedule for the negotiating sessions.

Program Authority: 20 U.S.C. 1090a.

Claudio R. Prieto,

Acting Assistant Secretary for Postsecondary Education.

[FR Doc. 99-18727 Filed 7-20-99; 8:45 am]

BILLING CODE 4000-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MI69-01-7277b; FRL-6357-4]

Approval and Promulgation of State Implementation Plans; Michigan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve several rule revisions and rescissions for incorporation into Michigan's State Implementation Plan (SIP). The Michigan Department of Environmental Quality (MDEQ) submitted these revisions on August 20, 1998 and supplemented them with a November 3, 1998, letter. They include revisions to degreasing, perchloroethylene dry cleaning, petroleum refinery, synthetic organic chemical manufacturing, and delivery vessel loading rules, and a number of rule rescissions.

In the final rules section of this **Federal Register**, EPA is approving the State's request as a direct final rule without prior proposal because EPA views this action as noncontroversial and anticipate no adverse comments. EPA has set forth a detailed rationale for approving the State's request in the direct final rule. The direct final rule will become effective without further notice unless we receive relevant adverse written comment. Should we receive adverse comment, EPA will publish a timely withdrawal informing the public that this direct final rule will not take effect; and that we will address the public comment received in a subsequent final rule based on the proposed rule. If EPA does not receive adverse written comments, the direct final rule will take effect on the date stated in that document, and there will be no further action on this rule. EPA does not plan to institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

DATES: Written comments must be received by August 20, 1999.

ADDRESSES: You may send written comments to: Carlton T. Nash, Chief,

Regulation Development Section, Air Programs Branch (AR-18J), United States Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Copies of the documents relevant to this action are available for public inspection during normal business hours at the above address. (Please telephone Kathleen D'Agostino at (312) 886-1767 before visiting the Region 5 Office.)

FOR FURTHER INFORMATION CONTACT: Kathleen D'Agostino at (312) 886-1767.

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule published in the rules section of this **Federal Register**.

Dated: May 28, 1999.

Francis X. Lyons,

Regional Administrator, Region 5.

[FR Doc. 99-18475 Filed 7-20-99; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 226-0159b FRL-6376-2]

Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision, South Coast Air Quality Management District and Yolo-Solano Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the California State Implementation Plan (SIP) which concern the control of volatile organic compound (VOC) emissions from organic liquid loading, pharmaceutical and cosmetics manufacturing operations, and polyester resin operations.

The intended effect of this action is to regulate emissions of VOCs in accordance with the requirements of the Clean Air Act, as amended in 1990 (CAA or the Act). In the Final Rules section of this **Federal Register**, the EPA is approving the state's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision and anticipates no adverse comments. A detailed rationale for this approval is set forth in the direct final rule. If no adverse comments are received, no further activity is contemplated. If EPA

receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period. Any parties interested in commenting should do so at this time.

DATES: Written comments must be received by August 20, 1999.

ADDRESSES: Comments should be addressed to: Andrew Steckel, Rulemaking Office (AIR-4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901.

Copies of the rule revisions and EPA's evaluation report of each rule are available for public inspection at EPA's Region IX office during normal business hours. Copies of the submitted rule revisions are also available for inspection at the following locations:

Environmental Protection Agency, Air Docket (6102), 401 "M" Street, S.W., Washington, D.C. 20460.

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 "L" Street, Sacramento, CA 95812.

South Coast Air Quality Management District, 21865 East Copley Drive, Diamond Bar, CA 91765.

Yolo-Solano Air Pollution Control District, 1947 Galileo Court, Suite 103, Davis, CA 95616.

FOR FURTHER INFORMATION CONTACT: Al Petersen, Rulemaking Office, AIR-4, Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744-1135.

SUPPLEMENTARY INFORMATION: This document concerns SCAQMD Rule 462, Organic Liquid Loading, SCAQMD Rule 1103, Pharmaceuticals and Cosmetics Manufacturing Operations, and YSAQMD Rule 2.30, Polyester Resin Operations. These rules were submitted by the California Air Resources Board to EPA on June 3, 1999, May 13, 1999, and June 3, 1999, respectively. For further information, please see the information provided in the direct final action that is located in the rules section of this **Federal Register**.

Dated: June 29, 1999.

Laura Yoshii,

Acting Regional Administrator, Region IX.

[FR Doc. 99-18473 Filed 7-20-99; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF TRANSPORTATION**Bureau of Transportation Statistics****49 CFR Part 1420****[Docket No. BTS-98-4659]****RIN 2139-AA05****Revision to Reporting Requirements for Motor Carriers of Property and Household Goods****AGENCY:** Bureau of Transportation Statistics, DOT.**ACTION:** Withdrawal of proposed rule.

SUMMARY: The Bureau of Transportation Statistics (BTS) published a Supplemental Notice of Proposed Rulemaking on March 23, 1999, regarding its motor carrier financial and operating data collection program. The proposal would have restricted access to individual carrier data for some of the operating statistics, revenue equipment, and employment data items. Access to these data items would have been limited to the Department of Transportation and to such persons and in such circumstances as DOT determined to be in the public interest or consistent with the Department's regulatory functions and responsibilities. Most of the comments strongly opposed adopting the proposed rule. After considering the issues raised by the comments, BTS is withdrawing the Supplemental Notice of Proposed Rulemaking.

DATES: The proposed amendment to § 1420.10, published on March 23, 1999 (64 FR 13948), is withdrawn on July 21, 1999.

FOR FURTHER INFORMATION CONTACT: David Mednick, K-1, Bureau of Transportation Statistics, 400 Seventh Street, SW., Washington, DC 20590; (202) 366-8871; fax: (202) 366-3640; e-mail: david.mednick@bts.gov.

SUPPLEMENTARY INFORMATION:**I. Electronic Access**

You can examine all comments that were submitted to the Rules Docket concerning this rulemaking at: Department of Transportation, 400 Seventh Street, SW., Room PL-401, Washington, DC 20590, from 10 a.m. to 5 p.m., Monday through Friday, except Federal holidays. Internet users can access the comments at the address: <http://dms.dot.gov>. Search for Docket Number 4659. Please follow the instructions online for more information and help.

You can download an electronic copy of this document using a modem and suitable communications software from

the Federal Register Electronic Bulletin Board Service at (202) 512-1661. If you have access to the Internet, you can obtain an electronic copy at <http://www.bts.gov/mcs/rulemaking.htm>.

II. Background

Under 49 U.S.C. 14123 and its implementing regulations at 49 CFR 1420, BTS collects financial and operating information from for-hire motor carriers of property and household goods. The data are collected on annual Form M, filed by Class I and Class II carriers, and quarterly Form QFR, filed only by Class I carriers. The data are used by the Department of Transportation, other federal agencies, motor carriers, shippers, industry analysts, labor unions, segments of the insurance industry, investment analysts, and the consultants and data vendors that support these users. Among the uses of the data are: (1) Developing the U.S. national accounts and preparing the quarterly estimates of the Gross Domestic Product; (2) measuring the performance of the for-hire motor carrier industry and segments within it; (3) monitoring carrier safety; (4) benchmarking carrier performance; and (5) analyzing motor carrier safety, productivity, and its role in the economy.

On November 3, 1998, BTS initiated a rulemaking to consider what data items BTS should collect and how BTS should implement a system whereby carriers could, in order to avoid competitive harm, request that their reported information be kept confidential or that they be excused from filing (63 FR 59263). The final rule was published on March 23, 1999 (64 FR 13916). On the same day, BTS published a Supplemental Notice of Proposed Rulemaking (SNPRM) concerning access to motor carrier financial and operating information reported to BTS (64 FR 13948). Under current policy, all reported data are made available at the carrier level. The only exception is when a carrier is granted confidentiality under 49 CFR 1420.9 based on competitive harm, in which case its report is withheld from public release for three years. BTS reviewed this policy in light of comments received during the rulemaking and the governing legislation. Under the legislation, in designing the data collection program BTS must consider: (1) Safety needs; (2) the need to preserve confidential business information and trade secrets and prevent competitive harm; (3) private sector, academic, and public use of information in the reports; and (4) the public interest. In other words, BTS has

to consider both confidentiality issues and data access issues.

The proposed regulation was therefore intended to strike a balance between the interests of respondents, many of whom do not want data they believe are proprietary and sensitive made available to competitors, shippers, and the public, and the interests of data users, who often need access to individual carrier data. While most data would be fully available, BTS sought to withhold the most sensitive data items from general release. Those data items receiving protection would be available only for key uses and this limitation would apply to data reported by all carriers. For these data items, access would be allowed only as follows: (1) Aggregate statistics that do not identify a particular carrier would be available to the public; (2) individual carrier data would be available only to Department of Transportation users and those users whose access is "in the public interest or consistent with the Department's regulatory functions and responsibilities;" and (3) individual carrier data previously kept confidential would be available to the public after three years.

III. General Summary of the Comments

BTS received 10 comments on the proposal, from the American Moving and Storage Association, the Central Analysis Bureau, the Inland Marine Underwriters Association, the International Brotherhood of Teamsters, Landstar System, Jack A. Nickerson, Transportation Technical Services, the Transportation Trades Department of the AFL-CIO, University of Michigan Trucking Industry Program, and Klaas T van't Veld. Nine of the commenters were opposed to the proposal and wanted it withdrawn; one supported the proposal as written.

Landstar System supported the proposal, stating that it would withhold certain sensitive information and struck a reasonable balance. The comments opposing the proposal were generally based on three arguments: (1) BTS does not have the authority to restrict access to data, except case-by-case based on carrier requests; (2) public availability of the data does not and will not cause competitive harm to the reporting carrier; and (3) the proposed system would impair important uses of the data.

IV. Withdrawal of the Proposed Rule

BTS appreciates both the concern that sensitive information be protected to the extent possible and the concern that the insurance industry, safety analysts, other researchers, and other data users

have timely access to information about the motor carrier industry and individual motor carriers. BTS has carefully reviewed the comments received. After considering the concerns raised on both sides of the issue, we are convinced that the proposal as written would not accomplish the goal of striking an appropriate balance and that BTS does not have enough experience with respect to the recent changes made to the program to make adequate adjustments. BTS is therefore withdrawing the supplemental proposal.

The SNPRM requested comments on whether and why public availability of the identified data items, or other data items, would be likely to cause substantial competitive harm. BTS received comments from only one carrier, which said the information was sensitive and release would cause competitive harm. Additionally, in the initial rulemaking, BTS received several similar generalized assertions. However, BTS received no explanation or examples of how public access would cause competitive harm for carriers generally, leaving the assertions unsupported.

BTS is also concerned that the changes it proposed were premature. The possibility of competitive harm resulting from public release of data is inextricably intertwined with what data items are collected. The types of data collected, the level of detail they are collected at, and how those data can be put together with other available data must all be considered. In the final rule published the same day as the SNPRM, BTS made many changes to the report forms, eliminating some categories of data items and either reducing detail or

changing what is collected in others. The amount of information reported by Class I carriers was reduced by 64 percent. For Class II carriers, the burden was not reduced, but the report form was significantly changed. The feedback BTS received regarding confidentiality was based largely on the old forms. Therefore, BTS does not know how the changes in the forms impact the confidentiality issue. Also, before the final rule was published, carriers did not have a mechanism for requesting confidentiality. Now individual carriers can request confidentiality protection based on a competitive harm standard. If a carrier meets the standard, BTS must withhold its report from public release. Carriers can also request an exemption from filing based on a similar standard. In order to know what further protections are needed, if any, BTS must review how effective these new mechanisms are. In sum, in order for BTS to accomplish its goal of striking an appropriate balance, it needs to gain more experience with the major changes it recently made.

Gaining experience and additional information will also be critical in solving several problems pointed out in the comments. For instance, while it may sound reasonable to limit access to certain classes of users—those classes where access would be least likely to cause competitive harm—this presents several practical problems. For instance, researchers would be able to conduct safety and policy-relevant studies with carrier-level data, but the researchers would not be able to publish their results at the carrier level. Not only would this preclude the presentation of many of the meaningful findings, but others would not be able to examine and

critique their work. Similarly, it is not clear whether safety researchers outside of academia would have access, although safety is certainly a concern to many others. For instance, how would access work with organizations such as trucking associations or labor unions, which are likely to have broad interests including safety? Thus, the proposal would not achieve its goal of not impeding access for safety and other key uses. While these problems have been raised, no solutions—other than withdrawing the proposal—were suggested.

While we will continue to monitor the issue and seek feedback from respondents and data users, BTS believes it would be unwise to proceed at this time. Any changes would have to come after the benefit of more experience regarding the recent changes and a deeper understanding of the issues. BTS can then determine whether and how to make further adjustments regarding access to reported data.

V. Effect on the Availability of Reported Data

While the SNPRM was pending, BTS did not release any reported data from the 1998 annual report and the 1999 quarterly reports. By withdrawing this proposal, BTS will make that information available, except as otherwise prohibited by law. For instance, pursuant to 49 CFR 1420.10, BTS will not release data where a carrier's report has been granted confidential treatment or is covered by a pending confidentiality request.

Ashish Sen,

Director.

[FR Doc. 99-18643 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-FE-P

Notices

Federal Register

Vol. 64, No. 139

Wednesday, July 21, 1999

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

Foreign Agricultural Service

Supplemental Information Concerning Quota Periods Applicable to Quantity Trigger Levels for Safeguard Measures Provided for in the Uruguay Round Agreement on Agriculture

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Notice.

SUMMARY: This notice supplements the 64 FR 11435 (March 9, 1999), and 63 FR 13387 (March 19, 1998), notices by clarifying the applicable period (quota year) for the trigger levels on products subject to the safeguard provisions.

EFFECTIVE DATE: July 21, 1999.

FOR FURTHER INFORMATION CONTACT:

Cathy S. Mckinnell, Multilateral Trade Negotiations Division, Foreign Agricultural Service, room 5530—South Building, U.S. Department of Agriculture, Washington, DC 20250—1022, telephone at (202) 720-6064, or e-mail at mckinnell@usda.gov.

SUPPLEMENTARY INFORMATION: Article 5 of the Uruguay Round Agreement on Agriculture provides that additional import duties may be imposed on imports of products subject to tariffication during the Uruguay Round if certain conditions are met. One circumstance under which the agreement permits additional duties to be imposed is if the volume of imports of a product exceeds by a specified percentage, depending on the product, the average of the most recent 3 years for which data are available. These additional duties may not be imposed on quantities for which minimum or current access commitments were made during the Uruguay Round negotiations.

Section 405 of the Uruguay Round Agreements Act requires that the President cause to be published in the **Federal Register** the annual quantity trigger levels based on import levels during the most recent 3 years, and the relevant period for the quantity-based

safeguard for each product. The President delegated this duty to the Secretary of Agriculture in Presidential Proclamation No. 6763, dated December 23, 1994. The Secretary of Agriculture further delegated the duty to the Administrator, Foreign Agriculture Service (7 CFR 2.43(a)(2)).

In the March 1989 and 1999 notices, applicable periods for those trigger levels were inadvertently omitted. This notice is to clarify the applicable periods consistent with earlier notices and the Harmonized Tariff Schedule of the United States (HTS).

Notice

The relevant periods for the respective quantity trigger levels currently in effect or to become effective in calendar year 1999 are set forth in the Annex to this notice.

Issued at Washington, DC this 15th day of July 1999.

Timothy J. Galvin,

Administrator, Foreign Agricultural Service.

Annex

The definitions of these products were provided in the Notice of Safeguard Action published in the **Federal Register**, 60 FR 427, January 4, 1995.

QUANTITY BASED SAFEGUARD TRIGGER

Product	Trigger level	Period
Beef	891,203 mt	January 1, 1999 to December 31, 1999.
Mutton	12,051 mt	January 1, 1999 to December 31, 1999.
Cream	5,729,263 liters	January 1, 1999 to December 31, 1999.
Evaporated or Condensed Milk	2,956,168 kilograms	January 1, 1999 to December 31, 1999.
Nonfat Dry Milk	3,313,542 kilograms	January 1, 1999 to December 31, 1999.
Dried Whole Milk	1,864,488 kilograms	January 1, 1999 to December 31, 1999.
Dried Cream	650 kilograms	January 1, 1999 to December 31, 1999.
Dried Whey/Buttermilk	222,488 kilograms	January 1, 1999 to December 31, 1999.
Butter	6,193,405 kilograms	January 1, 1999 to December 31, 1999.
Butter Oil and Butter Substitutes	5,812,414 kilograms	January 1, 1999 to December 31, 1999.
Dairy Mixtures	2,224,071 kilograms	January 1, 1999 to December 31, 1999.
Blue Cheese	3,183,782 kilograms	January 1, 1999 to December 31, 1999.
Cheddar Cheese	11,139,531 kilograms	January 1, 1999 to December 31, 1999.
American Type Cheese	3,939,843 kilograms	January 1, 1999 to December 31, 1999.
Edam/Gouda Cheese	6,621,244 kilograms	January 1, 1999 to December 31, 1999.
Italian-Type Cheese	15,148,033 kilograms	January 1, 1999 to December 31, 1999.
Swiss Cheese with Eye Formation	33,559,160 kilograms	January 1, 1999 to December 31, 1999.
Gruyere Process Cheese	7,687,097 kilograms	January 1, 1999 to December 31, 1999.
Lowfat Cheese	3,874,332 kilograms	January 1, 1999 to December 31, 1999.
NSPF Cheese	49,366,596 kilograms	January 1, 1999 to December 31, 1999.
Peanuts	49,248 mt	April 1, 1999 to March 31, 2000.
Peanut Butter/Paste	23,084 mt	January 1, 1999 to December 31, 1999.
Raw Cane Sugar	2,263,717 mt	October 1, 1998 to September 30, 1999.
	2,366,204 mt	October 1, 1999 to September 30, 2000.
Refined Sugar and Syrups	22,660 mt	October 1, 1998 to September 30, 1999.
	25,484 mt	October 1, 1999 to September 30, 2000.
Blended Syrups	0 mt	October 1, 1998 to September 30, 1999.

QUANTITY BASED SAFEGUARD TRIGGER—Continued

Product	Trigger level	Period
Articles Over 65% Sugar	0 mt	October 1, 1999 to September 30, 2000.
	0 mt	October 1, 1998 to September 30, 1999.
	0 mt	October 1, 1999 to September 30, 2000.
Articles Over 10% Sugar	80,309 mt	October 1, 1998 to September 30, 1999.
	80,282 mt	October 1, 1999 to September 30, 2000.
Sweetened Cocoa Powder	2,364 mt	October 1, 1998 to September 30, 1999.
	2,445 mt	October 1, 1999 to September 30, 2000.
Chocolate Crumb	15,324,776 kilograms	January 1, 1999 to December 31, 1999.
Lowfat Chocolate Crumb	78 kilograms	January 1, 1999 to December 31, 1999.
Infant Formula Containing Oligosaccharides	45,383 kilograms	January 1, 1999 to December 31, 1999.
Mixes and Doughs	1,274 mt	October 1, 1998 to September 30, 1999.
	5,424 mt	October 1, 1999 to September 30, 2000.
Mixed Condiments and	231 mt	October 1, 1998 to September 30, 1999.
Seasonings	253 mt	October 1, 1999 to September 30, 2000.
Ice Cream	49,353 liters	January 1, 1999 to December 31, 1999.
Animal Feed Containing Milk	1,622,296 kilograms	January 1, 1999 to December 31, 1999.
Short Staple Cotton	17,592,104 kilograms	September 20, 1998 to September 19, 1999.
	17,211,112 kilograms	September 20, 1999 to September 19, 2000.
Harsh or Rough Cotton	0 mt	August 1, 1998 to July 31, 1999.
	0 mt	August 1, 1999 to July 31, 2000.
Medium Staple Cotton	19,898 kilograms	August 1, 1998 to July 31, 1999.
	9,664 kilograms	August 1, 1999 to July 31, 2000.
Extra Long Staple Cotton	234,089 kilograms	August 1, 1998 to July 31, 1999.
	32,995 kilograms	August 1, 1999 to July 31, 2000.
Cotton Waste	39,828 kilograms	September 20, 1998 to September 19, 1999.
	13,378 kilograms	September 20, 1999 to September 19, 2000.
Cotton, Processed, Not Spun	383 kilograms	September 11, 1998 to September 10, 1999.
	383 kilograms	September 11, 1999 to September 10, 2000.

[FR Doc. 99-18622 Filed 7-20-99; 8:45 am]
BILLING CODE 3410-10-M

DEPARTMENT OF AGRICULTURE

Forest Service

**Proposed Interim Flat Fee Policy for
Outfitting and Guiding Activities;
Alaska National Forests**

AGENCY: Forest Service, USDA.

ACTION: Notice of availability; request for comments.

SUMMARY: The Regional Forester, Alaska Region, is seeking comments on a proposed interim flat fee policy for all outfitting and guiding activities on National Forest System land in the Alaska Region. Developed in response to an order from the federal district court in Alaska arising from a lawsuit filed by The Tongass Conservancy, the proposed interim flat fee policy is designed to charge fees that are fair and equitable to the federal government and the Alaska outfitter and guide industry. Copies of the proposed interim flat fee schedule and policy are being sent with a request for comments to all holders of National Forest outfitting and guiding permits in Alaska and other potentially interested parties. In addition, notice of and request to comment on the proposal is being published in local newspapers of record, and the policy and fee

schedule is being posted on the World Wide Web. The purpose of this notice is to advise others who may have an interest in this interim fee policy of the availability of the proposal and to invite their comments as well.

DATES: Comments must be received in writing by September 7, 1999.

ADDRESSES: For copies of the proposed interim flat fee policy, write to the Regional Forester, Attention: Public Services, Alaska Region, P.O. Box 21628, Juneau, AK 99802-1628 or access the document online at http://www.fs.fed.us/r10/what's_hot/hot.htm.

Send written comments to the post office listed under this heading or to webmaster/r10@fs.fed.us or by facsimile to (907) 586-7843. All comments, including names and addresses when provided, will be placed in the record and will be available for public inspection and copying. The public may inspect comments received on this proposed interim policy in the Office of the Public Services Staff, Room 501D, Federal Office Building, 709 West 9th Street, Juneau, AK, between the hours of 9 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: The local Forest Service Ranger District, Supervisor's Office, or Arn Albrecht, (907) 586-7886, or Don Fishers, (907) 586-7861, in the Alaska Regional Office.

Dated: July 14, 1999.

Rick D. Cables,

Regional Forester.

[FR Doc. 99-18551 Filed 7-20-99; 8:45 am]

BILLING CODE 3410-11-M

COMMISSION ON CIVIL RIGHTS

**Amendment of Public Meeting of the
Missouri Advisory Committee**

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a meeting of the Missouri Advisory Committee to the Commission on August 24, 1998, which was to have convened at 10:00 a.m. and adjourned at 12:00 p.m., has a time change. The new time will be from 3:00 p.m. to 5:00 p.m.

The original notice for the meeting was announced in the **Federal Register** on Thursday, July 15, 1999, FR Doc. 98-18071, 64 FR, No. 135, p. 38181.

Persons desiring additional information should contact Melvin L. Jenkins, Director of the Central Regional Office, 913-551-1400 (TDD 913-551-1414).

Dated at Washington, DC, July 15, 1999.

Carol-Lee Hurley,

Chief, Regional Programs Coordination Unit.

[FR Doc. 99-18507 Filed 7-16-99; 10:03 am]

BILLING CODE 6335-01-P

COMMISSION ON CIVIL RIGHTS**Agenda and Notice of Public Meeting
of the New Jersey Advisory Committee**

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a meeting of the New Jersey Advisory Committee to the Commission will convene at 10:00 a.m. and adjourn at 4:00 p.m. on August 13, 1999, at the Delaware River Port Authority, Board Room, One Port Center, 2 River Drive, Camden, New Jersey 08103. The Committee will receive a preliminary briefing as part of its project, "An Evaluation of State Civil Rights Enforcement in New Jersey," covering policy, practices, and obstacles facing the State Division of Civil Rights. Speakers will represent the division, the National Association of Human Rights Officials, and community interests. There will also be followup discussion on racial profiling in New Jersey. The topic for discussion will be the State Attorney General's "Final Report of the State Police Review Team," with comments by State officials and civil rights advocates.

Persons desiring additional information, or planning a presentation to the Committee, should contact Ki-Taek Chun, Director of the Eastern Regional Office, 202-376-7533 (TDD 202-376-8116). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, July 15, 1999.
Carol-Lee Hurley,
Chief, Regional Programs Coordination Unit.
[FR Doc. 99-18508 Filed 7-20-99; 8:45 am]
BILLING CODE 6335-01-P

DEPARTMENT OF COMMERCE**International Trade Administration**

[A-331-602]

**Certain Fresh Cut Flowers From
Ecuador: Extension of Time Limit for
Final Results of Antidumping Duty
Administrative Review**

AGENCY: Import Administration,
International Trade Administration,
Department of Commerce.

ACTION: Notice of extension of time limit for final results of antidumping duty administrative review.

EFFECTIVE DATE: July 21, 1999.

FOR FURTHER INFORMATION CONTACT:
Suzanne Flood, AD/CVD Enforcement,
Import Administration, International
Trade Administration, U.S. Department
of Commerce, 14th Street and
Constitution Avenue, NW, Washington,
DC 20230; telephone: (202) 482-0665.

The Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act.

**Extension of Time Limits for Final
Results**

The Department of Commerce (the Department) received a request to conduct an administrative review of the antidumping duty order on certain fresh cut flowers from Ecuador for the period March 1, 1997 through February 28, 1998. On April 16, 1999, the Department published preliminary results of this administrative review (64 FR 18878).

Because of the complexity of certain issues in this case, it is not practicable to complete this review within the time limits mandated by section 751(a)(3)(A) of the Act. Therefore, in accordance with that section, the Department is extending the time limits for the final results to October 13, 1999 (see Memorandum from Richard W. Moreland to Robert S. LaRussa, Extension of Final Results), which is 180 days after the publication of the preliminary results.

This extension of the time limit is in accordance with section 751(a)(3)(A) of the Act.

Dated: July 15, 1999.

Richard W. Moreland,
*Deputy Assistant Secretary for Import
Administration.*
[FR Doc. 99-18645 Filed 7-20-99; 8:45 am]
BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE**International Trade Administration**

[A-570-831]

**Fresh Garlic From the People's
Republic of China: 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 the petitioner, the Fresh Garlic Producers Association and its individual members, the Department of Commerce is conducting an administrative review of the antidumping duty order on fresh garlic from the People's Republic of China. The period of review is November 1, 1997, through October 31, 1998. The petitioner requested a review of Comercial Peregrin, S.A., Rizhao Hanxi Fisheries & Comprehensive Development Co., Ltd., and Fook Huat Tong Kee PTE. Ltd. Initially, Fook Huat Tong Kee PTE. Ltd. also requested a review of its own sales on November 13, 1998, but withdrew its request for review on May 7, 1999. Because we have determined that Fook Huat Tong Kee PTE. Ltd. has failed to submit a complete response to our questionnaires and the remaining named respondents did not respond at all to our questionnaire, we have preliminarily determined to use facts otherwise available for cash deposit and assessment purposes for all producers/exporters of the subject merchandise.

We invite interested parties to comment on these preliminary results. Parties who submit comments are requested to submit with each argument (1) a statement of the issue and (2) a brief summary of the argument.

EFFECTIVE DATE: July 21, 1999.

FOR FURTHER INFORMATION CONTACT:
Davina Hashmi or Farah Naim, Office of
Antidumping/Countervailing Duty
Enforcement, Import Administration,
International Trade Administration,
U.S. Department of Commerce, 14th
Street and Constitution Avenue, NW,
Washington, DC 20230; telephone (202)
482-5760 or (202) 482-3174,
respectively.

SUPPLEMENTARY INFORMATION:**The Applicable Statute and Regulations**

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's) regulations are to the regulations codified at 19 CFR Part 351 (1998).

Background

On November 12, 1998, the Department published in the **Federal Register** (63 FR 63287) a notice of "Opportunity to Request Administrative Review" with respect to the antidumping duty order on fresh garlic from the People's Republic of China (PRC) (59 FR 59209, November 16, 1994). On November 30, 1998, the petitioner requested an administrative review of three producers/exporters of this merchandise to the United States. One of those three companies, Fook Huat Tong Kee PTE. Ltd. (FHTK), an exporter of garlic from the PRC, also requested a review of its own sales on November 13, 1998, but withdrew its request on May 7, 1999. In response to the petitioner's request, the Department published a notice of initiation of an administrative review on December 23, 1998 (63 FR 71091), in accordance with 19 CFR 351.213(b). On December 29, 1998, we sent questionnaires to the three respondent firms named in the initiation notice.

Scope of Review

The products subject to this antidumping duty order are all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, provisionally preserved, or packed in water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing. The differences between grades are based on color, size, sheathing, and level of decay.

The scope of this order does not include the following: (a) Garlic that has been mechanically harvested and that is primarily, but not exclusively, destined for non-fresh use; or (b) garlic that has been specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed.¹

The subject merchandise is used principally as a food product and for seasoning. The subject garlic is currently classifiable under subheadings 0703.20.0000, 0710.80.7060,

0710.80.9750, 0711.90.6000, and 2005.90.9500 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive. In order to be excluded from the antidumping duty order, garlic entered under the HTSUS subheadings listed above that is (1) mechanically harvested and primarily, but not exclusively, destined for non-fresh use or (2) specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed must be accompanied by declarations to the Customs Service to that effect.

Use of Facts Otherwise Available

On December 29, 1998, we issued questionnaires to Comercial Peregrin, S.A. (Comercial), Rizhao Hanxi Fisheries & Comprehensive Development Co., Ltd. (Rizhao), and FHTK. Neither Comercial nor Rizhao responded. Although FHTK responded to our original questionnaire, it did not respond to our supplemental questionnaire, issued April 14, 1999. Section 776(a)(2) of the Act provides that, if an interested party withholds information that has been requested by the Department, thereby precluding it from conducting an analysis of its sales made during the instant POR, the Department may make its determination on the basis of the facts available. Accordingly, because Comercial and Rizhao did not respond to our original questionnaire and because FHTK did not respond to our supplemental request for information, we must resort to the facts available to determine the dumping margin for each of these respondents.

Section 776(b) of the Act permits us to draw an adverse inference where a party has not cooperated to the best of its ability in a proceeding. This section of the Act deems a respondent uncooperative where the party " * * * has not acted to the best of its ability to comply with requests for necessary information." See the Statement of Administrative Action accompanying the URAA, H.R. Doc. 316, Vol. 1, 103d Cong. (1994) (SAA) at 870. We find that, in not responding to our requests for information, these respondents were not cooperative. Since these respondents did not act to the best of their ability to comply with our requests for information, we have used an inference that is adverse to the interests of these respondents in selecting from among the facts otherwise available. The statute provides that an adverse inference may include reliance on information derived

from (1) the petition, (2) the final determination in the investigation segment of the proceeding, (3) a previous review under section 751 of the Act or a determination under section 753 of the Act, or (4) any other information placed on the record. In addition, the SAA establishes that the Department may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." SAA at 870. In employing adverse inferences, the Department is instructed to consider "the extent to which a party may benefit from its own lack of cooperation." *Id.* As none of the named respondents cooperated by complying with our requests for information and to ensure that they do not benefit from their lack of cooperation, we are employing an adverse inference in selecting from the facts available.

The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the margin is sufficiently adverse "as to effectuate the purpose of the facts available role to induce respondents to provide the Department with complete and accurate information in a timely manner." See *Static Random Access Memory Semiconductors from Taiwan; Final Determination of Sales at Less than Fair Value*, 63 FR 8909, 8932 (February 23, 1998). The Department also considers the extent to which a party may benefit from its own lack of cooperation in selecting a rate. See *Roller Chain, Other than Bicycle, from Japan; Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 62 FR 60472, 60477 (November 10, 1997).

Accordingly, in order to ensure that the rate is sufficiently adverse so as to induce cooperation by the named respondents, we have assigned each of these companies the petition rate of 376.67 percent, the highest dumping margin used in any segment of this proceeding. Although that rate constitutes secondary information, the information has already been corroborated in a prior review. See *Final Results of Administrative Review: Fresh Garlic from the People's Republic of China*, 61 FR 68229 (December 27, 1996). We have determined that there is no evidence on the administrative record that would warrant revisiting that issue in this review.

Interested parties may request a hearing not later than 30 days after publication of this notice. Interested parties may also submit written arguments in case briefs on these preliminary results within 30 days of

¹ Fresh Garlic from the People's Republic of China, Inv. No. 731-TA-683 (Final), USITC Pub. 2825 (November 1994).

the date of publication of this notice. Rebuttal briefs, limited to issues raised in case briefs, may be filed no later than five days after the time limit for filing case briefs. Parties who submit arguments are requested to submit with each argument a statement of the issue and a brief summary of the argument. Any hearing, if requested, will be held three days after the scheduled date for submission of rebuttal briefs.

The Department will publish the final results of this administrative review, including a discussion of its analysis of issues raised in any case or rebuttal brief or at a hearing. The Department will issue final results of this review within 120 days of publication of these preliminary results.

Upon completion of the final results in this review, the Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Furthermore, the following deposit rate will be effective upon publication of the final results of this administrative review for all shipments of fresh garlic from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(c) of the Act: for all PRC exporters and for all non-PRC exporters of subject merchandise from the PRC, the cash deposit rate will be the PRC-wide rate established in the final results of this review. This deposit rate, when imposed, shall remain in effect until publication of the final results of the next administrative review.

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.

We are issuing this determination and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: July 13, 1999.

Richard W. Moreland,

Acting Assistant Secretary for Import Administration.

[FR Doc. 99-18646 Filed 7-20-99; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

Energy Trade Mission; Notice

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce invites U.S. companies to participate in the following overseas trade mission: Energy Trade Mission. Location: Czech Republic, Hungary and Poland. Date: December 2-9, 1999.

The Assistant Secretary for Trade Development, Michael Copps, will lead an energy and environment trade mission to the Czech Republic, Hungary and Poland, December 2-9, 1999. Focusing on the energy sector, the mission will include representatives from 8-12 U.S. services and equipment firms interested in gaining access to the Eastern and Central European energy and environmental markets.

Time frame for applications: Applications may be submitted immediately to Andy Collier, Office of Energy, Infrastructure and Machineries, U.S. Department of Commerce, Room H4056 Washington, DC 20230; Telephone: (202) 482-0680; facsimile: (202) 482-3954; Internet: andrew_collier@ita.doc.gov.

All applications must be received by October 8, 1999. Applications received after the date will be considered only if space and scheduling constraints permit.

FOR FURTHER INFORMATION CONTACT: Andy Collier, Department of Commerce Tel: 202-482-0680 Fax: 202-482-3954.

Dated: July 15, 1999.

Tom Nisbet,

Director, Promotion Planning and Support Division, Office of Export Promotion Coordination.

[FR Doc. 99-18647 Filed 7-20-99; 8:45 am]

BILLING CODE 3510-DR-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 071299B]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Council) Scientific and Statistical Committee Groundfish Subcommittee (subcommittee) will hold a working meeting which is open to the public.

DATES: The meeting will begin Monday, August 2, 1999 at 8 a.m. and may go into the evening until business for the day is completed. The meeting will reconvene at 8 a.m. on Tuesday, August 3 and continue throughout the day until business for the day is completed.

ADDRESSES: The meeting will be held at the Pacific Fishery Management Council Conference Room, 2130 SW Fifth Avenue, Suite 224, Portland, OR; telephone: (503) 326-6352.

Council address: Pacific Fishery Management Council, 2130 SW Fifth Avenue, Suite 224, Portland, OR 97201.

FOR FURTHER INFORMATION CONTACT: Julie Walker, Fishery Management Analyst; telephone: (503) 326-6352.

SUPPLEMENTARY INFORMATION: The primary purpose of the meeting is to review rebuilding projections for lingcod, bocaccio, and Pacific ocean perch. The subcommittee plans to work with the stock assessment authors to develop consistent methods for arriving at rebuilding projections for the three species. As time allows, the subcommittee may also discuss a framework for future rebuilding projections.

Although other issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. John Rhoton at (503) 326-6352 at least 5 days prior to the meeting date.

Dated: July 15, 1999.

Bruce C. Morehead,

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

[FR Doc. 99-18640 Filed 7-20-99; 8:45 am]

BILLING CODE 3510-22-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 070999C]

Marine Mammals; File No. 638-1519-00

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

ACTION: Receipt of application.

SUMMARY: Notice is hereby given that Thomas R. Kieckhefer, Pacific Cetacean Group, UC Monterey Bay Education, Science & Technology Center, 3239 Imjin Road, #122, Marina, California 93933, has submitted an application for scientific research on humpback whales.

DATES: Written or telefaxed comments must be received on or before August 21, 1999.

ADDRESSES: The application and related documents are available for review upon written request or by appointment in the following offices:

Permits and Documentation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13130, Silver Spring, MD 20910 (301/713-2289); and

Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213 (562/980-4027).

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits and Documentation Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301) 713-0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period. Please note that comments will not be accepted by e-mail or by other electronic media.

FOR FURTHER INFORMATION CONTACT: Jeannie Drevenak, 301/713-2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), the regulations governing the

taking, importing, and exporting of endangered fish and wildlife (50 CFR 222.23).

The applicant is requesting to harass up to 300 humpback whales (*Megaptera novaeangliae*) annually in Monterey Bay National Marine Sanctuary, California during photo-identification and prey identification studies. The research will be carried out over a 5-year period. The research will investigate the feeding ecology of humpback whales in Monterey Bay.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: July 13, 1999.

Ann D. Terbush,

Chief, Permits and Documentation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 99-18641 Filed 7-20-99; 8:45 am]

BILLING CODE 3510-22-F

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Collection; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the "Corporation"), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, the Corporation is soliciting comments concerning its proposed applications entitled: The

2000 Application Guidelines for AmeriCorps National, State, and Indian Tribes and U.S. Territories. Copies of the information collection requests can be obtained by contacting the office listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section by September 20, 1999.

ADDRESSES: Send comments to the Corporation for National and Community Service, Nancy Talbot, Director, Planning and Program Development, 1201 New York Avenue, NW, Washington, DC 20525.

FOR FURTHER INFORMATION CONTACT: Nancy Talbot (202) 606-5000, ext. 470.

SUPPLEMENTARY INFORMATION:

Comment Request

The Corporation is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;
- 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;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Background

The 2000 Application Guidelines for AmeriCorps National, State, and Indian Tribes and U.S. Territories provide the background, requirements and instructions that potential applicants need to complete an application to the Corporation for funds to operate AmeriCorps programs.

Current Action

The Corporation seeks public comment on the forms, the instructions for the forms, and the instructions for the narrative portion of these application guidelines. The application forms and instructions are being revised to reflect the evaluation criteria approved by the Corporation board last year. In some instances this means that

questions appear under different categories than previously. In an effort to streamline and consolidate this application package, there is one title page all AmeriCorps National, State, and Indian Tribes and U.S. Territories can use. The budget form and title page have been revised so that information is asked for one place and does not need to be copied to some other part of the form as in the past. Form instructions are clearer and are written in plain language.

Type of Review: Revision of a currently approved collection.

Agency: Corporation for National and Community Service.

Title: The 2000 Application Guidelines for AmeriCorps National, State and Indian Tribes and U.S. Territories.

OMB Number: 3045-0047.

Agency Number: None.

Affected Public: Eligible applicants to the Corporation for funding.

Total Respondents: 2000.

Frequency: Once per year.

Average Time Per Response: Ten (10) hours.

Estimated Total Burden Hours: 20,000 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Comments submitted in response to this will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: July 16, 1999.

Thomas L. Bryant,

Associate General Counsel.

[FR Doc. 99-18624 Filed 7-20-99; 8:45 am]

BILLING CODE 6050-28-P

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE; the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Specialized Treatment Services (STS) Program

AGENCY: Office of the Secretary, DoD.

ACTION: Notice.

SUMMARY: This notice is to advise interested parties that the VA Palo Alto Health Care System (VAPAHCS) and the San Francisco VA Medical Center (SfVAMC), located in TRICARE Region Ten, have been designated as Regional Specialized Treatment Services Facilities (STSFs) for Cardiac Surgery. Both of these facilities are members of

the Veterans Integrated Service Network 21 (VISN 21) of the Veterans Health Administration (VHA). The application for the STSF designation was submitted by VISN 21 and approved by the Assistant Secretary of Defense (Health Affairs). The Lead Agent for Region Ten will ensure the STSFs maintain the quality and standards required for specialized treatment services. The designation covers the following Related Groups:

- 104—Cardiac valve procedure with cardiac catheterization
- 105—Cardiac valve procedure without PTCA
- 106—Coronary bypass with PTCA
- 107—Coronary bypass with cardiac catheterization
- 108—Other cardiothoracic procedures
- 109—Coronary bypass without cardiac catheterization

Travel and lodging for the patient and, if stated to be medically necessary by a referring physician, for one non-medical attendant, will be reimbursed by the VAPAHCS or SfVAMC in accordance with the provisions of the Joint Federal Travel Regulation. Patients will be referred to the STSFs based on patient/provider preference and, if no preference is indicated, the referrals will occur on a one-for-one rotational basis between the VAPAHCS and the SfVAMC. DoD beneficiaries who reside in the Regional STSF Catchment Area for VAPAHCS and SfVAMC in TRICARE Region Ten must receive cardiac surgery services for the above DRGs from these facilities unless a Nonavailability Statement (NAS) or an authorization is issued. Evaluation by VAPAHCS or SfVAMC in person is preferred, and travel and lodging expenses for the evaluation will be reimbursed as stated above. It is possible to conduct the evaluation telephonically if the patient is unable to travel to VAPAHCS or SfVAMC. If the procedure cannot be performed at the VAPAHCS and SfVAMC, these facilities will provide a medical necessity review prior to issuance of a NAS or authorization.

The Regional STSF Catchment Area for VAPAHCS and SfVAMC covering Region Ten will be defined by zip codes in the Defense Medical Information System STSF Catchment Area Directory. The Catchment Area includes zip codes within TRICARE Region Ten that fall within a 200-mile radius of the midpoint of a line between the VAPAHCS and SfVAMC.

EFFECTIVE DATE: On or after October 1, 1999.

FOR FURTHER INFORMATION CONTACT: Mr. Eric Raffin, CHE, VAPAHCS, at (650) 849-0113; or Lieutenant Colonel Pam

Cygan, TRICARE Region Ten Lead Agent Office, at (707) 424-6533; or Lieutenant Colonel Teresa Sommese, TRICARE Management Activity, (703) 681-3628, extension 5029; or Mr. Tariq Shahid, TRICARE Management Activity, (303) 676-3801.

SUPPLEMENTARY INFORMATION: In FR DOC 93-27050, appearing in the **Federal Register** on November 5, 1993 (Vol. 58, FR 58955-58964), the final rule on the STS Program was published. Included in the final rule was a provision that a notice of all military and civilian STS facilities be published in the **Federal Register** annually. This notice is issued under the authority of 10 U.S.C. 1105 and 32 CFR 199.4(a)(10).

Dated: July 14, 1999.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 99-18514 Filed 7-20-99; 8:45 am]

BILLING CODE 5001-10-M

DEPARTMENT OF ENERGY

Office of Science

Basic Energy Sciences Advisory Committee

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Basic Energy Sciences Advisory Committee (BESAC). Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, August 10, 1999, 8:15 a.m. to 5:30 p.m.; Wednesday, August 11, 1999, 8:30 a.m. to 12:00 p.m.

ADDRESSES: Washingtonian Marriott, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

FOR FURTHER INFORMATION CONTACT: Sharon Long; Office of Basic Energy Sciences; U. S. Department of Energy; 19901 Germantown Road; Germantown, MD 20874-1290; Telephone: (301) 903-5565

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The purpose of this meeting is to provide advice and guidance with respect to the basic energy sciences research program.

Tentative Agenda

Tuesday, August 10, 1999

- Welcome and Introduction of New BESAC Members
- Remarks from Dr. Martha Krebs, Director, Office of Science

- News and Views from Basic Energy Sciences
- Report on the Complex Systems Workshop
- Report from the Advanced Light Source
- Security at DOE Laboratories

Wednesday, August 11, 1999

- Scientific User Facilities Updates
- Update on Review of Electron Beam Microcharacterization Centers

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Sharon Long at 301-903-6594 (fax) or sharon.long@science.doe.gov (e-mail). You must make your request for an oral statement at least 5 business days prior to the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room; 1E-190, Forrestal Building; 1000 Independence Avenue, SW; Washington, DC 20585; between 9:00 a.m. and 4:00 p.m., Monday through Friday, except holidays.

Issued in Washington, DC on July 15, 1999.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 99-18580 Filed 7-20-99; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER99-2932-000]

Alcoa Inc., Tapoco, Inc., Yadkin, Inc., Alcoa Generating Corporation, Long Sault, Inc., and Colockum Transmission Company, Inc.; Issuance of Order

July 15, 1999.

Alcoa Inc., Tapoco, Inc., Yadkin, Inc., Alcoa Generating Corporation, Long Sault, Inc., and Colockum Transmission Company, Inc. (hereafter, "the Applicants") filed with the Commission rate schedules in the above-captioned proceedings, respectively, under which

the Applicants will engage in wholesale electric power and energy transactions at market-based rates, and for certain waivers and authorizations. In particular, certain of the Applicants may also have requested in their respective applications that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liabilities by the Applicants. On July 13, 1999, the Commission issued an order that accepted the rate schedules for sales of capacity and energy at market-based rates (Order), in the above-docketed proceedings.

The Commission's July 13, 1999 Order grants, for those Applicants that sought such approval, their request for blanket approval under Part 34, subject to the conditions found in Appendix B in Ordering Paragraph (2), (3), and (5):

(2) Within 30 days of the date of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by the Applicants 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 385.214.

(3) Absent a request to be heard within the period set forth in Ordering Paragraph (2) above, if the Applicants have requested such authorization, the Applicants are hereby authorized to issue securities and assume obligations and liabilities as guarantor, indorser, surety or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object with the corporate purposes of the Applicants, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(5) The Commission reserves the right to modify this order to require a further showing that neither public nor private interests will be adversely affected by continued Commission approval of the Applicants' issuances of securities or assumptions of liabilities * * *

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is August 12, 1999.

Copies of the full text of the Order are available from the Commission's Public

Reference Branch, 888 First Street, NE, Washington, DC 20426.

David P. Boergers,
Secretary.

[FR Doc. 99-18521 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER99-2792-000]

Archer Daniels Midland; Issuance of Order

July 15, 1999.

Archer Daniels Midland (ADM), a Delaware corporation engaged in procuring, transporting, storing, processing, and selling agricultural commodities and products, submitted for filing a Purchase Power Agreement (PPA) for sales of energy to Central Illinois Light Company (CILCO). ADM's application states that under the PPA, the parties can enter into either firm or non-firm transactions and the rate for each sale will be negotiated based on the market price of other available sources of supply. ADM's PPA also requested certain waivers and authorizations. In particular, ADM requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liabilities by ADM. On July 14, 1999, the Commission issued an Order Accepting Proposed Rate Market-Based Rates For Filing (Order), in the above-docketed proceeding.

The Commission's July 14, 1999 Order granted the request for blanket approval under Part 34, subject to the conditions found in Ordering Paragraphs (D), (E), and (G):

(D) Within 30 days of the date of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by ADM 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 385.214.

(E) Absent a request to be heard within the period set forth in Ordering Paragraph (D) above, ADM is hereby authorized to issue securities and assume obligations and liabilities as guarantor, indorser, surety or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of ADM,

compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(G) The Commission reserves the right to modify this order to require a further showing that neither public nor private interests will be adversely affected by continued Commission approval of ADM's issuances of securities or assumptions of liabilities * * *.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is August 13, 1999.

Copies of the full text of the Order are available from the Commission's Public Reference Branch, 888 First Street, NE, Washington, DC 20426.

David P. Boergers,

Secretary.

[FR Doc. 99-18519 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. MT99-15-000]

Arkansas Western Pipeline, L.L.C.; Compliance Filing

July 15, 1999.

Take notice that on July 13, 1999, Arkansas Western Pipeline, L.L.C. (AWP L.L.C.) tendered for filing to become part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets, with an effective date of July 13, 1999:

First Revised Sheet No. 110

First Revised Sheet No. 111

AWP L.L.C. asserts that the purpose of this filing is to comply with the Commission's July 6, 1999, order in Docket No. MG99-17-000, and the requirements of CFR 250.16(b)(1) and 250.16(b)(2).

Any person desiring to protest this filing should file a protest 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 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 protestant 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. This filing may be viewed on the web at <http://www.ferc.fed.us/online/>

rims.htm (call 202-208-2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 99-18518 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99-398-001]

Caprock Pipeline Co.; Tariff Filing

July 15, 1999.

Take notice that on July 13, 1999, Caprock Pipeline Co. (Caprock) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets, with an effective date of August 1, 1999:

First Revised Volume No. 1

Substitute Sixth Revised Sheet No. 29A

Caprock is submitting this filing to correct an inadvertent omission of the various GISB Standards from the previously effective "by reference" tariff sheet.

Caprock states that copies of this filing have been served upon all affected firm customers of Caprock and applicable state agencies.

Any person desiring to protest this filing should file a protest 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 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. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 99-18535 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. GT99-61-000]

Equitrans, L.P.; Refund Report

July 15, 1999.

Take notice that on July 12, 1999, Equitrans, L.P. (Equitrans) filed a Report summarizing the refunds of GRI overcollections which were credited to the June billing invoices of Equitrans' customers.

Equitrans states that on, May 28, 1999 it received a refund from GRI of \$488,325 for collections in excess of 105% of Equitrans 1998 GRI funding level. Equitrans states that it credited this amount to its eligible firm customers in billing invoices which were mailed out on July 15, 1999. The credits were allocated to Equitrans' eligible firm customers pro-rata based on GRI rate collections during the 1998 billing year.

Equitrans states that a copy of its report has been served on its customers and interested state commissions.

Any person desiring to protest said filing should file a protest 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 on or before July 22, 1999. 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. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 99-18517 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97-346-025]

Equitrans, L.P.; Proposed Changes in FERC Gas Tariff

July 15, 1999.

Take notice that on July 12, 1999, Equitrans, L.P. (Equitrans) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following

revised tariff sheet to become effective August 1, 1999:

Second Revised Sheet No. 11

Equitrans states that the purpose of this filing is to reflect the retainage factors from Article V, Section 1 of Equitrans' Stipulation and Agreement in Docket No. RP97-346 which was approved by the Commission on April 29, 1999. The revised retainage factors reflected in this filing are 3.00% for transmission and .59% for storage.

Any person desiring to protest this filing should file a protest 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 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. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 99-18531 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

Equitrans states that it refunded to its jurisdictional customers the principal amount of \$7,509,252.46, plus interest thereon to the date of distribution computed in accordance with Section 154.501 of the Commission's Regulations of \$436,402.88, less the agreed-upon capped adjustment pursuant Article X, Section 3 of the Stipulation and Agreement of \$316,452.98 for a total of \$7,629,202.36.

Equitrans states that a copy of its report has been served on its customers and interested state commissions.

Any person desiring to protest said filing should file a protest 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 on or before July 22, 1999. 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. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 99-18532 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

above-captioned proceedings, respectively, under which the Applicants will engage in wholesale electric power and energy transactions at market-based rates, and for certain waivers and authorizations. In particular, certain of the Applicants may also have requested in their respective applications that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liabilities by the Applicants. On July 14, 1999, the Commission issued an order that accepted the rate schedules for sales of capacity and energy at market-based rates (Order), in the above-docketed proceedings.

The Commission's July 14, 1999 Order granted, for those Applicants that sought such approval, their request for blanket approval under Part 34, subject to the conditions found in Appendix B in Ordering Paragraphs (2), (3), and (5):

(2) Within 30 days of the date of this Order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by the Applicants 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 385.214.

(3) Absent a request to be heard within the period set forth in Ordering Paragraph (2) above, if the Applicants have requested such authorization, the Applicants are hereby authorized to issue securities and assume obligations and liabilities as guarantor, indorser, surety of otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of the Applicants, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(5) The Commission reserves the right to modify this order to require a further showing that neither public nor private interests will be adversely affected by continued Commission approval of the Applicants' issuances of securities or assumptions of liabilities * * *.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is August 13, 1999.

Copies of the full text of the Order are available from the Commission's Public

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97-346-026]

Equitrans, L.P., Refund Report

July 15, 1999.

Take notice that on July 12, 1999, Equitrans, L. P. (Equitrans) tendered for filing its report refunds attributable to the resolution of the captioned proceedings. Equitrans states that the reported refunds reflect Equitrans' implementation of the rates contained in the Commission approved Stipulation and Agreement filed on January 22, 1999 and amended on March 31, 1999.

Equitrans states that the purpose of this filing is to report refunds and applicable interest made to its jurisdictional customers on June 21, 1999 and June 22, 1999 for all amounts collected in excess of the settlement rates which were subject to refund for the period from August 1, 1997 through March 31, 1999.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER99-2879-000, ER99-2968-000, ER99-2984-000, ER99-2992-000, ER99-3005-000, ER99-3050-000, ER99-3077-000, ER99-3086-000 and ER99-3098-000 (Not Consolidated)]

Front Range Associates, LLC, NRG Northeast Power Marketing, LLC, Green County Energy, LLC, Tenaska Gateway Partners, Ltd., Coast Energy Group, Little Bay Power Corporation, Colorado Power Partners, American Atlas #1, Ltd., LLLP., and EGC 1999 Holding Company, LP; Notice of Issuance of Order

July 15, 1999.

Front Range Associates, LLC, NRG Northeast Power Marketing, LLC, Green County Energy, LLC, Tenaska Gateway Partners, Ltd. Coast Energy Group, Little Bay Power Corporation, Colorado Power Partners, American Atlas #1, LLLP., and EGC 1999 Holding Company, LP (hereafter, "the Applicants") filed with the Commission rate schedules in the

Reference Branch, 888 First Street, NE,
Washington, DC 20426.

David P. Boergers,

Secretary.

[FR Doc. 99-18520 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99-407-001]

KN Wattenberg Transmission LLC; Tariff Filing

July 15, 1999.

Take notice that on July 13, 1999, KN Wattenberg Transmission LLC (KNW) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1 tariff sheets, with an effective date of August 1, 1999:

First Revised Volume No. 1
Substitute Third Revised Sheet No. 67

KNW is submitting this filing to correct an inadvertent omission of the various GIBS Standards from the previously effective "by reference" tariff sheet.

KNW states that copies of this filing has been served upon all affected firm customers of KNW and applicable state agencies.

Any person desiring to protest this filing should file a protest 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 as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by 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. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 99-18537 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99-390-001]

Northern Border Pipeline Company; Compliance Filing

July 15, 1999.

Take notice that on July 12, 1999, Northern Border Pipeline Company (Northern Border) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following compliance tariff sheet to become effective August 1, 1999:

Third Revised Sheet Number 258

Northern Border states that this filing is to correct a pagination error made in Northern Border's June 30, 1999 filing with the Commission at Docket No. RP99-390-000 which filing was being made in response to the Commission's letter order dated April 2, 1999.

Northern Border states that a copy of the instant filing is being served on all affected customers.

Any person desiring to protest this filing should file a protest 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 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. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 99-18534 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER99-3025-000]

Public Service Company of Colorado; Issuance of Order

July 15, 1999.

Public Service Company of Colorado (PSColorado) filed a rate schedule under which it may purchase electricity from certain of its retail customers with on-

site generation. PSColorado filed the rate schedule on behalf of the customer-sellers, rather than having numerous small sellers separately request authorization to sell power for the few times needed by PSColorado. The customers-sellers will become, by virtue of submitting service agreements under this rate schedule, subject to the Commission's jurisdiction. Consequently, PSColorado is requesting waiver of various requirements of the Commission on behalf of the participating entities (PSColorado's customer-sellers). In particular, PSColorado requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liabilities by PSColorado's customer-sellers. On July 14, 1999, the Commission issued an Order Accepting For Filing Proposed Rate Schedule And Granting Waivers (Order), in the above-docketed proceeding.

The Commission's July 14, 1999 Order granted the request for blanket approval under Part 35, subject to the conditions found in Ordering Paragraphs (D), (E), and (G):

(D) Within 30 days of the date of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by PSColorado's customer-sellers 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 385.214.

(E) Absent a request to be heard within the period set forth in Ordering Paragraph (D) above, PSColorado's customer-sellers is hereby authorized to issued securities and assume obligations and liabilities as guarantor, indorser, surety or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of PSColorado's customer-sellers, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(G) The Commission reserves the right to modify this order to require a further showing that neither public nor private interests will be adversely affected by continued Commission approval of PSColorado's customer-sellers' issuances of securities or assumptions of liabilities * * *.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is August 13, 1999.

Copies of the full text of the Order are available from the Commission's Public Reference Branch, 888 First Street, NE, Washington, DC 20426.

David P. Boergers,

Secretary.

[FR Doc. 99-18522 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 309-PA]

Sithe Piney LLC; Notice of Pennsylvania Electric Company's Request to Use Alternative Procedures in Filing a License Application

July 15, 1999.

On June 24, 1999, the existing licensee, Pennsylvania Electric Company (Penelec), filed a request to use alternative procedures for submitting an application for new license for the existing Sithe Piney Hydroelectric Project No. 309. The project is located on the Clarion River, in Clarion County, Pennsylvania.

The project consists of: (1) the 427-foot-long and 139-foot-high concrete arch dam with crest elevation of 1,075 ft. msl, an 84-foot-long left non-overflow wall, and a 200-foot-long right non-overflow wall; (2) an 800-acre surface area reservoir; (3) an 84-foot-wide integral intake; (4) three 230-foot-long; 14-foot-diameter penstocks; (5) a powerhouse with 3 generating units totaling 28,300 kilowatts; (6) a 250-foot-long tailrace; (7) 700-foot-long and 900-foot-long transmission lines; and (8) appurtenant facilities.

Penelec states that it has discussed the applicant prepared environmental assessment process with the Pennsylvania Fish and Boat Commission, Pennsylvania Department of Environmental Protection, and U.S. Fish and Wildlife Service, and that those agencies have expressed support for the use of alternative procedures. Penelec is developing a draft communications protocol that will be distributed to the other participants in the relicensing process.

The purpose of this notice is to invite any additional comments on Penelec's request to use the alternative procedures, pursuant to Section 4.34(i) of the Commission's regulations.¹ Additional notices seeking comments on the specific project proposal, interventions and protests, and

recommended terms and conditions will be issued at a later date.

The alternative procedures being requested here combine the prefiling consultation process with the environmental review process, allowing Penelec to complete and file an Environmental Assessment (EA) in lieu of Exhibit E of the license application. This process differs from the traditional way the applicant prepares a license application because the prefiling consultation with agencies, Indian tribes, and nongovernmental organizations (NGOs) is done concurrently with the environmental review process rather than waiting for the Commission staff to conduct its environmental review of the application after it is filed with the Commission. The alternative procedures are intended to simplify and expedite the licensing process by combining the prefiling consultation and environmental review processes into a single process, to facilitate greater participation, and to improve communication and cooperation among the participants.

Applicant Prepared EA Process and Piney Project Schedule

Penelec has distributed an Information Package for the proposed project to state and federal resource agencies, and NGOs. Penelec has held an initial consultation meeting to discuss potential issues by the participants, and is currently conducting studies. Penelec has submitted a proposed schedule for the alternative licensing process that leads to the filing of a license application by October 2000.

Comments

Interested parties have 30 days from the date of this notice to file with the Commission, any comments on Penelec's proposal to use the alternative procedures to file an application for the Piney Hydroelectric Project.

Filing Requirements

The comments must be filed by providing an original and 8 copies as required by the Commission's regulations to: Federal Energy Regulatory Commission, Office of the Secretary, Dockets—Room 1A, 888 First Street, NE, Washington, DC 20426.

All comment filing must bear the heading "Comments on the Alternative Procedures," and include the project name and number (Piney Hydroelectric Project No. 309).

For further information on this process, please contact William Guey-Lee of the Federal Energy Regulatory

Commission at 202-219-2808 or E-mail at william.gueylee@ferc.fed.us.

David P. Boergers,

Secretary.

[FR Doc. 99-18523 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99-405-001]

TCP Gathering Co.; Tariff Filing

July 15, 1999.

Take notice that on July 13, 1999, TCP Gathering Co. (TCP) tendered for filing of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheet with an effective date of August 1, 1999:

Substitute Fourth Revised Sheet No. 103A

TCP is submitting this filing to correct an inadvertent omission of the various GISB Standards from the previously effective "by reference" tariff sheet.

TCP states that copies of this filing have been served upon all affected firm customers of TCP and applicable state agencies.

Any person desiring to protest this filing should file a protest 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 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. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 99-18536 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

¹ Order No. 596, Regulations for the Licensing of Hydroelectric Projects, 81 FERC ¶61,103 (1997).

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. RP99-328-000]

Tennessee Gas Pipeline Company; Technical Conference

July 15, 1999.

In the Commission's order issued on July 1, 1999, the Commission directed that a technical conference be held to address issues raised by the filing.

Take notice that the technical conference will be held on Wednesday, August 4, 1999, at 10:00 a.m., in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

All interested parties and Staff are permitted to attend.

David P. Boegers,

Secretary.

[FR Doc. 99-18533 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. RP99-436-000]

Texas Gas Transmission Corporation; Filing of Tariff Sheets

July 15, 1999.

Take notice that on July 12, 1999, Texas Gas Transmission Corporation (Texas Gas) tendered for filing, as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets to be effective August 1, 1999:

Fourth Revised Sheet No. 147
Third Revised Sheet No. 148
Tenth Revised Sheet No. 207
Third Revised Sheet No. 207A

Texas Gas states that the purpose of this filing is to comply with Order No. 587-K, Final Rule issued on April 2, 1999, in Docket No. RM96-1-011. The revised tariff sheets reflect certain Version 1.3 standards promulgated by the Gas Industry Standards Board (GISB), which were adopted by the Commission and incorporated by reference in the Commission's Regulations.

Texas Gas states that copies of the tariff sheets are being served upon Texas Gas's jurisdictional customers and interested state commission.

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. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boegers,

Secretary.

[FR Doc. 99-18538 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. EG99-187-000, et al.]

Entergy Nuclear Generation Holding Company No. 1, Inc., et al.; Electric Rate and Corporate Regulation Filings

July 14, 1999.

Take notice that the following filings have been made with the Commission:

1. Entergy Nuclear Generation Holding Company No. 1, Inc.

[Docket No. EG99-187-000]

Take notice that on July 9, 1999, Entergy Nuclear Holding Company No. 1, Inc. (ENHC), with its principle office at 1340 Echelon Parkway, Jackson, Mississippi 39213, filed with the Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

ENHC states that it is a Delaware corporation. ENHC is engaged directly and exclusively in the business of owning the stock of Entergy Nuclear Generation Company, an EWG, and possibly, in the future, the stock of other EWGs.

Comment date: August 4, 1999, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

2. Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Lighting Company, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange & Rockland Utilities, Inc., Rochester Gas & Electric Corp., Power Authority of the State of New York, and New York Power Pool

[Docket No. EL99-77-000]

Take notice that on July 9, 1999, the New York Independent System Operator, Inc. (New York ISO) submitted a Request for Limited Waiver of OASIS Requirements. The New York ISO requests as an effective date the date that the New York ISO OATT becomes effective.

A copy of this filing was served upon all persons on the Commission's official service lists in Docket Nos. ER97-1523-000, OA97-470-000 and ER97-4234-000 (not consolidated), and the respective electric utility regulatory agencies in New York, New Jersey and Pennsylvania.

Comment date: August 9, 1999, in accordance with Standard Paragraph E at the end of this notice.

3. Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Lighting Company, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., Rochester Gas and Electric Corporation, Power Authority of the State of New York, and New York Power Pool

[Docket Nos. ER97-1523-008, OA97-470-007, and ER97-4234-005 (not consolidated)]

Take notice that on July 9, 1999, the Member Systems of the New York Power pool (Member Systems) tendered for filing under section 205 and 206 of the Federal Power Act, amendments to the transmission agreements in effect among and between them in accordance with the Federal Energy Regulatory Commission's order issued on January 27, 1999, in the above-referenced dockets.

The Member Systems request all waivers necessary to make the amendments effective upon implementation of the ISO OATT, September 1, 1999.

A copy of this filing was served upon all persons on the Commission's official service list(s) in the captioned proceeding(s), and the respective electric utility regulatory agencies in New York, New Jersey and Pennsylvania.

Comment date: July 29, 1999, in accordance with Standard Paragraph E at the end of this notice.

4. Complete Energy Services, Inc.

[Docket No. ER99-3033-000]

Take notice that on July 6, 1999, Complete Energy Services, Inc. (Complete) tendered for filing with the Federal Energy Regulatory Commission (Commission) additional information requested by the Commission on the ownership of Complete.

Comment date: July 26, 1999, in accordance with Standard Paragraph E at the end of this notice.

5. California Independent System Operator Corporation

[Docket No. ER99-3250-000]

Take notice that on July 9, 1999, the California Independent System Operator Corporation (ISO), tendered for filing an amendment to Schedule 1 of the Meter Service Agreement for ISO Metered Entities between the ISO and Green Power Partners I LLC—WECS 98 (WECS 98). The ISO states that the amendment revises Schedule 1 to incorporate meter information about WECS 98's facility.

The ISO states that this filing has been served on all parties listed on the official service list in the above-referenced docket.

Comment date: July 29, 1999, in accordance with Standard Paragraph E at the end of this notice.

6. Baltimore Gas and Electric Company

[Docket No. ER99-3523-000]

Take notice that on July 9, 1999, Baltimore Gas and Electric Company (BGE) filed Service Agreements with Merchant Energy Group of the Americas, Inc., and with GPU Advanced Resources, Inc., under BGE's FERC Electric Tariff Original Volume No. 3 (Tariff). Under the tendered Service Agreement, BGE agrees to provide services pursuant to the provisions of the Tariff.

BGE requests an effective date of July 1, 1999 for the Service Agreements.

BGE states that a copy of the filing was served upon the Public Service Commission of Maryland.

Comment date: July 29, 1999, in accordance with Standard Paragraph E at the end of this notice.

7. Commonwealth Edison Company

[Docket No. ER99-3524-000]

Take notice that on July 9, 1999, Commonwealth Edison Company (ComEd) tendered for filing a service agreement establishing PP&L, Inc. (PP&L), as a customer under ComEd's FERC Electric Market Based-Rate Schedule for power sales.

ComEd requests an effective date of June 7, 1999 for the Service Agreement to coincide with the first day of service to PP&L under this Service Agreement.

Copies of the filing were served on PP&L.

Comment date: July 29, 1999, in accordance with Standard Paragraph E at the end of this notice.

8. Puget Sound Energy, Inc.

[Docket No. ER99-3525-000]

Take notice that on July 9, 1999, Puget Sound Energy, Inc. (PSE) tendered for filing a Service Agreement under the provisions of PSE's market-based rates tariff, FERC Electric Tariff, First Revised Volume No. 8, with American Electric Power Service Corporation (AEP).

A copy of the filing was served upon AEP.

Comment date: July 29, 1999, in accordance with Standard Paragraph E at the end of this notice.

9. Ameren Services Company

[Docket No. ER99-3526-000]

Take notice that on July 9, 1999, Ameren Services Company (ASC) tendered for filing a Service Agreement for Market Based Rate Power Sales between ASC and Southern Indiana Gas and Electric Company (SIG&E). ASC asserts that the purpose of the Agreement is to permit ASC to make sales of capacity and energy at market based rates to SIG&E pursuant to ASC's Market Based Rate Power Sales Tariff filed in Docket No. ER98-3285-000.

ASC requests that the Service Agreement become effective April 6, 1999, the date for said agreement.

Comment date: July 29, 1999, in accordance with Standard Paragraph E at the end of this notice.

10. Ameren Services Company

[Docket No. ER99-3527-000]

Take notice that on July 9, 1999, Ameren Services Company (Ameren) tendered for filing Service Agreements for Market Based Rate Power Sales between Ameren and Allegheny Power Service Corporation and Minnesota Municipal Power Agency (the parties). Ameren asserts that the purpose of the Agreements is to permit Ameren to make sales of capacity and energy at market based rates to the parties pursuant to Ameren's Market Based Rate Power Sales Tariff filed in Docket No. ER98-3285-000.

Comment date: July 29, 1999, in accordance with Standard Paragraph E at the end of this notice.

11. Ameren Services Company

[Docket No. ER99-3528-000]

Take notice that on July 9, 1999, Union Electric Company (UE) tendered for filing a Service Agreement for Market Based Rate Power Sales between UE and Northern Indiana Public Service Company (NI). UE asserts that the purpose of the Agreement is to permit UE to make sales of capacity and energy at market based rates to NI pursuant to UE's Market Based Rate Power Sales Tariff filed in Docket No. ER97-3664-000.

UE requests that the Service Agreement become effective June 19, 1999.

Comment date: July 29, 1999, in accordance with Standard Paragraph E at the end of this notice.

12. Ameren Services Company

[Docket No. ER99-3529-000]

Take notice that on July 9, 1999, Ameren Services Company (ASC) tendered for filing a Service Agreement for Market Based Rate Power Sales between ASC and Kansas City Power & Light Company (KCPL). ASC asserts that the purpose of the Agreement is to permit ASC to make sales of capacity and energy at market based rates to KCPL pursuant to ASC's Market Based Rate Power Sales Tariff filed in Docket No. ER98-3285-000.

ASC requests that the Service Agreement become effective August 1, 1998.

Comment date: July 29, 1999, in accordance with Standard Paragraph E at the end of this notice.

13. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER99-3530-000]

Take notice that on July 9, 1999, the Midwest ISO Participants tendered for filing executed signature pages to the "Agreement of the Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., A Delaware Non-Stock Corporation," and the "Agency Agreement for Open Access Transmission Service Offered by the Midwest ISO for Nontransferred Transmission Facilities" executed by Southern Illinois Power Cooperative (Southern Illinois), in order to allow Southern Illinois to become a transmission-owning member of the Midwest ISO.

Comment date: July 29, 1999, in accordance with Standard Paragraph E at the end of this notice.

14. Orange and Rockland Utilities, Inc.

[Docket No. ES99-45-000]

Take notice that on July 2, 1999, Orange and Rockland Utilities, Inc. submitted an application under Section 204 of the Federal Power Act seeking authorization to issue not more than \$150 million of unsecured obligations through December 31, 2001, which have a maturity of less than one year after the date of issuance.

Comment date: August 4, 1999, in accordance with Standard Paragraph E at the end of this notice.

15. Texas-New Mexico Power Company

[Docket No. ES99-47-000]

Take notice that on July 9, 1999, Texas-New Mexico Power Company (TNMP) filed an Application pursuant to section 204 of the Federal Power Act and Part 34 of the Commission's Regulations seeking authorization to issue from time to time, in an aggregate principal amount not to exceed \$428 million at any one time outstanding, short-term debt securities and promissory notes bearing final maturities not to exceed one year. TNMP also requests an exemption from the Commission's competitive bidding and negotiated placement provisions.

Comment date: August 4, 1999, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest such 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 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of these filings are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 99-18577 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions**

July 15, 1999.

Taken notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

- a. *Type of Application:* New Major License.
- b. *Project No.:* 2060-005.
- c. *Date filed:* January 28, 1999.
- d. *Applicant:* Nigara Mohawk Power Corporation.
- e. *Name of Project:* Carry Falls.
- f. *Location:* On the Raquette River, at river mile 68 from its confluence with the St. Lawrence River, in the town of Colton, St. Lawrence County, New York. The project would not utilize federal lands.
- g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).
- h. *Applicant Contact:* Mr. Jerry L. Sabattis, Licensing Coordinator, Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, New York 13202, (315) 428-5561.
- i. *FERC Contact:* Charles T. Raabe, E-mail address, Charles.Raabe@ferc.fed.us, or telephone (202) 219-2811.
- j. *Deadline Date:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Status of environmental analysis:* This application has been accepted for filing and is ready for environmental analysis at this time. The Commission will prepare a multiple project Environmental Assessment (EA) including the Carry Falls Project (FERC No. 2060-005), the Upper Raquette

River Project (FERC No. 2084-020), the Middle Raquette River Project (FERC No. 2320-005), and the Lower Raquette River Project (FERC No. 2330-007). As part of the multiple project EA, the Commission will also consider the merits of an application of amendment to exemption for the Potsdam Project (FERC No. 2869-007), which is located between the Middle and Lower Raquette River Projects.

l. *Description of the Project:* the existing, operating project consists of: (1) An 826-foot-long dam consisting of: (a) A 568-foot-long and 76-foot-high concrete gravity spillway with a crest elevation of 1,386 feet; and (b) a 258-foot-long and 63-foot-high concrete gated non-overflow spillway with two 14.5-foot by 27-foot taintor regulation gates two 10-foot-square low-level sluice gates, and an intake structure with two 15-foot-square openings for future power installation; (2) five earth dikes totaling 2,500 feet in length, with lengths varying from 320 feet to 1,015 feet, maximum heights varying from 12 feet to 31 feet, each with a crest width of 12 feet at elevation 1,392 feet; and (3) a 7-mile-long reservoir having a 3,000-acre surface area and a 104,463-acre-foot usable storage capacity of normal pool elevation 1,385 feet USGS. the project has no installed generating capacity.

m. *Locations of the application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE, Washington, DC 20426, or by calling (202) 208-1371. The application may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance). A copy is also available for inspection and reproduction at the address in item h. above.

Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Filing and Service of Responsive Documents—The application is ready for environmental analysis at this time, and the Commission is requesting

comments, reply comments, recommendations, terms and conditions, and prescriptions.

The Commission directs, pursuant to Section 4.34(b) of the Regulations (see Order No. 533 issued May 8, 1991, 56 FR 23108, May 20, 1991) that all comments recommendations, terms and conditions and prescriptions concerning the application be filed with the Commission within 60 days from the issuance date of this notice. All reply comments must be filed with the Commission within 105 days from the date of this notice.

Anyone may obtain an extension of time for these deadlines from the Commission only upon a showing of good cause of extraordinary circumstances in accordance with 18 CFR 385.2008.

All filings must (1) bear in all capital letters the title "PROTEST", "MOTION TO INTERVENE", "COMMENTS," "REPLY COMMENTS," "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

David P. Boergers,
Secretary.

[FR Doc. 99-18524 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protest; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

July 15, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

- a. *Type of Application:* New Major License.
- b. *Project No.:* 2084-020.
- c. *Date filed:* January 28, 1999.
- d. *Applicant:* Niagara Mohawk Power Corporation.
- e. *Name of Project:* Upper Raquette River.
- f. *Location:* On the Raquette River, between river miles 52 and 68 from its confluence with the St. Lawrence River, in the towns of Colton and Parishville, St. Lawrence County, New York. The project would not utilize federal lands.
- g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).
- h. *Applicant Contact:* Mr. Jerry L. Sabattis, Licensing Coordinator, Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, New York 13202, (315) 428-5561.
- i. *FERC Contact:* Charles T. Raabe, E-mail address, Charles.Raabe@ferc.fed.us, or telephone (202) 219-2811.
- j. *Deadline Date:* 60 days from the date of issuance of this notice.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Status of environmental analysis:* This application has been accepted for filing and is ready for environmental analysis at this time. The Commission will prepare a multiple project Environmental Assessment (EA) including the Carry Falls Project (FERC

No. 2060-005), the Upper Raquette River Project (FERC No. 2084-020), the Middle Raquette River Project (FERC No. 2330-007). As part of the multiple project EA, the Commission will also consider the merits of an application for amendment to exemption for the Potsdam Project (FERC No. 2869-007) which is located between the Middle and Lower Raquette River Projects.

l. *Description of the Project:* The existing, operating project consists of: (1) The Stark Falls Development comprising: (a) A 35-foot-high concrete gravity-type dam with a concrete overflow section and a control gate section flanked by earth dikes; (b) six earth saddle dikes; (c) a 1.5-mile-long reservoir at normal pool elevation 1,355.0 feet USGS; (d) an intake; (e) a penstock; (f) a powerhouse containing a 23,872-kW generating unit; and (g) appurtenant facilities; (2) the Blake Falls Development comprising: (a) A 75-foot-high concrete gravity-type dam with a concrete overflow section; (b) an earth dike; (c) a 5.5-mile-long reservoir at normal pool elevation 1,250.5 feet USGS; (d) an intake; (e) a penstock; (f) a powerhouse containing a 13,913-kW generating unit; and (g) appurtenant facilities; (e) the Rainbow Falls Development comprising: (a) A 75-foot-high concrete gravity-type dam with a concrete overflow section flanked by a 1,630-foot-long earth dike; (b) an earth saddle dike; (c) a 3.5-mile-long reservoir at normal pool elevation 1,181.5 feet USGS; (d) an intake; (e) a penstock; (f) a powerhouse containing a 22,828-kW generating unit; and (g) appurtenant facilities; (4) the Five Falls Development comprising: (a) A 50-foot-high concrete gravity-type dam with a concrete overflow section flanked at each end by an earth dike; (b) a 1.0-mile-long reservoir at normal pool elevation 1,077.0 feet USGS; (c) an intake; (d) a 1,200-foot-long penstock; (e) a powerhouse containing a 22,828-kW generating unit; and (f) appurtenant facilities; and (5) the South Colton Development comprising: (a) A 45-foot-high concrete gravity-type dam with a concrete overflow section and earth abutments; (b) a 1.5-mile-long reservoir at normal pool elevation 973.5 feet USGS; (c) an intake; (d) a 1,300-foot-long penstock; (e) a powerhouse containing an 18,948-kW generating unit; and (f) appurtenant facilities. The Upper Raquette River Project has a total installed capacity of 102,389-kW.

m. *Locations of the application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE, Washington, DC 20426, or by calling

(202) 208-1371. The application may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance). A copy is also available for inspection and reproduction at the address in item h. above.

Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Filing and Service of Responsive Documents—The application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

The Commission directs, pursuant to Section 4.34(b) of the Regulations (see Order No. 533 issued May 8, 1991, 56 FR 23108, May 20, 1991) that all comments, recommendations, terms and conditions and prescriptions concerning the application be filed with the Commission within 60 days from the issuance date of this notice. All reply comments must be filed with the Commission within 105 days from the date of this notice.

Anyone may obtain an extension of time for these deadlines from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with 18 CFR 385.2008.

All filings must (1) bear in all capital letters the title "PROTEST", "MOTION TO INTERVENE", "COMMENTS," "REPLY COMMENTS," "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain

copies of the application directly from the applicant. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

David P. Boergers,
Secretary.

[FR Doc. 99-18525 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Amendment to License and Soliciting Comments, Motions To Intervene, and Protests

July 15, 1999.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment to License.

b. *Project No:* 2114-077.

c. *Date Filed:* June 11, 1999.

d. *Applicant:* Public Utility District No. 2 of Grant County.

e. *Name of Project:* Priest Rapids Hydroelectric Project.

f. *Location:* On the Columbia River in Grant County, Washington. The project utilizes federal lands managed by the U.S. Department of Energy, U.S. Bureau of Reclamation, U.S. Fish and Wildlife Service, and the U.S. Department of the Army.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Mr. Douglas A. Ancona, Manager, Natural Resources and Regulatory Affairs, Public Utility District No. 2 of Grant County, P.O. Box 878, Ephrata, WA 98823, (509) 754-3451.

i. *FERC Contact:* Any questions on this notice should be addressed to Timothy Welch at (202) 219-2666, or e-

mail addresses: timothy.welch@ferc.fed.us.

j. *Deadline for filing comments and or motions:* August 23, 1999.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Please include the project number (2114-077) on any comments or motion filed.

k. *Description of Proposal:* The applicant proposes to construct and test a prototype flow deflector at Wanapum Dam. Flow deflectors are structures installed on a dam spillway that dissipate spilled water to reduce the extent to which the spill will increase downstream total dissolved gas levels. The prototype flow deflector would consist of two parts, a sloping toe radius and a triangular concrete section located at elevation 483.0 msl. The toe radius would be 15 feet in length, the deflector's horizontal surface would be 7 feet in length. The deflector would run the full width of the spillway slot, approximately 50 feet. The applicant has scheduled construction of the prototype for September 1999, followed by a biological performance evaluation in October 1999.

l. *Location of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE, Room 2A, Washington, DC 20426, or by calling (202) 208-1371. This filing may be viewed on <http://www.ferc.fed.us/online/rims.htm> (call (202) 208-2222 for assistance). A copy is also available for inspection and reproduction at the address in item h above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title

“COMMENTS”, “RECOMMENDATIONS FOR TERMS AND CONDITIONS”, “PROTEST”, OR “MOTION TO INTERVENE”, as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission’s regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Agency Comments—Federal, state and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency’s comments must also be sent to the Applicant’s representatives.

David P. Boergers,

Secretary.

[FR Doc. 99–18526 Filed 7–20–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

July 15, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

- a. *Type of Application:* New Major License.
- b. *Project No.:* 2330–007.
- c. *Date filed:* December 24, 1991.
- d. *Applicant:* Niagara Mohawk Power Corporation.
- e. *Name of Project:* Lower Raquette River.
- f. *Location:* On the Raquette River, between river miles 19 and 27 from its confluence with the St. Lawrence River, in the towns of Potsdam and Norwood, St. Lawrence County, New York. The project would not utilize federal lands.
- g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).
- h. *Applicant Contact:* Mr. Jerry L. Sabattis, Licensing Coordinator, Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, New York 13202, (315) 428–5561.

i. *FERC Contact:* Charles T. Raabe, E-mail address, Charles.Raabe@ferc.fed.us, or telephone (202) 219–2811.

j. *Deadline Date:* 60 days from the date of issuance of this notice.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

The Commission’s Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project.

Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Status of environmental analysis:* This application has been accepted for filing and is ready for environmental analysis at this time. The Commission will prepare a multiple project Environmental Assessment (EA) including the Carry Falls Project (FERC No. 2060–005), the Upper Raquette River Project (FERC No. 2084–020), the Middle Raquette River Project (FERC No. 2320–005, and the Lower Raquette River Project (FERC No. 2330–007). As part of the multiple project EA, the Commission will also consider the merits of an application for amendment to exemption for the Potsdam Project (FERC No. 2869–007) which is located between the Middle and Lower Raquette River Projects.

l. *Description of the Project:* The existing, operating project consists of: (1) The Norwood Development comprising: (a) A 23-foot-high concrete gravity-type dam having 1-foot-high wooden flashboards; (b) a 350-acre reservoir at normal pool elevation 327.1 feet USGS; (c) a gated concrete intake structure having trashracks and a log chute; (d) a powerhouse containing a 2,000-kW generating unit; (e) a 3-mile-long transmission line; and (f) appurtenant facilities; (2) the East Norfolk Development comprising: (a) A concrete gravity-type dam having sluice gates; (b) a 135-acre reservoir at normal pool elevation 287.9 feet USGS; (c) a concrete intake structure; (d) a 1,408-foot-long flume; (e) a powerhouse containing a 3,500-kW generating unit; (f) a 0.86-mile-long transmission line; and (g) appurtenant facilities; (3) the Norfolk Development comprising: (a) A 20-foot-high concrete dam having 10-inch-high flashboards, headworks gates, and sluice gates; (b) a 10-acre reservoir at normal pool elevation 254.9 feet

USGS; (c) a 1,275-foot-long canal; (d) a 700-foot-long wood stave pipeline; (e) a 103-foot-long steel penstock; (f) a powerhouse containing a 4,500-kW generating unit; and (g) appurtenant facilities; and (4) the Raymondville Development comprising: (a) A 17-foot-high concrete gravity-type dam having two-foot-high flashboards; (b) a 50-acre reservoir at normal pool elevation 211.6 feet USGS; (c) a 447-foot-long concrete flume having trashracks, an ice chute, and gates; (d) a powerhouse containing a 2,000-kW generating unit; (e) a 2.32-mile-long transmission line; and (f) appurtenant facilities. The project has a total installed capacity of 12,000-kW.

m. *Locations of the application:* A copy of the application is available for inspection and reproduction at the Commission’s Public Reference Room, located at 888 First Street, NE, Washington, DC 20426, or by calling (202) 208–1371. The application may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202–208–2222 for assistance). A copy is also available for inspection and reproduction at the address in item h. above.

Filing and Service of Responsive Documents—The application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

The Commission directs, pursuant to Section 4.34(b) of the Regulations (see Order No. 533 issued May 8, 1991, 56 FR 23108, May 20, 1991) that all comments, recommendations, terms and conditions and prescriptions concerning the application be filed with the Commission within 60 days from the issuance date of this notice. All reply comments must be filed with the Commission within 105 days from the date of this notice.

Anyone may obtain an extension of time for these deadlines from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with 18 CFR 385.2008.

All filings must (1) bear in all capital letters the title “COMMENTS”, “REPLY COMMENTS”, “RECOMMENDATIONS,” “TERMS AND CONDITIONS,” or “PRESCRIPTIONS;” (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments,

recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, at the above address. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

David P. Boergers,

Secretary.

[FR Doc. 99-18527 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

July 15, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

- a. *Type of Application:* New Major License.
- b. *Project No.:* 2320-005.
- c. *Date filed:* December 24, 1991.
- d. *Applicant:* Niagara Mohawk Power Corporation.
- e. *Name of Project:* Middle Raquette River.
- f. *Location:* On the Raquette River, between river miles 38 and 47 from its confluence with the St. Lawrence River, in the towns of Colton, Pierrepont, and Potsdam, St. Lawrence County, New York. The project would not utilize federal lands.
- g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).
- h. *Applicant Contact:* Mr. Jerry L. Sabattis, Licensing Coordinator, Niagara Mohawk Power Corporation, 300 Erie Boulevard West, Syracuse, New York 13202, (315) 428-5561.
- i. *FERC Contact:* Charles T. Raabe, E-mail address, Charles.Raabe@ferc.fed.us, or telephone (202) 219-2811.
- j. *Deadline Date:* 60 days from the date of issuance of this notice.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource energy, they must also serve a copy of the document on that resource agency.

k. *Status of environmental analysis:* This application has been accepted for filing and is ready for environmental analysis at this time. The Commission will prepare a multiple project Environmental Assessment (EA) including the Carry Falls Project (FERC No. 2060-005), The Upper Raquette River Project (FERC No. 2084-020), the Middle Raquette River Project (FERC No. 2320-005), and the Lower Raquette River Project (FERC No. 2330-007). As part of the multiple project EA, the Commission will also consider the merits of an application for amendment to exemption for the Potsdam Project (FERC No. 2869-007) which is located between the Middle and Lower Raquette River Projects.

l. *Description of the Project:* The existing, operating project consists of: (1) The Higley Development comprising: (a) A 34-foot-high concrete gravity-type dam having 3-foot-high wooden flashboards, two flood gates, a trashrack, and two waste gates; (b) a 742-acre reservoir at normal pool elevation 883.6 feet USGS; (c) a 160-foot-long, 50-foot-wide flume; (d) a powerhouse containing three generating units having a total capacity of 4,480-kW; (e) a proposed intake structure, a proposed 13-foot-diameter, 225-foot-long steel pipeline, and a proposed powerhouse containing a 7,300-kW generating unit; and (f) appurtenant facilities; (2) The Colton Development comprising: (a) A 27-foot-high concrete gravity-type dam having 2-foot-high flashboards, a log flume, a trash gate, and a gated spillway; (b) a 195-acre reservoir at normal pool elevation 837.0 feet USGS; (c) an intake structure; (d) an 11,090-foot-long steel pipeline; (e) an 80-foot-high surge tank; (f) three penstocks; (g) a powerhouse containing three generating units having a total capacity of 33,605-kW; and (h) appurtenant facilities; (3) The Hannawa Development comprising: (a) A 38-foot-high stone and concrete dam having 3.5-foot-high wooden flashboards, a log

chute, a taintor gate, and a sluice gate; (b) a 204-acre reservoir at normal pool elevation 552.0 feet USGS; (c) a headworks structure; (d) a 2,700-foot-long canal; (e) two penstocks; (f) a powerhouse containing two generating units having a total capacity of 8,124-kW; and (g) appurtenant facilities; and (4) The Sugar Island Development comprising: (a) A 37-foot-high concrete gravity-type dam having two taintor gates; (b) a 29-acre reservoir at normal pool elevation 470.0 feet USGS; (c) an intake structure with trashracks and a headgate; (d) a 4,700-foot-long steel pipeline; (e) a 71-foot-high surge tank; (f) two penstocks; (g) a powerhouse containing two generating units having a total capacity of 5,138-kW; and (f) appurtenant facilities. The project has a total installed capacity of 51,347-kW.

m. *Locations of the applications:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE, Washington, DC 20426, or by calling (202) 208-1371. The application may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance). A copy is also available for inspection and reproduction at the address in item h. above.

*Filing and Service of Responsive Documents—*The application is ready for an environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

The Commission directs, pursuant to section 4.34(b) of the Regulations (see order No. 533 issued May 8, 1991, 56 FR 23108, May 20, 1991) that all comments, recommendations, terms and conditions and prescriptions concerning the application be filed with the Commission within 60 days from the issuance date of this notice. All reply comments must be filed with the Commission within 105 days from the date of this notice.

Anyone may obtain an extension of time for these deadlines from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with 18 CFR 385.2008.

All filings must (1) Bear in all capital letters the title "COMMENTS", "REPLY COMMENTS", "RECOMMENDATIONS", "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone

number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, at the above address. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

David P. Boergers,
Secretary.

[FR Doc. 99-18528 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Amendment of Exemption and Soliciting Comments, Motion To Intervene, and Protests

July 15, 1999.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment of Exemption.

b. *Project No.:* 9543-008.

c. *Date Filed:* May 18, 1999.

d. *Applicant:* Rim View Trout Company, Inc. (Rim View).

e. *Name of Project:* Rim View Hydroelectric Project.

f. *Location:* At Rim View's fish hatchery in Gooding County, Idaho. The project does not occupy federal or tribal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Gregory Kaslo, Rim View Trout Company, 1301 Vista Avenue, Boise, ID 83705, (208) 344-7321.

i. *FERC Contact:* Any questions on this notice should be addressed to James Hunter at (202) 219-2839, or e-mail address: james.hunter@ferc.fed.us.

j. *Deadline for filing comments and or motions:* August 23, 1999.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Please include the project number (P-9543-008) on any comments or motions filed.

k. *Description of Proposal:* Rim View requests amendment of its exemption to delete the proposed lower powerhouse that was to use outflow from the hatchery, because the site does not have the necessary elevation to allow construction of a powerhouse.

l. *Locations of the application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE, Room 2A, Washington, DC 20426, or by calling (202) 208-1371. The application may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call (202) 208-2222 for assistance). A copy is also available for inspection and reproduction at the address in item h above.

m. *Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.*

Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of rule of practice and procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Filing and Service of Responsive Documents—Any filing must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTESTS", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

David P. Boergers,

Secretary.

[FR Doc. 99-18529 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Application Accepted for Filing and Soliciting Motions To Intervene and Protests

July 15, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* P-11758-000.

c. *Date Filed:* June 11, 1999.

d. *Applicant:* Universal Electric Power Corporation.

e. *Name of Project:* Mississippi L&D #25.

f. *Location:* On the Mississippi River, in Lincoln County, Missouri, utilizing federal lands administered by the U.S. Army Corps of Engineers.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Mr. Ronald S. Feltenberger, Universal Electric Power Corp., 1145 Highbrook Street, Akron, OH 44301, (330) 535-7115.

i. *FERC Contact:* Charles T. Raabe, E-mail address, Charles.Raabe@ferc.fed.us, or telephone (202) 219-2811.

j. *Deadline Date:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a

particular resource agency, they must also serve a copy of the document on that resource agency.

k. The proposed project would utilize the existing U.S. Army Corps of Engineers' Mississippi L&D #25 and would consist of: (1) 18 new 80-foot-long, 114-inch-diameter steel penstocks; (2) a new 604-foot-long, 30-foot-wide, 30-foot-high powerhouse containing 9 generating units having a total installed capacity of 50,000-kW; (3) a new exhaust apron; (4) a new 500-foot-long, 14.7-kV transmission line; and (5) appurtenant facilities.

Applicant estimates that the average annual generation would be 307 GWh and that the cost of the studies to be performed under the terms of the permit would be \$5,000,000. Project energy would be sold to utility companies, corporations, municipalities, aggregators, or similar entities.

l. A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE, Washington, DC 20426, or by calling (202) 208-1371. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call (202) 208-2222 for assistance). A copy is also available for inspection and reproduction at the address in item h above.

Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

Preliminary Permit—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

Notice of intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. An additional copy must be sent to Director, Division of Project Reviews, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of any agency's comments must also be sent to the Applicant's representatives.

David P. Boergers,

Secretary.

[FR Doc. 99-18530 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Application Accepted for Filing and Soliciting Motions To Intervene and Protests

July 15, 1999.

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* P-11738-000.

c. *Dated filed:* May 7, 1999.

d. *Applicant:* Universal Electric Power Corp.

e. *Name of Project:* Grenada Dam Project.

f. *Location:* At the Corps of Engineer's Grenada Dam, on the Yalobusha River, near than Town of Grenada, Grenada County, Mississippi.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)-825(r).

h. *Applicant Contact:* Mr. Ronald Feltenberger, Universal Electric Power Corp., 1145 Highbrook Street, Akron, Ohio 44301 (330) 535-7115.

i. *FERC Contact:* Michael Spencer, Michael.Spencer@FERC.fed.us, (202) 219-2846.

j. *Deadline for filing motions to intervene and protest:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The proposed project would utilize the Corps of Engineer's Grenada dam and consist of the following: (1) Two 96-inch-diameter, 80-foot-long steel penstocks, constructed in the existing outlet works; (2) a powerhouse containing five generating units with a total capacity of 12.75 MW and an estimated average annual generation of 78.0 GWh; and (3) a 4-mile-long transmission line.

l. *Locations of the application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 888 First Street, NE, Room 2A, Washington, DC 20426, or by calling (202) 219-1371. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (Call (202) 208-2222 for assistance). A copy is also available for inspection and reproduction at the address in item h above.

Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

Preliminary Permit—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

Notice of intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of

application). A notice of intent must be served on the applicant(s) named in this public notice.

Proposed Scope of Studies Under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an

agency's comments must also be sent to the Applicant's representatives.

David P. Boergers,

Secretary.

[FR Doc. 99-18578 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Application Accepted for Filing and Soliciting Motions To Intervene and Protests

July 15, 1999.

a. *Type of Application:* Preliminary Permit.

b. *Project No.:* P-11730-000.

c. *Date filed:* May 7, 1999.

d. *Applicant:* Universal Electric Power Corp.

e. *Name of Project:* Sardis Dam Project.

f. *Location:* At the Corps of Engineer's Sardis Dam, on the Little Tallahatchie River, near the Town of Batesville, Panola County, Mississippi.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Mr. Ronald Feltenberger, Universal Electric Power Corp., 1145 Highbrook Street, Akron, Ohio 44301 (330) 535-7115.

i. *FERC Contact:* Michael Spencer, Michael.Spencer@FERC.fed.us, (202) 219-2846.

j. *Deadline for filing motions to intervene and protest:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Project:* The proposed project would utilize the Corps of Engineer's Sardis dam and consist of the following: (1) Two 96-inch-diameter, 80-foot-long steel penstocks, constructed in the existing outlet works; (2) a powerhouse containing six generating units with a total capacity of 15.75 MW and an

estimated average annual generation of 97.0 GWh; and (3) a 0.5-mile-long transmission line.

1. *Locations of the application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 888 First Street, NE, Room 2A, Washington, DC 20426, or by calling (202) 219-1371. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (Call (202) 208-2222 for assistance). A copy is also available for inspection and reproduction at the address in item h above.

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Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit

would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

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Filing any Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

David P. Boergers,

Secretary.

[FR Doc. 99-18579 Filed 7-20-99; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-6401-1]

Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; extension of time for request for comment.

SUMMARY: On June 18, 1999, the Environmental Protection Agency ("EPA") published a document in the **Federal Register** (64 FR 32948-32972) responding to comments on how it calculates the economic benefit obtained by regulated entities as a result of violating environmental requirements. The document also proposed certain changes to the Agency's benefit recapture approach, and requested further comment on those proposed changes. By this document, EPA is extending the deadline for comment from July 30, 1999, to September 30, 1999.

DATES: Comments must be received by EPA at the address below by September 30, 1999.

ADDRESSES: Written comments should be submitted in triplicate to: U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assurance, Economic Benefit Docket Clerk, Mail Code 2248-A, 401 M Street, SW, Washington, D.C. 20460.

EPA will maintain a record of all written comments submitted pursuant to this notice. Copies of the comments may be reviewed at the Ariel Rios Federal Building, 1200 Pennsylvania Avenue, Washington, DC 20004. Persons interested in reviewing the comments must make advance arrangements to do so by calling (202) 564-2235.

FOR FURTHER INFORMATION CONTACT: Copies of the BEN computer model and the BEN Users Manual may be obtained from the National Technological Information Service by calling (800) 553-6847. Callers should request order number PB99-501587. Electronic copies of these items are also downloadable through the Office of Enforcement and Compliance Assurance's World Wide Web page on the Internet at: <http://www.epa.gov/oeca/datasys/dsm2.html>. For further information, contact Jonathan Libber, Office of Regulatory Enforcement, Multimedia Enforcement Division, at (202) 564-6102.

Dated: July 15, 1999.

Melissa P. Marshall,

*Director, Multimedia Enforcement Division,
Office of Enforcement and Compliance
Assurance.*

[FR Doc. 99-18605 Filed 7-20-99; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-6400-8]

Draft Modification of the National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges From Construction Activities

AGENCY: Environmental Protection
Agency (EPA).

ACTION: Notice of draft modification of
the NPDES general permit reissuance for
storm water discharges from
construction activities.

SUMMARY: The EPA, Region 4, general
permit for the discharge of storm water
from construction activities, issued on
March 31, 1998, is being modified. This
modification will include monitoring
and reporting requirements for facilities
discharging storm water from
construction activities to waters of the
U.S. that are on the 303(d) list for
impairment due to sediment and/or silt.
In addition, several typographical errors
will be corrected, and, the eligibility
requirements of part I.B.3. will be
renumbered to be consistent with the
National general permit for the
discharge of storm water from
construction activities, which was
issued on February 17, 1998, and the
Notice of Intent (NOI, form 3510-9).

The following provides notice for a
draft modification of the NPDES general
permit and fact sheets for storm water
discharges from construction activities
in the following areas of, EPA, Region
4:

Indian Country Lands within the State
of Alabama

The State of Florida

Indian Country Lands within the State
of Florida

Indian Country Lands within the State
of Mississippi

Indian Country Lands within the State
of North Carolina

DATES: This general permit became
effective on April 3, 1998. Deadlines for
submittal of NOIs which are provided in
Part II.A. of the permit are not changed.
Comments on the proposed
modifications must be received or
postmarked by midnight no later than
February 28, 1999. This modification

will be effective 60 days from its final
publication in the **Federal Register**.

ADDRESSES: Notices of Intent (NOIs)
submitted in accordance with this
permit to receive coverage under this
permit must be sent to Storm Water
Notice of Intent (4203), 401 M Street,
SW, Washington, DC 20460. The
complete administrative record is
available from the U.S. Environmental
Protection Agency, Region 4, Freedom
of Information Officer, 61 Forsyth St.
S.W., Atlanta, GA 30303. A reasonable
fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr.
Floyd Wellborn, telephone number
(404) 562-9296, or Mr. Mike Mitchell,
telephone number (404) 562-9303, or at
the following address: United States
Environmental Protection Agency,
Region 4, Water Management Division,
Surface Water Permits Section, Atlanta
Federal Center, 61 Forsyth Street S.W.,
Atlanta, GA 30303.

PUBLIC COMMENT PERIOD: Public
comments are being invited only for
those specific modifications discussed
within the proposal for the general
permit for storm water discharges from
construction activities issued by EPA,
Region 4, on March 31, 1998. The public
should send their comments to the
Surface Water Permits Section, Water
Management Division, U.S. EPA, 61
Forsyth Street, SW, Atlanta, GA 30303.
To ensure that EPA can read,
understand, and therefore properly
respond to comments, the Agency
requests commenters to type or print in
ink any comments. Each comment
should cite the page number and, where
possible, the section(s) and/or
paragraph(s) in the proposed permitting
actions to which the comment relates.
Commenters should use a separate
paragraph for each issue discussed.

State Certification

EPA is providing copies of the
proposed permit modification to the
State of Florida and Indian Tribes where
the proposed actions would be effective.
The State of Florida and Tribes will
review the proposed actions to ensure
that they will not result in violations of
water quality criteria. EPA will work
with The State and Tribes to obtain their
certification in accordance with section
401 of the Clean Water Act. EPA will
prepare certifications for Indian lands
where there is no approved Tribe or any
Tribes which have not established water
quality standards.

The Coastal Zone Management Act
(CZMA) requires that all Federal
licensing and permitting actions be
reviewed for consistency with each
approved State coastal zone

management plan. The Federal
Consistency Act requires that all NPDES
permit be reviewed for consistency with
the Endangered Species Act and the
National Historic Preservation Act. EPA
has also initiated these reviews.

SUPPLEMENTARY INFORMATION:

Table of Contents

The following is an outline of the
organization of the proposed
modification actions:

- I. Introduction
- II. Coverage of General Permit
- III. Proposed Modification Summary and
Justification
- IV. Cost Estimates
- V. Economic Impact
- VI. Unfunded Mandates Reform Act
- VII. Paperwork Reduction Act
- VIII. Regulatory Flexibility Act
- IX. Official Signatures

I. Introduction

In 1972, the Federal Water Pollution
Control Act (also referred to as the Clean
Water Act (CWA)) was amended to
provide that the discharge of any
pollutants to waters of the United States
from any point source is unlawful,
except if the discharge is in compliance
with a National Pollutant Discharge
Elimination System (NPDES) permit. In
1987, section 402(p) was added to the
CWA to establish a comprehensive
framework for addressing storm water
discharges under the NPDES program.
Section 402(p)(4) of the CWA clarifies
the requirements for EPA to issue
NPDES permits for storm water
discharges associated with industrial
activity. On November 16, 1990 (55 FR
47990), EPA published final regulations
which define the term "storm water
discharge associated with industrial
activity."

In 1992, EPA issued a general permit
for discharges of storm water from
construction activities "associated with
industrial activity" to reduce the
administrative burden of issuing an
individual NPDES permit to each
construction activity. On March 31,
1998 EPA, Region 4, issued a renewal of
the 1992 permit.

Section 303(d) of the CWA requires
States to identify waters for which
technology based effluent limitations
are not stringent enough to implement
any applicable water quality standard.
The statute also requires the States to
establish a priority ranking for such
waters, taking into account the severity
of pollution and the uses to be made of
the waters. Title 40 of the Code of
Federal Regulation (CFR) section 130.7
defines the section 303(d) waters to be
those waters in each State which are
water quality limited segments which
still require total maximum daily loads.

40 CFR 122.4(d) and (i) prohibit EPA from authorizing discharges which will cause or contribute to the impaired use of waters of the U.S. Currently, facilities discharging to 303(d) listed waters would most likely be required to apply for individual permit coverage which is resource intensive for both the applicant and the issuing authority. Therefore, EPA Region 4 has concluded that additional permitting measures in the existing storm water general permit are necessary to assure that storm water discharges from construction activities to 303(d) waters, listed for silt or sediment, do not cause or contribute to the impaired designated use of a water body.

II. Coverage of General Permit

Section 402(p) of the Clean Water Act (CWA) clarifies that storm water discharges associated with industrial activity to waters of the United States must be authorized by an NPDES permit. On November 16, 1990, EPA published regulations under the NPDES program which defined the term "storm water discharge associated with industrial activity" to include storm water discharges from construction activities (including clearing, grading, and excavation activities) that result in the disturbance of five or more acres of total land area, including areas that are part of a larger common plan of development or sale (40 CFR 122.26(b)(14)(x)).¹ The term "storm water discharge from construction activities" will be used in this document to refer to storm water discharges from construction sites that meet the definition of a storm water discharge associated with industrial activity.

The proposed permit modification does not change the March 31, 1998, issued permit's coverage area. The modification only adds monitoring requirement in part III of the permit for dischargers to 303(d) listed waters, listed for silt or sediment, and it renumbers the eligibility requirements of part I.B.3.

III. Proposed Modification Summary and Justification

Monthly monitoring only requirements for Settleable Solids (ml/l), Total Suspended Solids (TSS), Turbidity (NTUs) and Volume of Flow will be added to the general permit to

provide data to more reasonably evaluate if the discharge is contributing to the impairment of the water body. The permit language will require monitoring of a qualifying storm event or discharges of a previously collected qualifying storm event(s), by grab sample within the first 30 minutes of the event or the discharge of a previously collected event. EPA defines the discharge of a previously collected event as the discharge from any impoundment which would detain or retain the storm water runoff from a site such that the runoff does not flow directly off the surface of the area under construction to a receiving water. A qualifying event will be 0.5 inch rain event over a 24 hour period. In addition to the effluent monitoring, upstream monitoring, where there is flow, will be required. These monitoring requirements are based on section 308(a) of the Clean Water Act and are intended to demonstrate that the BMPs on site are preventing the discharges of storm water from the construction activities from causing or contributing to the impairment in the receiving water. This demonstration will be accomplished by comparing the upstream data and the downstream data. Also, in accordance with section 308(a) of the CWA, the permittee will be required to report, monthly, the results of the monitoring for Settleable Solids, Turbidity and Volume of Flow. The permittee will be required to report the soil type and average slope of the drainage area of each outfall and the name of the receiving water.

The final version of this fact sheet for the General Permit modification will include lists of the 303(d) waters in the coverage areas of the permit that are impaired because of silt/sediment. The fact sheet will include instructions directing the applicant to determine if their facility will be discharging to these waters on the 303(d) lists. The instructions will direct the applicant to make this determination by referencing the lists and contacting the State agency which generated the list, since the lists may change from time to time. An internet site is being considered for accessing these lists for the coverage areas. The permit will reference this list and require the permittee, in addition to the above referenced monitoring and reporting requirements, to notify EPA-Region 4 if they discharge to waters that are on the 303(d) list. The permit will also require a discussion within the pollution prevention plan, by all potential permittees, to explain how the determination was made of whether or

not the facility discharges to 303(d) listed waters.

Finally, a typographical error in appendix C will be corrected to delete the reference to addendum H and replace it with a reference to appendix C. Part I.B.3.e.(1) in the permit is being renumbered to part I.B.3.e.(2); and part I.B.3.g. in the permit is being renumbered to part I.B.3.f. These two changes make the permit consistent with the Notice of Intent (NOI) used to apply for coverage under the general permit and with the national NPDES general permit for discharges of storm water from construction activity, issued on February 17, 1998.

IV. Cost Estimates

The two major costs associated with pollution prevention plans for construction activities include the costs of sediment and erosion controls and the costs of storm water management measures. The proposed modification does not change from the costs described in the permit issued in the **Federal Register** on March 31, 1998 (63 FR 15621). Typically, most construction sites will employ several types of sediment and erosion controls and storm water management controls.

Costs are presented in 1992 dollars and were reviewed by the Office of Management and Budget during the September 25, 1992 issuance of the general permit. Annualized costs are based on a 10 year period and 10 percent discount rate. Estimates include a contingency cost of 25 percent of the construction cost and operation and maintenance costs of 5 percent of the construction cost. Land costs are not included.

V. Economic Impact

Under Executive Order 1286 (58 FR 51735 (October 4, 1993)), the Agency must determine whether the 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 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; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants user fees, or loan programs or the rights and obligations recipients thereof; or raise novel legal or

¹ On June 4, 1992, the United States Court of Appeals for the Ninth Circuit remanded the exemption for construction sites of less than five acres to the EPA for further rulemaking (*Natural Resources Defense Council v. EPA*, Nos. 90-70671 and 91-70200, slip op. at 6217 (9th Cir. June 4, 1992)).

policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

EPA has determined that this modified general permit is not a "significant regulatory action" under the terms Executive Order 12866 and is therefore not subject to formal OMB review prior to proposal.

VI. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under UMRA section 202, 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, UMRA section 205 generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of UMRA section 205 do not apply when they are inconsistent with applicable law. Moreover, UMRA section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes an explanation with the final rule why the alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under UMRA section 203 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.

A. UMRA Section 202 and the Construction General Permit

UMRA section 202 requires a written statement containing certain assessments, estimates and analyses

prior to the promulgation of certain general notices of proposed rulemaking (2 U.S.C. 1532). UMRA section 421(10) defines "rule" based on the definition of rule in the Regulatory Flexibility Act. Section 601 of the Regulatory Flexibility Act defines "rule" to mean any rule for which an agency publishes a general notice of proposed rulemaking pursuant to section 553 of the Administrative Procedure Act. EPA does not propose to issue NPDES general permits based on APA section 553. Instead, EPA relies on publication of general permits in the **Federal Register** in order to provide "an opportunity for a hearing" under CWA section 402(a), 33 U.S.C. 1342(a). Nonetheless, EPA has evaluated permitting alternatives for regulation of storm water discharges associated with construction activity. The general permit modification that EPA proposes to issue would be virtually the same NPDES general permit for construction that many construction operators have used over the past five years. Furthermore, general permits provide a more cost and time efficient alternative for the regulated community to obtain NPDES permit coverage than that provided through individually drafted permits.

B. UMRA Section 203 and the Construction General Permit

Agencies are required to prepare small government agency plans under UMRA section 203 prior to establishing any regulatory requirement that might significantly or uniquely affect small governments. "Regulatory requirements" might, for example, include the requirements of these NPDES general permits for discharges associated with construction activity, especially if a municipality sought coverage under one of the general permits. EPA envisions that some municipalities—those with municipal separate storm sewer systems serving a population over 100,000—may elect to seek coverage under these proposed general permits. For many municipalities, however, a permit application is not required until August 7, 2001, for a storm water discharge associated with construction activity where the construction site is owned or operated by a municipality with a population of less than 100,000. (See 40 CFR 122.26(e)(1)(ii) and (g)).

In any event, any such permit requirements would not significantly affect small governments because most State laws already provide for the control of sedimentation and erosion in a similar manner as the general permit.

Permit requirements also would not uniquely affect small governments because compliance with the permit's conditions affects small governments in the same manner as any other entity seeking coverage under the permit. Thus, UMRA section 203 would not apply.

VII. Paperwork Reduction Act

EPA has reviewed the requirements imposed on regulated facilities in these final general permits under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* EPA did not prepare an Information Collection Request (ICR) document for the proposed permit modification because the information collection requirements in this permit have already been approved by the Office of Management and Budget (OMB) in submissions made for the NPDES permit program under the provisions of the Clean Water Act.

VIII. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, U.S.C. 601 *et seq.*, EPA is required to prepare a Regulatory Flexibility Analysis to assess the impact of rules on small entities. No Regulatory Flexibility Analysis is required, however, where the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The proposed permit modification does not nullify the permit condition which provides small entities with an application option that is less burdensome than individual applications or participating in a group application. The other requirements have been designed to minimize significant economic impacts of the rule on small entities and does not have a significant impact on industry. In addition, the permit reduces significant administrative burdens on regulated sources. Accordingly, I hereby certify pursuant to the provisions of the Regulatory Flexibility Act, that this permit will not have a significant impact on a substantial number of small entities.

IX. Official Signatures

Accordingly, I hereby certify pursuant to the provisions of the Regulatory Flexibility Act, that this permit will not have a significant impact on a substantial number of small entities.

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

Dated: July 7, 1999.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

**Draft NPDES General Permit Modification
for Storm Water Discharges From
Construction Activities**

*Proposed Modification of National Pollutant
Discharge Elimination System (NPDES)
General Permit for Storm Water Discharges
From Construction Activities*

For reasons set forth in the preamble, Part III of the NPDES General Permit for Storm Water Discharges From Construction Activities is proposed to be modified as described below. A new appendix D is proposed to be added to the general permit. These proposed modifications and additional requirements will become effective on the date of **Federal Register** publication of the final modifications.

Appendix C

I. Instructions

* * * * *

- Certify pursuant to Section I.B.3.e. of the construction general permit that their storm water discharges, and BMPs constructed to control storm water runoff, are not likely, and will not be likely to adversely affect species identified in Appendix C of this permit.

* * * * *

Appendix D

Discharging to Impaired Waters Guidance

I. Instructions

For facilities in Florida:

In order to get construction general permit coverage, applicants must determine if the facility discharges to waters listed on the 303(d) list for impairment due to either Total Suspended Solids, Turbidity, Silt or Sediment. The 303(d) list is updated periodically; therefore, it is incumbent upon the applicant to contact the Florida Department of Environmental Protection (FDEP) in Tallahassee for the most current list if you are unsure whether or not the facility will be discharging to a 303(d) listed water for either of the above referenced parameters. An current 303(d) list is maintained at the following web site: www2.dep.state.fl.us/water/

Please refer to this site if you have internet access before contacting FDEP.

For facilities in Indian Country Lands:

In order to get construction general permit coverage, applicants must determine if the facility discharges to waters impaired for either Total Suspended Solids, Turbidity, Silt or Sediment. It is incumbent upon the applicant to contact the Environmental Coordinator of the Tribe on whose lands the discharge occurs if you are unsure whether or not the facility will be discharging to impaired waters for either of the above referenced parameters.

What to do next:

For all facilities, if the determination is made that you will be discharging waters impaired because of either Total Suspended Solids, Turbidity, Silt or Sediment; then, the

facility must comply with the terms and conditions of Part III.C. of the permit.

Part I. Coverage Under This Permit

* * * * *

3. *Limitations on Coverage.* The following storm water discharges from construction sites are not authorized by this permit:

* * * * *

e. storm water discharges from construction sites if the discharges may adversely affect a listed or proposed to be listed endangered or threatened species or its critical habitat;

(1) All applicants must follow the procedures provided at Appendix C of this permit when applying for permit coverage.

(2) A discharge of storm water associated with construction activity may be covered under this permit only if the applicant certifies that they meet at least one of the following criteria. Failure to continue to meet one of these criteria during the term of the permit will result in the storm water discharges associated with construction ineligible for coverage under this permit.

(a) The storm water discharge(s), and the construction and implementation of Best Management Practices (BMPs) to control storm water runoff, are not likely to adversely affect species identified in Appendix C of this permit or critical habitat for a listed species; or

(b) The applicant's activity has received previous authorization under Section 7 or Section 10 of the Endangered Species Act and that authorization addressed storm water discharges and/or BMPs to control storm water runoff (e.g., developer included impact of entire project in consultation over a wetlands dredge and fill permit under Section 7 of the Endangered Species Act); or

(c) The applicant's activity was considered as part of a larger, more comprehensive assessment of impacts on endangered species under Section 7 or Section 10 of the Endangered Species Act that which accounts for storm water discharges and BMPs to control storm water runoff (e.g., where an area-wide habitat conservation plan and Section 10 permit is issued which addresses impacts from construction activities including those from storm water, or a National Environmental Policy Act (NEPA) review is conducted which incorporates ESA Section 7 procedures); or

(d) Consultation under Section 7 of the Endangered Species Act is conducted for the applicant's activity which results in either a no jeopardy opinion or a written concurrence on a finding of not likely to adversely affect; or

(e) The applicant's activity was considered as part of a larger, more comprehensive site-specific assessment of impacts on endangered species by the owner or other operator of the site and that permittee certified eligibility under item (a), (b), (c), or (d) above (e.g. owner was able to certify no adverse impacts for the project as a whole under item (a), so the contractor can then certify under item (e)).

* * * * *

f. Storm water discharges that would affect a property that is listed or is eligible for listing in the National Historic Register

maintained by the Secretary of Interior may be in violation of the National Historic Preservation Act. A discharge of storm water associated with construction activity may be covered under this permit only if the applicant certifies that either:

(1) The storm water discharge(s), and the construction and implementation of BMPs to control storm water runoff, do not affect a property that is listed or is eligible for listing in the National Historic Register maintained by the Secretary of Interior; or,

(2) The applicant consults with the State Historic Preservation Officer (SHPO) or the Tribal Historic Preservation Officer (THPO) on the potential for adverse effects which results in a no effect finding; or

(3) The applicant has obtained and is in compliance with a written agreement between the applicant and the SHPO or THPO that outlines all measures to be undertaken by the applicant to mitigate or prevent adverse effects to the historic property; or

(4) The applicant agrees to implement and comply with the terms of a written agreement between another owner/operator (e.g., subdivision developer, property owner, etc.) and the SHPO or THPO that outlines all measures to be undertaken by operators on the site to mitigate or prevent adverse effects to the historic property; or

(5) The applicant's activity was considered as part of a larger, more comprehensive site-specific assessment of effects on historic properties by the owner or other operator of the site and that permittee certified eligibility under item (1), (2), (3), or (4) above.

g. discharges of storm water associated with industrial activity from construction sites not specifically identified in the pollution prevention plan in accordance with Part V of this permit. Such discharges not identified in the plan are subject to the upset and bypass rules in Part VII of this permit.

* * * * *

C. Authorization

* * * * *

9. Under which section(s) of Part I.B.3.e.(2) (Endangered Species) and Part I.B.3.f. (Historical Preservation) the applicant is certifying eligibility.

* * * * *

Part III. Special Conditions, Management Practices, and Other Non-Numeric Limitations

* * * * *

C. Discharges to Waters Impaired Due to Sedimentation or Siltation

Facilities that have coverage under this general permit prior to its modification on [insert the effective date of the final modification] shall be in compliance with Parts III.C.1. through 5. within 30 days of the effective date of this modification.

Facilities that apply for coverage under the general permit after [insert the effective date of the final modification] which discharge storm water from construction activities directly to waters of the United States which are listed on the 303(d) list for sedimentation or siltation, see Appendix D, shall comply with the following:

1. The permittee shall monitor, during regular working hours, once per month within the first 30 minutes of a qualifying event or within the first 30 minutes of the beginning of the discharge of a previously collected qualifying event for Settleable Solids (ml/l), Total Suspended Solids (mg/l), Turbidity (NTUs) and Flow (MGD).

2. Where the receiving water has flow upstream from the discharge, a background sample for Settleable Solids, Total Suspended Solids and Turbidity shall be taken instream at middepth and immediately upstream from the influence of the discharge of storm water from the site.

3. The soil type and average slope of the drainage area for each outfall shall be reported with the Discharge Monitoring Report submitted in accordance with Part III.C.5. of the permit.

4. A qualifying event for the purpose of this section is a rain event of 0.5 inches or greater in a 24 hour period.

5. Data collected in accordance with Part III.C. of the permit shall be submitted to EPA once per month.

This permit does not authorize the discharge of storm water, from construction activities, which causes or contributes to the impairment of the designated use of waters of the United States.

* * * * *

[FR Doc. 99-18607 Filed 7-20-99; 8:45 am]

BILLING CODE 6560-50-U

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities: Extension of Existing Collection; Comment Request

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of information collection under review; Employer information report (EEO-1).

SUMMARY: In accordance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Equal Employment Opportunity Commission (EEOC) announces that it intends to submit to the Office of Management and Budget (OMB) a request for an extension of the existing information collection listed below.

DATES: Written comments on this notice must be submitted on or before September 20, 1999.

ADDRESSES: Comments should be submitted to Frances M. Hart, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 10th Floor, 1801 L Street, NW, Washington, DC 20507. As a convenience to commentators, the Executive Secretariat will accept comments transmitted by facsimile ("FAX") machine. The telephone

number of the FAX receiver is (202) 663-4114. (This is not a toll-free number.) Only comments of six or fewer pages will be accepted via FAX transmittal. This limitation is necessary to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663-4078 (voice) or (202) 663-4074 (TDD). (These are not toll-free telephone numbers.) Copies of comments submitted by the public will be available to review at the Commission's library, Room 6502, 1801 L Street, NW, Washington, DC 20507 between the hours of 9:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT:

Joachim Neckere, Director, Program Research and Surveys Division, 1801 L Street, NW, Room 9222, Washington, DC 20507, (202) 663-4958 (voice) or (202) 663-7063 (TTD).

SUPPLEMENTARY INFORMATION: The Commission solicits public comment to enable it to:

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

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

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

(4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

Collection Title: Employer Information Report (EEO-1).

OMB Number: 3046-0007.

Frequency of Report: Annual.

Type of Respondent: Private employer with 100 or more employees and some federal government contractors and first-tier subcontractors with 50 or more employees.

Description of Affected Public: Private industry employers and business, private institutions, organizations and farms.

Responses: 126,700.

Reporting Hours: 463,700.

Number of Forms: 1.

Federal Cost: \$813,175.

Abstract: Section 709(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-8(c), requires employers to make and keep records relevant to a determination of whether unlawful employment practices have or are being committed and to make reports therefrom as required by the EEOC. Accordingly, the EEOC has issued regulations which set forth the reporting requirement for various kinds of employers. Employers in the private sector with 100 or more employees and some federal contractors with 50 or more employees have been required to submit EEO-1 reports annually since 1966. The individual reports are confidential.

EEO-1 data are used by the EEOC to investigate charges of discrimination against employers in private industry. In addition, the data are used to support EEOC decisions and conciliations, and for research. The data are shared with the Office of Federal Contract Compliance Programs (OFCCP) in the U.S. Department of Labor, and several other federal agencies. Pursuant to section 709(d) of Title VII of the Civil Rights Act of 1964, as amended, EEO-1 data are also shared with 86 State and Local Fair Employment Practices Agencies (FEPAs).

Burden Statement: The estimated number of respondents included in the annual EEO-1 survey is 45,000 private employers. The estimated number of responses per respondent averages between 2 and 3 EEO-1 reports. The number of annual responses is approximately 126,700, and the total annual burden is estimated to be 463,700 hours. In order to help reduce burden, respondents are encouraged to report data on electronic media such as magnetic tapes and interactive diskettes.

Dated: July 14, 1999.

For the Commission.

Ida L. Castro,

Chairwoman.

[FR Doc. 99-18557 Filed 7-20-99; 8:45 am]

BILLING CODE 6570-01-M

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

July 12, 1999.

SUMMARY: The Federal Communications Commission, as part of its continuing

effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, Public Law 104-13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before September 20, 1999. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments to Les Smith, Federal Communications Commission, Room 1 A-804, 445 Twelfth Street, SW, Washington, DC 20554 or via the Internet to lesmith@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collections contact Les Smith at (202) 418-0217 or via the Internet at lesmith@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Approval Number: 3060-0394.
Title: Section 1.420 Additional procedures in proceedings for amendment of FM, TV or Air-Ground Table of Allotments.

Form Number: None.

Type of Review: Extension of currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 30.

Estimated Time Per Response: 20 minutes—2 hours (20 minutes consultation—1-2 hours contract attorney).

Frequency of Response: On occasion.

Total Annual Burden: 10 hours.

Total Annual Cost: \$9,000.

Needs and Uses: Section 1.420 requires a petitioner seeking to withdraw or dismiss its expression of interest in allotment proceedings to file a request for approval. This request would include a copy of any related written agreement and an affidavit certifying that neither the party withdrawing its interest nor its principals has received any consideration in excess of legitimate and prudent expenses in exchange for dismissing/withdrawing its petition, an itemization of the expenses for which it is seeking reimbursement, and the terms of any oral agreement. Each remaining party to any written or oral agreement must submit an affidavit within 5 days of petitioner's request for approval stating that it has paid no consideration to the petitioner in excess of the petitioner's legitimate and prudent expenses. The data is used by FCC staff to ensure that an expression of interest in applying for, constructing, and operating a station was filed under appropriate circumstances and not to extract payment in excess of legitimate and prudent expenses.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 99-18543 Filed 7-20-99; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL ELECTION COMMISSION

Sunshine Act Notice

AGENCY: Federal Election Commission.

DATE AND TIME: Tuesday, July 27, 1999 at 10 a.m.

PLACE: 999 E Street, N.W., Washington, D.C.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.

Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C. Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

DATE AND TIME: Thursday, July 29, 1999 at 10 a.m.

PLACE: 999 E Street, N.W., Washington, D.C. (ninth floor)

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes. Advisory Opinion 1999-17

Governor George W. Bush for President Exploratory Committee, by Benjamin Ginsberg, counsel.

Advisory Opinion 1999-18

San Diego County Republican Central Committee by C. April Boling, CPA. Title 26 Final Rules and Explanation and Justification on Documentation Required for Matching of Credit and Debit Card Contributions.

Title 26 Final Rules and Explanation and Justification on Coordinated Expenditures, Audit Procedures and Media Travel.

Administrative Matters.

PERSON TO CONTACT FOR INFORMATION:

Mr. Ron Harris, Press Officer, Telephone: (202) 694-1220.

Mary W. Dove,

Acting Secretary.

[FR Doc. 99-18772 Filed 7-19-99; 3:28 pm]

BILLING CODE 6715-01-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 August 4, 1999.

A. Federal Reserve Bank of Chicago (Philip Jackson, Applications Officer) 230 South LaSalle Street, Chicago, Illinois 60690-1413:

1. *Paul H. and Neva M. Johnson*, Algona, Iowa; to acquire additional voting shares of Mid-Iowa Bancshares Co., Algona, Iowa, and thereby indirectly acquire additional voting shares of Iowa State Bank, Algona, Iowa.

Board of Governors of the Federal Reserve System, July 15, 1999.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 99-18540 Filed 7-20-99; 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 (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 13, 1999.

A. Federal Reserve Bank of Cleveland (Paul Kaboth, Banking Supervisor) 1455 East Sixth Street, Cleveland, Ohio 44101-2566:

1. *Somerset Bancorp, Inc.*, Somerset, Kentucky; to become a bank holding company by acquiring 100 percent of

the voting shares of Somerset National Bank, Somerset, Kentucky.

B. Federal Reserve Bank of Atlanta (Lois Berthaume, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303-2713:

1. *Wewahitchka State Bank Employee Stock Ownership Plan*, Wewahitchka, Florida; to become a bank holding company by retaining 43 percent of the voting shares of Wewahitchka State Bank, Wewahitchka, Florida.

Board of Governors of the Federal Reserve System, July 15, 1999.

Robert deV. Friereson,

Associate Secretary of the Board.

[FR Doc. 99-18541 Filed 7-20-99; 8:45 am]

BILLING CODE 6210-01-F

FEDERAL RESERVE SYSTEM

Modification of Procedures for the September 1999 Changes in Deposit Reporting Frequency

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice.

SUMMARY: The Board is amending its procedures for shifting depository institutions among deposit reporting categories for September 1999. The adjustments to the usual category shift procedures are intended to help reduce the number and extent of modifications needed in the data processing systems of depository institutions close to the time of the century date change. The adjustments to the usual procedures are temporary; in September 2000, the normal category shift procedures will be employed.

EFFECTIVE DATE: August 1, 1999.

FOR FURTHER INFORMATION CONTACT:

Gretchen Weinbach, Economist, Division of Monetary Affairs (202/452-2841). For the hearing impaired only,

Telecommunications Device for the Deaf (TDD), Diane Jenkins (202/452-3544).

SUPPLEMENTARY INFORMATION: The Board has established five categories of deposit reporting for administering Regulation D, Reserve Requirements of Depository Institutions (12 CFR part 204), and for constructing and analyzing the monetary and reserve aggregates. Every institution is placed into one of these five categories for deposit reporting purposes.¹

In general, the larger the institution, the more detailed or more frequent is its reporting. Two "detailed reporting" categories apply to institutions that are not exempt from reserve requirements.² Institutions subject to detailed reporting requirements file the Report of Transaction Accounts, Other Deposits and Vault Cash (FR 2900) and, if applicable, the Report of Certain Eurocurrency Transactions (FR 2950 or FR 2951). Institutions file the reports either weekly or quarterly, depending on the level of the institution's deposits. Three reduced reporting categories apply to institutions that are exempt from reserve requirements. Institutions subject to reduced reporting file either the Quarterly Report of Selected Deposits, Vault Cash and Reservable Liabilities (FR 2910q), the Annual Report of Total Deposits and Reservable Liabilities (FR 2910a), or no report at all, depending on their deposit levels. Federal Reserve staff reviews the deposit levels and reservable liabilities of depository institutions each year and assigns institutions to new reporting categories effective in September of each year.

Table 1 shows the four categories of institutions that file deposit reports with the Federal Reserve (the fifth category, non-filing institutions, is not shown). The table shows the cutoff levels that would normally be in effect in September 1999.

TABLE 1.—DEPOSIT REPORT CATEGORIES

[With cutoff levels that would normally apply for September 1999]

Institutions exempt from reserve requirements (Reservable liabilities ≥ \$4.9 million)		Institutions not exempt from reserve requirements (Reservable liabilities > \$4.9 million)	
Annual Reporters	Quarterly Reporters	Quarterly Reporters	Weekly Reporters
<ul style="list-style-type: none"> Have deposits < \$52.6 million but ≥ \$4.9 million File a 2-item report (FR 2910a) 	<ul style="list-style-type: none"> Have deposits ≥ \$52.6 million File a 6-item report (FR 2910q) 	<ul style="list-style-type: none"> Have deposits < \$81.9 million File a 14-item report (FR 2900) 	<ul style="list-style-type: none"> Have deposits ≥ \$81.9 million. File a 14-item report (FR 2900).

¹ Depository institutions that are required to maintain reserves are defined in § 204.1(c) of Regulation D. Classes of institutions subject to deposit reporting include commercial banks, industrial banks and similar institutions, mutual or stock banks, building or savings and loan associations, homestead associations, credit unions,

Edge and Agreement corporations and their branches, and U.S. branches and agencies of foreign banks.

² Institutions are exempt from reserve requirements if their total reservable liabilities are equal to or less than the exemption amount, which

is indexed annually by 80 percent of the percentage increase in total reservable liabilities of all depository institutions measured on an annual basis as of June 30. No adjustment is made for a decrease in total reservable liabilities. The exemption amount effective for 1999 is \$4.9 million.

The Board and other supervisory agencies required depository institutions to have their data processing systems ready for the century date change by June 30 and to manage any subsequent changes in their systems with great care. For some institutions, changes in reporting requirements due

to a report category reclassification would necessitate system changes between August and September, 1999.

Under normal circumstances, there are six types of reporting category shifts that are compulsory: non-exempt quarterly reporters that shift to non-exempt weekly reporters, exempt quarterly reporters that shift to non-

exempt weekly or quarterly reporters, and exempt annual reporters that shift to exempt quarterly reporters or non-exempt weekly or quarterly reporters. (Other reclassifications represent downward shifts to less burdensome reporting categories, which are permissible but not compulsory.)

TABLE 2.—CHANGES IN COMPULSORY REPORTING CATEGORY SHIFTS IN 1999 NORMAL CATEGORY SHIFTS IN 1999

From	To	STATUS IN 1999
Non-exempt quarterly (FR 2900)	Non-exempt weekly (FR 2900)	No shift required. (Continue to report quarterly on FR 2900.)
Exempt quarterly (FR 2910q)	Non-exempt weekly (FR 2900)	Shift to non-exempt quarterly. (Report quarterly on FR 2900.)
Exempt quarterly (FR 2910q)	Non-exempt quarterly (FR 2900)	Shift as usual. (Report quarterly on FR 2900.)
Exempt annual (FR 2910a)	Non-exempt weekly (FR 2900)	Shift to non-exempt quarterly. (Report quarterly on FR 2900.)
Exempt annual (FR 2910a)	Non-exempt quarterly (FR 2900)	Shift as usual. (Report quarterly on FR 2900.)
Exempt annual (FR 2910a)	Exempt quarterly (FR 2910q)	No shift required. (Continue to report annually on FR 2910a.)

The Board believes that two of the six compulsory reporting category shifts can be deferred until September 2000 without material adverse consequences to the enforcement of reserve requirements. As shown in Table 2, the Board has determined that any non-exempt institution that otherwise would be required to begin filing the FR 2900 on a weekly basis will instead be allowed to continue to file the same report on quarterly basis. In addition, institutions that have been and remain exempt from reserve requirements (that is, have reservable liabilities of \$4.9 million or less) and that are currently reporting annually on form FR 2910a may continue to report annually on that form, even if their deposits have grown to a size that otherwise would require shifting to the quarterly exempt report (FR 2910q).

Given the Board's responsibility for enforcing reserve requirements, the deferral will not apply to any previously exempt institution that becomes non-exempt (that is, has reservable liabilities exceeding \$4.9 million in 1999). In order to reduce the burden on such an institution, however, it will only be required to file the FR 2900 on a quarterly basis, even if it otherwise would have been required to report weekly. Of the four remaining compulsory category shifts, therefore, two will shift as usual (exempt quarterly and annual reporters that shift to non-exempt quarterly reporters) and two will shift to a less burdensome category than would normally apply (exempt quarterly and annual reporters that would normally shift to non-exempt

weekly reporters will shift instead to non-exempt quarterly reporters).

In other respects, the reporting category shift procedures will remain unchanged. Existing weekly reporters that continue to meet the criteria for weekly reporting would not be allowed to shift to quarterly reporting. As usual, institutions that are allowed to shift to a less burdensome reporting category would not be compelled to do so. Normal category shift procedures will resume in September 2000.

By order of the Board of Governors of the Federal Reserve System, July 15, 1999.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 99-18542 Filed 7-20-99; 8:45 am]

BILLING CODE 6210-01-P

FEDERAL RESERVE SYSTEM

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11:00 a.m., Monday, July 26, 1999.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, NW, Washington, D.C. 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 items 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.federalreserve.gov> for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: July 16, 1999.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 99-18668 Filed 7-16-99; 4:21 pm]

BILLING CODE 6210-01-P

GENERAL SERVICES ADMINISTRATION

Office of Communications; Ordering Stocked Standard and Optional Forms

AGENCY: General Services Administration.

ACTION: Notice.

SUMMARY: To order all Standard and Optional forms that have national stock numbers, contact the following office within the Federal Supply Service: General Products Commodity Center, General Services Administration (7FXM), 819 Taylor Street, Fort Worth, TX 76102, (817) 978-2508.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Williams (202) 501-0581. This

contact is for explanation for this notice only, not for ordering forms.

DATES: Effective July 21, 1999.

Dated: July 16, 1999.

Barbara M. Williams,

Deputy Standard and Optional Forms Management Officer.

[FR Doc. 99-18638 Filed 7-20-99; 8:45 am]

BILLING CODE 6820-34-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability and Injury Prevention and Control Special Emphasis Panel: Implementation of the National Occupational Research Agenda (NORA), RFA OH-99-002, Program Area #8, Organization of Work: Demanding Work Schedules, Sleep Disorders, and Risk of Occupational Illness and Injury

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the following meeting.

Name: Disease, Disability and Injury Prevention and Control Special Emphasis Panel: Implementation of the National Occupational Research Agenda (NORA), RFA OH-99-002, Program Area #8, Organization of Work: Demanding Work Schedules, Sleep Disorders, and Risk of Occupational Illness and Injury, meeting.

Times and Dates:

8 a.m.-8:30 a.m., August 2, 1999 (Open)
8:30 a.m.-Noon, August 2, 1999 (Closed)

Place: Embassy Suites Hotel, 1900 Diagonal Rd., Alexandria, Va. 22134.

Status: Portions of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Associate Director for Management and Operations, CDC, pursuant to Public Law 92-463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to the NORA RFA OH-99-002.

Contact Person for More Information: Michael J. Galvin, Jr., Ph.D., Health Scientist Administrator, Office of Extramural Coordination and Special Projects, NIOSH, CDC, 1600 Clifton Rd., Atlanta, Ga. 30333. Telephone 404/639-3525, e-mail mtg3@cdc.gov.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** Notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: July 15, 1999.

Carolyn J. Russell,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 99-18545 Filed 7-16-99; 1:49 pm]

BILLING CODE 4163-19-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability and Injury Prevention and Control Special Emphasis Panel: Implementation of the National Occupational Research Agenda (NORA), RFA OH-99-002, Program Area #4, Exposure Assessment

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the following meeting.

Name: Disease, Disability and Injury Prevention and Control Special Emphasis Panel: Implementation of the National Occupational Research Agenda (NORA), RFA OH-99-002, Program Area #4, Exposure Assessment, meeting.

Times and Dates:

8 a.m.-8:30 a.m., August 3, 1999 (Open)
8:30 a.m.-6 p.m., August 3, 1999 (Closed)

Place: Embassy Suites Hotel, 1900 Diagonal Rd., Alexandria, Va. 22134.

Status: Portions of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Associate Director for Management and Operations, CDC, pursuant to Public Law 92-463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to the NORA RFA OH-99-002.

Contact Person For More Information: Michael J. Galvin, Jr., Ph.D., Health Scientist Administrator, Office of Extramural Coordination and Special Projects, NIOSH, CDC, 1600 Clifton Rd., Atlanta, Ga. 30333. Telephone 404/639-3525, e-mail mtg3@cdc.gov.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** Notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: July 15, 1999.

Carolyn J. Russell,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 99-18544 Filed 7-16-99; 1:49 pm]

BILLING CODE 4163-19-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability and Injury Prevention and Control Special Emphasis Panel: Implementation of the National Occupational Research Agenda (NORA), RFA OH-99-002, Program Area #5, Surveillance Research Methodology

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the following meeting.

Name: Disease, Disability and Injury Prevention and Control Special Emphasis Panel: Implementation of the National Occupational Research Agenda (NORA), RFA OH-99-002, Program Area #5, Surveillance Research Methodology, meeting.

Times and Dates:

10 a.m.-10:30 a.m., August 2, 1999 (Open)
10:30 a.m.-6 p.m., August 2, 1999 (Closed)

Place: Embassy Suites Hotel, 1900 Diagonal Rd., Alexandria, Va. 22134.

Status: Portions of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Associate Director for Management and Operations, CDC, pursuant to Public Law 92-463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to the NORA RFA OH-99-002.

Contact Person for More Information: Michael J. Galvin, Jr., Ph.D., Health Scientist Administrator, Office of Extramural Coordination and Special Projects, NIOSH, CDC, 1600 Clifton Rd., Atlanta, Ga. 30333. Telephone 404/639-3525, e-mail mtg3@cdc.gov.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** Notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: July 16, 1999.

Carolyn J. Russell,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 99-18546 Filed 7-16-99; 1:49 pm]

BILLING CODE 4163-19-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Disease Control and Prevention****Disease, Disability and Injury Prevention and Control Special Emphasis Panel: African American Community-Based Human Immunodeficiency Virus (HIV) Prevention Special Emphasis Panel (SEP): Cooperative Agreements for African American Community-Based Human Immunodeficiency Virus (HIV) Prevention**

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the following meeting.

Name: Disease, Disability and Injury Prevention and Control Special Emphasis Panel: African American Community-Based Human Immunodeficiency Virus (HIV) Prevention Special Emphasis Panel (SEP): Cooperative Agreements for African American Community-Based Human Immunodeficiency Virus (HIV) Prevention, Program Announcement #99092, meeting.

Times and Dates:

8:30 a.m.-9:00 a.m., July 26, 1999 (Open)
9:00 a.m.-4:30 p.m., July 26, 1999 (Closed)
8:30 a.m.-4:30 p.m., July 27, 1999 (Closed)
8:30 a.m.-4:30 p.m., July 28, 1999 (Closed)
8:30 a.m.-4:30 p.m., July 29, 1999 (Closed)
8:30 a.m.-4:30 p.m., July 30, 1999 (Closed)

Place: Professional and Scientific Associates (PSA), 2635 Century Parkway, Suite 990, Atlanta, Georgia, 30345.

Status: Portions of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Associate Director for Management and Operations, CDC, pursuant to Public Law 92-463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to Program Announcement #99092.

Contact Person for More Information:

Megan Foley, Prevention Support Office, National Center for HIV, STD, and TB Prevention, CDC, Corporate Square Office Park, 11 Corporate Square Boulevard, M/S E07, Atlanta, Georgia 30329, telephone 404/639-8025, e-mail MZF3@cdc.gov or Beth Wolfe at the same address and telephone, e-mail EOW1@cdc.gov.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** Notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: July 15, 1999.

Carolyn J. Russell,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 99-18547 Filed 7-16-99; 1:49 pm]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Disease Control and Prevention****Disease, Disability and Injury Prevention and Control Special Emphasis Panel: Implementation of the National Occupational Research Agenda (NORA), RFA OH-99-002, Program Area #1, Intervention Effectiveness**

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the following meeting.

Name: Disease, Disability and Injury Prevention and Control Special Emphasis Panel: Implementation of the National Occupational Research Agenda (NORA), RFA OH-99-002, Program Area #1, Intervention Effectiveness.

Times and Dates:

8 a.m.-8:30 a.m., August 5, 1999 (Open)
8:30 a.m.-6 p.m., August 5, 1999 (Closed)
8 a.m.-6 p.m., August 6, 1999 (Closed)

Place: Embassy Suites Hotel, 1900 Diagonal Rd., Alexandria, Va. 22134.

Status: Portions of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Associate Director for Management and Operations, CDC, pursuant to Public Law 92-463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to the NORA RFA OH-99-002.

Contact Person for More Information:

Michael J. Galvin, Jr., Ph.D., Health Scientist Administrator, Office of Extramural Coordination and Special Projects, NIOSH, CDC, 1600 Clifton Rd., Atlanta, Ga. 30333. Telephone 404/639-3525, e-mail mtg3@cdc.gov.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** Notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: July 15, 1999.

Carolyn J. Russell,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 99-18548 Filed 7-16-99; 1:49 pm]

BILLING CODE 4163-19-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Disease Control and Prevention****Disease, Disability and Injury Prevention and Control Special Emphasis Panel: Implementation of the National Occupational Research Agenda (NORA), RFA OH-99-002, Program Area #3, Hearing Loss**

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the following meeting.

Name: Disease, Disability and Injury Prevention and Control Special Emphasis Panel: Implementation of the National Occupational Research Agenda (NORA), RFA OH-99-002, Program Area #3, Hearing Loss.

Times and Dates:

8 a.m.-8:30 a.m., August 4, 1999 (Open)
8:30 a.m.-Noon, August 4, 1999 (Closed)

Place: Embassy Suites Hotel, 1900 Diagonal Rd., Alexandria, Va. 22134

Status: Portions of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Associate Director for Management and Operations, CDC, pursuant to Public Law 92-463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to the NORA RFA OH-99-002.

Contact Person For More Information:

Michael J. Galvin, Jr., Ph.D., Health Scientist Administrator, Office of Extramural Coordination and Special Projects, NIOSH, CDC, 1600 Clifton Rd., Atlanta, Ga. 30333. Telephone 404/639-3525, e-mail mtg3@cdc.gov.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** Notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: July 15, 1999.

Carolyn J. Russell,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 99-18549 Filed 7-16-99; 1:49 pm]

BILLING CODE 4163-19-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability and Injury Prevention and Control Special Emphasis Panel: Implementation of the National Occupational Research Agenda (NORA), RFA OH-99-002, Program Area #6 Special Populations at Risk/Aging Workforce

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the following meeting.

Name: Disease, Disability and Injury Prevention and Control Special Emphasis Panel: Implementation of the National Occupational Research Agenda (NORA), RFA OH-99-002, Program Area #6 Special Populations at Risk/Aging Workforce.

Times and Dates:

1 p.m.-1:30 p.m., August 4, 1999 (Open)
1:30 p.m.-6 p.m., August 4, 1999 (Closed)

Place: Embassy Suites Hotel, 1900 Diagonal Rd., Alexandria, Va. 22134.

Status: Portions of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Associate Director for Management and Operations, CDC, pursuant to Public Law 92-463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to the NORA RFA OH-99-002.

Contact Person For More Information: Michael J. Galvin, Jr., Ph.D., Health Scientist Administrator, Office of Extramural Coordination and Special Projects, NIOSH, CDC, 1600 Clifton Rd., Atlanta, Ga. 30333. Telephone 404/639-3525, e-mail mtg3@cdc.gov.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** Notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: July 15, 1999.

Carolyn J. Russell,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 99-18550 Filed 7-16-99; 1:49 pm]

BILLING CODE 4163-19-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 99F-2336]

Holliday Pigments, Ltd.; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Holliday Pigments, Ltd. has filed a petition proposing that the food additive regulations be amended to provide for the safe use of manganese ammonium pyrophosphate (C.I. Pigment Violet 16) as a colorant for all polymers intended for use in contact with food.

DATES: Written comments on the petitioner's environmental assessment by August 20, 1999.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

Mark A. Hepp, Center for Food Safety and Applied Nutrition (HFS-215), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-418-3098.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (sec. 409(b)(5) (21 U.S.C. 348(b)(5))), notice is given that a food additive petition (FAP 9B4670) has been filed by Holliday Pigments, Ltd., Morley St., Kingston upon Hull, HU8 8DN ENGLAND. The petition proposes to amend the food additive regulations in §178.3297 *Colorants for polymers* (21 CFR 178.3297) to provide for the safe use of manganese ammonium pyrophosphate (C.I. Pigment Violet 16) as a colorant for all polymers intended for use in contact with food.

The potential environmental impact of this action is being reviewed. To encourage public participation consistent with regulations issued under the National Environmental Policy Act (40 CFR 1501.4(b)), the agency is placing the environmental assessment submitted with the petition that is the subject of this notice on public display at the Dockets Management Branch (address above) for public review and comment. Interested persons may, on or before August 20, 1999, submit to the Dockets Management Branch (address above) written comments. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified

with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday. FDA will also place on public display any amendments to, or comments on, the petitioner's environmental assessment without further announcement in the **Federal Register**. If, based on its review, the agency finds that an environmental impact statement is not required and this petition results in a regulation, the notice of availability of the agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the **Federal Register** in accordance with 21 CFR 25.40(c).

Dated: June 25, 1999.

Alan M. Rulis,

Director, Office of Premarket Approval, Center for Food Safety and Applied Nutrition.
[FR Doc. 99-18582 Filed 7-20-99; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 99D-1458]

Enforcement Policy: Electronic Records; Electronic Signatures—Compliance Policy Guide; Guidance for FDA Personnel

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a new Compliance Policy Guide (CPG) section 160.850 entitled "Enforcement Policy: 21 CFR Part 11; Electronic Records; Electronic Signatures." This CPG is intended to represent the agency's current thinking on how to comply with the regulations for electronic records and electronic signatures. It also provides that agency decisions on whether or not to pursue regulatory actions will be based on a case-by-case evaluation. The text of the CPG is included in this document.

DATES: Written comments may be submitted at any time.

ADDRESSES: Submit written requests for single copies of CPG section 160.850 entitled "Enforcement Policy: 21 CFR Part 11; Electronic Records; Electronic Signatures" to the Division of Compliance Policy (HFC-230), Office of Enforcement, Office of Regulatory Affairs, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20852. Send two self-addressed

adhesive labels to assist that office in processing your requests. Written comments should be identified with the docket number found in brackets in the heading of this document and should be sent to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. A copy of the CPG is available on FDA's website at "http://www.fda.gov/ora/compliance_ref/cpg/cpggenl/default.htm". Scroll down the CPG page to locate section 160.850.

FOR FURTHER INFORMATION CONTACT: James F. McCormack, Division of Compliance Policy (HFC-230), Office of Enforcement, Office of Regulatory Affairs, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20852, 301-827-0425.

SUPPLEMENTARY INFORMATION: FDA is announcing the availability of a new CPG section 160.850 entitled "Enforcement Policy: 21 CFR Part 11; Electronic Records; Electronic Signatures." The CPG is an update to the Compliance Policy Guides Manual (August 1996 ed.). It is a new CPG and will be included in the next printing of the Compliance Policy Guides Manual. The CPG is intended for FDA personnel and is available electronically to the public. See the **ADDRESSES** section for electronic access to the CPG. The CPG is a level 2 guidance which is being issued consistent with FDA's good guidance practices (62 FR 8961, February 27, 1997). It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute, regulation, or both.

The text of the CPG follows:

Section 160.850

Title: Enforcement Policy: 21 CFR Part 11; Electronic Records; Electronic Signatures (CPG 7153.17)

Background:

This compliance guidance document is an update to the Compliance Policy Guides Manual (August 1996 edition). This is a new Compliance Policy Guidance (CPG) and will be included in the next printing of the Compliance Policy Guides Manual. The CPG is intended for Food and Drug Administration (FDA) personnel and is available electronically to the public. This guidance document represents the agency's current thinking on how to comply with 21 CFR Part 11, "Electronic Records; Electronic Signatures" and provides that agency decisions on whether or not to pursue regulatory actions will be based on a case by case evaluation. The CPG does not create or confer any rights for or on any person and does not operate to bind FDA or the public.

An alternative approach may be used if such approach satisfies the requirements of the applicable statute, regulation, or both.

In the **Federal Register** of March 20, 1997 at 62 FR 13430, FDA issued a notice of final rulemaking for 21 CFR, Part 11, Electronic Records; Electronic Signatures. The rule went into effect on August 20, 1997. Part 11 is intended to create criteria for electronic recordkeeping technologies while preserving the agency's ability to protect and promote the public health (e.g., by facilitating timely review and approval of safe and effective new medical products, conducting efficient audits of required records, and when necessary pursuing regulatory actions). Part 11 applies to all FDA program areas, but does not mandate electronic recordkeeping. Part 11 describes the technical and procedural requirements that must be met if a person chooses to maintain records electronically and use electronic signatures. Part 11 applies to those records required by an FDA predicate rule and to signatures required by an FDA predicate rule, as well as signatures that are not required, but appear in required records.

Part 11 was developed in concert with industry over a period of six years. Virtually all of the rule's requirements had been suggested by industry comments to a July 21, 1992 Advance Notice of Proposed Rulemaking (at 57 FR 32185). In response to comments to an August 31, 1994 Proposed Rule (at 59 FR 45160), the agency refined and reduced many of the proposed requirements in order to minimize the burden of compliance. The final rule's provisions are consistent with an emerging body of federal and state law as well as commercial standards and practices. Certain older electronic systems may not have been in full compliance with Part 11 by August 20, 1997, and modification to these so called "legacy systems" may take more time. As explained in the preamble to the final rule, Part 11 does not grandfather legacy systems and FDA expects that firms using legacy systems will begin taking steps to achieve full compliance.

Policy:

When persons are not fully compliant with Part 11, decisions on whether or not to pursue regulatory actions will be based on a case by case evaluation, which may include the following:

Nature and extent of Part 11 deviation(s). FDA will consider Part 11 deviations to be more significant if those deviations are numerous, if the deviations make it difficult for the agency to audit or interpret data, or if the deviations undermine the integrity of the data or the electronic system. For example, FDA expects that firms will use file formats that permit the agency to make accurate and complete copies in both human readable and electronic form of audited electronic records. Similarly, FDA would have little confidence in data from firms that do not hold their employees accountable and responsible for actions taken under their electronic signatures.

Effect on product quality and data integrity. For example, FDA would consider the absence of an audit trail to be highly significant when there are data discrepancies

and when individuals deny responsibility for record entries. Similarly, lack of operational system checks to enforce event sequencing would be significant if an operator's ability to deviate from the prescribed order of manufacturing steps results in an adulterated or misbranded product.

Adequacy and timeliness of planned corrective measures. Firms should have a reasonable timetable for promptly modifying any systems not in compliance (including legacy systems) to make them Part 11 compliant, and should be able to demonstrate progress in implementing their timetable. FDA expects that Part 11 requirements for procedural controls will already be in place. FDA recognizes that technology based controls may take longer to install in older systems.

Compliance history of the establishment, especially with respect to data integrity. FDA will consider Part 11 deviations to be more significant if a firm has a history of Part 11 violations or of inadequate or unreliable recordkeeping. Until firms attain full compliance with Part 11, FDA investigators will exercise greater vigilance to detect inconsistencies, unauthorized modifications, poor attributability, and any other problems associated with failure to comply with Part 11.

Regulatory Action Guidance:

Program monitors and center compliance offices should be consulted prior to recommending regulatory action. FDA will consider regulatory action with respect to Part 11 when the electronic records or electronic signatures are unacceptable substitutes for paper records or handwritten signatures, and that therefore, requirements of the applicable regulations (e.g., CGMP and GLP regulations) are not met. Regulatory citations should reference such predicate regulations in addition to Part 11. The following is an example of a regulatory citation for a violation of the device quality system regulations.

Failure to establish and maintain procedures to control all documents that are required by 21 CFR 820.40, and failure to use authority checks to ensure that only authorized individuals can use the system and alter records, as required by 21 CFR 11.10(g). For example, engineering drawings for manufacturing equipment and devices are stored in AutoCAD form on a desktop computer. The storage device was not protected from unauthorized access and modification of the drawings.

Dated: July 1, 1999.

Margaret M. Dotzel,

Acting Associate Commissioner for Policy.
[FR Doc. 99-18581 Filed 7-20-99; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Health Resources and Services Administration****Agency Information Collection Activities: Proposed Collection: Comment Request**

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104-13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to OMB under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443-1891.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the

proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Year 2000 Community Health Center and National Health Service Corps User/Visit Survey (OMB No. 0915-0185)

The purpose of this study is to conduct a sample survey which has three components: (1) A pilot study, including an evaluation of both retrospective and prospective sampling methodologies; (2) a personal interview survey of Community Health Center (CHC) and National Health Service Corps (NHSC) site users; and (3) a record-based study of visits to CHCs and NHSC sites. CHCs and NHSC sites serve predominantly poor minority medically underserved populations. The proposed user and visit survey will collect in-depth information about CHC and NHSC site users, their health status, the reasons they seek care, their diagnoses, and the services utilized in a medical encounter.

The Year 2000 User/Visit Survey builds on a 1995 User/Visit Survey which was conducted to learn about the process and outcomes of care in CHC users. The 1995 User/Visit Survey included a personal interview of approximately 2000 users of 48 selected CHCs as well as medical record abstractions for about 3000 visits to these same health centers. The interview questionnaire was derived from the National Health Interview Survey (NHIS) conducted by the National Center for Health Statistics (NCHS) and the visit survey was an adaptation of the NCHS National Hospital Ambulatory Medical Care Survey (NHAMCS). Conformance with the NHIS and NHAMCS allowed comparisons between these NCHS surveys and the User/Visit Survey.

The Year 2000 User/Visit Survey was developed using similar questionnaire methodology in conjunction with a contractor and will allow longitudinal comparisons for CHCs with the 1995 version of the survey data, including monitoring of process outcomes over time. The Year 2000 User/Visit Survey is the first year that NHSC non-grantee, freestanding sites will be surveyed.

The estimated response burden for the pilot test is as follows:

Pilot survey	Number of respondents	Responses per respondent	Total respondents	Hours per response	Total burden hours
CHCs	350	1	350	1.3	455
NHSC	150	1	150	1.3	195
Total			500		650

The estimated response burden for the main survey is as follows:

Main survey	Number of respondents	Responses per respondent	Total respondents	Hours per response	Total burden hours
CHCs	2300	1	2300	1.3	2990
NHSC	1000	1	1000	1.3	1300
Total			3300		4290

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 14-33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: July 14, 1999.

James J. Corrigan,

Associate Administrator for Management and Program Support.

[FR Doc. 99-18584 Filed 7-20-99; 8:45 am]

BILLING CODE 4160-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Health Resources and Services Administration****Agency Information Collection Activities: Proposed Collection: Comment Request**

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the

Paperwork Reduction Act of 1995, Pub. L. 104-13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to OMB under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443-1891.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance

of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Annual Administrative Reporting System for the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act (RWCA) of 1990 for Titles I and II (OMB No. 0915-0166)

OMB approval is requested for the Annual Administrative Reporting System (AAR) established in 1994 to collect information from grantees and their subcontracted service providers. The AARs collect aggregate information

from grantees about the disbursement of funds, number of clients served and services provided, demographic information about clients served, and cost of providing services funded under Title I and II of the Ryan White CARE Act.

The primary purposes of the AARs are to: (1) Document the use of Title I and Title II funds and the providers who received them, (2) assess the effects of these funds on the number and diversity of individuals served, (3) evaluate the quantity of services received, and (4) help examine the effectiveness of coordinated systems of care in meeting the needs of individuals living with HIV. In addition to meeting the goal of accountability to Congress, clients, advocacy groups, and the general public, the AAR supports critical efforts by HRSA, State and local grantees, and providers to assess the status of existing HIV-related service delivery systems.

Separate reports were developed to collect aggregate data from the three

program types that receive funds under Title I and/or Title II: (1) Title I programs, Title II Consortia, and Title II Home- and Community-Based programs; (2) centrally administered State programs for the continuation of health insurance; and (3) State programs providing HIV prescription drug assistance.

The following changes to the AAR are proposed to improve the accuracy of the data collected, reduce respondent burden, and facilitate local analysis of primary medical care outcome measures: Certain funding questions will be eliminated, all questions will require numerical responses, not percentages; some questions will be restricted to certain providers; an optional set of questions has been added to help evaluate primary medical services for local planning and evaluation needs.

The estimated response burden is as follows:

Form name	Number of respondents	Responses per respondent	Total responses	Hours per response	Total hour burden
Standard Annual Administrative Report (SAAR)					
Providers	2,600	1	2,600	14	36,400
Grantees	107	1	107	25	2,675
AIDS Pharmaceutical Assistance Annual Administrative Report (includes State ADAP and local APA pharmaceutical programs)					
Administrator/Grantee	158	1	158	25	3,950
Health Insurance Continuation Program (HICP) Annual Administrative Report					
Administrator/Grantee	35	1	35	15	525
Total	2,900	1	2,900	43,550

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 14-33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: July 14, 1999.

James J. Corrigan,

Associate Administrator for Management and Program Support.

[FR Doc. 99-18585 Filed 7-20-99; 8:45 am]

BILLING CODE 4160-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

AIDS Education and Training Centers Program Grants

AGENCY: Health Resources and Services Administration, Department of Health and Human Services.

ACTION: Notice of limited competition.

SUMMARY: The Health Resources and Services Administration's (HRSA) HIV/AIDS Bureau (HAB) announces a limited competition to support regional AIDS Education and Training Centers in the following regional areas: Delta Region (serving Arkansas, Louisiana, Mississippi), Mid Atlantic Region serving Delaware, Maryland, Virginia, West Virginia, Washington, DC and

Texas/Oklahoma Region to provide state-of-the-art treatment education, training consultation and support to health care professionals treating HIV seropositive patients for HRSA's AIDS Education Training Centers Program under section 2692(a) of the Public Health Service Act as amended by Pub. L. 104-146, the Ryan White Comprehensive Aids Resources Emergency Act Amendments of 1996. Assistance will be provided only to these three regional areas. No other applications are solicited, nor will they be accepted.

Approximately \$2,500,000 is available in fiscal year 1999. The first budget period will be for 9 months with a start date of October 1, 1999. The total project period will be for 2 years 9 months. Continuation awards within the project period will have a July 1 start date with a 12 month budget period and

will be made on the basis of satisfactory progress and the availability of funds.

HRSA is limiting competition to the three regional areas because during the previously announced competitive cycle, applications submitted for the three regional areas did not successfully compete for funds. It is HRSA's intent to fund AETC Programs in all regions of the United States. This limited competition will focus on supporting a regional AETC Program in each of the three regions to provide state-of-the-art treatment education, training, consultation, and support to health care professionals treating HIV seropositive patients for the Health Resources and Services Administration's AETC Programs during the period of support. **DATES:** Applications for these announced grants must be received in the Grants HRSA Application Center by the close of business September 1, 1999 to be considered for competition. Applications will meet the deadline if they are either (1) received on or before the deadline date or (2) postmarked on or before the deadline date, and received in time for submission to the objective review panel. A legibly dated receipt from a commercial carrier of U.S. Postal Service will be accepted as proof of timely mailing. Applications received after the deadline will be returned to the applicant.

ADDRESSES: All applications should be mailed or delivered to: Grants Management Officer, HRSA Grants Application Center, Parklawn Building, 5600 Fishers Lane, Room 4-91, Rockville, Maryland 20857. Grant applications sent to any address other than that above are subject to being returned. **Federal Register** notices and application guidance for the HIV/AIDS Bureau program are available on the World Wide Web via the Internet. The web site for the HIV/AIDS Bureau is: <http://www.hrsa.gov/hab/>. Federal grant application kits are available at the following Internet address: <http://forms.psc.gov/phsforms.htm>. For those applicants who are unable to access application materials electronically, a hard copy of the official grant application kit (PHS Form 6025-1) must be obtained from the HRSA Grants Application Center. The Center may be contacted by (telephone, 1-888-300-4772) FAX: 301-309-0579, or 3 e-mail, HRSA.GAC@ix.netcom.com.

FOR FURTHER INFORMATION CONTACT: Additional Information may be obtained from Mrs. Juanita Koziol, Deputy Branch Director, HIV Education Branch, Division of Training and Technical Assistance, HIV/AIDS Bureau, Health Resources and Services Administration,

5600 Fishers Lane, Room 9A-39, Rockville, Maryland 20857. Telephone number (301) 443-6364 and the FAX: (301) 443-9887.

Dated: July 14, 1999.

Claude Earl Fox,
Administrator.

[FR Doc. 99-18583 Filed 7-20-99; 8:45 am]

BILLING CODE 4160-15-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

Draft OIG Compliance Program Guidance for Hospices

AGENCY: Office of Inspector General (OIG), HHS.

ACTION: Notice and comment period.

SUMMARY: This **Federal Register** notice seeks the comments of interested parties on draft compliance guidance developed by the Office of Inspector General (OIG) for the hospice industry. Through this notice, the OIG is setting forth its general views on the value and fundamental principles of hospice compliance programs, and the specific elements that the hospice industry should consider when developing and implementing an effective compliance program.

DATES: To assure consideration, comments must be delivered to the address provided below by no later than 5 p.m. on August 20, 1999.

ADDRESSES: Please mail or deliver written comments to the following address: Office of Inspector General, Department of Health and Human Services, Attention: OIG-6P-CPG, Room 5246, Cohen Building, 330 Independence Avenue, SW, Washington, DC 20201.

We do not accept comments by facsimile (FAX) transmission. In commenting, please refer to file code OIG-6P-CPG. Comments received timely will be available for public inspection as they are received, generally beginning approximately 2 weeks after publication of a document, in Room 5541 of the Office of Inspector General at 330 Independence Avenue, SW, Washington, DC 20201 on Monday through Friday of each week from 8:00 a.m. to 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Michael Shaw, Office of Counsel to the Inspector General, (202) 619-2078.

SUPPLEMENTARY INFORMATION:

Background

The creation of compliance program guidance is a major initiative of the OIG

in its effort to engage the private health care community in addressing and fighting fraud and abuse. In the last several years, the OIG has developed and issued compliance program guidance directed at the following segments of the health care industry:

- Clinical Laboratories (62 FR 9435; March 3, 1997, as amended in 63 FR 45076; August 24, 1998),
- Hospitals (63 FR 8987; February 23, 1998),
- Home Health Agencies (63 FR 42410; August 7, 1998),
- Third-Party Medical Billing Companies (63 FR 70138; December 18, 1998), and
- Durable Medical Equipment, Prosthetics, Orthotics and Supply Industry (64 FR 36368; July 6, 1999).

Copies of these compliance program guidances can also be found on the OIG web site at <http://www.os.dhhs.gov/oig>.

Developing Draft Compliance Program Guidance for the Hospice Industry

On January 13, 1999, the OIG published a solicitation notice seeking information and recommendations for developing formal guidance for the hospice industry (64 FR 2228). In response to that solicitation notice, the OIG received 11 comments from various outside sources. In developing this notice for formal public comment, we have considered those comments, as well as previous OIG publications, such as other compliance program guidances and Special Fraud Alerts. We have also taken into account past and recent fraud investigations conducted by the OIG's Office of Investigations and the Department of Justice, and have consulted with the Health Care Financing Administration.

This draft guidance for the hospice industry contains seven elements that the OIG has determined are fundamental to an effective compliance program:

- Implementing written policies;
- Designating a compliance officer and compliance committee;
- Conducting effective training and education;
- Developing effective lines of communication;
- Conducting internal monitoring and auditing;
- Enforcing standards through well-publicized disciplinary guidelines; and
- Responding promptly to detected offenses and developing corrective action.

These elements are contained in the other guidance issued by the OIG, indicated above. As with the previously-issued guidances, this draft compliance program guidance represents the OIG's

suggestions on how the hospice industry can best establish internal controls and prevent fraudulent activities. The contents of this guidance should not be viewed as mandatory or as an exclusive discussion of the advisable elements of a compliance program; the guidance is intended to present voluntary guidance to the industry and not represent binding standards for hospices.

Public Input and Comment in Developing Final Guidance

In an effort to ensure that all parties have an opportunity to provide input into the OIG's guidance, we are publishing this guidance in draft form. We welcome any comments from interested parties regarding this guidance. We will consider all comments that are received within the above-cited time frame, incorporate any specific recommendations as appropriate, and prepare a final version of the guidance thereafter for publication in the **Federal Register**.

Draft Compliance Program Guidance for the Hospice Industry (July 1999)

I. Introduction

The Office of Inspector General (OIG) of the Department of Health and Human Services (HHS) continues to promote voluntarily developed and implemented compliance programs for the health care industry. The following compliance program guidance is intended to assist hospices¹ and their agents and subproviders (referred to collectively in this document as "hospices") develop effective internal controls that promote adherence to applicable Federal and State law, and the program requirements of Federal, State, and private health plans. The adoption and implementation of voluntary compliance programs significantly advance the prevention of fraud, abuse, and waste in these health care plans while at the same time further the fundamental mission of all hospices, which is to provide palliative care² to patients.

¹ The term "hospice" is applied in this document as the term "hospice program" is defined in 42 U.S.C. 1395x(dd).

² Palliative care is an intensive program of care that focuses on the relief of pain and suffering associated with a terminal illness. Through this emphasis on palliative rather than curative services, individuals have a choice whenever conventional approaches for medical treatment may no longer be appropriate. Hospice addresses the needs of terminally ill individuals by including the patient and family, specially trained volunteers, caregivers from the community, and representatives from medicine, nursing, social work, and spiritual counseling in the caregiving team.

Within this document, the OIG first provides its general views on the value and fundamental principles of hospice compliance programs, and then provides the specific elements that each hospice should consider when developing and implementing an effective compliance program. While this document presents basic procedural and structural guidance for designing a compliance program, it is not in itself a compliance program. Rather, it is a set of guidelines to be considered by a hospice interested in implementing a compliance program.

The OIG recognizes the size-differential that exists between operations of the different hospices and organizations that compose the hospice industry. Appropriately, this guidance is pertinent for all hospices, whether for-profit or non-profit, hospital-based or free-standing, community-based or volunteer-based, large or small, urban or rural. The applicability of the recommendations and guidelines provided in this document depends on the circumstances of each particular hospice. However, regardless of a hospice's size and structure, the OIG believes that every hospice can and should strive to accomplish the objectives and principles underlying all of the compliance policies and procedures recommended within this guidance.

Fundamentally, compliance efforts are designed to establish a culture within a hospice that promotes prevention, detection, and resolution of instances of conduct that do not conform to Federal and State law, and Federal, State, and private payor health care program requirements, as well as the hospice's business policies. In practice, the compliance program should effectively articulate and demonstrate the organization's commitment to ethical conduct. Compliance programs guide a hospice's governing body (e.g., board of directors or trustees), chief executive officer (CEO), managers, physicians, clinicians, billing personnel, and other employees in the efficient management and operation of a hospice. Eventually, a compliance program should become part of the fabric of routine hospice operations.

It is incumbent upon a hospice's corporate officers and managers to provide ethical leadership to the organization and to assure that adequate systems are in place to facilitate ethical and legal conduct. Employees, managers, and the Government will focus on the words and actions of a hospice's leadership as a measure of the organization's commitment to

compliance. Indeed, many hospices have adopted mission statements articulating their commitment to high ethical standards. A formal compliance program, as an additional element in this process, offers a hospice a further concrete method that may improve the appropriateness and quality of care and reduce waste. Compliance programs also provide a central coordinating mechanism for furnishing and disseminating information and guidance on applicable Federal and State statutes, regulations, and other requirements.

Implementing an effective compliance program requires a substantial commitment of time, energy, and resources by senior management and the hospice's governing body.³ Superficial programs that simply purport to comply with the elements discussed and described in this guidance or programs that are hastily constructed and implemented without appropriate ongoing monitoring will likely be ineffective and could expose the hospice to greater liability than no program at all. While it may require significant additional resources or reallocation of existing resources to implement an effective compliance program, the OIG believes that the long term benefits of implementing the program outweigh the costs.⁴

A. Benefits of a Compliance Program

The OIG believes an effective compliance program provides a mechanism that brings the public and private sectors together to reach mutual goals of reducing fraud and abuse, strengthening operational quality, improving the quality of health care services, and reducing the cost of health care. Attaining these goals provides positive results to hospices, the Government, and individual citizens alike. In addition to fulfilling its legal duty to ensure that it is not submitting false or inaccurate claims to Government and private payors, a hospice may gain numerous additional benefits by voluntarily implementing an effective compliance program. These benefits may include the ability to:

³ Recent case law suggests that the failure of a corporate director to attempt in good faith to institute a compliance program in certain situations may be a breach of a director's fiduciary obligation. See, e.g., *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Ct. Chanc. Del. 1996).

⁴ The conclusion of a recent report by the United States General Accounting Office (GAO) to Congress stated that "despite the investment of time and resources that compliance programs entail, many hospitals believe the benefits of these programs * * * outweigh their costs * * * and providers themselves believe that compliance programs can reduce improper Medicare payments." See GAO report GAO/HEHS-99-59 (April 1999).

- Formulate effective controls to assure compliance with Federal and State statutes, rules, and regulations, and Federal, State and private payor health care program requirements, and internal guidelines;

- Concretely demonstrate to employees and the community at large the hospice's strong commitment to honest and responsible provider and corporate conduct;

- Identify and prevent illegal and unethical conduct;

- Improve internal communication;
- More quickly and accurately react to employees' operational compliance concerns and target resources to address those concerns;

- Improve the quality, efficiency, and consistency of patient care;

- Create a centralized source for distributing information on health care statutes, regulations, and other program directives regarding fraud, waste, and abuse, and related issues;

- Formulate a methodology that encourages employees to report potential problems;

- Develop procedures that allow the prompt, thorough investigation of alleged misconduct by corporate officers, managers, employees, independent contractors, consultants, volunteers, physicians, nurses, and other health care professionals;

- Initiate immediate, appropriate, and decisive corrective action; and

- Minimize, through early detection and reporting, the loss to the Government from false claims, and thereby reduce the hospice's exposure to civil damages and penalties, criminal sanctions, and administrative remedies, such as program exclusion.⁵

Overall, the OIG believes that an effective compliance program is a sound investment on the part of a hospice.

The OIG recognizes that the implementation of a compliance program may not entirely eliminate fraud, abuse, and waste from the hospice system. However, a sincere effort by hospices to comply with applicable Federal and State standards, as well as the requirements of private health care programs, through the establishment of an effective

compliance program, significantly reduces the risk of unlawful or improper conduct.

B. Application of Compliance Program Guidance

Given the diversity within the industry, there is no single "best" hospice compliance program. The OIG understands the variances and complexities within the hospice industry and is sensitive to the differences among large national and regional multi-hospice organizations, small independent hospices, and other types of hospice organizations and systems. However, elements of this guidance can be used by all hospices, regardless of size, location, or corporate structure, to establish an effective compliance program. Similarly, a hospital or corporation that owns a hospice or provides hospice services may incorporate these elements into its system-wide compliance or managerial structure. We recognize that some hospices may not be able to adopt certain elements to the same comprehensive degree that others with more extensive resources may achieve. This guidance represents the OIG's suggestions on how a hospice can best establish internal controls and monitoring to correct and prevent fraudulent activities. By no means should the contents of this guidance be viewed as an exclusive discussion of the advisable elements of a compliance program. On the contrary, the OIG strongly encourages a hospice to develop and implement compliance elements that uniquely address its own particular risk areas.

The OIG believes that input and support by the individuals and organizations that will use the tools set forth in this document are critical to the development and success of this compliance program guidance. In a continuing effort to collaborate closely with the private sector, the OIG placed a notice in the **Federal Register** soliciting recommendations and suggestions on what should be included in this Compliance Program Guidance.⁶ Further, we took into consideration previous OIG publications, such as Special Fraud Alerts, the recent findings and recommendations in reports issued by OIG's Office of Audit Services and Office of Evaluation and Inspections, as well as the experience of past and recent fraud investigations related to hospices conducted by OIG's Office of

Investigations and the Department of Justice. As appropriate, this guidance may be modified and expanded as more information and knowledge is obtained by the OIG, and as changes in the law, rules, policies, and procedures of the Federal, State, and private health plans occur.

The OIG recognizes that the development and implementation of compliance programs in hospices often raise sensitive and complex legal and managerial issues.⁷ However, the OIG wishes to offer what it believes is critical guidance for providers who are sincerely attempting to comply with the relevant health care statutes and regulations.

II. Compliance Program Elements

The elements proposed by these guidelines are similar to those of other compliance program guidances⁸ and the OIG's corporate integrity agreements.⁹ The elements represent a guide that can be tailored to fit the needs and financial realities of a particular hospice. The OIG is cognizant that, with regard to compliance programs, one model is not suitable to every hospice.

The OIG believes that every effective compliance program must begin with a formal commitment¹⁰ by the hospice's governing body to include all of the applicable elements listed below. These elements are based on the seven steps of the Federal Sentencing Guidelines.¹¹ Further, we believe that every hospice can implement most of our recommended elements that expand upon these seven steps. We recognize that full implementation of all elements

⁷ Nothing stated within this document should be substituted for, or used in lieu of, competent legal advice from counsel.

⁸ See 63 FR 70138 (December 18, 1998) for the Compliance Program Guidance for Third Party Medical Billing Companies; 63 FR 42410 (August 7, 1998) for the Compliance Program Guidance for Home Health Agencies; 63 FR 45076 (August 24, 1998) for the Compliance Program Guidance for Clinical Laboratories, as revised; 63 FR 8987 (1998) for the Compliance Program Guidance for Hospitals. These documents are also located on the Internet at <http://www.dhhs.gov/progorg/oig>.

⁹ Corporate integrity agreements are executed as part of a civil settlement between the health care provider and the Government to resolve a case based on allegations of health care fraud or abuse. These OIG-imposed programs are in effect for a period of three to five years and require many of the elements included in this compliance program guidance.

¹⁰ E.g., a resolution by the board of directors, owner(s) or president, where applicable, and the allocation of adequate resources to ensure that each of the elements is addressed.

¹¹ See United States Sentencing Commission Guidelines, *Guidelines Manual*, 8A1.2, Application Note 3(k). The Federal Sentencing Guidelines are detailed policies and practices for the Federal criminal justice system that prescribe the appropriate sanctions for offenders convicted of Federal crimes.

⁵ The OIG, for example, will consider the existence of an effective compliance program that pre-dated any governmental investigation when addressing the appropriateness of administrative sanctions. See 62 FR 67392 (December 24, 1997). The burden is on the provider to demonstrate the operational effectiveness of a compliance program. Further, the False Claims Act, 31 U.S.C. 3729-3733, provides that a person who has violated the Act, but who voluntarily discloses the violation to the Government, in certain circumstances will be subject to not less than double, as opposed to treble, damages. See 31 U.S.C. 3729(a).

⁶ See 64 FR 2228 (January 13, 1999), Notice for Solicitation of Information Recommendations for Developing OIG Compliance Program Guidance for the Hospice Industry.

may not be immediately feasible for all hospices. However, as a first step, a good faith and meaningful commitment on the part of the hospice administration, especially the governing body and the CEO, will substantially contribute to a program's successful implementation. As the compliance program is implemented, that commitment should cascade down through the management of the hospice to every employee at all levels in the organization.

At a minimum, comprehensive compliance programs should include the following seven elements:

(1) The development and distribution of written standards of conduct, as well as written policies and procedures, which promote the hospice's commitment to compliance and address specific areas of potential fraud, such as assessment of Medicare eligibility, quality assurance, and financial relationships with nursing facilities and other health care professionals and entities.

(2) The designation of a compliance officer and other appropriate bodies, e.g., a corporate compliance committee, charged with the responsibility for operating and monitoring the compliance program, and who report directly to the CEO and the governing body.¹²

(3) The development and implementation of regular, effective education and training programs for all affected employees.

(4) The creation and maintenance of a process, such as a hotline or other reporting system, to receive complaints and ensure effective lines of communication between the compliance officer and all employees, and the adoption of procedures to protect the anonymity of complainants and to protect whistleblowers from retaliation.

(5) The use of audits and/or other evaluation techniques to monitor compliance, identify problem areas, and assist in the reduction of identified problem areas.

(6) The development of appropriate disciplinary mechanisms to enforce standards and the development of policies to address (i) employees who have violated internal compliance

policies, applicable statutes, regulations, or Federal health care program requirements¹³ and (ii) the employment of sanctioned and other specified individuals.

(7) The development of policies that direct prompt and proper responses to detected offenses, including the initiation of appropriate corrective action and preventative measures.

A. Written Policies and Procedures

Every compliance program should require the development and distribution of written compliance policies, standards, and practices that identify specific areas of risk and vulnerability to the hospice. These policies, standards, and practices should be developed under the direction and supervision of, or subject to review by, the compliance officer and compliance committee and, at a minimum, should be provided to all individuals who are affected by the particular policy at issue, including the hospice's agents and independent contractors.¹⁴

1. Standards of Conduct

Hospices should develop standards of conduct for all affected employees that include a clearly delineated commitment to compliance by the hospice's senior management¹⁵ and its divisions, including affiliated providers

¹³ The term "Federal health care programs" is applied in this document as defined in 42 U.S.C. 1320a-7b(f), which includes any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government i.e., via programs such as Medicare, Federal Employees' Compensation Act, Black Lung, or the Longshore and Harbor Worker's Compensation Act) or any State health plan (e.g., Medicaid, or a program receiving funds from block grants for social services or child health services). Also, for the purpose of this document, the term "Federal health care program requirements" refers to the statutes, regulations, rules, requirements, directives, and instructions governing Medicare, Medicaid, and all other Federal health care programs.

¹⁴ According to the Federal Sentencing Guidelines, an organization must have established compliance standards and procedures to be followed by its employees and other agents in order to receive sentencing credit for an "effective" compliance program. The Federal Sentencing Guidelines define "agent" as "any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization." See United States Sentencing Commission Guidelines, *Guidelines Manual*, 8A1.2, Application Note 3.

¹⁵ The OIG strongly encourages high-level involvement by the hospice's governing body, CEO, chief operating officer, general counsel, and chief financial officer, as well as other medical or clinical personnel, as appropriate, in the development of standards of conduct. Such involvement should help communicate a strong and explicit statement of compliance goals and standards.

operating under the hospice's control¹⁶ and other health care professionals (e.g., hospice physicians,¹⁷ nurses, physical therapists, occupational therapists, social workers, spiritual counselors, bereavement counselors, and volunteers). Standards should articulate the hospice's commitment to comply with all Federal, State, and private insurer standards, with an emphasis on preventing fraud and abuse. They should explicitly state the organization's mission, goals, and ethical requirements of compliance and reflect a carefully crafted, clear expression of expectations for all hospice governing body members, officers, managers, employees, physicians, clinicians, and, where appropriate, volunteers, contractors and other agents. These standards should promote integrity, support objectivity, and foster trust. Standards should not only address compliance with statutes and regulations, but should also set forth broad principles that guide employees in conducting business professionally and properly.

The standards should be distributed to, and comprehensible by, all affected employees (e.g., translated into other languages when necessary and written at appropriate reading levels). Standards should not only address compliance with statutes and regulations, but should also set forth broad principles that guide employees in conducting business professionally and properly. Further, to assist in ensuring that employees continuously meet the expected high standards set forth in the code of conduct, any employee handbook delineating or expanding upon these standards of conduct should be regularly updated as applicable statutes, regulations, and Federal health care program requirements are modified and/or clarified.¹⁸

¹⁶ E.g., attending physicians, pharmacies, durable medical equipment suppliers, hospitals, nursing homes, home health agencies, and supplemental staffing entities.

¹⁷ When the term "hospice physician" is applied in this document, it refers to the hospice's medical director or the physician member of a hospice's Interdisciplinary Group. The "Interdisciplinary Group," which is composed of at least a doctor of medicine or osteopathy, registered nurse, medical social worker, and pastoral or other counselor, is responsible for: (1) participation in the establishment of the plan of care; (2) provision of supervision of hospice care and services; (3) periodic review and updating of the plan of care for each individual receiving hospice care; (4) establishment of policies governing the day-to-day provision of hospice care and services. See 42 CFR 418.68.

¹⁸ The OIG recognizes that not all standards, policies, and procedures need to be communicated to all employees. However, the OIG believes that the bulk of the standards that relate to complying with fraud and abuse laws and other ethical areas

Continued

¹² The integral functions of a compliance officer and a corporate compliance committee in implementing an effective compliance program are discussed throughout this compliance program guidance. However, the OIG recognizes that a hospice may tailor the structure of those positions in consideration of the size and design of the hospice, while endeavoring to address and accomplish all of the underlying objectives of a compliance officer and a corporate compliance committee. See section II.B. and accompanying notes.

When they first begin working for the hospice, and each time new standards of conduct are issued, employees should be asked to sign a statement certifying that they have received, read, and understood the standards of conduct. An employee's certification should be retained by the hospice in the employee's personnel file, and available for review by the compliance officer.

2. Risk Areas

The OIG believes that a hospice's written policies and procedures should take into consideration the particular statutes, rules, and program instructions that apply to each function or department of the hospice.¹⁹ In contrast to the standards of conduct, which are designed to be a clear and concise collection of fundamental standards, the written policies should articulate specific procedures that hospice staff should follow.

Consequently, we recommend that these policies and procedures be coordinated with the appropriate training and educational programs, with an emphasis on areas of special concern that have been identified by the OIG through its investigative and audit functions.²⁰ Some of the special areas of OIG concern include:²¹

- Uninformed consent to elect the Medicare Hospice Benefit;²²
- Discriminatory admission;²³
- Admitting patients to hospice care who are not terminally ill;²⁴
- Arrangement with another health care provider who a hospice knows is submitting claims for services already covered by the Medicare Hospice Benefit;²⁵

²² A hospice must ensure that an individual (or authorized representative) is informed about the palliative nature of the care and services that may be provided if the individual desires to elect the Medicare Hospice Benefit. 42 CFR 418.62. The decision to elect the Medicare Hospice Benefit has significant consequences because the patient waives the right to receive standard Medicare benefits related to the terminal illness, including all treatment for the purposes of curing the terminal illness. See 42 U.S.C. 1395d(d). A patient's hospice election statement must include the following items of information: (1) identification of the particular hospice that will provide care to the individual; (2) the individual's or representative's acknowledgment that he or she has been given a full understanding of hospice care; (3) the individual's or representative's acknowledgment that he or she understands that certain Medicare services are waived by the election; (4) the effective date of the election; and (5) the signature of the individual or representative. See *Medicare Hospice Manual* § 210.

²³ Hospices should offer palliative care to all terminally ill individuals and their families who are eligible, regardless of age, gender, nationality, race, creed, sexual orientation, or disability.

²⁴ For a hospice patient to receive reimbursement for hospice services under Medicare, the patient must be "terminally ill." See 42 U.S.C. 1395d(a). An individual is considered to be "terminally ill" if the individual has a medical prognosis that the individual's life expectancy is six months or less if the illness runs its normal course. 42 CFR 418.3. In March 1995, Operation Restore Trust (ORT), a joint initiative, was established between the OIG, HCFA, and Administration on Aging. Among its projects, ORT assessed the medical eligibility for hospice services in the five largest States in terms of Medicare spending (New York, Florida, Illinois, Texas, and California). Through ORT activities, it was discovered that many beneficiaries receiving Medicare hospice benefits did not have a terminal illness as defined by Medicare. See OIG report A-05-96-00023—"Enhanced Controls Needed to Assure Validity of Medicare Hospice Enrollments." In addition, OIG investigators have encountered hospices that asked nurse employees to alter notes in patients' records or to otherwise misrepresent patients' medical conditions, in order to falsify the existence of a terminal condition. See also section II.A.3.a. and accompanying notes.

²⁵ When an individual makes an election to receive services covered by the Medicare Hospice Benefit, that individual waives the right to receive Medicare reimbursement for any treatment related to his or her terminal illness. Accordingly, a hospice should ensure it is not involved with a health care provider who the hospice knows submits claims for the following services that are unallowable for reimbursement under the Medicare Hospice Benefit: (1) standard Medicare benefits for treatment of the terminal illness; (2) treatment by another hospice not arranged for by the patient's hospice; and (3) care from another provider that duplicates care the hospice is required to furnish. See 42 U.S.C. 1395d(d). It is expected that the hospice provider will work with other providers to coordinate care and ensure appropriate billing if these situations occur.

- Under-utilization;²⁶
- Falsified medical records or plans of care;²⁷
- Untimely and/or forged physician certifications on plans of care;
- Inadequate or incomplete services rendered by the Interdisciplinary Group;²⁸
- Insufficient oversight of patients receiving more than six consecutive months of hospice care;²⁹
- Hospice incentives to actual or potential referral sources (e.g., physicians, nursing homes, hospitals, patients, etc.) that may violate the anti-kickback statute or other similar Federal or State statute or regulation.³⁰

²⁶ In other words, knowing denial of needed care in order to keep costs low. A hospice is accountable for the appropriate allocation and utilization of its resources in order to provide optimal care consistent with the needs of a patient, family, and/or lawful representative. When a patient is receiving hospice care, the hospice is paid a predetermined fee for each day during the length of care, no matter how much care the hospice actually provides. This means that a hospice may have a financial incentive to reduce the number of services provided to each patient, because the hospice will get paid the same amount regardless of the number of services provided. The OIG has received complaints about hospices neglecting patient needs and ignoring reasonable requests for treatment, including complaints about limited availability of durable medical equipment for patients as their medical condition decreases and failure to provide continuous care for periods of crisis due to staff shortages. The OIG has also been alerted to improper utilization of services that occurs when a hospice encourages a patient to revoke the Medicare Hospice Benefit for the purpose of obtaining expensive care under the standard Medicare benefits, only to re-elect the Medicare Hospice Benefit when expensive care is no longer necessary.

²⁷ OIG investigations have revealed that certain hospices have falsified or "re-created" patient medical records and plans of care to exaggerate the negative aspects regarding a hospice patient's condition to justify reimbursement. See section II.A.3.b. and accompanying notes.

²⁸ Each hospice is required to have an "Interdisciplinary Group" of personnel. See 42 U.S.C. 1395x(dd)(2)(B). See note 17. Failure of the Interdisciplinary Group to meet its responsibilities may result in substandard care. In addition, inadequate review of a hospice patient may result in improper reimbursement for services provided to a patient who fails to continue to be eligible for the Medicare Hospice Benefit.

²⁹ Since the enactment of the Balanced Budget Act of 1997, the Medicare Hospice Benefit is divided into the following benefit periods: (1) initial 90-day; (2) subsequent 90-day; and (3) unlimited number of 60-day benefit periods as long as the patient continues to meet program eligibility requirements. See 42 U.S.C. 1395d. At the beginning of each subsequent 60-day benefit period, either the attending physician or hospice physician must recertify that the patient is terminally ill. See 42 U.S.C. 1395f(a)(7). If the necessary oversight is not performed during the unlimited periods of care, a hospice may receive improper reimbursement for services provided to a patient who fails to continue to be eligible for the Medicare Hospice Benefit.

³⁰ Examples of arrangements that may run afoul of the anti-kickback statute include practices in which a hospice pays a fee to a physician for each plan of care certified, and provides nursing or

should be addressed and made part of all affected employees' training. The hospice must decide which additional educational programs should be limited to the different levels of employees, based on job functions and areas of responsibility.

¹⁹ A hospice can conduct focus groups composed of managers from various departments to solicit their concerns and ideas about compliance risks that may be then addressed by the hospice's policies and procedures. Such employee participation in the development of the hospice's compliance program can promote its credibility and foster employee acceptance of the program.

²⁰ The OIG periodically issues Special Fraud Alerts setting forth activities believed to raise legal and enforcement issues. For example, see OIG Special Fraud Alert—"Fraud and Abuse in Nursing Home Arrangements with Hospices" (March 1998); see also OIG Medicare Advisory Bulletin on Hospice Benefits (November 1995). Hospice compliance programs should require that the legal staff, compliance officer, or other appropriate personnel carefully consider any and all Special Fraud Alerts issued by the OIG that relate to hospices. Moreover, the compliance programs should address the ramifications of failing to cease and correct any conduct criticized in a Special Fraud Alert, if applicable to hospices, or to take reasonable action to prevent such conduct from reoccurring in the future. If appropriate, a hospice should take the steps described in section II.G. regarding investigations, reporting, and correction of identified problems.

²¹ Hospices may also want to consult the OIG's Work Plan when conducting the risk assessment. The OIG Work Plan details the various projects the OIG intends to address in the applicable fiscal year. It should be noted that the priorities in the Work Plan are subject to modification and revision as the year progresses and it does not represent a complete or final list of areas of concern to the OIG. The Work Plan is currently available on the Internet at <http://www.os.dhhs.gov/oig>.

including improper arrangements with nursing homes;³¹

- Overlap in the services that a nursing home provides, which results in insufficient care provided by a hospice to a nursing home resident;³²
- Improper relinquishment of core services and professional management responsibilities to nursing homes, volunteers, and privately-paid professionals;³³
- Providing hospice services in a nursing home before a written

administrative services for free or below fair market value to physicians, nursing homes, hospitals and other potential referral sources. See 42 U.S.C. 1320a-7b; 60 FR 40847 (1995). See also discussion in section II.A.4. and accompanying notes. In addition, a hospice that offers an incentive to an individual that such hospice knows or should know is likely to influence the individual to use a particular hospice may be subject to civil monetary penalties. See 42 U.S.C. 1320a-7a(a)(5).

³¹ The OIG has observed instances of potential kickbacks between hospices and nursing homes to unlawfully influence the referral of patients. In general, payments by a hospice to a nursing home for "room and board" provided to a Medicaid hospice patient should not exceed what the nursing home otherwise would have received if the patient had not been enrolled in hospice. (If a patient receiving Medicare hospice benefits in a nursing home is also eligible for Medicaid, Medicaid will pay the hospice at least 95 percent of the State's daily nursing home rate, and the hospice is then responsible for paying the nursing home for the patient's room and board.) Any additional payment must represent the fair market value of additional services actually provided to that patient that are not included in the Medicaid daily rate. See *Hospice Medicare Manual* § 204.2. See also section II.A.4. and accompanying notes.

³² There may be some overlap in the services that the nursing homes and hospices provide, thereby providing one or the other the opportunity to reduce services and costs. Recent OIG reports found that residents of certain nursing homes receive fewer services from their hospice than patients who receive hospice services in their own homes. Upon review, it was found that many nursing home hospice patients were receiving only basic nursing and aide visits that were provided by nursing home staff as part of room and board when hospice staff were not present. Other additional treatments provided by hospice staff, such as nursing and aide visits, were often clearly within the professional skills possessed by nursing home staff. The reports found that the nature of services provided by hospice staff, while appropriate and efficacious, appeared to differ little from services a nursing home would have provided if the patient was not enrolled in hospice. See OEI report OEI-05-95-00250—"Hospice Patients in Nursing Homes;" see also OIG report A-05-96-00023—"Enhanced Controls Needed to Assure Validity of Medicare Hospice Enrollments." Since hospices receive a fixed daily payment regardless of the number of services provided or the location of the patient, fewer services may result in higher profits per patient. See also section II.A.3.e. and accompanying notes.

³³ Certain of the hospice services, (i.e., "core services" such as nursing, medical, social, and counseling services) must be provided directly to the patient by employees of the hospice, while other non-core hospice services may be provided in accordance with contracts with other providers. However, the hospice must retain professional management for all contacted services. See 42 CFR 418.80.

agreement has been finalized, if required;³⁴

- Billing for a higher level of services than was necessary;³⁵
- Knowingly billing for inadequate or substandard care;
- Inadequate justification in the medical record when a patient revokes the Medicare Hospice Benefit;³⁶
- Billing for hospice care provided by unqualified or unlicensed clinical personnel;³⁷
- False dating of amendments to medical records;³⁸
- High-pressure marketing of hospice care to ineligible beneficiaries;³⁹

³⁴ A patient who resides in a skilled nursing facility or nursing facility may elect the Medicare Hospice Benefit if: (1) the residential care is paid for by (a) the beneficiary or private insurance, or (b) Medicaid (if the beneficiary is dual eligible); and (2) the hospice and facility have a written agreement under which the hospice takes full responsibility for the professional management of the individual's hospice care and the facility agrees to provide room and board. *Hospice Medicare Manual* § 204.2.

³⁵ Billing for unnecessary services involves knowingly seeking reimbursement for services that "are not reasonable and necessary for the palliation or management of terminal illness." See 42 U.S.C. 1395y(a)(1)(C). Because HCFA establishes different payment amounts for specific categories of covered hospice care, a hospice must ensure that it provides services to hospice patients that are reasonable and necessary. Otherwise, the hospice may be reimbursed for a higher level of services than was necessary, e.g., a hospice that provides and bills for continuous care where only routine home care is necessary. See also section II.A.3.d. and accompanying notes.

³⁶ Fiscal intermediaries have informed the OIG that hospices rarely offer the reasons supporting the revocation of a patient's Medicare Hospice Benefit. Although a hospice may discharge a patient if it discovers that the patient is not terminally ill, hospices should not encourage a patient to revoke the benefit merely to avoid the obligation to pay for hospice services that have become too costly. See *Hospice Medicare Manual* § 210.

³⁷ Medicare conditions of participation require that hospices and all hospice employees must be licensed in accordance with applicable Federal, State, and local laws and regulations. 42 CFR 418.72.

³⁸ If additions or corrections need to be made to medical records, hospices should make such entries appropriately. For example, hospices might correct a medical record by drawing a single line through the erroneous entry, writing "error" next to the entry, initialing and dating the correction, and writing the correct information near the entry or writing where the correct information could be found.

³⁹ Hospices should not utilize prohibited or inappropriate conduct (e.g., offer free gifts or services to patients), designed to maximize business growth and patient retention, to carry out their initiatives and activities. Also, any marketing information offered by hospices should be clear, correct, non-deceptive, and fully informative. Through ORT, it was discovered that hospice marketing materials had placed considerable emphasis on the availability of hospice benefits for long term care patients, while downplaying or ignoring the terminal illness eligibility requirement. See OIG report A-05-96-00023—"Enhanced Controls Needed To Assure Validity of Medicare Hospice Enrollments." Hospices should not engage in marketing and sales strategies that offer incomplete or inadequate information about

• Improper patient solicitation activities, such as "patient charting;"⁴⁰

- Inadequate management and oversight of subcontracted services, which results in improper billing;⁴¹
- Sales commissions based upon length of stay in hospice;⁴²
- Deficient coordination of volunteers;⁴³
- Improper indication of the location where hospice services were delivered;⁴⁴

Medicare entitlement under the Medicare Hospice Benefit to induce beneficiaries to elect hospice and thereby waive aggressive treatment options that Medicare would otherwise cover. Marketing statements should not create the perception that the initial terminal prognosis is of limited importance and that hospice benefits may almost routinely be provided over an indefinite time period. Marketing materials should prominently feature the eligibility requirements for the Medicare Hospice Benefit.

⁴⁰ Hospices should not review medical records of nursing home patients in an attempt to recruit patients for hospice services based on their diagnoses. For instance, see OIG report A-05-96-00023—"Enhanced Controls Needed To Assure Validity of Medicare Hospice Enrollments."

⁴¹ The Balanced Budget Act of 1997, Pub. L. No. 105-33, amended the Social Security Act so that hospices will no longer be required to routinely provide all physician services directly by employing a physician. See 42 U.S.C. 1395x(dd)(2). Because the OIG has received reports of limited involvement displayed by contracted physicians, as opposed to hospice-employed physicians, hospices should consider having oversight mechanisms in place to ensure that hospice physicians are thoroughly reviewing re-certification documentation.

⁴² Through ORT activities, it was discovered that hospice sales staff often were paid on commission based on the length of a patient's stay in hospice. For example, commission amounts were determined by multiplying the total number of days of hospice patient care (patient days) within a sales representative's territory by a factor that reflected the level of achievement of assigned sales performance objectives. Such marketing tactics are encouraged the recruitment of long-term patients, many of whom the review found ineligible for the Medicare Hospice Benefit. The OIG recommends that hospices monitor sales commissions for potential vulnerabilities associated with improper patient recruiting. See OIG report A-05-96-00023—"Enhanced Controls Needed to Assure Validity of Medicare Hospice Enrollments."

⁴³ Hospices rely heavily on volunteer support. In fact, the Medicare Hospice Benefit is the only federally funded program that mandates the provision of volunteer services. Appropriately, hospices need to recognize and attend to compliance issues associated with volunteers (i.e., screening, training, disciplining, monitoring, etc.).

⁴⁴ Medicare payments for hospice services are made on a prospective basis and adjusted by an area wage index. Hospices must submit claims based on the geographic location at which the service is furnished and not the location of the hospice. Incorrect designation of the place of service for revenue codes 651 and 652 of the hospice claim may significantly alter reimbursement and result in overpayment for services performed (e.g., hospice office in a metropolitan area may be reimbursed more than a rural home where the services were performed).

- Failure to comply with applicable requirements for verbal orders for hospice services;⁴⁵

- Non-response to late hospice referrals by physicians;⁴⁶

- Knowing misuse of provider certification numbers, which results in improper billing;⁴⁷

- Failure to adhere to hospice licensing requirements and Medicare conditions of participation;⁴⁸ and

- Knowing failure to return overpayments made by Federal health care programs.⁴⁹

A hospice's prior history of noncompliance with applicable statutes, regulations, and Federal health care program requirements may indicate additional types of risk areas where the hospice may be vulnerable and that may require policies and procedures to prevent recurrence.⁵⁰ Additional risk

⁴⁵ Hospice staff must make an appropriate entry in the patient's medical record as soon as they receive a verbal certification of terminal illness and file written certifications in the medical record. See 42 CFR 418.22(d). State regulations may require that verbal and telephone orders from physicians should only be accepted by individuals authorized by State law to accept such orders. The OIG recommends that those authorized individuals accepting verbal and telephone orders should record, date, and sign these orders and the physician(s) who ordered the service or treatment should countersign them no later than the time period required by State regulations.

⁴⁶ We have received comments expressing concern over late hospice referrals by physicians. While the onus of a timely hospice referral may be on a physician, a hospice should not allow untimely referrals to go unrecognized with inadequate follow-up to the physicians. When hospice referrals are late, terminally ill patients may be unnecessarily denied access to the Medicare Hospice Benefit, hospices may have to admit a patient at the costliest stage of terminal illness, and quality of care may be affected because of patients being too far along to receive the optimum benefits of hospice care. Hospices need to work closely with physicians to educate and remind them as to the sensitivities and risks associated with untimely referrals.

⁴⁷ E.g., transfer of a patient from one hospice to another hospice owned by the same company to circumvent applicable reimbursement caps.

⁴⁸ See 42 CFR 418.50–418.100 for the Medicare conditions of participation that apply to hospices.

⁴⁹ An overpayment is the amount of money a hospice may have received in excess of the amount due and payable under a health care program. Examples of overpayments include, but are not limited to, instances where a hospice is: (1) paid twice for the same service either by Medicare or by Medicare and another insurer; or (2) paid for care rendered to patients who are not terminally ill or are otherwise ineligible for the Medicare Hospice Benefit. For instance, see *Hospice Medicare Manual* §307. The OIG strongly recommends that the hospice institute procedures to detect overpayments and to promptly remit such overpayments to the affected payor. See 42 U.S.C. 1320a–7b(a)(3), which provides criminal penalties for failure to disclose an overpayment. See also 18 U.S.C. 669.

⁵⁰ Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct and is a significant factor in the assessment of whether a compliance program

areas should be assessed by hospices as well and incorporated into the written policies and procedures and training elements developed as part of their compliance programs.

3. Eligibility Requirements

Of the risk areas identified above, those pertaining to the Medicare eligibility requirements have been the frequent subject of investigations and audits. With respect to the reimbursement process, a hospice's written policies and procedures should reflect and reinforce current Federal health care requirements regarding the eligibility for Medicare reimbursement. The policies must create a mechanism for the billing or reimbursement staff to communicate effectively and accurately with the clinical staff. Policies and procedures should:

- Provide for complete and timely documentation of the specific clinical factors that qualify a patient for the Medicare Hospice Benefit;⁵¹

- Delineate who has authority to make entries in the patient record;

- Emphasize that patients should be admitted to hospice care only when appropriate documentation supports the applicable reimbursement eligibility criteria and only when such documentation is maintained, appropriately organized in a legible form, and available for audit and review. The documentation should record the activity leading to the record entry and the identity of the individual providing the service. Documentation should be consistent and any discrepancies discussed and reconciled. The hospice should consult with its physicians, clinical staff, and/or governing body to establish other appropriate documentation guidelines;

- Indicate that the diagnosis and procedure codes for hospice services reported on the reimbursement claim should be based on the patient's clinical condition as reflected in the medical record and other documentation, and should comply with all applicable official coding rules and guidelines. Any Health Care Financing Administration Common Procedure Coding System (HCPCS), International Classification of Disease (ICD), or

is effective. See United States Sentencing Commission Guidelines, *Guidelines Manual*, 8A1.2, Application Note 3(k)(iii).

⁵¹ Each patient's clinical record must contain: (1) the initial and subsequent assessments (including hospice admission history, certification, and recertification); (2) the plan of care; (3) identification data; (4) consent and authorization and election forms; (5) pertinent medical history; and (6) complete documentation of all services and events (including evaluations, treatments, progress notes, etc.) See 42 CFR 418.74.

revenue code (or successor codes) used by the billing staff should accurately describe the service that was ordered by the physician and performed by the hospice. The documentation necessary for accurate billing should be available to billing staff; and

- Provide that the compensation for hospice admission personnel, billing department personnel and billing consultants should not offer any financial incentive to bill for hospice care regardless of whether applicable eligibility criteria for reimbursement is met.

The written policies and procedures concerning proper billing should reflect the current reimbursement principles set forth in applicable regulations and should be developed in tandem with private payor and organizational standards. Particular attention should be paid to issues associated with patient election of the Medicare Hospice Benefit, certification of terminal illness of a patient, development and certification of a patient's interdisciplinary plan of care, and reasonableness and necessity of the level of hospice care provided.⁵²

a. Terminal Illness as an Eligibility Requirement

For a hospice patient to receive reimbursement for hospice services under Medicare,⁵³ the patient must be "terminally ill."⁵⁴ Hospices should create oversight mechanisms to ensure that the terminal illness of a Medicare beneficiary is verified⁵⁵ and the specific

⁵² The OIG has undertaken numerous audits, investigations, inspections, and national enforcement initiatives aimed at reducing potential and actual fraud, abuse, and waste. For example, see OIG report A–05–96–00023—"Enhanced Controls Needed to Assure Validity of Medicare Hospice Enrollments;" see also OIG Special Fraud Alert—"Fraud and Abuse in Nursing Home Arrangements with Hospices" (March 1998); OIG Medicare Advisory Bulletin on Hospice Benefits (November 1995).

⁵³ 42 U.S.C. 1395d(a) authorizes the reimbursement of hospice care.

⁵⁴ An individual is considered to be "terminally ill" if the individual has a medical prognosis that the individual's life expectancy is six months or less if the illness runs its normal course. 42 CFR 418.3. However, the fact that a hospice patient lives beyond this six month period, in and of itself, does not constitute grounds for a determination that the patient was never eligible for hospice care, or that the services provided to the patient were not reimbursable by Medicare.

⁵⁵ Medical reviews, audits, inspections, and investigations of hospices have concluded that hospices have billed Medicare for hospice services provided to patients who are not terminally ill, with diagnoses including arthritis, anorexia, debility, and failure to thrive. For instance, see OIG report OEI–04–93–00270—"Medicare Hospice Beneficiaries: Services and Eligibility." Through Operation Restore Trust activities and the increased program integrity actions by the Regional Home Health Intermediaries (RHHIs), it was discovered

factors qualifying the patient as terminally ill are properly documented.⁵⁶ Any determinative assessment of the terminal illness of a Medicare beneficiary should be completed prior to billing Medicare for hospice care. Physicians must certify that the beneficiary was terminally ill at the time when a patient was admitted for hospice services as well as at the beginning of subsequent hospice benefit periods.⁵⁷

The hospice's written policies and procedures should require, at a minimum, that:

- Before a patient is admitted for hospice services, the hospice physician and attending physician thoroughly review and certify the admitting diagnosis and prognosis;
- A patient's medical record contain complete and measurable documentation to support the certification made by the hospice physician or attending physician;⁵⁸
- The patient or lawful representative is informed of the determination of the patient's life limiting condition;
- The patient or lawful representative is aware that the goal of hospice is directed toward relief of symptoms, rather than the cure of the underlying disease;
- A patient's medical condition and status is completely reviewed during Interdisciplinary Group meetings; and
- The clinical progression/status of a patient's disease and medical condition are properly documented.

Hospices can further ensure compliance with the terminal illness requirement through discussions with Medicare beneficiaries and their

families, reminding them that they must satisfy the regulatory requirements for terminal illness status to be eligible for Medicare coverage. These discussions can take place at the beginning of hospice election and during appropriate times throughout a patient's hospice care, e.g., at time of recertification. Because the Medicare conditions of participation require hospices to give all beneficiaries an informed consent form that outlines their legal rights before furnishing them with hospice care,⁵⁹ providers can include reminders of terminal illness requirements in these forms.

The OIG recognizes that decisions to admit patients to hospices are often not based on medical factors alone. Such decisions are routinely influenced by non-medical factors that would generally be reflected in the plan of care. However, it is important to make a distinction between admitting a patient to a hospice program and certifying a patient for the Medicare Hospice Benefit. Based on an individual hospice's admission criteria, some patients may be admitted to hospice care prior to an estimated six months before death, as long as the hospice is paid fair market value for its services. Regardless, patients can be certified for the Medicare Hospice Benefit *only* when it is reasonable to conclude that a patient's life expectancy is six months or less if the illness runs its normal course. In other cases, alternative modes of reimbursement, often provided through community support, should be sought outside the Medicare Hospice Benefit.

b. Plan of Care

A hospice should take all reasonable steps to ensure that a written plan of care is established and maintained for each individual who receives hospice services, and that the care provided to that individual is in accordance with the plan.⁶⁰ The plan must be established by the patient's attending physician, the hospice physician, and the Interdisciplinary Group.⁶¹ Each patient's needs should be continuously assessed and all treatment options explored and evaluated in the context of the patient's symptoms.⁶² The hospice's written

policies and procedures should require, at a minimum, that:

- Before the hospice bills for hospice care provided to a patient, the plan of care must be established by the hospice patient's attending physician,⁶³ the hospice physician, and the Interdisciplinary Group;
- The plan of care includes (i) An assessment of the hospice patient's needs and identification of services, including the management of discomfort and symptom relief, and (ii) the scope and frequency of services, in detail, needed to meet the patient's and family's needs;⁶⁴
- The plan of care must be reviewed and updated, at intervals specified in the plan, by the attending physician, hospice physician, and the Interdisciplinary Group;⁶⁵
- The hospice properly documents any review or update of a hospice patient's plan of care by the attending physician, the hospice physician and Interdisciplinary Group; and⁶⁶
- The hospice regularly reviews the appropriateness of Interdisciplinary Group services and level of services being provided, patient admission to hospice, patient length of stay, delays, and specific treatment modalities.

c. Utilization of Hospice Services

A hospice is accountable for the appropriate allocation and utilization of its resources in order to provide optimal care consistent with patient and family needs.⁶⁷ Accordingly, a hospice should monitor and evaluate its resource allocation regularly to identify and

ordered by a physician are excessive or otherwise inappropriate, the hospice cannot avoid liability for filing improper claims simply because a physician has certified the need for hospice care.

⁶³ For Medicare reimbursement purposes, a plan for furnishing hospice services must be certified by a physician who is a doctor of medicine, osteopathy, or podiatric medicine. See 42 CFR 410.20. The services of the hospice medical director(s) or the physician member of the Hospice Interdisciplinary Group must be performed by a doctor of medicine or osteopathy. See 42 CFR 418.202. The hospice should employ reasonable measures to verify that physicians who certify hospice services are appropriately licensed and no adverse actions, such as criminal conviction, debarment, or an exclusion, have been taken against them.

⁶⁴ 42 CFR 418.58(c).

⁶⁵ See 42 U.S.C. 1395f(a)(7)(B); 42 U.S.C. 1395x(dd)(2)(B).

⁶⁶ 42 CFR 418.58(b).

⁶⁷ Once a Medicare beneficiary elects hospice care, the hospice is responsible for furnishing directly, or arranging for, all supplies and services that relate to the beneficiary's terminal condition, except the services of an attending physician. Hospice beneficiaries have the right to receive covered medical, social, and emotional support services from the hospice directly, or through arrangements made by the hospice, and should not be forced to seek or pay for such care from non-hospice providers.

that many beneficiaries receiving Medicare hospice benefits did not have a terminal illness. In the review of hospice cases between 1992 and 1996, patients did not demonstrate significant clinical symptoms of their disease nor notable functional limitations one would expect to see in a person who has a terminal illness as defined by Medicare. See OIG report A-05-96-00023—"Enhanced Controls Needed to Assure Validity of Medicare Hospice Enrollments." Findings such as these have prompted a concern that some hospices may intentionally misrepresent a condition as terminal in order to secure Medicare reimbursement. See also note 24.

⁵⁶ See 42 CFR 418.22(d). If a question is raised as to whether a patient is terminally ill, the hospice will be requested to furnish its Medicare fiscal intermediary with the information necessary to establish that the patient is terminally ill.

⁵⁷ See 42 U.S.C. 1395f(a)(7). See also note 29.

⁵⁸ In order to verify a patient's terminal illness, Medicare fiscal intermediaries need to review physician input and rationale beyond a signature on the certification form (e.g., a recent medical history and physical if the physician does not actually examine the patient prior to admission to hospice; summary of physician review of the history and physical taken by hospice personnel; or physician documentation of his or her contribution to the Interdisciplinary Group meetings).

⁵⁹ See 42 CFR 418.62.

⁶⁰ See 42 U.S.C. 1395f(a)(7); 42 CFR 418.58.

⁶¹ *Id.*

⁶² Some OIG audits found that hospice physicians, at times, rely partly on referring, attending physicians. Although the referring physician's opinion can and should be considered as part of the decision making process, the final determination of hospice eligibility is the responsibility of the hospice physician. For instance, see OIG report A-04-95-02111. If employees of a hospice believe that services

resolve problems with the utilization of services, facilities, and personnel. To achieve such monitoring, a hospice should schedule Interdisciplinary Group case reviews and conferences,⁶⁸ review specific problems that may arise with services provided, and use objective written criteria or treatment protocols to guide decisions about the utilization of hospice services provided. Utilization concerns may be an indication of a problem with the quality or quantity of services provided to a hospice patient or demonstrate a more fundamental concern as to the patient's eligibility for the Medicare Hospice Benefit in the first place. Therefore, a hospice should implement policies and procedures to identify, assess, and rectify any problems associated with:

- Appropriateness of Interdisciplinary Group services and level of services being provided;
- Appropriateness of patient admission to hospice;
- Regular review of patient length of stay;
- Delays in admission or in the provision of Interdisciplinary Group services; and
- Specific treatment modalities.

When utilization problems are identified, a hospice should implement corrective actions and preventative measures that may include ongoing monitoring, changes in the provision of services, and revisions of policies and procedures.

d. Levels of Hospice Care

A hospice's compliance program should provide that it should only seek reimbursement for services that the hospice has reason to believe are reasonable and necessary⁶⁹ for the palliation or management of terminal illness and were ordered by a physician or other appropriately licensed individual. The OIG recommends the hospice's compliance program communicate to physicians authorized to certify patients for hospice care and hospice personnel authorized to admit patients for hospice care that services will only be paid if ordered, certified, covered, reasonable, and necessary for the patient, given his or her clinical condition.

Although hospice services are reimbursed on a per diem basis and not per individual component of the services performed, the payment is

based upon the level of care provided.⁷⁰ Because HCFA establishes different payment amounts for specific categories of covered hospice care, a hospice must ensure that it provides for services to hospice patients that are reasonable and necessary. Otherwise, the hospice may be reimbursed for a higher level of services than was necessary, e.g., a hospice that provides and bills for continuous care where only routine home care is necessary.

As a preliminary matter, the OIG recognizes that licensed health care professionals must be able to order any services that are appropriate for the care of their patients. However, Medicare and other Government and private health care plans will only pay for those services otherwise covered that meet appropriate standards (i.e., in the case of Medicare, "reasonable and necessary" services). Providers may not bill for services that do not meet the applicable standards.⁷¹ The hospice is in a unique position to deliver this information to the health care professionals on its staff and to the physicians who certify hospice services. Upon request, a hospice must be able to provide documentation, such as physician orders and other patient medical records, to support the level of services provided to a hospice patient.⁷² The compliance officer should ensure that a clear, comprehensive summary of the definitions for the different levels of hospice care⁷³ and applicable rules of the various Government and private plans is prepared, disseminated, and explained to appropriate hospice personnel.

⁷⁰ Payment amounts are determined within each of the following categories: (1) Routine home care day; (2) continuous home care day (patient who receives hospice care that consists predominantly of nursing care on a continuous basis at home, is furnished only during brief periods of crisis and only as necessary to maintain the terminally ill patient at home); (3) inpatient respite care day (hospice patient receives care in an approved facility on a short-term basis for respite—not more than five consecutive days at a time); and (4) general inpatient care day (hospice patient receives general inpatient care in an inpatient facility for pain control or acute or chronic symptom management that cannot be managed in other settings). See 42 CFR 418.302.

⁷¹ Administrative civil monetary penalties, assessments, and exclusion, as well as remedies available under criminal and civil law, including the civil False Claims Act, may be imposed against any person who submits a claim for services "that [the] person knows or should know are not medically necessary." See, e.g., 42 U.S.C. 1320a-7a(a).

⁷² Medicare fiscal intermediaries have the authority to require hospices that furnish items or services under the program to submit documentation that substantiates services were actually provided and medically necessary. See *Medicare Intermediary Manual* § 3116.1.B.

⁷³ See note 70.

We recommend that hospices formulate policies and procedures that include periodic clinical reviews, both prior and subsequent to billing for services, as a means of verifying that patients are receiving only reasonable and necessary services. As part of such reviews, hospices should examine the level, frequency, and duration of the services they perform to determine, in consultation with a physician, whether patients' medical conditions justify the level of services provided and billed. A hospice may choose to incorporate this clinical review function into pre-existing quality assurance mechanisms or any other quality assurance processes that are part of its conditions of participation.⁷⁴

e. Services Provided to Hospice Patients in Nursing Homes

Hospice services may be appropriate and beneficial to terminally ill nursing home residents who wish to receive palliative care.⁷⁵ However, the OIG has found hospices that enroll nursing home patients in hospice care are particularly vulnerable to fraud and abuse.⁷⁶ Appropriately, a hospice should set sufficient oversight controls in place to ensure that care it provides to nursing home residents is appropriate, complete, and in accordance with applicable laws and Federal health care program requirements.

When a resident of a nursing home elects the Medicare Hospice Benefit, the hospice and the nursing home should jointly establish a coordinated plan of care that reflects the hospice philosophy, and is based on an assessment of the individual's needs and unique living situation in the nursing home. The coordinated plan should identify the care and services that the nursing home will provide to be responsive to the unique needs of the patient/resident and his or her expressed desire for hospice care.

In general, a hospice should involve nursing home personnel in assisting with the administration of a patient's prescribed therapies included in the plan of care only to the extent that the

⁷⁴ See 42 CFR 418.66.

⁷⁵ See note 34.

⁷⁶ In some cases reviewed in nursing homes, records have shown that patients did have a terminal condition, but were stable with little sign of deterioration or decline. OIG medical reviewers have found that while the hospice benefit may eventually have been appropriate, at the time of election, patients were stable and the election of hospice was premature. See OEI report OEI-05-95-00250: "Hospice Patients in Nursing Homes;" see also OIG report A-05-96-00023—"Enhanced Controls Needed to Assure Validity of Medicare Hospice Enrollments." For other examples of potential fraud and abuse in the hospice/nursing home context, see notes 31-34.

⁶⁸ Interdisciplinary Group conferences are regularly scheduled periodic meetings of the Interdisciplinary Group to review the most current patient/family assessment, evaluate needs, and update the plan of care.

⁶⁹ See note 35.

hospice would routinely utilize the services of a hospice patient's family/caregiver in implementing the plan of care.⁷⁷ To satisfy the applicable Medicare conditions of participation in the nursing home context, hospices should implement policies and procedures to ensure that:

- The hospice makes all covered services available to meet the needs of a patient and does not routinely discharge patients in need of costly inpatient care;⁷⁸
- The hospice retains professional responsibility for services (e.g., personal care, nursing, medication for relieving pain control) furnished by nursing home staff;⁷⁹
- All the care furnished by a nursing home is in accordance with the plan of care;⁸⁰
- The hospice and the nursing home must communicate with each other when any changes are indicated to the plan of care, and each provider must be aware of the other's responsibilities in implementing the plan of care and complete those respective functions;⁸¹
- Evidence of the coordinated plan of care must be present in the clinical records of both providers;⁸²
- Substantially all the core services are routinely provided directly by hospice employees⁸³ and the hospice does not rely on employees of the inpatient facility to furnish needed nursing, physician, counseling, or medical social services;⁸⁴ and
- The hospice keeps its forms and documentation of services separate from the nursing home's forms and documentation.⁸⁵

4. Anti-Kickback and Self-Referral Concerns

The hospice should have policies and procedures in place with respect to compliance with Federal and State anti-kickback statutes.⁸⁶ Such policies should provide that:

- All of the hospices's contracts and arrangements with actual or potential referral sources are reviewed by counsel and comply with all applicable statutes and regulations;⁸⁷
- The hospice does not submit or cause to be submitted to the Federal health care programs claims for patients who were referred to the hospice pursuant to contracts or financial arrangements that were designed to induce such referrals in violation of the anti-kickback statute or similar Federal or State statute or regulation; and
- The hospice does not offer or provide gifts, free services, or other incentives to patients, relatives of patients, physicians, nursing facilities, hospitals, contractors, or other potential referral sources for the purpose of inducing referrals in violation of the anti-kickback statute or similar Federal or State statute or regulation.⁸⁸

In particular, arrangements between nursing homes and hospices are vulnerable to fraud and abuse because nursing home operators have control over the specific hospice or hospices they will permit to provide hospice services to their residents.⁸⁹ Moreover, hospice patients residing in nursing homes may be particularly desirable from a hospice's financial standpoint.⁹⁰ Therefore, with respect to arrangements with nursing homes, a hospice should develop policies and procedures to prevent the following practices from occurring, which may constitute potential kickbacks:

- Hospice offering free or below fair market value goods to induce a nursing home to refer patients to the hospice;
- Hospice paying "room and board" payments to the nursing home in amounts in excess of what the nursing

home would have received directly from Medicaid had the patient not been enrolled in hospice;⁹¹

- Hospice referring its patients to a nursing home to induce the nursing home to refer its patients to the hospice;
- Hospice providing free (or below fair market value) care to nursing home patients, for whom the nursing home is receiving Medicare payment under the Medicare Skilled Nursing Facility Benefit, with the expectation that after the patient exhausts the skilled nursing facility benefit, the patient will receive hospice services from that hospice; and
- Hospice providing staff at its expense to the nursing home to perform duties that otherwise would be performed by the nursing home.

Further, the policies and procedures should specifically reference and take into account the OIG's safe harbor regulations, which clarify those payment practices that would be immune from prosecution under the anti-kickback statute, as well as the OIG's civil monetary penalty and exclusion authorities.⁹²

5. Retention of Records

Hospice compliance programs should provide for the implementation of a records system. This system should establish policies and procedures regarding the creation, distribution, retention, storage, retrieval, and destruction of documents.⁹³ The two categories of documents developed under this system should include: (1) All records and documentation (e.g., medical records, and billing and claims documentation) required either by Federal or State law for participation in Federal health care programs⁹⁴ or any other applicable Federal and State laws and regulations (e.g., document retention requirements to maintain State licensure); and (2) all records necessary to protect the integrity of the hospice's compliance process and confirm the effectiveness of the program. The second category includes: (a) Documentation that employees were adequately trained; (b) reports from the hospice's hotline, including the nature and results of any investigation that was conducted; (c) documentation of

⁷⁷ *Hospice Certification Manual* § 2082.B.

⁷⁸ See 42 CFR 418.50.

⁷⁹ See 42 CFR 418.56.

⁸⁰ See 42 CFR 418.58.

⁸¹ *Hospice Certification Manual* § 2082.A.

⁸² *Hospice Certification Manual* § 2082.A.

⁸³ See 42 CFR 418.80.

⁸⁴ In limited circumstances, HCFA may approve a waiver of the requirement for core nursing services to be provided by a hospice that is located in a non-urbanized area. See 42 CFR 418.83.

⁸⁵ A hospice may consider creating some type of payroll tracking or time study in an effort to properly differentiate services between the hospice and the nursing home.

⁸⁶ The hospice's in-house counsel or compliance officer should, among other things, obtain copies of all relevant OIG regulations, Special Fraud Alerts, and advisory opinions (these documents are located on the Internet at <http://www.os.dhhs.gov/oig>), and ensure that the hospice's policies reflect the guidance provided by the OIG.

⁸⁷ Although hospices may contract with physicians, see note 41, hospices and physicians must still tailor such agreements to avoid violation of the anti-kickback statute or similar Federal or State statute or regulation and to comply with applicable Medicare conditions of participation. See 42 CFR 418.56 and 418.86.

⁸⁸ See 42 U.S.C. 1320a-7b(b); 60 FR 40847 (1995).

⁸⁹ While an exclusive or semi-exclusive arrangement with a nursing home to provide hospice services to residents can promote efficiency and safety by permitting the nursing home operator to coordinate care, screen hospice caregivers, and maintain control of the premises, such an arrangement may have substantial monetary value to a hospice. In these circumstances, some nursing home operators and/or hospices may request or offer illegal remuneration to influence a nursing home's decision to do business with a particular hospice.

⁹⁰ First, a nursing home's population represents a sizable pool of potential hospice patients. Second, nursing home hospice patients may generate higher gross revenues per patient than patients residing in their own homes, because nursing home residents receiving hospice care have, on average, longer lengths of stay than hospice patients residing in their own homes.

⁹¹ See note 31.

⁹² See 42 CFR 1001.952.

⁹³ This records system should be tailored to fit the individual needs and financial resources of the hospice.

⁹⁴ For example, Medicare requires that hospices must establish and maintain a clinical record for every individual receiving care and services. The record must be complete, promptly and accurately documented, readily accessible and systematically organized to facilitate retrieval. Any entries are to be made and signed by the person providing the services. See 42 CFR 418.74.

corrective action, including disciplinary action taken and policy improvements introduced, in response to any internal investigation or audit; (d) modifications to the compliance program; (e) self-disclosures; and (f) the results of the hospice's auditing and monitoring efforts.⁹⁵

6. Compliance as an Element of a Performance Plan

Compliance programs should require that the promotion of, and adherence to, the elements of the compliance program be a factor in evaluating the performance of all employees, who should be periodically trained in new compliance policies and procedures. In addition, all managers and supervisors should:

- Discuss with all supervised employees and relevant contractors the compliance policies and legal requirements pertinent to their function;
- Inform all supervised personnel that strict compliance with these policies and requirements is a condition of employment; and
- Disclose to all supervised personnel that the hospice will take disciplinary action up to and including termination for violation of these policies or requirements.

In addition to making performance of these duties an element in evaluations, a compliance program should include a policy for sanctioning managers and supervisors who fail to adequately instruct their subordinates or fail to detect noncompliance with applicable policies and legal requirements, where reasonable diligence on the part of the manager or supervisor would have led to the discovery of any problems or violations and given the hospice the opportunity to correct them earlier.

The OIG believes all hospices should ensure that its employees understand the importance of compliance. If a small hospice does not have a formal performance evaluation structure, it should informally convey the employee's compliance responsibilities and the importance of these responsibilities in a written job description or orientation checklist. The applicable documentation should include a dated signature, with an indication that the employee has received it and will be responsible for adherence to the responsibilities expressed.

⁹⁵ The creation and retention of such documents and reports may raise a variety of legal issues, such as patient privacy and confidentiality. These issues are best discussed with legal counsel.

B. Designation of a Compliance Officer and a Compliance Committee

1. Compliance Officer

Every hospice should designate a compliance officer to serve as the focal point for compliance activities. This responsibility may be the individual's sole duty or added to other management responsibilities, depending upon the size and resources of the hospice and the complexity of the task. Designating a compliance officer with the appropriate authority is critical to the success of the program, necessitating the appointment of a high-level official in the hospice with direct access to the hospice's president or CEO, governing body, all other senior management, and legal counsel.⁹⁶ The officer should have sufficient funding and staff to perform his or her responsibilities fully. Coordination and communication are the key functions of the compliance officer with regard to planning, implementing, and monitoring the compliance program.

The compliance officer's primary responsibilities should include:

- Overseeing and monitoring the implementation of the compliance program;⁹⁷
- Reporting on a regular basis to the hospice's governing body, CEO, and compliance committee (if applicable) on the progress of implementation, and assisting these components in establishing methods to improve the hospice's efficiency and quality of services, and to reduce the hospice's vulnerability to fraud, abuse, and waste;
- Periodically revising the program in light of changes in the organization's needs, and in the law and policies and procedures of Government and private payor health plans;
- Reviewing employees' certifications that they have received, read, and understood the standards of conduct;
- Developing, coordinating, and participating in a multifaceted

⁹⁶ The OIG believes that it is not advisable for the compliance function to be subordinate to the hospice's general counsel, or comptroller or similar hospice financial officer. Free standing compliance functions help to ensure independent and objective legal reviews and financial analyses of the institution's compliance efforts and activities. By separating the compliance function from the key management positions of general counsel or chief financial officer (where the size and structure of the hospice make this a feasible option), a system of checks and balances is established to more effectively achieve the goals of the compliance program.

⁹⁷ For multi-hospice organizations or hospital-owned hospices, the OIG encourages coordination with each hospice owned by the corporation or hospital through the use of a headquarter's compliance officer, communicating with parallel positions in each facility, regional office, or business line, as appropriate.

educational and training program that focuses on the elements of the compliance program, and seeks to ensure that all relevant employees and management are knowledgeable of, and comply with, pertinent Federal and State standards;

- Ensuring that independent contractors and agents who furnish physician, nursing, or other health care services to the clients of the hospice, or billing services to the hospice, are aware of the requirements of the hospice's compliance program with respect to eligibility, billing, and marketing, among other things;

- Coordinating personnel issues with the hospice's Human Resources/Personnel office (or its equivalent) to ensure that (i) the National Practitioner Data Bank⁹⁸ has been checked with respect to all medical staff and independent contractors (as appropriate) and (ii) the List of Excluded Individuals/Entities⁹⁹ has been checked with respect to all employees, medical staff, and independent contractors (as appropriate);¹⁰⁰

- Assisting the hospice's financial management in coordinating internal compliance review and monitoring activities, including annual or periodic reviews of departments;

- Independently investigating and acting on matters related to compliance, including the flexibility to design and coordinate internal investigations (e.g., responding to reports of problems or suspected violations) and any resulting corrective action (e.g., making necessary improvements to hospice policies and practices, taking appropriate disciplinary action, etc.) with all hospice departments, subcontracted providers, and health care professionals

⁹⁸ The National Practitioner Data Bank is a data base that contains information about medical malpractice payments, sanctions by boards of medical examiners or State licensing boards, adverse clinical privilege actions, and adverse professional society membership actions. Health care entities can have access to this data base to seek information about their own medical or clinical staff, as well as prospective employees or physician contractors.

⁹⁹ The List of Excluded Individuals/Entities is an OIG-produced report available on the Internet at <http://www.os.dhhs.gov/oig>. It is updated on a regular basis to reflect the status of health care providers who have been excluded from participation in the Medicare and Medicaid programs. In addition, the General Services Administration maintains a monthly listing of debarred contractors on the Internet at <http://www.arnet.gov/eplis>.

¹⁰⁰ The compliance officer may also have to ensure that the criminal backgrounds of employees have been checked depending upon State requirements or hospice policy. See note 132.

under the hospice's control,¹⁰¹ and any other agents if appropriate; and

- Continuing the momentum of the compliance program and the accomplishment of its objectives long after the initial years of implementation.¹⁰²

The compliance officer must have the authority to review all documents and other information that are relevant to compliance activities, including, but not limited to, patient medical records, billing records, and records concerning the marketing efforts of the facility and the hospice's arrangements with other parties, including employees, physicians, professionals on staff, relevant independent contractors, suppliers, agents, and supplemental staffing entities. This policy enables the compliance officer to review contracts and obligations (seeking the advice of legal counsel, where appropriate) that may contain referral and payment provisions that could violate the anti-kickback statute and other legal or regulatory requirements.

A small hospice may not have the need or the resources to hire or appoint a full time compliance officer. However, each hospice should have a person in its organization (this person may have other functional responsibilities) who can oversee the hospice's compliance with applicable statutes, rules, regulations, and policies. The structure and comprehensiveness of the hospice's compliance program will help determine the responsibilities of each individual compliance officer.

2. Compliance Committee

The OIG recommends that a compliance committee be established to advise the compliance officer and assist in the implementation of the compliance program.¹⁰³ When

developing an appropriate team of people to serve as the hospice's compliance committee, including the compliance officer, a hospice should consider a variety of skills and personality traits that are expected from those in such positions.¹⁰⁴ Once a hospice chooses the people that will accept the responsibilities vested in members of the compliance committee, the hospice needs to train these individuals on the policies and procedures of the compliance program, as well as how to discharge their duties.

The committee's functions should include:

- Analyzing the legal requirements with which it must comply, and specific risk areas;
- Assessing existing policies and procedures that address these risk areas for possible incorporation into the compliance program;
- Working with appropriate hospice departments to develop standards of conduct and policies and procedures to promote compliance with legal and ethical requirements;
- Recommending and monitoring, in conjunction with the relevant departments, the development of internal systems and controls to carry out the organization's standards, policies, and procedures as part of its daily operations;
- Determining the appropriate strategy/approach to promote compliance with the program and detection of any potential violations, such as through hotlines and other fraud reporting mechanisms;
- Developing a system to solicit, evaluate, and respond to complaints and problems; and
- Monitoring internal and external audits and investigations for the purpose of identifying troublesome issues and deficient areas experienced by the hospice, and implementing corrective and preventive action.

The committee may also address other functions as the compliance concept becomes part of the overall hospice operating structure and daily routine.

C. Conducting Effective Training and Education

The proper education and training of corporate officers, managers, employees,

necessary changes to hospice policies and procedures as recommended by the committee.

¹⁰⁴ A health care provider should expect its compliance committee members and compliance officer to demonstrate high integrity, good judgment, assertiveness, and an approachable demeanor, while eliciting the respect and trust of employees of the hospice and having significant professional experience working with billing, clinical records, documentation, and auditing principles.

volunteers, nurses, physicians, and other health care professionals, and the continual retraining of current personnel at all levels, are significant elements of an effective compliance program. As part of their compliance programs, hospices should require personnel to attend specific training on a periodic basis, including appropriate training in Federal and State statutes, regulations, and guidelines, and the policies of private payors, and training in corporate ethics, which emphasizes the organization's commitment to compliance with these legal requirements and policies.¹⁰⁵

These training programs should include sessions highlighting the organization's compliance program, summarizing fraud and abuse laws, Federal health care program requirements, claim development and submission processes, patient rights, and marketing practices that reflect current legal and program standards. The organization must take steps to communicate effectively its standards and procedures to all affected employees, physicians, independent contractors, and other significant agents, e.g., by requiring participation in training programs and disseminating publications that explain specific requirements in a practical manner.¹⁰⁶ Managers of specific departments or groups can assist in identifying areas that require training and in carrying out such training.¹⁰⁷ Training instructors may come from outside or inside the organization, but must be qualified to present the subject matter involved and experienced enough in the issues presented to adequately field questions and coordinate discussions among those being trained. New employees should be trained early in their employment.¹⁰⁸ Training programs and materials should be designed to take into account the skills, experience, and knowledge of the individual trainees. The compliance

¹⁰⁵ Specific compliance training should complement any "inservice" training sessions that a hospice may regularly schedule to provide an ongoing program for the training of employees as required by its conditions of participation. 42 CFR 418.64.

¹⁰⁶ Some publications, such as OIG's Special Fraud Alerts, audit and inspection reports, and advisory opinions, as well as the annual OIG work plan, are readily available from the OIG and could be the basis for standards, educational courses, and programs for appropriate hospice employees.

¹⁰⁷ Significant variations in the functions and responsibilities of different departments or groups may create the need for training materials that are tailored to compliance concerns associated with particular operations and duties.

¹⁰⁸ Certain positions, such as those that involve the billing of hospice services or patient admission to hospice care, create a greater organizational legal exposure, and therefore require specialized training.

¹⁰¹ E.g., attending physicians, pharmacies, durable medical equipment suppliers, hospitals, nursing homes, home health agencies, and supplemental staffing entities.

¹⁰² Periodic on-site visits of hospice operations, bulletins with compliance updates and reminders, distribution of audiotapes or videotapes on different risk areas, lectures at management and employee meetings, circulation of recent health care articles covering fraud and abuse, and innovative changes to compliance training are various examples of approaches and techniques the compliance officer can employ for the purpose of ensuring continued interest in the compliance program and the hospice's commitment to its policies and principles.

¹⁰³ The compliance committee benefits from having the perspectives of individuals with varying responsibilities in the organization, such as operations, finance, audit, human resources, and clinical management (e.g., hospice physician), as well as employees and managers of key operating units. These individuals should have the requisite seniority and comprehensive experience within their respective departments to implement any

officer should document any formal training undertaken by the hospice as part of the compliance program.

A variety of teaching methods, such as interactive training, and training in several different languages, particularly where a hospice has a culturally diverse staff, should be implemented so that all affected employees are knowledgeable of the institution's standards of conduct and procedures for alerting senior management to problems and concerns.¹⁰⁹ In addition to specific training in the risk areas identified in section II.A.2, above, primary training for appropriate corporate officers, managers, and other hospice staff should include such topics as:

- Government and private payor reimbursement principles;
- General prohibitions on paying or receiving remuneration to induce referrals;
- Improper alterations to clinical records;¹¹⁰
- Providing hospice services with proper authorization;
- Patient rights and patient education;
- Compliance with Medicare conditions of participation; and
- Duty to report misconduct.

Clarifying and emphasizing these areas of concern through training and educational programs are particularly relevant to a hospice's marketing and financial personnel, in that the pressure to meet business goals may render these employees vulnerable to engaging in prohibited practices.

The OIG suggests that all relevant levels of personnel be made part of various educational and training programs of the hospice.¹¹¹ Employees should be required to have a minimum number of educational hours per year, as appropriate, as part of their employment responsibilities.¹¹² For

example, for certain employees involved in the hospice admission functions, periodic training in applicable reimbursement coverage and eligibility requirements should be required. In hospices with high employee turnover, periodic training updates are critical.

The OIG recognizes that the format of the training program will vary depending upon the resources of the hospice. For example, a small hospice may want to create a video for each type of training session so new employees can receive training in a timely manner.¹¹³

The OIG recommends that attendance and participation in training programs be made a condition of continued employment and that failure to comply with training requirements should result in disciplinary action, including possible termination, when such failure is serious. Adherence to the provisions of the compliance program, such as training requirements, should be a factor in the annual evaluation of each employee. The hospice should retain adequate records of its training of employees, including attendance logs and material distributed at training sessions.

D. Developing Effective Lines of Communication

1. Access to the Compliance Officer

An open line of communication between the compliance officer and hospice employees is equally important to the successful implementation of a compliance program and the reduction of any potential for fraud, abuse, and waste. Written confidentiality and non-retaliation policies should be developed and distributed to all employees to encourage communication and the reporting of incidents of potential fraud.¹¹⁴ The compliance committee should also develop independent reporting paths for an employee to report fraud, waste, or abuse so that employees can feel comfortable reporting outside the normal chain of

command and supervisors or other personnel cannot divert such reports.¹¹⁵

The OIG encourages the establishment of a procedure so that hospice personnel may seek clarification from the compliance officer or members of the compliance committee in the event of any confusion or question with regard to a hospice policy, practice, or procedure. Questions and responses should be documented and dated and, if appropriate, shared with other staff so that standards, policies, practices, and procedures can be updated and improved to reflect any necessary changes or clarifications. The compliance officer may want to solicit employee input in developing these communication and reporting systems.

2. Hotlines and Other Forms of Communication

The OIG encourages the use of hotlines,¹¹⁶ e-mails, written memoranda, newsletters, suggestion boxes, and other forms of information exchange to maintain these open lines of communication.¹¹⁷ If the hospice establishes a hotline, the telephone number should be made readily available to all employees and independent contractors, possibly by circulating the number on wallet cards or conspicuously posting the telephone number in common work areas.¹¹⁸ Employees should be permitted to report matters on an anonymous basis. Matters reported through the hotline or other communication sources that suggest substantial violations of compliance policies, Federal health care program requirements, regulations, or statutes should be documented and investigated promptly to determine their veracity. A log should be maintained by the compliance officer that records such calls, including the nature of any investigation and its results.¹¹⁹ Such

¹⁰⁹ Post-training tests can be used to assess the success of training provided and employee comprehension of the hospice's policies and procedures.

¹¹⁰ This practice involves the hospice altering the attending physician's or other authorized physician's diagnosis in order to receive reimbursement for hospice care. A hospice should not claim the patient has a particular medical condition in order to qualify for reimbursement for which it would not otherwise qualify.

¹¹¹ In addition, where feasible, the OIG recommends that a hospice afford outside contractors the opportunity to participate in the hospice's compliance training and educational programs, or develop their own programs that complement the hospice's standards of conduct, compliance requirements, and other rules and practices.

¹¹² Currently, the OIG is monitoring a significant number of corporate integrity agreements that require many of these training elements. The OIG usually requires a minimum of one to three hours annually for basic training in compliance areas.

Additional training is required for specialty fields such as billing and marketing.

¹¹³ If videos are utilized for compliance training, the OIG suggests that a hospice make an individual available to field questions from video trainees. In addition, those hospices that use video training should strongly consider requiring trainees to complete post training comprehension tests to ensure that trainees actively paid attention to the video.

¹¹⁴ The OIG believes that whistleblowers should be protected against retaliation, a concept embodied in the provisions of the False Claims Act. See 31 U.S.C. 3730(h). In many cases, employees sue their employers under the False Claims Act's *qui tam* provisions out of frustration because of the company's failure to take action when a questionable, fraudulent, or abusive situation was brought to the attention of senior corporate officials.

¹¹⁵ Hospices can also consider rewarding employees for appropriate use of established reporting systems.

¹¹⁶ The OIG recognizes that it may not be financially feasible for a smaller hospice to maintain a telephone hotline dedicated to receiving calls about compliance issues. These companies may want to explore alternative methods, e.g., outsourcing the hotline or establishing a written method of confidential disclosure.

¹¹⁷ In addition to methods of communication used by current employees, an effective employee exit interview program could be designed to solicit information from departing employees regarding potential misconduct and suspected violations of hospice policy and procedures.

¹¹⁸ Hospices should also post in a prominent, available area the HHS-OIG Hotline telephone number, 1-800-447-8477 (1-800-HHS-TIPS), in addition to any company hotline number that may be posted.

¹¹⁹ To efficiently and accurately fulfill such an obligation, the hospice should create an intake form for all compliance issues identified through

information should be included in reports to the governing body, the CEO, and compliance committee.¹²⁰ Further, while the hospice should always strive to maintain the confidentiality of an employee's identity, it should also explicitly communicate that there may be a point where the individual's identity may become known or may have to be revealed in certain instances.

The OIG recognizes that assertions of fraud and abuse by employees who may have participated in illegal conduct or committed other malfeasance raise numerous complex legal and management issues that should be examined on a case-by-case basis. The compliance officer should work closely with legal counsel, who can provide guidance regarding such issues.

The OIG recognizes that protecting anonymity may be infeasible for small hospices. However, the OIG believes all hospice employees, when seeking answers to questions or reporting potential instances of fraud and abuse, should know to whom to turn to for attention and should be able to do so without fear of retribution.

E. Auditing and Monitoring

An ongoing evaluation process is critical to a successful compliance program. The OIG believes that an effective program should incorporate thorough monitoring of its implementation and regular reporting to senior hospice or corporate officers.¹²¹ Compliance reports created by this ongoing monitoring, including reports of suspected noncompliance, should be maintained by the compliance officer and shared with the hospice's senior management and the compliance committee. The extent and frequency of the audit function may vary depending on factors such as the size and available resources, prior history of noncompliance, and the risk factors that a particular hospice confronts.

Although many monitoring techniques are available, one effective

reporting mechanisms. The form could include information concerning the date that the potential problem was reported, the internal investigative methods utilized, the results of the investigation, the corrective action implemented, the disciplinary measures imposed, and any identified overpayments and monies returned.

¹²⁰ Information obtained over the hotline may provide valuable insight into management practices and operations, whether reported problems are actual or perceived.

¹²¹ Even when a hospice or group of hospices is owned by a larger corporate entity, the regular auditing and monitoring of the compliance activities of an individual hospice must be a key feature in any annual review. Appropriate reports on audit findings should be periodically provided and explained to a parent organization's senior staff and officers.

tool to promote and ensure compliance is the performance of regular, periodic compliance audits by internal or external auditors who have expertise in Federal and State health care statutes, regulations, and Federal health care program requirements. The audits should focus on the hospice's programs or divisions, including external relationships with third-party contractors, specifically those with substantive exposure to Government enforcement actions. At a minimum, these audits should be designed to address the hospice's compliance with laws governing kickback arrangements, claim development and submission, reimbursement, eligibility, and marketing. The audits and reviews should inquire into the hospice's compliance with the Medicare conditions of participation and the specific rules and policies that have been the focus of particular attention on the part of the Medicare fiscal intermediaries or carriers, and law enforcement, as evidenced by educational and other communications from OIG Special Fraud Alerts, OIG audits and evaluations, and law enforcement's initiatives.¹²² In addition, the hospice should focus on any areas of concern that are specific to the individual hospice and have been identified by any entity, whether Federal, State, or internal.

Monitoring techniques may include sampling protocols that permit the compliance officer to identify and review variations from an established baseline.¹²³ Significant variations from the baseline should trigger a reasonable inquiry to determine the cause of the deviation. If the inquiry determines that the deviation occurred for legitimate, explainable reasons, the compliance officer and hospice management may want to limit any corrective action or take no action. If it is determined that the deviation was caused by improper procedures, misunderstanding of rules, including fraud and systemic problems, the hospice should take prompt steps to correct the problem. Any overpayments discovered as a result of such deviations should be returned promptly to the

affected payor, with appropriate documentation and a sufficiently detailed explanation of the reason for the refund.¹²⁴

An effective compliance program should also incorporate periodic (at least annual) reviews of whether the program's compliance elements have been satisfied, e.g., whether there has been appropriate dissemination of the program's standards, training, ongoing educational programs, and disciplinary actions, among other elements.¹²⁵ This process will verify actual conformance by all departments with the compliance program and may identify the necessity for improvements to be made to the compliance program, as well as the hospice's operations. Such reviews could support a determination that appropriate records have been created and maintained to document the implementation of an effective program.¹²⁶ However, when monitoring discloses that deviations were not detected in a timely manner due to program deficiencies, proper modifications must be implemented. Such evaluations, when developed with the support of management, can help ensure compliance with the hospice's policies and procedures.

As part of the review process, the compliance officer or reviewers should consider techniques such as:

- Visits and interviews of patients at their residences;
- Analysis of utilization patterns;
- Testing clinical and hospice admission staff on their knowledge of reimbursement coverage criteria (e.g., present hypothetical scenarios of situations experienced in daily practice and assess responses);
- Assessment of existing relationships with physicians, nursing homes,¹²⁷ hospitals, and other potential referral sources;
- Unannounced mock audits and investigations;
- Reevaluation of deficiencies cited in past surveys for Medicare conditions of participation;
- Examination of hospice complaint logs;

¹²⁴ In addition, when appropriate, as referenced in section G.2, below, reports of fraud or systemic problems should also be made to the appropriate governmental authority.

¹²⁵ One way to assess the knowledge, awareness, and perceptions of the hospice's employees is through the use of a validated survey instrument (e.g., employees questionnaires, interviews, of focus groups).

¹²⁶ Such records should include, but not be limited to, logs of hotline calls, logs of training attendees, training agenda materials, and summaries of corrective action taken and improvements made to hospice policies as a result of compliance activities.

¹²⁷ See section II.A.3.e.

¹²² See also section II.A.2.

¹²³ The OIG recommends that when a compliance program is established in a hospice, the compliance officer, with the assistance of department managers, should take a "snapshot" of their operations from a compliance perspective. This assessment can be undertaken by outside consultants, law or accounting firms, or internal staff, with authoritative knowledge of health care compliance requirements. This "snapshot," often used as part of benchmarking analyses, becomes a baseline for the compliance officer and other managers to judge the hospice's progress in reducing or eliminating potential areas of vulnerability.

- Checking personnel records to determine whether any individuals who have been reprimanded for compliance issues in the past are among those currently engaged in improper conduct;

- Questionnaires developed to solicit impressions of a broad cross-section of the hospice's employees and staff;

- Evaluation of the timeliness of physician referrals and physician signatures for hospice certifications;

- Reviews of clinical documentation (e.g., terminal illness certification, plan of care, nursing notes, etc.), financial records, and other source documents that support claims for reimbursement;

- Validation of qualifications of hospice physicians and other hospice staff, including verification of applicable state license renewals;

- Evaluation of written materials and documentation outlining the hospice's policies and procedures; and

- Trend analyses, or longitudinal studies, that uncover deviations, positive or negative, in specific areas over a given period.

The reviewers should:

- Have the qualifications and experience necessary to adequately identify potential issues with the subject matter that is reviewed;

- Be objective and independent of line management to the extent reasonably possible;¹²⁸

- Have access to existing audit and health care resources, relevant personnel, and all relevant areas of operation;

- Present written evaluative reports on compliance activities to the CEO, governing body, and members of the compliance committee on a regular basis, but no less often than annually; and

- Specifically identify areas where corrective actions are needed.

Just as a hospice is required by its conditions of participation to conduct "an ongoing, comprehensive, integrated, self-assessment of the quality and appropriateness of care provided,"¹²⁹ the OIG believes that a hospice should monitor its compliance with the Federal health care program requirements in the same fashion. Furthermore, just as a hospice is required by its conditions of participation to use its quality assurance findings to correct identified problems and revise hospice policies if necessary to improve patient care,¹³⁰ the OIG believes that a hospice's management should take whatever steps are

necessary to correct identified compliance problems and prevent them from recurring. In certain cases, subsequent reviews or studies would be advisable to ensure that the recommended corrective actions have been implemented successfully.

While conducting its monitoring and auditing efforts, as well as its daily operations, a hospice should document its efforts to comply with applicable statutes, regulations, and Federal health care program requirements. For example, where a hospice, in its efforts to comply with a particular statute, regulation or program requirement, requests advice from a Government agency (including a Medicare fiscal intermediary or carrier) charged with administering a Federal health care program, the hospice should document and retain a record of the request and any written or oral response. This step is extremely important if the hospice intends to rely on that response to guide it in future decisions, actions, or claim reimbursement requests or appeals. A log of oral inquiries between the hospice and third parties will help the organization document its attempts at compliance. In addition, the hospice agency should maintain records relevant to the issue of whether its reliance was "reasonable" and whether it exercised due diligence in developing procedures and practices to implement the advice.

The extent of a hospice's audit should depend on the hospice's identified risk areas and resources. If the hospice comes under Government scrutiny in the future, the Government will assess whether or not the hospice developed a comprehensive audit based upon identified risk areas and resources. If the Government determines the hospice failed to develop an adequate audit program, given its resources, the Government will be less likely to afford the hospice favorable treatment under the Federal Sentencing Guidelines.

F. Enforcing Standards Through Well-Publicized Disciplinary Guidelines

1. Discipline Policy and Actions

An effective compliance program should include guidance regarding disciplinary action for corporate officers, managers, employees, and other health care professionals who have failed to comply with the hospice's standards of conduct, policies and procedures, Federal health care program requirements, or Federal and State laws, or those who have otherwise engaged in wrongdoing, which have the potential to impair the hospice's status as a reliable, honest, and trustworthy health care provider.

The OIG believes that the compliance program should include a written policy statement setting forth the degrees of disciplinary actions that may be imposed upon corporate officers, managers, employees, physicians, and other health care professionals for failing to comply with the hospice's standards and policies and applicable statutes and regulations. Intentional or reckless noncompliance should subject transgressors to significant sanctions. Such sanctions could range from oral warnings to suspension, termination, or financial penalties, as appropriate. Each situation must be considered on a case-by-case basis to determine the appropriate sanction. The written standards of conduct should elaborate on the procedures for handling disciplinary problems and those who will be responsible for taking appropriate action. Some disciplinary actions can be handled by department or agency managers, while others may have to be resolved by a senior hospice administrator. Disciplinary action may be appropriate where a responsible employee's failure to detect a violation is attributable to his or her negligence or reckless conduct. Personnel should be advised by the hospice that disciplinary action will be taken on a fair and equitable basis. Managers and supervisors should be made aware that they have a responsibility to discipline employees in an appropriate and consistent manner.

It is vital to publish and disseminate the range of disciplinary standards for improper conduct and to educate officers and other hospice employees regarding these standards. The consequences of noncompliance should be consistently applied and enforced, in order for the disciplinary policy to have the required deterrent effect. All levels of employees should be potentially subject to the same types of disciplinary action for the commission of similar offenses. The commitment to compliance applies to all personnel levels within a hospice. The OIG believes that corporate officers, managers, supervisors, clinical staff, and other health care professionals should be held accountable for failing to comply with, or for the foreseeable failure of their subordinates to adhere to, the applicable standards, laws, and procedures.

2. New Employee Policy

For all new employees who have discretionary authority to make decisions that may involve compliance with the law or compliance oversight, hospices should conduct a reasonable and prudent background investigation,

¹²⁸ The OIG recognizes the hospices that are small in size and have limited resources may not be able to use internal reviewers who are not part of line management or hire outside reviewers.

¹²⁹ 42 CFR 418.66.

¹³⁰ *Id.*

including a reference check,¹³¹ as part of every such employment application. The application should specifically require the applicant to disclose any criminal conviction,¹³² as defined by 42 U.S.C. 1320a-7(i), or exclusion action. Pursuant to the compliance program, hospice policies should prohibit the employment of individuals who have been recently convicted of a criminal offense related to health care¹³³ or who are listed as debarred, excluded, or otherwise ineligible for participation in Federal health care programs.¹³⁴ In addition, pending the resolution of any criminal charges or proposed debarment or exclusion, the OIG recommends that an individual who is the subject of such actions should be removed from direct responsibility for or involvement in any Federal health care program. That individual's salary should not be paid in whole or part, directly or indirectly, by Federal health care programs or otherwise with Federal funds.¹³⁵ With regard to current employees or independent contractors, if resolution of the matter results in conviction, debarment, or exclusion, the hospice should terminate its employment or other contract arrangement with the individual or contractor.

G. Responding to Detected Offenses and Developing Corrective Action Initiatives

1. Violations and Investigations

Violations of a hospice's compliance program, failures to comply with applicable Federal or State law, and other types of misconduct threaten a hospice's status as a reliable, honest and trustworthy provider capable of participating in Federal health care

programs. Detected but uncorrected misconduct can seriously endanger the mission, reputation, and legal status of the hospice. Consequently, upon reports or reasonable indications of suspected noncompliance, it is important that the compliance officer or other management officials immediately investigate the conduct in question to determine whether a material violation of applicable law or the requirements of the compliance program has occurred, and if so, take decisive steps to correct the problem.¹³⁶ As appropriate, such steps may include an immediate referral to criminal and/or civil law enforcement authorities, a corrective action plan,¹³⁷ a report to the Government,¹³⁸ and the return of any overpayments, if applicable.

Where potential fraud or False Claims Act liability is not involved, the OIG recommends that normal repayment channels should be used for returning overpayments to the Government as they are discovered. However, even if the overpayment detection and return process is working and is being monitored by the hospice's audit or billing divisions, the OIG still believes that the compliance officer needs to be made aware of these overpayments, violations, or deviations that may reveal trends or patterns indicative of a systemic problem.

Depending upon the nature of the alleged violations, an internal investigation will probably include interviews and a review of relevant documents. Some hospices should consider engaging outside counsel, auditors, or health care experts to assist in an investigation. Records of the investigation should contain documentation of the alleged violation,

a description of the investigative process (including the objectivity of the investigators and methodologies utilized), copies of interview notes and key documents, a log of the witnesses interviewed and the documents reviewed, the results of the investigation, *e.g.*, any disciplinary action taken, and the corrective action implemented. While any action taken as the result of an investigation will necessarily vary depending upon the hospice and the situation, hospices should strive for some consistency by utilizing sound practices and disciplinary protocols.¹³⁹ Further, after a reasonable period, the compliance officer should review the circumstances that formed the basis for the investigation to determine whether similar problems have been uncovered or modifications of the compliance program are necessary to prevent and detect other inappropriate conduct or violations.

If an investigation of an alleged violation is undertaken and the compliance officer believes the integrity of the investigation may be at stake because of the presence of employees under investigation, those subjects should be removed from their current work activity until the investigation is completed (unless an internal or Government-led undercover operation known to the hospice is in effect). In addition, the compliance officer should take appropriate steps to secure or prevent the destruction of documents or other evidence relevant to the investigation. If the hospice determines that disciplinary action is warranted, it should be prompt and imposed in accordance with the hospice's written standards of disciplinary action.

2. Reporting

If the compliance officer, compliance committee, or management official discovers credible evidence of misconduct from any source and, after a reasonable inquiry, has reason to believe that the misconduct may violate criminal, civil, or administrative law, then the hospice should promptly report the existence of misconduct to the appropriate Federal and State authorities¹⁴⁰ within a reasonable

¹³¹ See note 99.

¹³² States may mandate, and many hospices voluntarily conduct, criminal background checks for prospective employees of hospices. Identification of a criminal background of an applicant, who may have been recently convicted of serious crimes that relate to the proposed employment duties, could be grounds for denying employment. Further, criminal background screening may deter those individuals with criminal intent from entering the field of hospice.

¹³³ Because providers of hospice care have frequent, relatively unsupervised access to potentially vulnerable people and their property, a hospice should also strictly scrutinize whether it should employ individuals who have been convicted of crimes of neglect, violence, or financial misconduct.

¹³⁴ Likewise, hospice compliance programs should establish standards prohibiting the execution of contracts with companies that have been recently convicted of a criminal offense related to health care or that are listed by a Federal agency as debarred, excluded, or otherwise ineligible for participation in Federal health care programs. See note 99.

¹³⁵ Prospective employees who have been officially reinstated into the Medicare and Medicaid programs by the OIG may be considered for employment upon proof of such reinstatement.

¹³⁶ Instances of noncompliance must be determined on a case-by-case basis. The existence, or amount, of a *monetary* loss to a health care program is not solely determinative of whether or not the conduct should be investigated and reported to governmental authorities. In fact, there may be instances where there is no readily identifiable monetary loss at all, but corrective action and reporting are still necessary to protect the integrity of the applicable program and its beneficiaries, *e.g.*, where services required by a plan of care were not provided.

¹³⁷ Advice from the hospice's in-house counsel or an outside law firm may be sought to determine the extent of the hospice's liability and to plan the appropriate course of action.

¹³⁸ The OIG currently maintains a provider self-disclosure protocol that encourages providers to report suspected fraud. The concept of voluntary self-disclosure is premised on a recognition that the Government alone cannot protect the integrity of the Medicare and other Federal health care programs. Health care providers must be willing to police themselves, correct underlying problems, and work with the Government to resolve these matters. The self-disclosure protocol can be located on the OIG's website at: <http://www.os.dhhs.gov/oig>.

¹³⁹ The parameters of a claim review subject to an internal investigation will depend on the circumstances surrounding the issue(s) identified. By limiting the scope of an internal audit to current billing, a hospice may fail to discover major problems and deficiencies in operations, as well as be subject to certain liability.

¹⁴⁰ Appropriate Federal and State authorities include the Office of Inspector General of the Department of Health and Human Services, the Criminal and Civil Divisions of the Department of

period, but not more than sixty (60) days¹⁴¹ after determining that there is credible evidence of a violation.¹⁴² Prompt reporting will demonstrate the hospice's good faith and willingness to work with governmental authorities to correct and remedy the problem. In addition, reporting such conduct will be considered a mitigating factor by the OIG in determining administrative sanctions (e.g., penalties, assessments, and exclusion), if the reporting provider becomes the target of an OIG investigation.¹⁴³

When reporting misconduct to the Government, a hospice should provide all evidence relevant to the alleged violation of applicable Federal or State law(s) and potential cost impact. The compliance officer, under advice of counsel, and with guidance from the governmental authorities, could be requested to continue to investigate the reported violation. Once the investigation is completed, the compliance officer should be required to notify the appropriate governmental authority of the outcome of the investigation, including a description of the impact of the alleged violation on the operation of the applicable health care programs or their beneficiaries. If the investigation ultimately reveals that criminal, civil, or administrative violations have occurred, the appropriate Federal and State authorities¹⁴⁴ should be notified immediately.

Justice, the U.S. Attorney in relevant districts, and the other investigative arms for the agencies administering the affected Federal or State health care programs, such as the State Medicaid Fraud Control Unit, the Defense Criminal Investigative Service, the Department of Veterans Affairs, and the Office of Personnel Management (which administers the Federal Employee Health Benefits Program).

¹⁴¹ In contrast, to qualify for the "not less than double damages" provision of the False Claims Act, the report must be provided to the Government within thirty (30) days after the date when the hospice first obtained the information. 31 U.S.C. 3729(a).

¹⁴² The OIG believes that some violations may be so serious that they warrant immediate notification to governmental authorities, prior to, or simultaneous with, commencing an internal investigation, e.g., if the conduct: (1) is a clear violation of criminal law; (2) has a significant adverse effect on the quality of care provided to program beneficiaries (in addition to any other legal obligations regarding quality of care); or (3) indicates evidence of a systemic failure to comply with applicable laws or an existing corporate integrity agreement, regardless of the financial impact on Federal health care programs.

¹⁴³ The OIG has published criteria setting forth those factors that the OIG takes into consideration in determining whether it is appropriate to exclude a health care provider from program participation pursuant to 42 U.S.C. 1320a-7(b)(7) for violations of various fraud and abuse laws. See 62 FR 67392 (December 24, 1997).

¹⁴⁴ See note 140.

As previously stated, the hospice should take appropriate corrective action, including prompt identification of any overpayment to the affected payor and the imposition of proper disciplinary action. If potential fraud or violations of the False Claims Act are involved, any repayment of the overpayment should be made as part of the discussion with the Government following a report of the matter to law enforcement authorities. Otherwise, normal repayment channels should be used for repaying identified overpayments.¹⁴⁵ Failure to disclose overpayments within a reasonable period of time could be interpreted as an intentional attempt to conceal the overpayment from the Government, thereby establishing an independent basis for a criminal violation with respect to the hospice, as well as any individuals who may have been involved.¹⁴⁶ For this reason, hospice compliance programs should emphasize that overpayments obtained from Medicare or other Federal health care programs should be promptly disclosed and returned to the payor that made the erroneous payment.

The OIG believes all hospices, regardless of size, should ensure they are reporting the results of any overpayments or violations to the appropriate entity and taking the appropriate corrective action to remedy the identified deficiency.

III. Assessing the Effectiveness of a Compliance Program

Because the Government views the existence of a compliance program as a mitigating factor when determining culpability regarding allegations of fraud and abuse only if the compliance program is "effective," how a hospice may assess its compliance program becomes quite significant. A hospice, as well as any other type of health care provider, should consider the attributes of each individual element of its compliance program to assess the program's "effectiveness" as a whole. Examining the comprehensiveness of policies and procedures implemented to satisfy these elements is merely the first

¹⁴⁵ A hospice should consult with its Medicare fiscal intermediary or HCFA for any further guidance regarding normal repayment channels. The hospice's Medicare fiscal intermediary or HCFA may require certain information (e.g., alleged violation or issue causing overpayment, description of the internal investigative process with methodologies used to determine any overpayments, disciplinary actions taken, and corrective actions taken, etc.) to be submitted with return of any overpayments, and that such repayment information be submitted to a specific department or individual. Interest will be assessed, when appropriate. See 42 CFR 405.376.

¹⁴⁶ See 42 U.S.C. 1320a-7b(a)(3).

step. Evaluating how a compliance program performs during a provider's day-to-day operations becomes the critical indicator.¹⁴⁷

As previously stated, a compliance program should require the development and distribution of written compliance policies, standards, and practices that identify specific areas of risk and vulnerability to a hospice. One way to judge whether these policies, standards, and practices measure up is to observe how an organization's employees react to them. Do employees consistently experience recurring pitfalls because they lack guidance on certain issues not adequately covered in company policies? Are employees flagrantly disobeying an organization's standards of conduct because they observe no sincere buy-in from senior management? Do employees have trouble understanding policies and procedures because they are written in legalese or at difficult reading levels? Does an organization routinely experience systematic billing failures because employees are ill-instructed how to implement written policies and practices? Written compliance policies, standards, and practices are only as good as an organization's commitment to apply them in practice.

Every hospice should designate a compliance officer or contact to serve as the focal point of compliance activities, and, if appropriate, a compliance committee to advise and assist the compliance officer. An organization needs to seriously consider whoever fills such integral roles and periodically monitor how the individuals chosen satisfy their responsibilities. Does a compliance officer have sufficient professional experience working with billing, clinical records, documentation, and auditing principles to perform assigned responsibilities fully? Has a compliance officer or compliance committee been negligent in ensuring an organization's compliance due to inadequate funding, staff, and authority necessary to carry out their jobs? Did adding the compliance officer function to a key management position with other significant duties compromise the goals of the compliance program (e.g., chief financial officer who discounts certain overpayments identified to improve the company's bottom line profits)? Since a compliance officer and

¹⁴⁷ Evaluation may be accomplished through techniques such as employee surveys, management assessments, and periodic review of benchmarks established for audits, investigations, disciplinary action, overpayments, and employee feedback. All elements of an organization's compliance program can be evaluated, including policies, training, practices, and compliance personnel.

a compliance committee can potentially have a significant impact on how effectively a compliance program is implemented, those functions should not be taken for granted.

As evidenced throughout this guidance, the proper education and training of corporate officers, managers, health care professionals, and other applicable employees of a provider, and the continual retraining of current personnel at all levels, are significant elements of an effective compliance program. Accordingly, such efforts should be routinely evaluated. Are employees trained frequently enough? Do employees fail post-training tests that evaluate knowledge of compliance? Do training sessions and materials adequately summarize important aspects of the organization's compliance program, such as fraud and abuse laws, Federal health care program requirements, and claim development and submission processes? Are training instructors qualified to present the subject matter and experienced enough to duly field questions? When thorough compliance training is periodically conducted, employees receive the reinforcement they need to ensure an effective compliance program.

An open line of communication between the compliance officer and a provider's employees is equally important to the success of a compliance program. In today's intensive regulatory environment, the OIG believes that a provider cannot possibly have an effective compliance program if it receives minimal or no feedback from its employees regarding compliance matters. For instance, if a compliance officer does not receive appropriate inquiries from employees: Do policies and procedures fail to adequately guide employees to whom and when they should be communicating compliance matters? Do employees fear retaliation if they report misconduct? Are employees reporting issues not related to compliance through the wrong channels? Do employees have bad-faith, ulterior motives for reporting? Regardless of the means that a provider employs, whether it be telephone hotline, email, or suggestion boxes, employees should seek clarification from compliance staff in the event of any confusion or question dealing with compliance policies, practices, or procedures.

An effective compliance program should include guidance regarding disciplinary action for corporate officers, managers, health care professionals, and other employees who have failed to adhere to an organization's standards of conduct,

Federal health care program requirements, or Federal or State laws. The number and caliber of disciplinary actions taken by an organization can be insightful. Have appropriate sanctions been applied to compliance misconduct? Are sanctions applied to all employees consistently, regardless of an employee's level in the corporate hierarchy? Have double-standards in discipline bred cynicism among employees? When disciplinary action is not taken seriously or applied haphazardly, such practices reflect poorly on senior management's commitment to foster compliance as well as the effectiveness of an organization's compliance program in general.

Another critical component of a successful compliance program is an ongoing monitoring and auditing process. The extent and frequency of the audit function may vary depending on factors such as the size and available resources, prior history of noncompliance, and risk factors of a particular hospice. The hallmark of effective monitoring and auditing efforts is how an organization determines the parameters of its reviews. Do audits focus on all pertinent departments of an organization? Does an audit cover compliance with all applicable laws and Federal health care program requirements? Are results of past audits, pre-established baselines, or prior deficiencies reevaluated? Are the elements of the compliance program monitored? Are auditing techniques valid and conducted by objective reviewers? The extent and sincerity of an organization's efforts to confirm its compliance often proves to be a revealing determinant of a compliance program's effectiveness.

As was expressed in the last section of this guidance, it is essential that the compliance officer or other management officials immediately investigate reports or reasonable indications of suspected noncompliance. If a material violation of applicable law or compliance program requirements has occurred, a provider must take decisive steps to correct the problem. Providers who do not thoroughly investigate misconduct leave themselves open to undiscovered fraud, waste, and abuse. When a provider learns of certain issues, does it knowingly disregard associated legal exposure? Is there a consistent and methodical approach to the correlation between compliance issues identified and the corrective action necessary to remedy? Are isolated overpayment matters properly resolved through normal repayment channels? Is credible evidence of misconduct that may violate

criminal, civil, or administrative law promptly reported to the appropriate Federal and State authorities? If any step in this process of responding to detected offenses is circumvented or improperly handled, such conduct would most likely demonstrate an ineffective compliance program, as well as potentially result in criminal, civil, or administrative liability.

Documentation is the key to demonstrating the effectiveness of a provider's compliance program. For example, documentation of the following should be maintained: audit results; logs of hotline calls and their resolution; corrective actions plans; due diligence efforts regarding business transactions; records of employee training, including the number of training hours; disciplinary action; and modification and distribution of policies and procedures. Given that the OIG is encouraging self-disclosure of overpayments and billing irregularities, maintaining a record of disclosures and refunds to the health care programs is strongly endorsed. A documented practice of refunding of overpayments and self-disclosing incidents of non-compliance with Federal health care program requirements can serve as evidence of a meaningful compliance effort by a hospice.

Hospices, as well as all health care providers, should acknowledge that it is their responsibility to formulate policies, procedures, and practices that are tailored to their own operations, and that are comprehensive enough to ensure compliance with all applicable Federal health care program requirements. An organization is in the best position to validate the suitability of its compliance efforts based upon its own particular circumstances.

IV. Conclusion

Through this document, the OIG has attempted to provide a foundation to the process necessary to develop an effective and cost-efficient hospice compliance program. As previously stated, however, each program must be tailored to fit the needs and resources of an individual hospice, depending upon its particular corporate structure, mission, and employee composition. The statutes, regulations, and guidelines of the Federal and State health insurance programs, as well as the policies and procedures of the private health plans, should be integrated into every hospice's compliance program.

The OIG recognizes that the health care industry in this country, which reaches millions of beneficiaries and expends about a trillion dollars annually, is constantly evolving. The

time is right for hospices to implement a strong voluntary health care compliance program. As stated throughout this guidance, compliance is a dynamic process that helps to ensure that hospices and other health care providers are better able to fulfill their commitment to ethical behavior, as well as meet the changes and challenges being imposed upon them by Congress and private insurers. Ultimately, it is OIG's hope that a voluntarily created compliance program will enable hospices to meet their goals, improve the quality of patient care, and substantially reduce fraud, waste, and abuse, as well as the cost of health care to Federal, State, and private health insurers.

Dated: July 14, 1999.

June Gibbs Brown,
Inspector General.

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4441-N-34]

Notice of Submission of Proposed Information Collection to OMB: Emergency Comment Request; HUD's Year 2000 Status Survey—A Special Year Data Gathering Request

AGENCY: Office of the Assistance Secretary for Administration, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for emergency review and approval, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* July 28, 1999.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within seven (7) days from the date of this Notice. Comments should refer to the proposal by name and should be sent to: Joseph F. Lackey, Jr., HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410, telephone (202) 708-2374. This is not a toll-free

number. Copies of available documents submitted to the OMB may be obtained from Mr. Eddins.

SUPPLEMENTARY INFORMATION: This Notice informs the public that the Department of Housing and Urban Development (HUD) has submitted to OMB, for emergency processing, an information collection package with respect to Year 2000 (Y2K) compliancy efforts for HUD properties operated by Public Housing Authorities and Multi-Family owner/agents. The survey specifically addresses the status of embedded chips in HUD facilities.

Emergency processing of this request is necessary due to the imminent nature of Y2K issues and the potential vulnerability of HUD facilities to experience Y2K-induced failures.

This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (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.

This Notice also lists the following information:

Title of Proposal: HUD's Year 2000 Status Survey—A Special Year Data Gathering Request on Embedded Microchips.

OMB Control Number, if applicable: 2507-__.

Description of the need for the information and proposed use: The House Committee on Banking and Financial Services has requested that HUD—Real Estate Assessment Center (REAC) provide information on the status of Y2K compliancy efforts for HUD properties operated by Public Housing Authorities and Multi-Family owner/agents. The Committee is specifically interested in the status of embedded chips in HUD facilities. The Y2K Embedded Chip survey will enable HUD—REAC to respond to the House Committee's request for information.

Agency form numbers, if applicable: form HUD-95000 (6/23/99).

Members of affected public: Public Housing Authorities and Multi-Family owner/agents.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:

It is estimated that the survey will take approximately 60 minutes to complete. Approximately 33,200 Public Housing Authorities and Multi-Family owner/agents will be requested to complete the survey.

Status of the proposed information collection: Awaiting OMB approval.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: July 15, 1999.

David S. Cristy,

Director, IRM Policy and Management Division.

[FR Doc. 99-18512 Filed 7-20-99; 8:45 am]

BILLING CODE 4210-01-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4441-N-33]

Submission for OMB Review: Repayment Agreement

AGENCY: Office of the Assistant Secretary for Administration, HUD.

ACTION: Notice.

SUMMARY: Information on the HUD-56146 is being collected under Public Law 479 which empowers the Secretary for HUD to collect or compromise all obligations assigned to or held by the Secretary and all legal or equitable rights accruing to HUD in connection with the payment of a HUD-insured loan until such time as such obligations may be referred to the Attorney General of the United States for suit or collections.

DATES: *Comments Due Date:* August 20, 1999.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number (2502-0483) and should be sent to: Joseph F. Lackey, Jr., OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 708-1305. This is not a toll-free number. Copies of the proposed

forms and other available documents submitted to OMB may be obtained from Mr. Eddins.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35). The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the

information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: July 14, 1999.

David S. Cristy,

Director, IRM Policy and Management Division.

Notice of Submission of Proposed Information Collection to OMB

Title of Proposal: Repayment Agreement.

Office: Housing.

OMB Approval Number: 2502-0483.

Description of the Need for the Information and its Proposed Use: Once a Debt Servicing Representative has a clear understanding of the debtor's attitude about repayment of the debt and the debtor's ability to repay the debt, attempts should be made to secure a signed repayment agreement.

Form Number: HUD-56146.

Respondents: Individuals or Households.

Frequency of Submission: On Occasion.

Reporting Burden:

	Number of respondents	×	Frequency of response	×	Hours per re- sponse	=	Burden hours
HUD-56146, 5000	1,258		1		1		1,258

Total Estimated Burden Hours: 1,258.

Status: Reinstatement without changes.

Contact: Lester J. West, HUD, (518) 464-4200 ext. 4257, Joseph F. Lackey, Jr., OMB, (202) 395-7316.

[FR Doc. 99-18513 Filed 7-20-99; 8:45 am]

BILLING CODE 4210-01-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. No. FR-4441-N-35]

Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request Resident Opportunities and Self-Sufficiency Program (ROSS) Notice of Proposed Information Collection for Public Comment

AGENCY: Office of Public and Indian Housing—HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for emergency review and approval, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* July 28, 1999.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be

received within seven (7) days from the date of this Notice. Comments should refer to the proposal by name and should be sent to: Joseph F. Lackey, Jr., HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410, telephone (202) 708-5221, extension 121. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Mr. Eddins.

SUPPLEMENTARY INFORMATION: This Notice informs the public that the Department of Housing and Urban Development (HUD) has submitted to OMB an information collection package with respect to a Notice announcing the Resident Opportunities and Self-Sufficiency Program and a Notice of Funding Availability for Resident Opportunities and Self-Sufficiency Grants. This information collection package submission to OMB for review is required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the

information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (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.

The Department has submitted the proposal for the collection of information to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35). The Department has requested emergency clearance of the collection of information, as described below, with approval being sought by July 27, 1999.

Title of Proposals: Notice of Resident Opportunities and Self-Sufficiency Program; Notice of Funding Availability for Resident Opportunities and Self-Sufficiency (ROSS) Program.

Description of the need for the information and proposed use:

The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, (Pub. L. 105-276, 112 Stat. 2461, approved October 21, 1998), (FY 1999 Appropriations Act) provided approximately \$40 million and \$12.7 million of carryover funds from the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies

Appropriations Act 1998 (Pub. L. 105-65, 111 Stat. 1344, approved October 27, 1997) to fund ROSS, an economic self sufficiency program. ROSS will provide linkages to public housing residents by providing supportive services, resident empowerment activities and assisting residents in becoming economically self-sufficient. Under the ROSS program HUD is seeking to fund successful models which will link services and public housing residents to enhance their quality of life while promoting self sufficiency and personal responsibility in communities. HUD believes that it is imperative that housing authorities and residents work together to meet the challenge of welfare reform. Eligible applicants, (public housing authorities (PHAs), resident management corporations, resident councils or resident organizations, non profit entities supported by residents, Intermediary Resident Organizations) are encouraged to form partnerships and submit applications to be evaluated in accordance with the criteria contained in the Notice.

The FY 1999 Appropriations also includes \$15 million for the employment and support of Service Coordinators (SC) to serve the elderly and persons with disabilities in public housing. These Service Coordinators will help elderly and disabled public housing residents obtain essential supportive services that are needed to enable independent living and aging in place. Under this NOFA only renewals of prior Service Coordinator grants will be accepted. SC Grant award amounts cannot be higher than the applicant's funding and staffing level that was approved for their last funded Service Coordinator Grant. An increase of 2 percent will be allowed if supported by a narrative justification.

Members of affected public: Approximately 850 applicants are expected from eligible recipients such as resident management organizations, resident organizations, nonprofit entities supported by residents, public housing agencies, Intermediary Resident Organizations, Tribes, Tribally designated housing entities (THDEs) are expected under the Notice and the NOFA.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: Applicants will be able to apply for ROSS grants in respective categories from the first day after the NOFA is published until the due date. Since this is the first year of operation for the ROSS program, it is essential that the technical assistance to

be provided under the NOFA be in place as the ROSS applications are being developed to ensure that the new program is successful. The average amount of time to put together a ROSS application is likely to be, on an average, 40 hours. We anticipate that not more than 850 applicants will apply under the NOFA. In total, the Department expects this request will have an annual reporting burden of 33,200 hours.

Status of the proposed information collection: Pending OMB approval.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: July 15, 1999.

David S. Cristy,

Director, Office of Investment Strategies, Policy and Management, Office of the Chief Information Officer.

[FR Doc. 99-18623 Filed 7-20-99; 8:45 am]

BILLING CODE 4210-01-M

DEPARTMENT OF THE INTERIOR

Geological Survey

United States Geological Survey Government Performance and Results Act Strategic Plan; Comment Solicitation

AGENCY: United States Geological Survey (USGS), Interior.

The U.S. Geological Survey is the Nation's largest water, earth, and biological science and civilian mapping agency. The USGS works in cooperation with more than 2,000 organizations across the country to provide reliable, impartial scientific information to resource managers, planners, and other customers. This information is gathered in every State by USGS scientists to minimize the loss of life and property from natural disasters; contribute to the sound conservation, as well as the economic and physical development of the Nation's natural resources; and enhance the quality of life by monitoring water, biological energy, and mineral resources.

ACTION: Notice.

SUMMARY: The Government Performance and Results Act (GPRA) of 1993 requires that agencies update and revise their strategic plans at least every 3 years, with the first revision due in 2000. The GPRA also states that agencies must consult with the Congress and solicit and consider the views and suggestions of other parties that could be affected by or be interested in the agency's plan during the plan's development. USGS has refocused its strategic plan over the

past year and would welcome comments from interested parties before finalizing the revisions.

USGS is continuing to consult with customers and stakeholders and will provide several public forums for interested parties to provide input during the revision of the strategic plan, including:

- Electronic input: Comments may be provided through the USGS web site, at the URL provided in the Supplementary Information section.

- Paper input: Comments may be provided with written correspondence to the address cited in the Address section.

- Public meetings: USGS may hold public consultation sessions as described in the Supplementary Information section.

DATES: Please provide comments electronically or on paper no later than August 31, 1999, and any expressions of interest in USGS holding public consultation sessions by August 16, 1999.

ADDRESSES: Send written comments to Ms. Anne Kinsinger, Chief, Office of Program Planning and Coordination, U.S. Geological Survey, 107 National Center, Reston, VA 20192. Send E-mail comments to StratPlan@usgs.gov. Contact Ms. Anne Kinsinger at (703) 648-4451.

SUPPLEMENTARY INFORMATION:

Strategic Plan Availability: See the USGS web site at <http://www.usgs.gov/stratplan> to access pdf files of the USGS GPRA Strategic Plan, as well as Annual Performance Plans for Fiscal Years 1999 and 2000. If you do not have electronic access, please request a copy of the plan from Ms. Kinsinger (see the **ADDRESSES** section).

Public Consultation Sessions: USGS will hold public consultation sessions in early September if there is sufficient interest. Interested parties should reply to the addresses in the Addresses section on later than August 16, 1999. Session participants should be familiar with the plan. The intent of the sessions will be to have free-flowing discussions about the direction and goals established in the strategic plan and to hear suggestions and expectations for the final revision. USGS will establish logistics after expressions of interests have been received, and will notify respondents of dates, locations, and times no later than August 31, 1999.

Dated: July 14, 1999.

Charles G. Groat,

Director, U.S. Geological Survey.

[FR Doc. 99-18555 Filed 7-20-99; 8:45 am]

BILLING CODE 4310-Y7-M

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Quarterly Status Report of Water Service, Repayment, and Other Water-Related Contract Negotiations

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: Notice is hereby given of proposed contractual actions that are new, modified, discontinued, or completed since the last publication of this notice on April 27, 1999. The January 22, 1999, notice should be used as a reference point to identify changes. This notice is one of a variety of means used to inform the public about proposed contractual actions for capital recovery and management of project resources and facilities. Additional Bureau of Reclamation (Reclamation) announcements of individual contract actions may be published in the **Federal Register** and in newspapers of general circulation in the areas determined by Reclamation to be affected by the proposed action. Announcements may be in the form of news releases, legal notices, official letters, memorandums, or other forms of written material. Meetings, workshops, and/or hearings may also be used, as appropriate, to provide local publicity. The public participation procedures do not apply to proposed contracts for sale of surplus or interim irrigation water for a term of 1 year or less. Either of the contracting parties may invite the public to observe contract proceedings. All public participation procedures will be coordinated with those involved in complying with the National Environmental Policy Act.

ADDRESSES: The identity of the approving officer and other information pertaining to a specific contract proposal may be obtained by calling or writing the appropriate regional office at the address and telephone number given for each region in the supplementary information.

FOR FURTHER INFORMATION CONTACT: Alonzo Knapp, Manager, Reclamation Law, Contracts, and Repayment Office, Bureau of Reclamation, PO Box 25007, Denver, Colorado 80225-0007; telephone 303-445-2889.

SUPPLEMENTARY INFORMATION: Pursuant to section 226 of the Reclamation Reform Act of 1982 (96 Stat. 1273) and 43 CFR 426.20 of the rules and regulations published in 52 FR 11954, Apr. 13, 1987, Reclamation will publish notice of the proposed or amendatory contract actions for any contract for the

delivery of project water for authorized uses in newspapers of general circulation in the affected area at least 60 days prior to contract execution. Pursuant to the "Final Revised Public Participation Procedures" for water resource-related contract negotiations, published in 47 FR 7763, Feb. 22, 1982, a tabulation is provided of all proposed contractual actions in each of the five Reclamation regions. Each proposed action is, or is expected to be, in some stage of the contract negotiation process in 1999. When contract negotiations are completed, and prior to execution, each proposed contract form must be approved by the Secretary of the Interior, or pursuant to delegated or redelegated authority, the Commissioner of Reclamation or one of the regional directors. In some instances, congressional review and approval of a report, water rate, or other terms and conditions of the contract may be involved.

Public participation in and receipt of comments on contract proposals will be facilitated by adherence to the following procedures:

1. Only persons authorized to act on behalf of the contracting entities may negotiate the terms and conditions of a specific contract proposal.
2. Advance notice of meetings or hearings will be furnished to those parties that have made a timely written request for such notice to the appropriate regional or project office of Reclamation.
3. Written correspondence regarding proposed contracts may be made available to the general public pursuant to the terms and procedures of the Freedom of Information Act (80 Stat. 383), as amended.
4. Written comments on a proposed contract or contract action must be submitted to the appropriate regional officials at the locations and within the time limits set forth in the advance public notices.
5. All written comments received and testimony presented at any public hearings will be reviewed and summarized by the appropriate regional office for use by the contract approving authority.

6. Copies of specific proposed contracts may be obtained from the appropriate regional director or his designated public contact as they become available for review and comment.

7. In the event modifications are made in the form of a proposed contract, the appropriate regional director shall determine whether republication of the notice and/or extension of the comment period is necessary.

Factors considered in making such a determination shall include, but are not limited to: (i) the significance of the modification, and (ii) the degree of public interest which has been expressed over the course of the negotiations. As a minimum, the regional director shall furnish revised contracts to all parties who requested the contract in response to the initial public notice.

Acronym Definitions Used Herein

(BON) Basis of Negotiation
(BCP) Boulder Canyon Project
(CAP) Central Arizona Project
(CUP) Central Utah Project
(CVP) Central Valley Project
(CRSP) Colorado River Storage Project
(D&MC) Drainage and Minor Construction
(FR) Federal Register
(IDD) Irrigation and Drainage District
(ID) Irrigation District
(M&I) Municipal and Industrial
(NEPA) National Environmental Policy Act
(O&M) Operation and Maintenance
(P-SMBP) Pick-Sloan Missouri Basin Program
(PPR) Present Perfected Right
(RRA) Reclamation Reform Act
(R&B) Rehabilitation and Betterment
(SOD) Safety of Dams
(SRPA) Small Reclamation Projects Act
(WCUA) Water Conservation and Utilization Act
(WD) Water District

Pacific Northwest Region: Bureau of Reclamation, 1150 North Curtis Road, Suite 100, Boise, Idaho 83706-1234, telephone 208-378-5346.

The Pacific Northwest Region has no updates to report for this quarter. Please refer to the January 22, 1999, publication of this notice for current contract actions.

Mid-Pacific Region: Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95825-1898, telephone 916-978-5250.

New contract actions:

40. Byron-Bethany ID, CVP, California: Long-term Warren Act contract for conveyance of non-project water in the Delta-Mendota Canal.

Modified contract actions:

6. El Dorado County Water Agency, CVP, California: M&I water service contract for 15,000 acre-feet to supplement existing water supply, authorized by Public Law 101-514.

14. Mercy Springs WD, CVP, California: Assignment of Mercy Springs Water District's water service contract to Pajaro Valley Water Management Agency. The assignment will provide for delivery of up to 13,300 acre-feet annually of water to the Agency from the CVP for agricultural purposes.

Completed contract actions:

6. El Dorado County Water Agency, San Juan WD, and Sacramento County Water Agency, CVP, California: M&I water service contracts to supplement existing water supply: 15,000 acre-feet for El Dorado County Water Agency, 13,000 acre-feet for San Juan WD, and 22,000 acre-feet for Sacramento County Water Agency authorized by Public Law 101-514. Completed contract actions with Sacramento County Water Agency (contract No. 6-07-20-W1372) executed April 8, 1999, and San Juan WD (contract No. 6-07-20-W1373) executed April 8, 1999.

14. Mercy Springs WD, CVP, California: Assignment of District's water service contract to Pajaro Valley Water Management Agency. The assignment will provide for delivery of up to 13,300 acre-feet annually of water to the Agency from the CVP for agricultural purposes. Interim assignment of up to 6,260 acre-feet of water annually to Westlands WD and Santa Clara Valley WD until Pajaro Water Management Agency completes their water project. Interim assignment agreement executed May 14, 1999.

20. Napa County Flood Control and Water Conservation District, Solano Project, California: Renewal of water service contract No. 14-06-200-1290A, which expired February 28, 1999. Contract executed March 18, 1999, with effective date of March 1, 1999.

21. Solano County Water Agency, Solano Project, California: Renewal of water service contract No. 14-06-200-4090, which expired February 28, 1999. Contract executed February 28, 1999, with effective date of March 1, 1999.

31. Solano County Water Agency and Solano ID, Solano Project, California: Contract to transfer responsibility for O&M of Monticello Dam, Putah Diversion Dam, Putah South Canal, Headworks of Putah South Canal, and Parshall Flume at Milepost 0.18 of Putah South Canal to Solano ID and provide that the Solano County Water Agency shall provide the funds necessary for O&M of the facilities. Contract No. 9-07-20-X0358 executed June 2, 1999.

Lower Colorado Region: Bureau of Reclamation, PO Box 61470 (Nevada Highway and Park Street), Boulder City, Nevada 89006-1470, telephone 702-293-8536.

New contract actions:

56. Southern Nevada Water Authority, Robert B. Griffith Water Project, BCP, Nevada: Title transfer of physical facilities with interest in acquired lands, grant or assignment of perpetual rights or easements over Federal-owned lands.

57. Hohokam IDD, CAP, Arizona: Amend distribution system repayment contract to reflect final project costs.

58. Sun City Water Co., CAP, Arizona: Partial assignment of 2,372 acre-feet of CAP M&I water to Sun City West Utilities Co.

59. Sun City Water Co., CAP, Arizona: Amendment to M&I water service subcontract with Citizens Utilities Co., Agua Fria Division.

60. Gila River Indian Community, CAP, Arizona: Amend CAP water delivery contact and distribution system repayment, and OM&R contract pursuant to proposed Gila River Indian Community Water Rights Settlement Agreement.

61. Cortaro Marana ID, CAP, Arizona: Assignment of 47 acre-feet of CAP M&I water to the Town of Marana.

62. Basic Management, Inc., Salinity Project, Nevada: Title transfer of the Pitman Wash Bypass Demonstration Project facilities and all interests in acquired lands and easements with an obligation to continue bypassing the water in Pitman Wash.

63. BHP Copper, Inc., CAP, Arizona: Proposed agreement and amendments to CAP water delivery subcontracts to transfer BHP Copper's CAP water allocation to the City of Scottsdale, Town of Carefree, and Tonto Hills Utility Company.

Discontinued contract actions:

28. McMicken ID/Town of Goodyear, CAP, Arizona: Amend McMicken's CAP water service subcontract to reduce its entitlement by 507 acre-feet and Goodyear's water service subcontract to increase its entitlement by 507 acre-feet. This action is included in No. 53.

54. McMicken ID, CAP, Arizona: Amendment No.1 to terminate CAP water service subcontract.

Completed contract actions:

2. Arizona State Land Department, State of Arizona, BCP, Arizona: Contract for 6,607 acre-feet per year of Colorado River water for agricultural use and related purposes on State-owned land.

37. Arizona State Land Department, BCP, Arizona: Water delivery contract for delivery of up to 9,000 acre-feet per year of unused apportionment and surplus Colorado River water for irrigation.

45. ASARCO Inc., CAP, Arizona: Amendment to extend deadline for giving notice of termination on exchange subcontract.

46. BHP Copper, Inc., CAP, Arizona: Amendment to extend deadline for giving notice of termination on exchange subcontract.

47. Cyprus Miami Mining Corporation, CAP, Arizona: Amendment

to extend deadline for giving notice of termination on exchange subcontract.

59. Sun City Water Co., CAP, Arizona: Amendment to M&I water service subcontract with Citizens Utilities Co., Agua Fria Division.

Upper Colorado Region: Bureau of Reclamation, 125 South State Street, Room 6107, Salt Lake City, Utah 84138-1102, telephone 801-524-4419.

New contract actions:

1(g) Whetstone Vista L.L.C., Aspinall Unit, CRSP, Colorado: Contract for 1 acre-foot to support augmentation plans, Water Division Court No. 4, State of Colorado (Case No. 96CW298), to provide for single-family residential use, irrigation, and livestock watering.

19. Individual irrigators, Carlsbad Project, New Mexico: The United States proposes to enter into long-term forbearance lease agreements with individuals who have privately held water rights to divert non-project water either directly from the Pecos River or from shallow/artesian wells in the Pecos River Watershed. This action will result in additional water in the Pecos River to make up for the water depletions caused by changes in operations at Sumner Dam which were made to improve conditions for a threatened species, the Pecos Bluntnose Shiner.

Completed contract actions:

1(e) Frank M. Colman, Karen Edstrom, William and Lorena Gunn, Emily Vernon, and William E. Williams; Aspinall Unit; CRSP; Colorado: Contract for 3 acre-feet to support augmentation plans, Water Division Court No. 4, State of Colorado, to provide for single-family residential use, irrigation, fire protection, and livestock watering.

15. Emery County Water Conservancy District, Emery County Project, Utah: Warren Act contract to allow temporary storage of non-project water in Joes Valley Reservoir and/or Huntington North Reservoir.

Great Plains Region: Bureau of Reclamation, PO Box 36900, Federal Building, 316 North 26th Street, Billings, Montana 59107-6900, telephone 406-247-7730.

New contract actions:

39. Fryingpan-Arkansas Project, Colorado: Pueblo Board of Water Works, long-term storage and conveyance contract.

40. Keith Bower (Individual), Boysen Unit, Wyoming, P-SMBP: Contract for up to 500 acre-feet of irrigation water to service 144 acres.

41. Canyon Lam. Liability (Individual), Boysen Unit, Wyoming, P-SMBP: Contract for up to 16 acre-feet of supplemental irrigation water to service 4 acres.

42. L. Sheep Company (Individual), Boysen Unit, Wyoming, P-SMBP: Contract for up to 60 acre-feet of irrigation water to service 180 acres.

Modified contract actions:

9. Northern Cheyenne Indian Reservation, Montana: In accordance with section 9 of the Northern Cheyenne Reserved Water Rights Settlement Act of 1992, the United States and the Northern Cheyenne Indian Tribe are proposing to contract for 30,000 acre-feet per year of stored water from Bighorn Reservoir, Yellowtail Unit, Lower Bighorn Division, P-SMBP, Montana. The Tribe will pay the United States both capital and O&M costs associated with each acre-foot of water the Tribe sells from this storage for M&I purposes. Agreement undergoing final review by Reclamation. A date for execution has not been scheduled.

15. Fort Shaw and Greenfields IDs, Sun River Project, Montana: Contract for SOD costs for repairs to Willow Creek Dam. Have received the revised/ approved BON from the Commissioner. The contract has been sent to the Fort Shaw ID for signature.

24. Lower Marias Unit, P-SMBP, Montana: Water service contract expired June 1997. Initiating renewal of existing contract for 25 years for up to 480 acre-feet of storage from Tiber Reservoir to irrigate 160 acres. Received approved BON from the Commissioner. Currently developing the contract and consulting with the Tribes regarding the Water Rights Compact. A 1-year interim contract has been issued to continue delivery of water until the necessary actions can be completed to renew a long-term contract.

32. Savage ID, P-SMBP, Montana: A 1-year interim contract has been entered into with the District. The District is currently seeking title transfer.

36. Fryingpan-Arkansas Project, Colorado: Proposed contract amendment to contract No. 9-07-70-W099 with Busk-Ivanhoe, Inc.

37. Fort Shaw and Greenfields IDs, Sun River Project, Montana: Contract for additional SOD costs for repairs to Willow Creek Dam. Approved BON has been received for the Greenfields ID. Contract will be executed upon approval of the MOD report by Congress. Awaiting approval of the BON for the Fort Shaw ID.

Discontinued contract actions:

6. Lakeview ID, Shoshone Project, Wyoming: New long-term water service contract for up to 3,200 acre-feet of firm water supply annually and up to 11,800 acre-feet of interim water from Buffalo Bill Reservoir. Pursuant to section 9(e) of the Reclamation Project Act of 1939 and Public Law 100-516. Category

undetermined, removed due to District not receiving Federal water.

Completed contract actions:

5. Tom Green County Water Control and Improvement District No. 1, San Angelo Project, Texas: Pursuant to section 501 of Public Law 101-434, negotiate amendatory contract to increase irrigable acreage within the project.

21. Canadian River Project, Texas: Recalculate existing contract repayment schedule to conform with the provisions of the Emergency Drought Relief Act of 1996. The revised schedule is to reflect a consideration for project land transferred to the National Park Service, and a 3-year deferment of payments.

27. Glendo Unit, P-SMBP, Wyoming: Initiate amendments to extend the current contracts until December 31, 2000, in accordance with the "Irrigation Project Contract Extension Act of 1998" for Burbank Ditch, New Grattan Ditch Company, Torrington ID, Lucerne Canal and Power Company, and Wright and Murphy Ditch Company.

28. Glendo Unit, P-SMBP, Nebraska: Initiate amendments to extend the current contracts until December 31, 2000, in accordance with the "Irrigation Project Contract Extension Act of 1998" for Bridgeport, Enterprise, and Mitchell IDs, and Central Nebraska Public Power and ID.

31. Canadian River Project, Texas: Amend repayment contract No. 14-06-500-485 to allow for prepayment of construction charge obligation as authorized by Public Law 105-316, signed October 30, 1998.

33. San Angelo Project, Texas: San Angelo Water Supply Corporation, amend contract to reflect increase in irrigable acreage as authorized pursuant to section 501 of Public Law 101-434.

Dated: July 14, 1999.

Wayne O. Deason,

Deputy Director, Office of Policy.

[FR Doc. 99-18553 Filed 7-20-99; 8:45 am]

BILLING CODE 4310-94-P

DEPARTMENT OF LABOR

Office of the Secretary; Bureau of International Labor Affairs; Notice for Public Submissions of Information on Labor Practices in Burma

The Department of Labor (DOL) is currently undertaking a Congressionally-mandated report addressing labor practices in Burma (pursuant to the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 § 564, Pub. L. 105-277, 112 Stat 2681, 2681-193).

House Conference Report No. 105-825 requests that DOL provide comprehensive details on child labor practices, workers' rights, forced relocation of laborers, forced labor performed to support the tourism industry, and forced labor performed in conjunction with, and in support of, the Yadonna gas pipeline. In addition, the report should address whether the Government of Burma is in compliance with international labor standards and should provide details regarding the U.S. Government's efforts to address and correct practices of forced labor in Burma. This report will update the findings of the Congressionally-mandated report, "Report on Labor Practices in Burma," which was published by DOL in September 1998, pursuant to the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998 § 568, Pub. L. 105-118, 111 Stat 2386, 2429).

This document is a notice for public submissions for the purpose of gathering information regarding labor practices in Burma. DOL is now accepting written submissions on this subject matter from all interested parties. The Department is not able to provide financial assistance to those preparing written submissions.

Information provided through written submissions will be considered by the Department of Labor in preparing its report to Congress. Materials submitted should be confined to the specific topic of the study. Copies of the 1998 report can be obtained from the DOL website at <http://www.dol.gov/dol/ilab> or by calling DOL's Bureau of International Labor Affairs, Office of Foreign Relations at (202) 219-7616.

This Notice is a general solicitation of comments from the public. The Department is seeking facts or opinions in response to this Notice and is not requiring commenters to supply specific information about themselves.

DATES: Individuals submitting information will be required to provide two (2) copies of their written submissions to the Bureau of International Affairs by 5:00 p.m., Friday, August 20, 1999 at the address noted below.

ADDRESSES: Written submissions should be addressed to the Bureau of International Affairs, U.S. Department of Labor, Attention: Sue Hahn, Room S-5006, 200 Constitution Avenue, NW, Washington, DC 20210. Individuals may also submit their information via fax at the following FAX number: (202) 219-5613.

FOR FURTHER INFORMATION CONTACT: Sue Hahn, Bureau of International Labor Affairs, U.S. Department of Labor, Room

S-5006, 200 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 219-9403, ext. 161; fax: (202) 219-5613. All written comments submitted pursuant to this notice will be made part of the record of review and will be available for public inspection.

Signed at Washington, DC, this 15th day of July, 1999.

Andrew J. Samet,

Deputy Under Secretary, Bureau of International Labor Affairs.

[FR Doc. 99-18596 Filed 7-20-99; 8:45 am]

BILLING CODE 4510-28-P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. ICR 99-9]

Crawler, Locomotive, and Truck Cranes; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA); Labor.

ACTION: Notice of an opportunity for public comment.

SUMMARY: OSHA solicits comments concerning the proposed reduction, and extension of, the information collection requirements contained in the standard on Crawler, Locomotive, and Truck Cranes (29 CFR 1926.550(b)(2)).

The Agency is particularly interested in comments on the following:

- Whether the information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of the Agency's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply, for example, by using automated, electronic, mechanical, and other technological information and transmission collection techniques.

DATES: Submit written comments on or before September 20, 1999.

ADDRESSES: Submit comments to the Docket Office, Docket No. ICR-99-9, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 693-2350. You may

transmit written comments 10 pages or less in length by facsimile to (202) 693-1648.

FOR FURTHER INFORMATION CONTACT:

Kathleen Martinez, Directorate of Policy, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-3605, 200 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 693-2444. A copy of the Agency's Information Collection Request (ICR) supporting the need for the information collection requirements in the Crawler, Locomotive, and Truck Cranes Standard is available for inspection and copying in the Docket Office, or mailed on request by telephoning Kathleen Martinez at (202) 693-2444 or Barbara Bielaski at (202) 693-2444. For electronic copies of the ICR on the Crawler, Locomotive, and Truck Cranes Standard, contact OSHA on the Internet at <http://www.osha-slc.gov>.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA-95) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and information collection OSHA's estimate of the burden is correct. The Occupational Safety and Health Act of 1970 (the Act) (29 U.S.C. 657) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents.

II. Proposed Actions

The certification record required in 29 CFR 1926.550(b)(2) is necessary to assure that employers conduct inspections of cranes and that they retain a certification record on file until a new record is prepared. OSHA will summarize the comments submitted in response to this notice, and will include this summary in the request to OMB to extend the approval of the information collection requirements contained in the Crawler, Locomotive, and Truck Cranes Standard (29 CFR 1926.550(b)(2)).

Type of Review: Extension of currently approved information collection requirements.

Agency: Occupational Safety and Health Administration.

Title: Crawler, Truck and Locomotive Cranes (29 CFR 1926.550(b)(2)).

OMB Number: 1218-0232.

Affected Public: Business or other for-profit; Federal government; state, local, or tribal government.

Number of Respondents: 94,000.

Frequency: Monthly.

Average Time per Response: 30 minutes.

Estimated Total Burden Hours: 564,000.

III. Authority and Signature

Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), Secretary of Labor's Order No. 6-96 (62 FR 111), and 29 CFR part 1911.

Signed at Washington, DC, this 14th day of July 1999.

Charles N. Jeffress,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 99-18598 Filed 7-20-99; 8:45 am]

BILLING CODE 4510-26-M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

Medical Child Support Working Group

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (FACA), notice is given of the fourth meeting of the Medical Child Support Working Group (MCSWG). The Medical Child Support Working Group was jointly established by the Secretaries of the Department of Labor (DOL) and the Department of Health and Human Services (DHHS) under section 401(a) of the Child Support Performance and Incentive Act of 1998. The purpose of the MCSWG is to identify the impediments to the effective enforcement of medical support by State child support enforcement agencies, and to submit to the Secretaries of DOL and DHHS a report containing recommendations for appropriate measures to address those impediments.

DATES: The meeting of the MCSWG will be held on Thursday, August 12, 1999,

from approximately 12:00 p.m. to approximately 6:00 p.m., and on Friday, August 13, 1999, from 8:30 a.m. to approximately 4:00 p.m.

ADDRESSES: The meeting will be held in Parlor H, on the sixth floor of the Palmer House Hilton and Towers, 17 East Monroe Street, Chicago, IL 60603. All interested parties are invited to attend this public meeting. Seating may be limited and will be available on a first-come, first-serve basis. Persons needing special assistance, such as sign language interpretation or other special accommodation, should contact the Executive Director of the Medical Child Support Working Group, Office of Child Support Enforcement at the address listed below.

FOR FURTHER INFORMATION CONTACT: Ms. Samara Weinstein, Executive Director, Medical Child Support Working Group, Office of Child Support Enforcement, Fourth Floor East, 370 L'Enfant Promenade, SW, Washington, DC 20447 (telephone (202) 401-6953; fax (202) 401-5559; e-mail:

sweinstein@acf.dhhs.gov). These are not toll-free numbers. The date, location and time for subsequent MCSWG meetings will be announced in advance in the **Federal Register**.

SUPPLEMENTARY INFORMATION: Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2) (FACA), notice is given of a meeting of the Medical Child Support Working Group (MCSWG). The Medical Child Support Working Group was jointly established by the Secretaries of the Department of Labor (DOL) and the Department of Health and Human Services (DHHS) under section 401(a) of the Child Support Performance and Incentive Act of 1998 (Pub.L. 105-200).

The purpose of the MCSWG is to identify the impediments to the effective enforcement of medical support by State child support enforcement agencies, and to submit to the Secretaries of DOL and DHHS a report containing recommendations for appropriate measures to address those impediments. This report will include: (1) Recommendations based on assessments of the form and content of the National Medical Support Notice, as issued under interim regulations; (2) appropriate measures that establish the priority of withholding of child support obligations, medical support obligations, arrearages in such obligations, and in the case of a medical support obligation, the employee's portion of any health care coverage premium, by such State agencies in light of the restrictions on garnishment

provided under title III of the Consumer Credit Protection Act (15 U.S.C. 1671-1677); (3) appropriate procedures for coordinating the provision, enforcement, and transition of health care coverage under the State programs for child support, Medicaid and the Child Health Insurance Program; (4) appropriate measures to improve the availability of alternate types of medical support that are aside from health care coverage offered through the noncustodial parent's health plan, and unrelated to the noncustodial parent's employer, including measures that establish a noncustodial parent's responsibility to share the cost of premiums, co-payments, deductibles, or payments for services not covered under a child's existing health coverage; (5) recommendations on whether reasonable cost should remain a consideration under section 452(f) of the Social Security Act; and (6) appropriate measures for eliminating any other impediments to the effective enforcement of medical support orders that the MCSWG deems necessary.

The membership of the MCSWG was jointly appointed by the Secretaries of DOL and DHHS, and includes representatives of: (1) DOL; (2) DHHS; (3) State Child Support Enforcement Directors; (4) State Medicaid Directors; (5) employers, including owners of small businesses and their trade and industry representatives and certified human resource and payroll professionals; (6) plan administrators and plan sponsors of group health plans (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1167(1))); (7) children potentially eligible for medical support, such as child advocacy organizations; (8) State medical child support organizations; and (9) organizations representing State child support programs.

Agenda

The agenda for this meeting includes a discussion of the issues to be included in the MCSWG's report to the Secretaries containing recommendations for appropriate measures to address the impediments to the effective enforcement of medical child support as listed above. At the May, 1999, meeting the MCSWG formed four (4) subcommittees to discuss barriers, issues, options, and recommendations in the interim between full MCSWG meetings. At this August, 1999, meeting the four subcommittees will present their initial issues and recommendations to the full MCSWG for further discussion and consideration.

Public Participation

Members of the public wishing to present oral statements to the MCSWG should forward their requests to Samara Weinstein, MCSWG Executive Director, as soon as possible and at least four days before the meeting. Such request should be made by telephone, fax machine, or mail, as shown above. Time permitting, the Chairs of the MCSWG will attempt to accommodate all such requests by reserving time for presentations. The order of persons making such presentations will be assigned in the order in which the requests are received. Members of the public are encouraged to limit oral statements to five minutes, but extended written statements may be submitted for the record. Members of the public also may submit written statements for distribution to the MCSWG membership and inclusion in the public record without presenting oral statements. Such written statements should be sent to the MCSWG Executive Director, as shown above, by mail or fax at least five business days before the meeting.

Minutes of all public meetings and other documents made available to the MCSWG will be available for public inspection and copying at both the DOL and DHHS. At DOL, these documents will be available at the Public Documents Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5638, 200 Constitution Avenue, NW, Washington, DC from 8:30 a.m. to 5:30 p.m. Questions regarding the availability of documents from DOL should be directed to Ms. Ellen Goodwin, Plan Benefits Security Division, Office of the Solicitor, Department of Labor (telephone (202) 219-4600, ext. 119). This is not a toll-free number. Any written comments on the minutes should be directed to Ms. Samara Weinstein, Executive Director of the Working Group, as shown above.

Signed at Washington, DC, this 15th day of July, 1999.

Richard McGahey,

Assistant Secretary for Pension and Welfare Benefits.

[FR Doc. 99-18597 Filed 7-20-99; 8:45 am]

BILLING CODE 4510-29-P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meeting

AGENCY HOLDING MEETING: National Science Foundation, National Science Board.

DATE AND TIME: July 29, 1999—1:30 p.m., Closed Session; July 29, 1999—2:00

p.m., Closed Session; July 29, 1999—3:30 p.m., Open Session.

PLACE: The National Science Foundation, 4201 Wilson Boulevard, Room 1235, Arlington, VA 22230.

STATUS: Part of this meeting will be closed to the public. Part of this meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Closed Session (12:30 p.m.–12:45 p.m.)

Closed Session Minutes
Board Member Proposals
Personnel

Closed Session (2 p.m.–3:30 p.m.)

Awards and Agreements
FY 2001 Budget

Open Session (3:30 p.m.–5:30 p.m.)

Minutes, May 1999
Closed Session Items for November 1999
Chair's Report
Director's Report
Committee Reports
NSB 2000 Meeting Calendar
Criteria for NSB Delegation of Authority
NSF Strategic Plan
Report of the CPP Task Force on the Environment
NSF Commendation to Navy Personnel for Antarctic Support

[FR Doc. 99–18776 Filed 7–19–99; 3:50 pm]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 40–8794–MLA and 40–8778–MLA ASLBP No. 99–769–08–MLA]

Molycorp, Inc.; Designation of Presiding Officer

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28,710 (1972), and Sections 2.1201 and 2.1207 of Part 2 of the Commission's Regulations, a single member of the Atomic Safety and Licensing Board Panel is hereby designated to rule on petitions for leave to intervene and/or requests for hearing and, if necessary, to serve as the Presiding Officer to conduct an informal adjudicatory hearing in the following proceeding.

Molycorp, Inc. (Request for Materials License Amendment)

The hearing, if granted, will be conducted pursuant to 10 C.F.R. Part 2, Subpart L, of the Commission's Regulations, "Informal Hearing Procedures for Adjudications in Materials and Operator Licensing Proceedings." This proceeding concerns

a request for hearing submitted by the City of Washington, Pennsylvania, and Canton Township, Pennsylvania. The requests were filed in response to a notice of receipt by the Nuclear Regulatory Commission of a license amendment request of Molycorp, Inc., for temporary storage at its Washington, Pennsylvania facility of decommissioning waste now located at its facility in York, Pennsylvania. The notice of the proposed amendment request was published in the **Federal Register** at 64 Fed. Reg. 31,021 (June 9, 1999).

The Presiding Officer in this proceeding is Administrative Judge Peter B. Bloch. Pursuant to the provisions of 10 C.F.R. 2.722, 2.1209, Administrative Judge Richard F. Cole has been appointed to assist the Presiding Officer in taking evidence and in preparing a suitable record for review.

All correspondence, documents, and other materials shall be filed with Judge Bloch and Judge Cole in accordance with 10 C.F.R. 2.1203. Their addresses are:

Administrative Judge Peter B. Bloch,
Presiding Officer, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

Dr. Richard F. Cole, Special Assistant,
Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

Issued at Rockville, Maryland, this 15th day of July, 1999.

G. Paul Bollwerk, III,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 99–18631 Filed 7–20–99; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–397]

In the Matter of Washington Public Power Supply System, WPPSS Nuclear Project No. 2 (WNP–2), Exemption

I

Washington Public Power Supply System (the Supply System or the licensee) is the holder of Facility Operating License No. NPF–21, which authorizes operation of the Washington Public Power Supply System Nuclear Project 2 (WNP–2). The facility consists of a boiling water reactor at the licensee's site in Benton County, Washington. The operating license provides, among other things, that

WNP–2 is subject to all rules, regulations, and orders of the Commission now or hereafter in effect.

II

Pursuant to 10 CFR 55.59(a)(1), each licensed operator is required to successfully complete a requalification program developed by the licensee that has been approved by the Commission. This program is to be conducted for a continuous period not to exceed 24 months in duration. In addition, pursuant to 10 CFR 55.59(a)(2), each licensed operator must also pass a comprehensive requalification written examination and an annual operating test.

By letter dated May 7, 1999, the Supply System requested an exemption under 10 CFR 55.11 from the requirements of 10 CFR 55.59(a)(2). The scheduler exemption requested would extend the completion date for the administration of the annual operating test for the WNP–2 requalification program from October 23, 1999, to February 12, 2000, because the scheduled examination time coincides with the plant refueling outage. The requested exemption would constitute a one-time extension of the annual operating test requirement of the requalification program.

The Code of Federal Regulations at 10 CFR 55.11 states that, "The Commission may, upon application by an interested person, or upon its own initiative, grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law and will not endanger life or property and are otherwise in the public interest."

III

In support of its request for exemption, the Supply System indicated that the licensed operators at WNP–2 will continue to participate in the ongoing requalification training program. The Supply System further indicated that due to the two extended shutdowns, the annual operating test would have to be conducted on overtime. The exemption would eliminate the need to conduct the annual operating tests on overtime.

The NRC staff finds the one-time exemption will allow additional licensed operator support during the current refueling outage, which will provide a safety enhancement during plant shutdown operations, and post-maintenance testing and eliminate the need to conduct annual operating tests on overtime. The affected licensed operators will continue to demonstrate and possess the required levels of knowledge, skills, and abilities needed

to safely operate the plant throughout the extension period via continuation of the current satisfactory licensed operator requalification program. In meeting the requirement for the administration of an annual operating test, the current plant refueling outage could be prolonged without a net benefit to safety, and would otherwise have a detrimental effect on the public interest.

IV

The Commission has determined that pursuant to 10 CFR 55.11, granting an exemption to the Washington Public Power Supply System from the requirements in 10 CFR 55.59(a)(2) is authorized by law and will not endanger life or property and is otherwise in the public interest.

Therefore, the Commission hereby grants Washington Public Power Supply System an exemption on a one-time only basis from the scheduler requirements of 10 CFR 55.59(a)(2), to allow the Washington Public Power Supply System Nuclear Project 2 current annual operating examination to be extended until February 12, 2000.

Pursuant to 10 CFR 51.32, the Commission has also determined that the issuance of the exemption will have no significant impact on the environment. An Environmental Assessment and Finding of No Significant Impact was noticed in the **Federal Register** on July 9, 1999 (64 FR 37173).

This exemption is effective upon issuance.

Dated at Rockville, Maryland this 14th day of July, 1999.

For the Nuclear Regulatory Commission.

Bruce A. Boger,

Director, Division of Inspection Program Management Office of Nuclear Reactor Regulation.

[FR Doc. 99-18635 Filed 7-20-99; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. STN 50-456, STN 50-457, STN 50-454, STN 50-455, 50-237, 50-249, 50-373, 50-374, 50-254 and 50-265]

Commonwealth Edison Company: Braidwood Station, Unit Nos. 1 and 2, Byron Station, Unit Nos. 1 and 2, Dresden Station, Unit Nos. 2 and 3, LaSalle County Station, Unit Nos. 1 and 2, Quad Cities Station, Unit Nos. 1 and 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is

considering issuance of exemptions from certain requirements of its regulations to Facility Operating License Nos. NPF-72, NPF-77, NPF-37, NPF-66, DPR-19, DPR-25, NPF-11, NPF-18, DPR-29 and DPR-30 issued to the Commonwealth Edison Company (ComEd, the licensee), for operation of Braidwood Station, located in Will County, Illinois; Byron Station located in Ogle County, Illinois; Dresden Station located in Grundy County, Illinois; LaSalle County Station located in LaSalle County, Illinois; and Quad Cities Station located in Rock Island County, Illinois, respectively.

Environmental Assessment

Identification of Proposed Action

The proposed actions would exempt the licensee from the requirements of 10 CFR 50.71(e)(4) regarding submission of revisions to the Updated Final Safety Analysis Report (UFSAR). Under the proposed exemptions, the licensee would submit updates to the UFSARs within 24 calendar months of the previous UFSAR revision submittal. Braidwood and Byron share a common FSAR and the Dresden, Quad Cities, and LaSalle Stations maintain their own FSARs that are common to both units at each station.

The proposed actions are in accordance with the licensee's application dated May 4, 1993.

The Need for the Proposed Action

The *Code of Federal Regulations*, 10 CFR 50.71(e)(4), requires licensees to submit updates to their FSARs annually or within 6 months after each refueling outage provided that the interval between successive updates does not exceed 24 months. Since the units for each station, and the Braidwood and Byron stations, share a common FSAR, the licensee must update the same document annually or within 6 months after a refueling outage for each unit. The underlying purpose of the rule was to relieve licensees of the burden of filing annual FSAR revisions while assuring that such revisions are made at least every 24 months. The Commission reduced the burden, in part, by permitting a licensee to submit its FSAR revisions 6 months after refueling outages for its facility, but did not provide for multiple unit facilities sharing a common FSAR in the rule. Rather, the Commission stated: "with respect to the concern about multiple facilities sharing a common FSAR, licensees will have maximum flexibility for scheduling updates on a case-by-case basis" (57 FR 39355) (1992). Allowing the exemption would maintain the

updated FSAR current within 24 months of the last revision.

Environmental Impacts of the Proposed Action

The Commission has completed its evaluation of the proposed actions and concludes that they involve administrative activities unrelated to plant operation.

The proposed actions will not increase the probability or consequences of accidents, no changes are being made in the types of any effluents that may be released off site, and there is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed actions.

With regard to potential non-radiological impacts, the proposed actions do not involve any historic sites. They do not affect non-radiological plant effluents and have no other environmental impact. Therefore, there are no significant non-radiological environmental impacts associated with the proposed actions.

Accordingly, the Commission concludes that there are no significant environmental impacts associated with these actions.

Alternative to the Proposed Actions

As an alternative to the proposed actions, the staff considered denial of the proposed actions (i.e., the "no-action" alternative). Denial of the exemptions would result in no change in current environmental impacts. The environmental impacts of the proposed actions and the alternative action are similar.

Alternative Use of Resources

These actions do not involve the use of any resources not previously considered in the Final Environmental Statements for Braidwood, Byron, Dresden, LaSalle, or Quad Cities.

Agencies and Persons Consulted

In accordance with its stated policy, on May 14, 1999, the staff consulted with the Illinois official, Mr. Frank Nizeolik of the Illinois Department of Nuclear Safety, regarding the environmental impact of the proposed actions. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the Commission concludes that the proposed actions will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to

prepare an environmental impact statement for the proposed exemption.

For further details with respect to this action, see the licensee's letter dated May 4, 1993, which is available for public inspection at the Commission's Public Document Room, The Gelman Building, 2120 L Street, NW., Washington DC.

Dated at Rockville, Maryland, this 15th day of July, 1999.

For the Nuclear Regulatory Commission.

Jon B. Hopkins,

Acting Chief, Section 2, Project Directorate III, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 99-18634 Filed 7-20-99; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-320]

GPU Nuclear, Inc. Three Mile Island Nuclear Station, Unit 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission or NRC) is considering issuance of an exemption from Title 10 of the *Code of Federal Regulations* (10 CFR) Part 50 for Facility Operating License No. DPR-73, issued to GPU Nuclear, Inc. (GPUN or the licensee), for operation of the Three Mile Island Nuclear Station, Unit 2 (TMI-2), located in Dauphin County, Pennsylvania.

Environmental Assessment

Identification of the Proposed Action

The proposed action would reduce the amount of onsite property insurance as required by 10 CFR 50.54(w), based on the permanently shutdown status of TMI-2 and that the plant is in a safe, inherently stable condition suitable for long-term management and any threat to the health and safety of the public has been eliminated. The requested action would allow GPUN to reduce onsite insurance coverage from \$1.6 billion to \$50 million.

The proposed action is in accordance with the licensee's application for exemption dated March 9, 1999.

Need for the Proposed Action

The proposed action is needed because the licensee's required insurance coverage significantly exceeds the potential cost consequences of radiological incidents possible at a permanently shutdown and defueled reactor with over 99 percent of the fuel removed.

Environmental Impacts of the Proposed Action

The Commission has completed its evaluation of the proposed action and concludes that the issuance of the proposed exemption is an administrative action and will not have any environmental impact. TMI-2 permanently ceased operations following the March 28, 1979, accident. The licensee maintains the facility in a safe, stable configuration to comply with the facility operating license and the Commission's rules and regulations.

No changes are being made in the types or amounts of any radiological effluents that may be released offsite. There is no increase in occupational or public radiation exposure. Accordingly, the Commission concludes that there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential nonradiological impacts, the proposed action does not involve any historic sites. It does not affect nonradiological plant effluents and has no other environmental impact. Therefore, there are no significant nonradiological environmental impacts associated with the proposed action.

Accordingly, the Commission concludes that there are no significant environmental impacts associated with the proposed action.

Alternatives to the Proposed Action

The principal alternative to the action would be to deny the request thereby requiring the licensee to maintain insurance coverage required of an operating plant (i.e., the "no action" alternative); such an action would not enhance the protection of the environment. Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Programmatic Final Environmental Statement Related to Decontamination and Disposal of Radioactive Wastes Resulting from the March 28, 1979, Accident—Three Mile Island Nuclear Station, Unit 2, Supplement No. 3, issued in August 1989.

Agencies and Persons Contacted

In accordance with its stated policy, on June 3, 1999, the NRC staff consulted with Pennsylvania State official, Stan Miangi of the Pennsylvania Department

of Environmental Protection regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the Commission concludes that the proposed action will not have a significant impact on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated March 9, 1999, which is 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 Government Publications Section, State Library of Pennsylvania, Walnut Street and Commonwealth Avenue, Harrisburg, Pennsylvania.

Dated at Rockville, Maryland, this 15th day of July, 1999.

For the Nuclear Regulatory Commission.

Suzanne C. Black,

Deputy Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 99-18633 Filed 7-20-99; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-272 and 50-311]

Salem Nuclear Generating Station, Unit Nos. 1 and 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. DPR-70 and DPR-75, issued to the Public Service Electric and Gas Company (the licensee), for operation of the Salem Nuclear Generating Station, Unit Nos. 1 and 2, located in Salem County, New Jersey.

Environmental Assessment

Identification of Proposed Action

The proposed action is in response to the licensee's application dated February 2, 1999, as supplemented on April 26, 1999, for proposed amendments to the Technical Specifications (TS) to change the maximum unirradiated fuel assembly enrichment value for new fuel storage from 4.5 to 5.0 weight percent Uranium-

235 and to allow the use of equivalent criticality control to that provided by the current TS requirement of 2.35 milligrams of Boron-10 per linear inch loading in the Integral Fuel Burnable Absorber pins.

The Need for the Proposed Action

The licensee intends, in the future, to use the more highly enriched fuel to achieve higher energy core reloads which can contribute substantially to improved capacity factors for the spent fuel pool by decreasing the cumulative amount of fuel stored during the lifetime of the plant. Currently, TS 5.6, "Fuel Storage, Criticality," limits the storage of fuel to an enrichment of 4.3 weight percent U-235. Thus, the proposed change to the TS was requested.

Environmental Impacts of the Proposed Action

The Commission has completed its evaluation of the proposed action and concludes that the storage and use of fuel enriched with U-235 up to 5.0 weight percent at Salem Units 1 and 2 is acceptable. The safety considerations associated with higher enrichments have been evaluated by the staff, and the staff has concluded that such changes would not adversely affect plant safety. The proposed changes have no adverse effect on the probability of any accident. There will be no change to the authorized power level. There is no change to the allowable fuel burnup (60,000 MWD/MTU) already approved for Salem Units 1 and 2. As a result, there is no significant increase in individual or cumulative radiation exposure.

The environmental impacts of transportation resulting from the use of higher enrichment fuel and extended irradiation are discussed in the staff assessment entitled, "NRC Assessment of the Environmental Effects of Transportation Resulting from Extended Fuel Enrichment and Irradiation." This assessment was published in the **Federal Register** on August 11, 1988 (53 FR 30355), as corrected on August 24, 1988 (53 FR 32322), in connection with the Shearon Harris Nuclear Power Plant, Unit 1, Environmental Assessment and Finding of No Significant Impact. As indicated therein, the environmental cost contribution of an increase in fuel enrichment of up to 5.0 weight percent U-235 and irradiation limits up to 60,000 MWD/MTU are either unchanged, or may in fact be reduced from those summarized in Table S-4 as set forth in 10 CFR 51.52(c). These findings are applicable to the proposed amendments for Salem Units 1 and 2.

Therefore, the Commission concludes that this proposed action would result in no significant radiological environmental impact.

With regard to potential non-radiological impacts, the proposed changes involve systems located within the restricted area as defined in 10 CFR Part 20. The proposed action does not involve any historic sites. It does not affect non-radiological plant effluents and has no other environmental impact. Therefore, the Commission concludes that there are no significant non-radiological environmental impacts associated with the proposed amendments.

Accordingly, the Commission concludes that there are no significant environmental impacts associated with this action.

Alternative to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (i.e., the "no-action" alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Final Environmental Statement related to the Salem Nuclear Generating Station dated April 1973.

Agencies and Persons Contacted

In accordance with its stated policy, on June 22, 1999, the staff consulted with the New Jersey State official, Mr. Dennis Zannoni, Chief, Bureau of Nuclear Engineering, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

Based upon the foregoing environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed amendments.

For further details with respect to this action, see the licensee's request for the amendments dated February 2, 1999, as supplemented on April 26, 1999, which are available for public inspection at the Commission's Public Document Room, Gelman Building, 2120 L Street, NW., Washington DC, and at the local public

document room located at the Salem Free Public Library, 112 West Broadway, Salem, NJ 08079.

Dated at Rockville, Maryland, this 14th day of July, 1999.

For the Nuclear Regulatory Commission.

Singh S. Bajwa,

Chief, Section 1, Project Directorate I, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 99-18632 Filed 7-20-99; 8:45 am]

BILLING CODE 7590-01-P

OFFICE OF PERSONNEL MANAGEMENT

Science and Technology Reinvention Laboratory Personnel Demonstration Project at the Naval Sea Systems Command Warfare Centers

AGENCY: Office of Personnel Management.

ACTION: Notice of amendment to expand coverage of all provisions of the Naval Sea Systems Command, Naval Surface Warfare Center and Naval Undersea Warfare Center personnel demonstration project to include employees of the Naval Warfare Assessment Station (NWAS).

SUMMARY: Public Law 103-337, October 5, 1994, permits the Department of Defense (DOD), with the approval of the Office of Personnel Management (OPM), to carry out personnel demonstration projects at DOD Science and Technology (S&T) Reinvention Laboratories. This notice identifies the expanded coverage of the Naval Sea Systems Command, Naval Surface Warfare Center and Naval Undersea Warfare Center personnel demonstration project to include employees of the Naval Warfare Assessment Station (NWAS). This notice also serves to clarify provisions of the Warfare Centers' final demonstration project plan published in the December 3, 1997, **Federal Register** Notice.

DATES: This notice may be implemented July 21, 1999.

FOR FURTHER INFORMATION CONTACT: Warfare Centers: Shirley Scott, NSWC/NUWC Deputy Demonstration Project Manager, NSWCDD, HR Department, 17320 Dahlgren Road, Dahlgren, VA 22448, 540-653-4623.

OPM: John André, U.S. Office of Personnel Management, 1900 E Street, NW, Room 7460, Washington, DC 20415, 202-606-1255.

SUPPLEMENTARY INFORMATION: OPM has approved "Science and Technology Laboratory Personnel Management Demonstration Projects" and published

the Naval Sea Systems Command, Naval Surface Warfare Center and Naval Undersea Warfare Center final plan in the **Federal Register** on Wednesday, December 3, 1997, Volume 62, Number 232, Part II. The Warfare Centers' demonstration project involved a simplified broad banded position classification system, performance management and development system, performance-based incentive pay system, competitive examining and appointment provisions, and modified reduction-in-force procedures. The final plan provided for a staggered implementation strategy across the Warfare Centers' divisions which began March 15, 1999.

On February 15, 1998, the Naval Warfare Assessment Station (NWS) was established as an organizational component reporting directly to the Naval Surface Warfare Center (NSWC). NSWC plans to expand coverage of the personnel demonstration project to include employees of NWS.

Dated: July 9, 1999.

Office of Personnel Management.

Janice R. Lachance,
Director.

I. Executive Summary

The Naval Sea Systems Command established the Naval Surface Warfare Center and the Naval Undersea Warfare Center Personnel Demonstration Project to be generally similar to the system in use at the Naval Personnel Demonstration Project known as China Lake. The project was built upon the concepts of linking performance to pay, simplifying the position classification system, emphasizing performance development, and delegating other authorities to line managers.

II. Introduction

A. Purpose

The Warfare Centers' personnel demonstration project attempts to provide managers, at the lowest practical level, the authority, control and flexibility needed to recruit, retain, develop, recognize and motivate its workforce. Expanding the demonstration project to include employees of the newly established NWS activity will allow the Naval Surface Warfare Center to implement the provisions of the project throughout all of its organizational activities, and to compete more effectively for high-quality personnel while strengthening the manager's role in personnel management. All provisions of the approved Warfare Centers' personnel demonstration project will apply.

Employee notification will be made by delivery of a copy of the December 3, 1997, final plan, any subsequent amendments, and this notice. Training for supervisors and employees will be accomplished by information briefings and training sessions prior to implementation.

B. Participating Employees

This demonstration project will be expanded to cover all NWS civilian employees, with the exception of members of the Senior Executive Service, located in Corona, California and remote locations. Table 1 reflects the duty locations and a projected number of employees to be covered.

TABLE 1.—NWS EMPLOYEES

Location	Projected number of employees
Corona, CA	653
Arlington, VA	2
Beaufort, SC	4
Cairo, Egypt	1
Ceiba, Puerto Rico.	
Cherry Point, NC	7
El Centro, CA	1
Fallon, NV	12
Key West NAV Air Station, FL.	
MCAS Miramar, CA	1
Moorestown, NJ	2

C. Other Changes

(1) Section III.B.1h.3: Pay Protection Provision

The intent of this provision was to offer maximum protection of the employee's salary upon movement to a different geographic location. Upon conversion to the demonstration project, many employees who were previously covered by special salary rates had their total adjusted salary reallocated between basic pay and locality pay. These reallocations were necessary to convert the employees to a broad-banded classification and pay system and it was not intended to lower the employees' total adjusted salary. Concurrent with the conversion, some of these same employees received an increase in basic pay under the demonstration project buy-in provisions outlined in Section III.D.1.: Initial Conversion of Current Workforce. Increases to basic pay under this section were granted as a buy-in into the demonstration project to compensate employees for time earned creditable toward their next within-grade-increase under the General Schedule system. Despite seemingly clear language, the pay protection provision addressed in Section III.B.1h3. appears to disregard consideration of the employee's

adjusted salary granted under this buy-in provision. This notice corrects this oversight by clarifying that the salary under protection includes the employee's pre-conversion special rate plus any increase in salary granted under the buy-in provisions. The second sentence of this section is amended to read: "For these employees, the new adjusted rate following a geographic move may not be less than the dollar amount of the employee's pre-conversion special rate plus any increase in salary granted under Section III.D.1. of this plan."

(2) Section III.B.5. Competitive Examining and Distinguished Scholastic Appointments

The Warfare Centers' demonstration project restructures the competitive examining process and provides for an authority to appoint candidates meeting prescribed distinguished scholastic achievements. The final plan includes language that may be interpreted as authority to extend changes in the examining process to positions outside the demonstration project activities. To eliminate confusion, the following sentence is deleted: "To further minimize resource requirements and the complexities inherent in administering two different sets of examining and hiring processes, this component may be applied to GS and FWS positions in activities for which the Warfare Center Divisions provide human resource services."

Also, the third sentence of that paragraph is changed from: "When a Division implements the Demonstration Project for some portion of their workforce, this component may be available for all occupations."

to:

"When a Division implements the Demonstration Project for some portion of their workforce, this provision may be available for all occupations, GS and FWS, within that Warfare Center Division."

This change further clarifies that this provision is used only for occupations covered by the Demonstration Project.

(3) Section III.D.3. Exit From the Demonstration Project

To clarify that conversion-out procedures also apply in the event the project ends, the following sentence is added at the end of the first paragraph under this section: "These procedures will also be followed for those employees who exit the project because of project termination."

(4) Section V.A.: Waivers to title 5, United States Code

The Warfare Centers' personnel demonstration project includes an enhanced performance management system requiring a waiver of existing laws and regulations governing performance management systems. Waivers of specific provisions of title 5 and the Code of Federal Regulations (CFR) were included under section V of the Warfare Centers' final plan. However, waivers of 5 U.S.C. 4304(b)(1) and (3) were inadvertently not included in this section. These title 5 provisions require OPM's review and approval of performance appraisal systems developed by agencies under 5 U.S.C. chapter 43. Simultaneously, Public Law 103-337 (Section 342 of the National Defense Authorization Act for FY95), October 5, 1994, requires OPM's approval of personnel demonstration projects. This approval was obtained and the Warfare Centers' final plan was published in the 3 December 1997 **Federal Register**. OPM's approval of the Warfare Centers' final plan removes the need to have separate review and approval of the revised performance appraisal system as required under chapter 43 of title 5 U.S.C. Part V of the final plan is therefore amended to add the following waivers:

5 U.S.C. 4304(b)(1)
5 U.S.C. 4304(b)(3)

[FR Doc. 99-18558 Filed 7-20-99; 8:45 am]
BILLING CODE 6325-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-41618; File No. SR-EMCC-99-04]

Self-Regulatory Organizations; Emerging Markets Clearing Corporation; Order Granting Approval on an Accelerated Basis of a Proposed Rule Change Regarding Expansion of Eligible Instruments

July 14, 1999.

On March 26, 1999, the Emerging Markets Clearing Corporation ("EMCC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change (File No. SR-EMCC-99-04) under Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").¹ Notice of the proposed rule change was published in the **Federal Register** on June 23, 1999, to solicit comments from interested persons.² No

comments have been received by the Commission. For the reasons discussed below, the Commission is approving the proposed rule change on an accelerated basis.

I. Description

The rule change expands the types of instruments eligible for processing by EMCC by amending the definition of "eligible sovereign debt," which is set forth in EMCC's Rule 1, to mean any instruments which either:

- (1) Are issued by or on behalf of an emerging markets sovereign issuer or an agency or instrumentality thereof (including, without limitation, any central bank thereof); provided that, in the case of any instrument issued by an agency or instrumentality, the credit quality of those instruments is judged by one or more NRSROs or by market participants generally on the basis of the credit quality of the related sovereign issuer; or
- (2) Have the timely payment of principal and interest guaranteed by an issuer who meets the criteria set forth in (1).

Initially, EMCC was established to facilitate the clearance and settlement of transactions in Brady Bonds but has always contemplated extending its services to include other emerging market debt instruments. In August 1998, EMCC amended its rules to expand the list of eligible EMCC instruments to include highly rated, liquid sovereign debt.³ As a result of that rule change, the sovereign debt of Brazil, Argentina, and Mexico became eligible for clearance and settlement at EMCC.

As with all instruments that are EMCC eligible, eligible sovereign debt instruments must also meet the existing criteria set forth in Rule 3, Section 1. That section requires that only instruments which are eligible for settlement at a qualified securities depository and that are U.S. dollar denominated may be eligible for clearance and settlement through EMCC.

II. Discussion

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to facilitate the development of a national system for the prompt and accurate clearance and settlement of securities transactions.⁴ The Commission finds that the rule change is consistent with this obligation because by making more emerging market securities eligible at EMCC, which will subject trades in these securities to EMCC's risk management

systems and standardized processing, market participants' clearance and settlement of these instruments should be less risky and more efficient.

EMCC has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after publication of the notice of the filing. The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after publication of the notice of the filing because accelerated approval will permit EMCC to provide clearance and settlement services for the sovereign debt of other emerging market countries immediately.

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act⁵ that the above-mentioned proposed rule change (File No. SR-EMCC-99-04) be, and hereby is, approved, on an accelerated basis.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 99-18516 Filed 7-20-99; 8:45 am]
BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new, and/or currently approved information collection.

DATES: Comments should be submitted on or before September 20, 1999.

FOR FURTHER INFORMATION CONTACT: Curtis B. Rich, Management Analyst, Small Business Administration, 409 3rd Street, SW, Suite 5000, Washington, DC 20416. Phone Number: 202-205-7030.

SUPPLEMENTARY INFORMATION:
Title: "Size Status Declaration."

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release No. 41534 (June 16, 1999), 64 FR 33540.

³ Securities Exchange Act Release No. 40363 (August 25, 1998), 63 FR 46263.

⁴ 15 U.S.C. 78q-1(b)(3)(F).

⁵ 15 U.S.C. 78s(b)(2).

⁶ 17 CFR 200.30-3(a)(12).

Form No: 480.

Description of Respondents: Small Businesses Requesting Size Determinations.

Annual Responses: 4,200.

Annual Burden: 700.

Title: "Stockholders confirmation."

Form No: 1405.

Description of Respondents: New Licensees.

Annual Responses: 300.

Annual Burden: 50.

Form No's: 415, 415A.

Description of Respondents: Applicants for Small Business Investment Company Licenses.

Annual Responses: 3,260.

Annual Burden: 2,320.

Comments: Send all comments regarding these information collections to Cathy Fields, Program Analyst, Office of SBIC Examinations, Small Business Administration, 409 3rd Street SW, Suite 6300, Washington, DC 20416. Phone No: 202-205-6512. Send comments regarding whether these information collections are necessary for the proper performance of the function of the agency, accuracy of burden estimate, in addition to ways to minimize these estimates, and ways to enhance the quality.

Title: "Application for Small Business Size Determination."

Form No: 355.

Description of Respondents: Small Businesses requesting an SBA size status determination.

Annual Responses: 4,125.

Annual Burden: 16,500.

Title: "Application for Certificate of Competency."

Form No: 1531.

Description of Respondents: Small Business Owners.

Annual Responses: 1,000.

Annual Burden: 8,000.

Comments: Send all comments regarding these information collections to Susan Monge, Procurement Analyst, Office of Government Contracting, Small Business Administration, 409 3rd Street SW, Suite 8800, Washington, DC 20416. Phone No: 202-205-6460. Send comments regarding whether these information collections are necessary for the proper performance of the function of the agency, accuracy of burden estimate, in addition to ways to minimize these estimates, and ways to enhance the quality.

Title: "Disaster Loan Authorization and Agreement (Including Borrower's Progress Certification)."

Form No's: 1366, 1391.

Description of Respondents: Recipients of SBA Disaster Loans.

Annual Responses: 74,142.

Annual Burden: 181,873.

Comments: Send all comments regarding this information collection to Bridget Dusenbury, Administrative Officer, Office of Disaster Assistance, Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416. Phone No: 202-205-6734. Send comments regarding whether this information collection is necessary for the proper performance of the function of the agency, accuracy of burden estimate, in addition to ways to minimize this estimate, and ways to enhance the quality.

Title: "Management Training Report."

Form No: 888.

Description of Respondents: Attendees at SBA sponsored training.

Annual Responses: 22,700.

Annual Burden: 3,768.

Comments: Send all comments regarding this information collection to Janet Moorman, Business Development Specialist, Office of Business Initiatives, Small Business Administration, 409 3rd Street SW, Suite 6100, Washington, DC 20416. Phone No: 202-205-6419.

Send comments regarding whether this information collection is necessary for the proper performance of the function of the agency, accuracy of burden estimate, in addition to ways to minimize this estimate, and ways to enhance the quality.

Title: "Lender Field Visit Report."

Form No: 1183.

Description of Respondents: Small Businesses.

Annual Responses: 10,000.

Annual Burden: 10,000.

Comments: Send all comments regarding this information collection to Sandra Lee Johnston, Program Assistant, Office of Financial Assistance, Small Business Administration, 409 3rd Street SW, Suite 8300, Washington, DC 20416. Phone No: 202-205-7528.

Send comments regarding whether this information collection is necessary for the proper performance of the function of the agency, accuracy of burden estimate, in addition to ways to minimize this estimate, and ways to enhance the quality.

Title: "SBDC Program and Financial Reports."

Form No: N/A.

Description of Respondents: SBDC Director's.

Annual Responses: 348.

Annual Burden: 9,000.

Comments: Send all comments regarding this information collection to Joan Bready, Business Development Specialist, Office of Small Business Development Centers, Small Business Administration, 409 3rd Street SW,

Suite 4600, Washington, DC 20416.

Phone No: 202-205-7384.

Send comments regarding whether this information collection is necessary for the proper performance of the function of the agency, accuracy of burden estimate, in addition to ways to minimize this estimate, and ways to enhance the quality.

Title: "Surety Guarantee Graduation Questionnaire."

Form No: 1972.

Description of Respondents: Surety Companies participating in SBA's Surety Bond Guarantee Program.

Annual Responses: 29.

Annual Burden: 3.

Title: "Survey of Loss and Recovery Information."

Form No: 1973.

Description of Respondents: Surety Companies participating in SBA's Surety Bond Guarantee Program.

Annual Responses: 29.

Annual Burden: 3.

Comments: Send all comments regarding these information collections to Dillar Barnes, Surety Bond Specialist, Office of Surety Guarantees, Small Business Administration, 409 3rd Street SW, Suite 8600, Washington, DC 20416. Phone No: 202-205-7610.

Send comments regarding whether these information collections are necessary for the proper performance of the function of the agency, accuracy of burden estimate, in addition to ways to minimize these estimates, and ways to enhance the quality.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 99-18636 Filed 7-20-99; 8:45 am]

BILLING CODE 8025-01-P

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: Notice of reporting requirements submitted for OMB review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made such a submission.

DATES: Submit comments on or before August 20, 1999. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

COPIES: Request for clearance (OMB 83-1), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer.

ADDRESSES: Address all comments concerning this notice to: Agency Clearance Officer, Jacqueline White, Small Business Administration, 409 3rd Street, SW, 5th Floor, Washington, DC 20416; and OMB Reviewer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Jacqueline White, Agency Clearance Officer, (202) 205-7044.

SUPPLEMENTARY INFORMATION:

Title: Nomination for the Small Business Prime Contract & Contractor & Nomination for the Small Business Subcontractor of the year award.

Form No's: 883 and 1375.

Frequency: On Occasion.

Description of Respondents: Prime Contractor, Subcontractor.

Annual Responses: 469.

Annual Burden: 1,876.

Title: PRO-NET.

Form No: 1167.

Frequency: On Occasion.

Description of Respondents: Small Disadvantaged Businesses.

Annual Responses: 200,000.

Annual Burden: 50,000.

Dated: July 14, 1999.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 99-18637 Filed 7-20-99; 8:45 am]

BILLING CODE 8025-01-P

DEPARTMENT OF STATE

[Public Notice 3097]

FY 1999 Funding Under the Research and Training for Eastern Europe and the Independent States of the Former Soviet Union Act of 1983

On April 27, 1999, Secretary of State Madeleine Albright approved the recommendations of the Advisory Committee for the Study of Eastern Europe and the Independent States of the Former Soviet Union. The Title VIII program, administered by the Department of State, seeks to build expertise among Americans on Russia, Eurasia, and Eastern Europe through support for advanced research, language training, and other activities both in the U.S. and in the region. FY 1999 grant recipients are listed below.

1. American Council of Learned Societies

Grant: \$390,000 (EE).

Purpose: To support language programs, dissertation fellowships, advanced graduate fellowships, the Junior Scholars Training Seminar, post-doctoral fellowships, and pre-dissertation travel grants.

Contact: Jason Parker, Executive Associate, American Council of Learned Societies, 228 East 45th Street, New York, NY 10017-3398, (212) 697-1505 (ext. 134/135), Fax (212) 949-8058 e-mail: Jason@ACLS.Org.

2. American Council of Teachers of Russian/American Council for Collaboration in Education and Language Studies

Grant: \$430,000 (\$355,000-NIS, \$75,000-EE).

Purpose: To support advanced Russian Language and Area Studies, Languages of the NIS program, Central and East European languages and research, the Special Research Initiative, the Combined Language and Research Program, Junior Faculty Research Program, and Policy Forums.

Contact: Mary Petruszewicz, ACTR, 1776 Massachusetts Avenue, NW, Suite 700, Washington, DC 20036, (202) 833-7522, Fax (202) 833-7523, e-mail: Petruszewicz@ACTR.Org.

3. University of Illinois at Urbana-Champaign

Grant: \$125,000 (\$95,000-NIS; \$30,000-EE).

Purpose: To support the Summer Research Laboratory, which provides dormitory housing and access to the University's library for advanced research, and the Slavic Reference Service, which locates materials unavailable through regular interlibrary loan.

Contact: Dianne Merridith, Program Administrator, Russian and East European Center, University of Illinois at Urbana-Champaign, 104 International Studies Building, 910 South Fifth Street, Champaign, IL 61820, (217) 333-1244, Fax (217) 333-1582, e-mail: DianneM@UIUC.EDU

4. Institute of International Education

Grant: \$120,000 (\$70,000-NIS, \$50,000-EE)

Purpose: To support Professional Development Fellowships for young professionals in fields related to public service and civil policy in the NIS and Eastern Europe.

Contact: Andrew Small, Institute of International Education, U.S. Student Program Division, 809 United Nations Plaza, New York, NY 10017-3580, (212)

883-8200, Fax (212) 984-5325, e-mail: ASmall@IIE.Org

5. International Research and Exchanges Board

Grant: \$840,000 (\$530,000-NIS; \$310,000-EE).

Purpose: To support its programs for Individual Advanced Research Opportunities; Short-term Travel Grants; Dissemination, and Policy Forums.

Contact: McKinney Russell, IREX, 1616 H Street, NW, Washington, DC 20006, (202) 628-8188, Fax (202) 628-8189, e-mail: MRussell@IREX.Org

6. National Academy of Sciences

Grant: \$70,000 (\$40,000-NIS, \$30,000-EE).

Purpose: To support a Governance Program with a strong focus on "Technology and Industrial Economics."

Contact: Steven Deets, Office for Central Europe and Eurasia, National Academy of Sciences/National Research Council, 2101 Constitution Avenue, NW, (FO 2014), Washington, DC 20418, (202) 334-2644, Fax (202) 334-2614, e-mail: SDeets@NAS.EDU

7. National Council for Eurasian and East European Research

Grant: \$1,300,000 (\$990,000-NIS; \$310,000-EE).

Purpose: To support the Research Contract and Fellowship Grant Programs for postdoctoral research, Policy Research Fellowships in the NIS and East Europe, and the Ed. A. Hewitt Fellowship Program to allow a scholar to work on a research project for a year while serving in a USG agency.

Contact: Robert Huber, President, NCEEER, 1755 Massachusetts Avenue, NW, Suite 304, Washington, DC 20036, (202) 822-6950, Fax (202) 822-6955, e-mail: NCEEER@IX.Netcom.Com

8. Social Science Research Council

Grant: \$765,000 (\$745,000-NIS, \$20,000-EE).

Purpose: To support dissertation fellowships, advanced graduate fellowships, US-based language training, and postdoctoral fellowships.

Contact: Judith Sedaitis, Staff Associate, Social Science Research Council, 810 7th Avenue, New York, NY 10019, (212) 377-2700, Fax (212) 377-2727, e-mail: Sedaitis@SSRC.Org

9. The Woodrow Wilson Center for International Scholars

Grant: \$735,000 (\$470,000-NIS; \$265,000-EE).

Purpose: To support research and short-term scholar programs,

internships, meetings, outreach publications, and the East European Junior Scholars Training Program.

Contact: Nancy Popson, Program Associate, Kennan Institute, (202) 691-4243, Fax (202) 691-4247, e-mail: Popsonna@WWIC.SI.Edu or

Martin Sletzing, Program Associate, East European Studies, East and West European Program, The Wilson Center, One Woodrow Wilson Plaza, 1300 Pennsylvania Ave., NW, Washington, DC 20004-3027, (202) 691-4263, Fax (202) 691-4247, e-mail: EES-WWC@erols.com

Dated: July 16, 1999.

Kenneth E. Roberts,

Executive Director, Advisory Committee for Study of Eastern Europe and the Independent States of the Former Soviet Union.

[FR Doc. 99-18620 Filed 7-20-99; 8:45 am]

BILLING CODE 4710-32-P

DEPARTMENT OF STATE

[Public Notice No. 3080]

Shipping Coordinating Committee, Subcommittee for the Facilitation of International Maritime Traffic; Notice of Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 9:30 AM on Wednesday, August 18, 1999, in room 6319 at U.S. Coast Guard Headquarters, 2100 Second Street, SW, Washington, DC 20593-0001. The purpose of the meeting is to finalize preparations for the 27th session of the Facilitation Committee of the International Maritime Organization (IMO), which is scheduled for 6-10 September, 1999, at the IMO Headquarters in London. Discussions will focus on papers received and draft U.S. positions.

Among other things, the items of particular interest are:

- Convention on Facilitation of International Maritime Traffic
- Consideration and Adoption of Proposed Amendments to the Annex to the Convention
- EDI Messages for the Clearance of Ships
- Application of the Committee's Guidelines
- General Review of the Convention
- Formalities Connected with the Arrival, Stay and Departure of Ships
- Formalities Related to Cargo—Facilitation Aspects of the Multimodal Transport of Dangerous Goods
- Formalities Connected with the Arrival, Stay and Departure of Persons—Stowaways

- Facilitation Aspects of Other IMO Forms and Certificates-Harmonized Reporting Format
- Ship-Port Interface
- Technical Co-Operation Sub-Programme for Facilitation

Members of the public may attend this meeting up to the seating capacity of the room. Interested persons may seek information by writing: Chief, Office of Standards Evaluation and Development, U.S. Coast Guard Headquarters, Commandant (G-MSR), Room 1400, 2100 Second Street, SW, Washington, DC 20593-0001 or by calling Mr. David A. Du Pont at: (202) 267-0971.

Dated: July 14, 1999.

Stephen M. Miller,

Executive Secretary, Shipping Coordinating Committee.

[FR Doc. 99-18618 Filed 7-20-99; 8:45 am]

BILLING CODE 4710-7-P

DEPARTMENT OF STATE

[Public Notice No. 3081]

Shipping Coordinating Committee, Subcommittee on Safety of Life at Sea, Working Group on Safety of Navigation; Notice of Meeting

The Working Group on Safety of Navigation of the Subcommittee on Safety of Life at Sea (SOLAS) will conduct an open meeting at 9:30 AM on Thursday, August 12, 1999, in room 6103 U.S. Coast Guard Headquarters, 2100 Second Street, SW, Washington, DC.

The purpose of the meeting is to prepare for the 45th session of the Subcommittee on Safety of Navigation (NAV) of the International Maritime Organization (IMO) which is scheduled for September 20-24, 1999, at the IMO Headquarters in London.

Items of principal interest on the agenda are:

- Routing of ships, ship reporting, and related matters
 - Amendments to the International Regulations for Prevention of Collisions at Sea, 1972 (72 COLREGS)
 - Revision of SOLAS chapter V
 - Ergonomic criteria for bridge equipment and layout
 - Navigational aids and related matters
 - International Telecommunication Union (ITU) matters including Radiocommunication ITU-R Study Group 8
 - Training and certification of maritime pilots and revision of resolution A.485(XII)
 - Safety of passenger submersible craft
- Members of the public may attend these meetings up to the seating

capacity of the room. Interested persons may seek information by writing: Mr. Edward J. LaRue, Jr., U.S. Coast Guard (G-MOV-3), Room 1407, 2100 Second Street SW, Washington, DC 20593-0001 or by calling: (202) 267-0416.

Dated: July 14, 1999.

Stephen M. Miller,

Executive Secretary, Shipping Coordinating Committee.

[FR Doc. 99-18619 Filed 7-20-99; 8:45 am]

BILLING CODE 4710-7-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Safety Performance Standards Program Meeting

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of NHTSA Rulemaking Status Meeting.

SUMMARY: This notice announces a public meeting at which NHTSA will answer questions from the public and the automobile industry regarding the agency's vehicle regulatory program. **DATES:** The Agency's regular, quarterly public meeting relating to its vehicle regulatory program will be held on Thursday, September 16, 1999, beginning at 9:45 a.m. and ending at approximately 12:00 p.m., at the Tysons Westpark Hotel, McLean, VA. Questions relating to the vehicle regulatory program must be submitted in writing with a diskette (Wordperfect) by Thursday, August 19, 1999, to the address shown below or by e-mail. If sufficient time is available, questions received after August 19 may be answered at the meeting. The individual, group or company submitting a question(s) does not have to be present for the question(s) to be answered. A consolidated list of the questions submitted by August 19, 1999, and the issues to be discussed, will be posted on NHTSA's web site (www.nhtsa.dot.gov) by Monday, September 13, 1999, and also will be available at the meeting. The regulatory program meeting will take place on Thursday, December 16, 1999 at the Clarion Hotel, Romulus, MI.

ADDRESSES: Questions for the September 16, NHTSA Rulemaking Status Meeting, relating to the agency's vehicle regulatory program, should be submitted to Delia Lopez, NPS-01, National Highway Traffic Safety Administration, Room 5401, 400 Seventh Street, SW., Washington, DC

20590, Fax Number 202-366-4329, e-mail dlopez@nhtsa.dot.gov. The meeting will be held at the Tysons Westpark Hotel, 8401 Westpark Drive, McLean, VA.

FOR FURTHER INFORMATION CONTACT:
Delia Lopez, (202) 366-1810.

SUPPLEMENTARY INFORMATION: NHTSA holds a regular, quarterly meeting to answer questions from the public and the regulated industries regarding the agency's vehicle regulatory program. Questions on aspects of the agency's research and development activities that relate directly to ongoing regulatory actions should be submitted, as in the past, to the agency's Safety Performance Standards Office. The purpose of this meeting is to focus on those phases of NHTSA activities which are technical, interpretative or procedural in nature. Transcripts of these meetings will be available for public inspection in the DOT Docket in Washington, DC, within four weeks after the meeting. Copies of the transcripts will then be available at ten cents a page, (length has varied from 80 to 150 pages) upon request to DOT Docket, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590. The DOT Docket is open to the public room 10:00 a.m. to 5:00 p.m. The transcript may be also accessed electronically at <http://dms.dot.gov> at docket NHTSA-1999-5087. Questions to be answered at the quarterly meeting should be organized by categories to help us process the questions into an agenda form more efficiently. Sample format:

- I. Rulemaking
 - A. Crash avoidance
 - B. Crashworthiness
 - C. Other Rulemakings
- II. Consumer Information
- III. Miscellaneous

NHTSA will provide auxiliary aids to participants as necessary. Any person desiring assistance of "auxiliary aids" (e.g., sign-language interpreter, telecommunications devices for deaf persons (TDDs), readers, taped texts, brailled materials, or large print materials and/or a magnifying device), please contact Delia Lopez on (202) 366-1810, by COB September 13, 1999.

Issued: July 15, 1999.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

[FR Doc. 99-18644 Filed 7-20-99; 8:45 am]

BILLING CODE 4910-59-M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33781]

The Indiana & Ohio Rail Passenger Corp.—Trackage Rights Exemption—Indiana & Ohio Rail Corp. and The Central Railroad Company of Indiana

Indiana & Ohio Rail Corp. (I&O) and The Central Railroad Company of Indiana (CIND) have agreed to grant local trackage rights¹ to The Indiana & Ohio Rail Passenger Corp. (IORP) for the operation of rail passenger service from Cincinnati, OH, at M.P. 0.0, to M.P. 81.0, near Shelbyville, IN, a distance of 81.0 miles. This transaction is expected to be consummated on or after July 23, 1999.

The purpose of the trackage rights is to permit IORP to conduct rail passenger operations over the lines of CIND and I&O.

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Because this transaction involves Class III rail carriers only, the Board, under the statute, may not impose labor protective conditions for this transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33781, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW, Washington, DC 20423-0001. In addition, one copy of each pleading must be served on Robert L. Calhoun, Esq., Redmon, Boykin & Braswell, L.L.P. 510 King Street, Suite 301, Alexandria, VA 22314.

¹ The trackage rights agreement filed in STB Finance Docket No. 33781 is a confirmation of and an amendment to an earlier trackage rights agreement, dated June 4, 1996, between the IORP and certain other Class III carriers. See *The Indiana & Ohio Rail Passenger Corporation—Acquisition by Trackage Rights and Operation Exemption—Cincinnati Terminal Railway Corp., Indiana and Ohio Railroad Company, Indiana & Ohio Railway Company, Inc., and Indiana & Ohio Central Railroad Company, Inc.*, STB Finance Docket No. 32976 (STB served June 21, 1996).

Board decisions and notices are available on our website at "WWW.STB.DOT.GOV."

Decided: July 13, 1999.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 99-18331 Filed 7-20-99; 8:45 am]

BILLING CODE 4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33778]

Louisville & Indiana Railroad Company—Trackage Rights Exemption—New York Central Lines, LLC and CSX Transportation, Inc.¹

New York Central Lines, LLC (NYC), as owner, and CSX Transportation, Inc. (CSXT), as operator, have agreed to grant overhead trackage rights to Louisville & Indiana Railroad Company (L&I) as follows: (1) Approximately 5.5 miles over NYC main line, former Consolidated Rail Corporation (CRC) Louisville Secondary, (a) from the connection between NYC and L&I milepost 4.0 +/- at Indianapolis, IN, and the connection in the southeast quadrant of the former Indianapolis Union Belt running track (former Indiana Union Belt Railroad) milepost 6.0 +/- known as Dale, a distance of approximately 2.7 miles; and (b) from this connection in the southeast quadrant of running track in the vicinity of the former Indianapolis Union Belt Railroad milepost 6.0 +/- and the entrance to Hawthorne Yard at or near milepost 8.8 +/-, a distance of approximately 2.8 miles; and (2) approximately 7.8 miles over NYC main line, former CRC Louisville Secondary, (a) from the connection between NYC

¹ By decision served July 23, 1998, the Board approved, subject to certain conditions, the acquisition of control of Conrail, and the division of the assets thereof, by CSX Corporation and CSX Transportation, Inc. (referred to collectively as CSX) and Norfolk Southern Corporation and Norfolk Southern Railway Company (referred to collectively as NS). See *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388, Decision No. 89 (STB served July 23, 1998). Acquisition of control of Conrail was effected by CSX and NS on August 22, 1998. The division of the assets of Conrail was effected by CSX and NS on June 1, 1999. See *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388, Decision No. 127 (STB served May 20, 1999).

and L&I milepost 4.0 +/- at Indianapolis, IN, and the connection in the northeast quadrant of former CRC Indianapolis Line milepost 283.7 +/-, a distance of approximately 4 miles; (b) from this connection milepost 283.7 +/- of the former Indianapolis Line and milepost 283.1

+/- of the former CRC Indianapolis Line, a distance of approximately 0.6 miles; (c) from CRC Indianapolis Line milepost 283.1

+/- connection to milepost 109.3 +/- of the former CRC Shelbyville Secondary and from this connection in the former CRC Shelbyville Secondary milepost 109.3 +/- and CRC Shelbyville Secondary milepost 106.9 +/-, a distance of approximately 2.4 miles; and (d) from CRC Shelbyville Secondary milepost 106.9 +/- connection to former Indianapolis Union Belt running track milepost 8 +/- in the southeast quadrant and from this connection to former Indianapolis Union Belt running track milepost 8 +/- and the entrance to Hawthorne Yard in the northeast quadrant at or near milepost 8.8 +/- of the Indianapolis Union Belt running track, a distance of approximately 0.8 miles.²

The transaction was scheduled to be consummated on or after July 8, 1999, the effective date of the exemption.

The purpose of the trackage rights is to permit L&I to interchange certain traffic with the Norfolk Southern Railway Company at Hawthorne Yard, thereby promoting operating efficiencies.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33778, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 123 K Street, NW, Washington, DC 20423-0001. In addition, one copy of each

pleading must be served on Rose-Michele Weinryb, Esq., Weiner, Brodsky, Sidman & Kider, P.C., 1350 New York Avenue, NW, Suite 800, Washington, DC 20005-4797.

Board decisions and notices are available on our website at "WWW.STB.DOT.GOV."

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 99-18330 Filed 7-20-99; 8:45 am]

BILLING CODE 4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33776]

Delaware and Hudson Railway Company, Inc.—Trackage Rights Exemption—New York State Department of Transportation

New York State Department of Transportation has agreed to grant full service trackage rights to Delaware and Hudson Railway Company, Inc. (D&H), over the South Bronx Oak Point Link, which is approximately 10,000 feet of railroad track from 800 feet north of the north end of the track support structure south to Harlem River Yard, then east 6,000 feet along an easement through the Harlem River Yard to the northeastern end of the easement at the Harlem River Yard property line at East 132nd Street between Walnut and Willow Streets.¹ According to applicants, the notice of exemption in STB Finance Docket No. 33776 is filed in connection with Surface Transportation Board Decision Nos. 109 and 123 in STB Finance Docket No. 33388 (Sub-No. 69).²

¹ In *Delaware and Hudson Railway Company, Inc.—Trackage Rights Exemption—CSX Transportation, Inc. and New York Central Lines LLC*, STB Finance Docket No. 33771 (STB served July 8, 1999), D&H acquired overhead trackage rights from CSX Transportation, Inc. and New York Central Lines LLC, over lines generally between Schenectady, NY, and Fresh Pond Junction, NY. The scope of these rights and their terms were established by the Board in *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388, Decision Nos. 89, 109, and 123 (STB served July 23, 1998, December 18, 1998, and May 20, 1999, respectively).

² The responsive application filed jointly by the State of New York, acting by and through its Department of Transportation, and the New York City Economic Development Corporation, acting on behalf of the City of New York, in connection with the railroad control application in STB Finance Docket No. 33388, was docketed as STB Finance Docket No. 33388 (Sub-No. 69).

The transaction was scheduled to be consummated on or after July 8, 1999, the effective date of the exemption.

The purpose of the trackage rights is to enhance rail competition for movements of traffic on the east side of the Hudson River.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If it contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33776, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 123 K Street, NW, Washington, DC 20423-0001. In addition, one copy of each pleading must be served on Eric von Salzen, Hogan & Hartson L.L.P., 555 Thirteenth Street, NW, Washington, DC 20004-1109.

Board decisions and notices are available on our website at "WWW.STB.DOT.GOV."

By the Board, David M. Konschnik, Director, Office of Proceedings.

Decided: July 14, 1999.

Vernon A. Williams,

Secretary.

[FR Doc. 99-18504 Filed 7-20-99; 8:45 am]

BILLING CODE 4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB-227 (Sub-No. 9X)]

Wheeling and Lake Erie Railway Company—Abandonment Exemption—in Harrison and Jefferson Counties, OH

On July 1, 1999, Wheeling & Lake Erie Railway Company (W&LE) 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 to abandon its line of railroad known as the Valley Line extending from milepost 188.5 near Unionvale to milepost 205.54 near Warrenton, a distance of approximately 18 miles in Jefferson and Harrison Counties, OH. The line traverses U.S.

² A redacted version of the Trackage Rights Agreement among L&I, NYC, and CSXT was filed with the notice of exemption. The full version of the agreement was concurrently filed under seal, along with a motion for a protective order which was granted in a separate decision.

Postal Service ZIP Codes 43901, 43907, 43917, and 43943, and includes the stations of East Cadiz (milepost 185), Kenwood (milepost 189), Adena (milepost 192), Dillonvale (milepost 199.9), and Warrenton (milepost 204).

The line does not contain federally granted rights-of-way. Any documentation in W&LE's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

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 October 19, 1999.

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 offer must be accompanied by a \$1,000 filing fee. See 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than August 10, 1999. 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-227 (Sub-No. 9X) 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) Christopher E.V. Quinn, Two Prudential Plaza, 45th Floor, 180 North Stetson Avenue, Chicago, IL 60601. Replies to the W&LE petition are due on or before August 10, 1999.

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."

By the Board, David M. Konschnik,
Director, Office of Proceedings.

Decided: July 14, 1999.

Vernon A. Williams,
Secretary.

[FR Doc. 99-18505 Filed 7-20-99; 8:45 am]

BILLING CODE 4915-00-P

DEPARTMENT OF THE TREASURY

Customs Service

Modification of National Customs Automation Program Test Regarding Reconciliation

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: On February 6, 1998 and August 18, 1998, general notice documents were published in the **Federal Register** regarding the Customs Automated Commercial System (ACS) Reconciliation Prototype test. These documents announced, explained, and modified the prototype test. This notice serves to notify interested parties of two additional modifications to the prototype. The first allows downward adjustments on Aggregate Reconciliations, subject to certain conditions, and the second authorizes the use of a midpoint interest calculation method for Aggregate Reconciliations. All other aspects of the prototype remain the same.

EFFECTIVE DATES: The prototype testing period started on October 1, 1998. It will run for approximately two years from that date and may be extended. Applications to participate in the prototype will be accepted throughout the duration of the prototype. The effective date for use of the downward adjustment reporting option for Aggregate Reconciliations is July 21, 1999. Prototype participants may use that option for Aggregate Reconciliations filed on or after that date. The effective date for use of the midpoint interest calculation method is July 25, 1999. Prototype participants will use that method for Aggregate Reconciliations filed on or after that date.

ADDRESSES: Written inquiries regarding participation in the prototype test should be addressed to Ms. Shari McCann, Reconciliation Team, U.S. Customs Service, 1300 Pennsylvania Ave. NW, Mailstop 5.2A, Washington, DC, 20229-0001.

FOR FURTHER INFORMATION CONTACT: Mr. Don Luther at (202) 927-0915 or Ms. Shari McCann at (202) 927-1106.

SUPPLEMENTARY INFORMATION:

Background

Reconciliation is the process which allows an importer, at the time of entry summary, to identify undeterminable information (other than that affecting admissibility) to Customs and provide that outstanding information at a later date. Reconciliation, a planned component of the National Customs Automation Program (NCAP), as provided for in Title VI (Subtitle B) of the North American Free Trade Agreement Implementation Act (the NAFTA Implementation Act; Pub. L. 103-182, 107 Stat. 2057 (December 8, 1993)), is currently being tested by Customs under the Customs Automated Commercial System (ACS) Prototype test.

Customs announced and explained the ACS Prototype test of reconciliation in a general notice document published in the **Federal Register** (63 FR 6257) on February 6, 1998. A notice published in the **Federal Register** (63 FR 44303) on August 18, 1998, announced clarifications and operational changes. This notice modifies the test by providing a downward adjustment option and a midpoint interest calculation method for Aggregate Reconciliations. Except for these particular modifications, all other aspects of the test remain the same.

The downward adjustment modification is an enhancement to the prototype test. The midpoint interest modification is authorized under the Miscellaneous Trade and Technical Corrections Act of 1999 (Pub. L. 106-36 (June 25, 1999)), which amended 19 U.S.C. 1505(c) (see section further below pertaining to the midpoint interest calculation method). Prototype participants should note that these modifications have different effective dates (see "Effective Dates" section) and both apply only to Aggregate Reconciliations. The Entry-by-Entry Reconciliation aspect of the prototype remains unchanged.

Aggregate Reconciliation for Decrease in Duties, Taxes, and Fees

As set forth in the **Federal Register** notice published on February 6, 1998

(63 FR 6257), there are two types of Reconciliations that may be filed:

(1) Entry-by-Entry Reconciliations, where adjustments for duties, taxes, and fees are shown for every entry being reconciled. Such Reconciliations may be used to report increases, decreases, or no change to the duties, taxes, and fees determined on the underlying entry summary (ies); and

(2) Aggregate Reconciliations for reporting absolute increases in duties, taxes, and fees, where reconciled adjustments are shown on an aggregate basis, rather than on an entry-by-entry basis.

The same **Federal Register** notice (63 FR 6257) described the term "absolute increase" to encompass only entry summaries that result in either an increase or no change in duties, taxes, and fees. Thus, prior to publication of this notice, only increases and no changes have been eligible for Aggregate Reconciliations.

In this notice, Customs announces an enhancement to the Aggregate Reconciliation option that has the effect of altering this limitation. Upon publication of this notice, participants in the prototype may now also use the Aggregate Reconciliation to report changes resulting in a decrease in duties, taxes, and fees (referred to as downward adjustments), provided that the participant waives any claim for a refund (of duties, taxes, and fees) and releases Customs from any such liability.

While upward and downward adjustments will be allowed on a single Aggregate Reconciliation, they will be reported in separate sections of the line

item data spreadsheet. Importers and other interested parties must be aware that the prohibition against netting remains in effect: decreases may NOT be netted against increases. For example, if a given product has two value issues, one resulting in an increase in value (and corresponding duties) and one resulting in a decrease in value (and corresponding duties), these two adjustments may not be offset against each other and reported as one line on the spreadsheet. They must be reported in separate sections of the spreadsheet, the increase adjustment as an increase for which additional duties will be tendered upon filing the Reconciliation and the downward adjustment as a decrease for which a refund is waived.

Downward adjustments, while reported on the spreadsheet, will not be reported on the Aggregate Reconciliation Header File in ACS. The Header File will be prepared without regard to decrease items, reflecting only increases in duties, taxes, and fees. In the event there are only decreases on the Aggregate Reconciliation, the Header File will be prepared as if the Reconciliation resulted in no change in duties, taxes, and fees.

Aggregate Reconciliations showing a decrease in duties, taxes, and fees will be liquidated as appropriate but without refund or reduction in duties, taxes, and fees otherwise due, since participants waive all claims for refunds due to downward adjustments.

The following certification must be included in the line item data spreadsheet of all Aggregate Reconciliations that report decreases. It contains the waiver, the release from

liability, and a pledge that the changes reported do not reflect netting:

The tariff items shown below are items for which the reconciliation adjustment resulted in a decrease in duties, taxes, and/or fees. On this Aggregate Reconciliation, we hereby declare these changes and acknowledge that we waive any claims for a refund of any monies due us as a result of these changes, release Customs of any liability for the refund, and certify that the changes shown below are not included elsewhere in the Reconciliation or netted against increases.

This certification must appear immediately before the listing of tariff items for which decreases are reported. It will separate the sections of the data spreadsheet, with absolute increases listed above and decreases listed below (see sample spreadsheet further below, showing increases, decreases, and the required certification).

The downward adjustment modification described above serves only to add another voluntary option for importers participating in the prototype test. It does not remove any other options. Importers wishing to obtain refunds for monies due them pursuant to reconciled information (downward adjustments that result in monies owed to the importer) may still do so via the Entry-by-Entry Reconciliation method.

Sample Spreadsheet

Below is an example of an Aggregate Reconciliation spreadsheet where increases and decreases are reported in separate sections. The downward adjustments are reported but not calculated in the Reconciliation Adjustment.

BILLING CODE 4820-02-P

DURANT MOTOR CORP. — RECONCILIATION DETAILS																
PERIOD: 10/1/1999 THRU 3/31/2000																
Rec.Line	Cal Year	Reason	Port	Origin	Original SPI	Rec. SPI	HTS	Original Quant.	Rec. Quant.	Original Value	Reconciled Value	Change in Value	Duty	Duty Change*	MPF	HMT
1	1999	Value		JP			4011101000			\$16,300,451	\$16,544,958	\$244,507	4.00%	\$9,780.28	\$513.46	\$305.63
2	2000	Value		JP			4011101000			\$5,751,916	\$5,838,195	\$86,279	4.00%	\$3,451.16	\$181.19	\$107.85
3	1999	Value		MX	MX	MX	5704900090			\$685,231	\$721,548	\$36,317	2.60%	\$944.24	\$61.74	\$0.00
4	2000	Value		MX	MX	MX	5704900090			\$623,966	\$657,036	\$33,070	2.60%	\$859.82	\$56.22	\$0.00
5	1999	Value		KR			7007110010			\$3,201,101	\$4,601,298	\$1,400,197	5.60%	\$78,411.03	\$2,940.41	\$1,750.25
6	2000	Value		KR			7007110010			\$2,604,538	\$3,015,562	\$411,024	5.60%	\$23,017.34	\$863.15	\$513.78
RECONCILIATION ADJUSTMENT														\$116,463.88	\$4,616.17	\$2,677.51
The tariff items shown below are items for which the reconciliation adjustment resulted in a decrease in duties, taxes and/or fees. On this Aggregate Reconciliation, we hereby declare these changes, and acknowledge that we waive any claims for a refund of any monies due us as a result of these changes, release Customs of any liability for the refund, and certify that the changes shown below are not included elsewhere in the Reconciliation or netted against increases.																
7	1999	Value		IT			8421905050			\$382,904	\$365,109	(\$17,795)				
8	2000	Value		TH			9018651021			\$104,926	\$99,423	(\$5,503)				

BILLING CODE 4820-02-C

Midpoint Interest Calculation for Aggregate Reconciliations

Section 1505(c) of Title 19, United States Code, provides for the accrual of interest on underpayments and excess deposits applicable to ordinary entries and Reconciliations (19 U.S.C. 1505(c)). Under the statute, interest accrues for underpayments of duties, fees, and interest from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the entry or Reconciliation. Interest accrues on excess deposits from the date the importer of record deposits estimated duties, fees, and interest to the date of liquidation or reliquidation of the entry or Reconciliation. Thus, under the prototype test, interest accrues on all Reconciliations where monetary adjustments take place, whether the adjustments are increases (Entry-by-Entry or Aggregate Reconciliations) or decreases (Entry-by-Entry Reconciliations) in duties, taxes, and fees. If interest is due to Customs, the filer will pay the interest, along with duties, taxes, and fees, upon filing the Reconciliation.

The previously mentioned **Federal Register** notice of August 18, 1998 (63 FR 44303) indicated that Customs was seeking a statutory amendment to 19

U.S.C. 1505(c) to authorize use of an alternative midpoint interest calculation method, an alternative to the entry-by-entry interest calculation method described in the previous paragraph. On June 25, 1999, the Miscellaneous Trade and Technical Corrections Act of 1999 was signed into law (the Act) (Pub. L. 106-36, 113 Stat. 127 (June 25, 1999)). Under section 2418(e) of the Act (Title II, Subtitle B), section 1505(c) was amended to authorize, for purposes of the prototype test, an alternative midpoint interest calculation method based upon aggregate data. This amendment predicates this modification of the prototype test.

Under the midpoint interest calculation method, interest is calculated on the entire amount of adjusted duties, taxes, and fees as if they had been due on the midpoint date of the period covered by the Reconciliation. For example, if an Aggregate Reconciliation covers January 1, 1999, through December 31, 1999, and results in \$20,000 in increased revenue due to Customs, the interest would be calculated on that amount from the midpoint date of July 1, 1999. Interest would accrue from the midpoint date until the date the Reconciliation is filed with payment. The midpoint interest method will be used for Aggregate Reconciliations filed on or

after July 25, 1999. Such Aggregate Reconciliations may cover underlying entries filed during the period from October 1, 1998, through October 1, 2000, or the end of the prototype, whichever occurs first.

Prototype participants are reminded that they have the option of filing either an Aggregate Reconciliation or an Entry-by-Entry Reconciliation. As above, the midpoint interest calculation method will be used for Aggregate Reconciliations, and the entry-by-entry interest calculation method will be used for Entry-by-Entry Reconciliations. Under the entry-by-entry method, interest is calculated based on the monetary changes and dates associated with each underlying entry summary.

Prototype participants also are reminded that where a refund is claimed (on Entry-by-Entry Reconciliations), no interest calculations are required of the filer. Customs will calculate the interest due on the refund using the entry-by-entry method of calculation. For NAFTA Reconciliations, interest runs from the date the Reconciliation is filed until the date the Reconciliation is liquidated by Customs.

Conclusion

Regarding the prototype test generally, interested parties should

consult the **Federal Register** notices of February 6, 1998 (63 FR 6257) and August 18, 1998 (63 FR 44303). All terms and conditions set forth in those notices remain in effect, except as specifically modified by this notice.

Dated: July 16, 1999.

Charles W. Winwood,

Assistant Commissioner, Office of Field Operations.

[FR Doc. 99-18560 Filed 7-20-99; 8:45 am]

BILLING CODE 4820-02-P

DEPARTMENT OF THE TREASURY

Customs Service

Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of Customs duties. Due to recent legislation, the interest rate applicable to overpayments by corporations is now different than the interest rate for overpayments by non-corporations. For the quarter beginning July 1, 1999, the interest rates for

overpayments will be 7 percent for corporations and 8 percent for non-corporations, and the interest rate for underpayments will be 8 percent. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: July 1, 1999.

FOR FURTHER INFORMATION CONTACT:

Ronald Wyman, Accounting Services Division, Accounts Receivable Group, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298-1200, extension 1349.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85-93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 was recently amended (at paragraph (a)(1)(B) by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105-206, 112 Stat. 685) to provide different interest rates applicable to overpayments: one for corporations and one for non-corporations. The interest rate applicable to underpayments is not so bifurcated.

The interest rates are based on the short-term Federal rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 99-27 (see, 1999-25 IRB 7, dated June 21, 1999), the IRS determined the rates of interest for the fourth quarter of fiscal year (FY) 1999 (the period of July 1—September 30, 1999). The interest rate paid to the Treasury for underpayments will be the short-term Federal rate (5%) plus three percentage points (3%) for a total of eight percent (8%). For corporate overpayments, the rate is the Federal short-term rate (5%) plus two percentage points (2%) for a total of seven percent (7%). For overpayments made by non-corporations, the rate is the Federal short-term rate (5%) plus three percentage points (3%) for a total of eight percent (8%). These interest rates are subject to change for the first quarter of FY-2000 (the period of October 1—December 31, 1999).

For the convenience of the importing public and Customs personnel the following list of Internal Revenue Service interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of Customs duties, is published in summary format.

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate Overpayments (Eff. 1-1-99) (percent)
Prior to 070174	063075	6	6	
070175	013176	9	9	
020176	013178	7	7	
020178	013180	6	6	
020180	013182	12	2	
020182	123182	20	20	
010183	063083	16	16	
070183	123184	11	11	
010185	063085	13	13	
070185	123185	11	11	
010186	063086	10	10	
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate Overpayments (Eff. 1-1-99) (percent)
040198	123198	8	7	
010199	033199	7	7	6
040199	093099	8	8	7

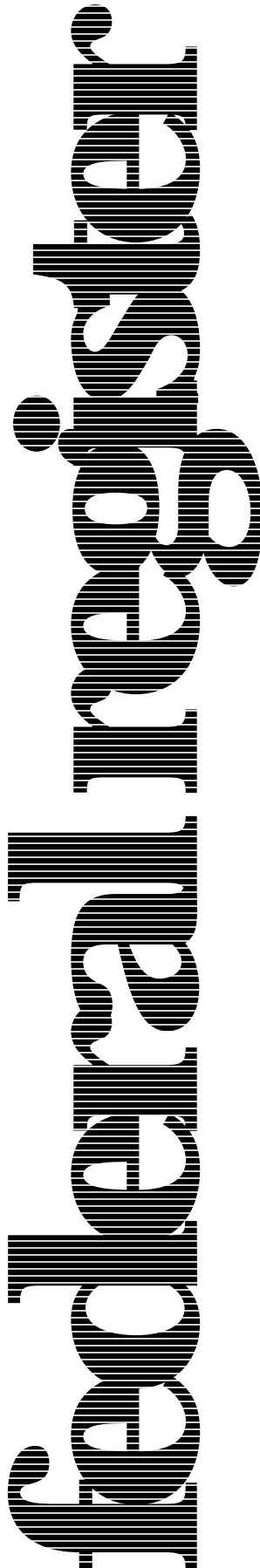
Dated: July 16, 1999.

Raymond W. Kelly.

Commissioner of Customs

[FR Doc. 99-18559 Filed 7-20-99; 8:45 am]

BILLING CODE 4820-02-P



Wednesday
July 21, 1999

Part II

Department of Commerce

Bureau of Export Administration

Department of State

Bureau of Arms Control

15 CFR Parts 710 Through 721 and 22
CFR Part 103

Regulations Implementing Provisions of
the Chemical Weapons Convention and
the Chemical Weapons Convention
Implementation Act of 1998 on the
Taking of Samples and on Enforcement
of Requirements Concerning Record
Keeping and Inspections; Proposed Rules

DEPARTMENT OF COMMERCE**Bureau of Export Administration****15 CFR Parts 710 Through 721**

[Docket No. 990611158-9158-01]

RIN 0694-AB06

Chemical Weapons Convention Regulations**AGENCY:** Bureau of Export Administration, Commerce.**ACTION:** Proposed rule; request for comments.

SUMMARY: On April 25, 1997, the United States ratified the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, also known as the Chemical Weapons Convention (CWC or Convention). The Bureau of Export Administration is proposing to establish the Chemical Weapons Convention Regulations (CWCR) to implement provisions of the Convention affecting U.S. industry and other U.S. persons. The proposed CWCR include requirements to report certain activities involving Scheduled chemicals and Unscheduled Discrete Organic Chemicals, and to provide access for on-site verification by international inspectors of certain facilities and locations in the United States.

DATES: Comments must be received by August 20, 1999.

ADDRESSES: Written comments should be sent to Nancy Crowe, Regulatory Policy Division, Office of Exporter Services, Bureau of Export Administration, Room 2705, 14th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20230.

FOR FURTHER INFORMATION CONTACT: For questions of a general or regulatory nature, contact Nancy Crowe, Regulatory Policy Division, telephone: (202) 482-2440 or e-mail: Ncrowe@BXA.DOC.GOV. For program information, contact Charles Guernieri, Director, Treaty Compliance Division, Office of Chemical and Biological Controls and Treaty Compliance, telephone: (202) 501-7876; for legal questions, contact Cecil Hunt, Deputy Chief Counsel, Office of the Chief Counsel for Export Administration, telephone (202) 482-5301.

SUPPLEMENTARY INFORMATION:**Background***Chemical Weapons Convention*

On April 25, 1997, the United States ratified the Convention on the

Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, also known as the Chemical Weapons Convention (CWC or Convention). The Convention, which entered into force on April 29, 1997, is an arms control treaty with significant non-proliferation aspects. As such, the Convention bans the development, production, stockpiling or use of chemical weapons and prohibits States Parties from assisting or encouraging anyone to engage in a prohibited activity. The Convention provides for declaration and inspection of all States Parties' chemical weapons and chemical weapon production facilities and oversees the destruction of such weapons and facilities.

To fulfill its arms control and non-proliferation objectives, the Convention also establishes a comprehensive verification scheme and requires the declaration and inspection of facilities that produce, process or consume certain listed or "Scheduled" chemicals, many of which have significant commercial applications. The Convention also requires States Parties to report imports and exports and to impose import and export restrictions on certain chemicals. These requirements apply to all entities under the jurisdiction and control of States Parties, including commercial entities and individuals. States Parties to the Convention, including the United States, have agreed to this verification scheme to provide transparency and to ensure that no State Party to the Convention is engaging in prohibited activities.

Specifically, the Convention requires States Parties to declare all facilities that produce Schedule 1 or Schedule 3 chemicals in quantities exceeding specified declaration thresholds, or that produce, process or consume Schedule 2 chemicals in quantities exceeding specified declaration thresholds. Schedule 1, 2 and 3 chemicals are set forth in the Convention's Schedules of Chemicals and have been selected for these Schedules based on degree of toxicity, history of use in chemical warfare and commercial utility. The Convention also requires States Parties to declare facilities that produce "Unscheduled Discrete Organic Chemicals" ("UDOCs") in quantities exceeding specified thresholds. The requirement to declare UDOC facilities is intended to identify facilities capable of producing chemical warfare agents or precursors.

Certain "declared" facilities will also be subject to routine on-site inspections by international inspectors from the

Convention's implementing body, the Organization for the Prohibition of Chemical Weapons (OPCW). All declared Schedule 1 facilities are subject to routine inspection. Declared Schedule 2 facilities are subject to inspection if they produce, process or consume Schedule 2 chemicals in quantities exceeding specified inspection thresholds. Declared Schedule 3 facilities are subject to inspection if they produce Schedule 3 chemicals in quantities exceeding a specified inspection threshold. Facilities producing UDOCs in quantities exceeding a specified threshold will be subject to inspection, beginning in 2001, unless the Conference of States Parties decides otherwise. With a few exceptions, inspection thresholds are higher than declaration thresholds.

The Convention also provides for challenge inspections of any facility or location under the jurisdiction of any State Party. Challenge inspections are intended to resolve questions of possible non-compliance with the Convention.

Finally, the Convention requires States Parties to provide data on imports and exports of Scheduled chemicals. States Parties must also, among other things, prohibit exports of Schedule 1 chemicals to non-States Parties, require advance notification of imports and exports of Schedule 1 chemicals, require End-Use Certificates for exports of Schedule 2 and 3 chemicals to non-States Parties, and ban the import from or export to non-States Parties of Schedule 2 chemicals after April 28, 2000.

Application of CWC Requirements to U.S. Commercial Entities and Individuals

The Chemical Weapons Convention Implementation Act of 1998 ("Act") (Pub. L. 105-277, Division I), enacted on October 21, 1998, authorizes the United States to require the U.S. chemical industry and other private entities to submit declarations, notifications and other reports and also to provide access for on-site inspections. Executive Order No. 13128, among other things, delegates authority to the Department of Commerce to promulgate regulations, obtain and execute warrants, provide assistance to certain facilities, and carry out appropriate functions to implement the Convention, consistent with the Act. The Department of Commerce will carry out CWC import restrictions under the authority of the International Emergency Economic Powers Act, the National Emergencies Act and Executive Order 12938, as revised by E.O. No. 13128.

The Departments of State and Commerce are implementing CWC export restrictions under their respective export control authorities.

Other State and Commerce Department Regulations Implementing Requirements of the Chemical Weapons Convention

In addition to these proposed Chemical Weapons Convention Regulations, the Department of State is publishing a separate proposed rule on the taking of samples during on-site inspections in the United States and the enforcement provisions for violations of the reporting and inspection requirements set forth in the Act, and also maintains the International Traffic in Arms Regulations (22 CFR 120–130).

Further, on May 18, 1999, BXA published an interim rule (64 FR 27138) that implemented the following export control provisions of the CWC:

- Annual reporting of all exports of Schedule 1 chemicals;
- Advance notification of all exports of Schedule 1 chemicals;
- Prohibition on exports of Schedule 1 chemicals subject to Commerce Department jurisdiction to non-States Parties;
- Prohibition on all reexports of Schedule 1 chemicals subject to Commerce Department jurisdiction;
- Prohibition on exports of Schedule 2 chemicals subject to Commerce Department jurisdiction to non-States Parties after April 28, 2000;
- Requirement that exporters obtain an End-Use Certificate prior to exporting any Schedule 2 or 3 chemicals to a non-State Party; and
- License requirements for the export of Schedule 1 chemicals under Commerce Department jurisdiction to all destinations, including Canada.

Note that all existing export license requirements that apply to CWC Scheduled chemicals and UDOCs subject to Commerce Department jurisdiction continue in effect. Further, the new CWC reporting requirements, such as the End-Use Certificate and prior notification requirements, are in addition to existing export license and supporting documentation requirements for exports of chemicals subject to Commerce Department or State Department export licensing jurisdiction.

The Chemical Weapons Convention Regulations (CWCRC)

This proposed rule implements reporting and inspection requirements and import restrictions. The CWCRC:

- Apply to all U.S. persons and facilities in the United States, except

for Department of Defense and Department of Energy facilities and other U.S. Government agencies that notify the United States National Authority of their decision to be excluded from the CWCRC (Such entities are referred to as “persons and facilities subject to the CWCRC”). United States Government facilities are those owned by or leased to the U.S. Government, including facilities that are contractor-operated.

- Set forth the declaration and other reporting requirements that affect persons and facilities subject to the CWCRC. The reporting requirements of this proposed rule are consistent with the procedural provisions of section 401(a) of the Act. Section 401(a) of the Act requires submission to the Director of the USNA such reports as the USNA may reasonably require to provide to the OPCW, pursuant to subparagraph 1(a) of the Convention’s Annex on Confidentiality. Subparagraph 1(a) of the Confidentiality Annex provides that the OPCW shall require only the minimum amount of information and data necessary for the timely and efficient conduct by the OPCW of its responsibilities under the Convention. As required by Section 401(a) of the Act, the USNA, in coordination with the CWC interagency group, has determined that the reports required by the CWCRC are those reasonably required to be provided to the OPCW. Declarations, notifications and other reports required under the CWCRC will be due to the Department of Commerce at specified dates or within specified time frames for verification, aggregation and submission to the Director of the USNA. The USNA will transmit United States declarations, reports and notifications to the OPCW located in the Hague, Netherlands.
- Require access for on-site inspections.
- Prohibit imports of Schedule 2 chemicals from non-States Parties after April 28, 2000.
- Contain recordkeeping requirements and administrative procedures and penalties related to violations of reporting and inspection requirements and importation restrictions.
- Implement section 211 of the Act, which authorizes revocation of the export privileges of any person determined to have violated the chemical weapons provisions of 18 U.S.C. § 229.

Reporting Requirements

Declaration Requirements

Facilities required to submit “declarations” are those that produce,

process or consume certain chemicals in quantities that exceed specified thresholds. Four types of declarations are due to BXA when required by parts 712 through 715 of the CWCRC: initial declarations, annual declarations on past activities, annual declarations on anticipated activities, and a one-time declaration of facilities that produced Schedule 2 or 3 chemicals for chemical weapons purposes at any time since January 1, 1946. Declared Schedule 1, 2 and 3 facilities will provide import and export data on declared chemicals as part of their annual declarations. The United States will transmit data on declared facilities to the OPCW. Such data will also be compiled to establish the U.S. national aggregate on production, processing and consumption of relevant chemicals. Import and export data contained in declarations will also be compiled and added to import and export information obtained from other reports to establish the U.S. national aggregate declaration on imports and exports of certain chemicals.

Initial declarations. Initial declarations are one-time declarations that will be due to BXA within 90 days after the date of publication of the CWCRC as a final rule. Facilities that produced more than 100 grams aggregate of Schedule 1 chemicals in calendar year 1997 must provide a technical description of their facilities. Facilities that produced, processed or consumed more than specified quantities of a Schedule 2 chemical in any of calendar years 1994, 1995 or 1996 must provide data on activities involving this Schedule 2 chemical that occurred in each of calendar years 1994, 1995, and 1996. Facilities that produced more than 30 metric tons of a Schedule 3 chemical in calendar year 1996 must provide data on activities involving this Schedule 3 chemical that occurred in 1996. Facilities that produced more than specified quantities of UDOCs in calendar year 1996 must provide ranges of production for 1996.

Annual declarations on past activities. Facilities that produced more than 100 grams aggregate of Schedule 1 chemicals, more than 30 metric tons of a Schedule 3 chemical, or more than specified quantities of UDOCs in the previous calendar year, must submit an annual declaration on past activities. Facilities that produced, processed or consumed more than specified quantities of a Schedule 2 chemical in any of the three previous calendar years must submit an annual declaration on past activities for activities during the previous year. Annual declarations on past activities for calendar years 1997

and 1998 will be due to the Department of Commerce within 90 days of the publication of the CWC as a final rule.

Annual declarations on anticipated activities. Facilities that anticipate engaging in production of Schedule 1 or Schedule 3 chemicals or production, processing or consumption of Schedule 2 chemicals above specified thresholds during the next calendar year must submit an annual declaration on anticipated activities. The due date for annual declarations on anticipated activities will be determined when the CWC is published as a final rule.

One time declaration of past production for chemical weapons purposes. Facilities that have produced Schedule 2 or Schedule 3 chemicals anytime since January 1, 1946, for chemical weapons purposes must submit a declaration within 90 days after publication of the CWC as a final rule.

Amended declarations. The CWC also provide for submission of "amended declarations" to correct errors and to declare additionally planned activities after the submission of the annual declarations of anticipated activities.

Notification Requirements. Facilities that intend to import or export Schedule 1 chemicals to States Parties or to begin production of Schedule 1 chemicals in excess of 100 grams aggregate per year must submit prior notifications of these activities. These notifications will be forwarded to the OPCW.

Other Reporting Requirements

U.S. persons and facilities subject to the CWC that have imported or exported a Scheduled chemical but have not produced, processed, or consumed declarable quantities of that chemical may nevertheless have an import or export reporting requirement. The United States National Authority will NOT forward facility-specific information contained in these reports to the OPCW. BXA will include the import and export data in the compilation of the U.S. national aggregate declaration on imports and exports of relevant chemicals.

Initial reports on imports and exports. Initial reports for imports and exports are required for imports and exports of Schedule 2 and Schedule 3 chemicals above certain threshold quantities during calendar year 1996.

Annual reports on imports and exports. Annual reports for imports and exports are required for all imports and exports of Schedule 1 chemicals during the previous calendar year, and for imports and exports of Schedule 2 and 3 chemicals above certain threshold

quantities during the previous calendar year, beginning with 1997.

The first declaration and report package due to the Department of Commerce will include the initial declaration plus the annual declarations for calendar years 1997 and 1998 activities, and may also include the annual declaration on activities anticipated for calendar year 2000. Certain facilities may also need to submit the one-time declaration on past production of Schedule 2 or Schedule 3 chemicals for chemical weapons purposes. Handbooks containing necessary multipurpose forms for declarations and reports will be available by mail and through the Internet. If there are discrepancies between the CWC and the handbook (including instructions and forms), the CWC prevail.

On-Site Inspection Requirements

This proposed rule also sets forth the requirements and procedures for on-site inspections of U.S. facilities subject to the CWC, consistent with sections 301 to 309 of the Act. On-site inspections will be conducted by inspectors from the OPCW's Technical Secretariat. The Department of Commerce will lead the U.S. host team accompanying and escorting the inspectors during inspections.

Types of inspections. There are two major kinds of inspections: (1) initial and subsequent ("routine," under the Act) inspections of declared facilities whose level of production, processing or consumption of specified chemicals makes them subject to such verification as a routine matter; and (2) "challenge" inspections of any facility or location in the United States based on a request made by another State Party to clarify and resolve any questions concerning possible non-compliance with the Convention.

Notification and consent procedures. Pursuant to section 304 of the Act, before an inspection may take place, the USNA must authorize each inspection of a facility or location in the United States and provide actual written notification of each inspection to the owner and operator or other person in charge of the facility. For routine or challenge inspections of declared facilities, the USNA will provide such written notification within 6 hours of receiving notification from the OPCW Technical Secretariat or as soon as possible thereafter. The Department of Commerce will provide preliminary notice to facilities to be inspected. The Department of Commerce will also obtain an administrative warrant, as provided for by section 305 of the Act

and in Executive Order No. 13128, if the owner or person in charge of the facility does not consent to the inspection.

Part-by-Part Analysis

The Chemical Weapons Convention Regulations will include 21 parts, as follows:

Part 710—General Information and Overview of the CWC

This part includes general information about the Convention, definitions of terms used in the CWC, an overview of Scheduled chemicals and examples of affected industries. States Parties to the Convention are listed in Supplement No. 1 to part 710 of the CWC. This part also briefly describes the declaration and inspection provisions of the Convention.

Part 711—General Information Regarding Reporting Requirements

This part provides an overview of declaration and other reporting requirements, who is responsible for declarations and reports, and where to get assistance, forms and handbooks. The Convention requires an initial declaration and report and subsequent annual declarations and reports for activities involving specified amounts of certain chemicals. If, after reviewing parts 712 through 715, you determine that you have declaration and/or reporting requirements, you may obtain the appropriate forms by contacting the Bureau of Export Administration (BXA). Note that in instances where a declaration or report is required, the operator of a facility required to declare or report under the CWC is responsible for the submission of all required forms in accordance with all applicable provisions of the CWC. Also note that the Act defines and provides for the protection of confidential business information obtained pursuant to the CWC. A supplement to this part includes information on protection of confidential business information.

Part 712—Activities Involving Schedule 1 Chemicals

This part prohibits imports of Schedule 1 chemicals from non-States Parties and imports from States Parties for purposes other than research, medical, pharmaceutical, or protective purposes. (Part 712 also cross-references similar export restrictions on Schedule 1 chemicals set forth in the Export Administration Regulations.) This part also describes declaration and other reporting requirements for activities involving Schedule 1 chemicals, including production, use (consumption), imports, exports,

domestic transfers and storage of any quantity of Schedule 1 chemicals. This part provides that facilities that produce more than 100 grams of Schedule 1 chemicals in a calendar year are considered Schedule 1 "declared" facilities. Facility-specific information on "declared facilities" will be forwarded to the Organization for the Prohibition of Chemical Weapons (OPCW) and all Schedule 1 "declared" facilities will be subject to routine on-site inspection by the OPCW. Finally, this part requires advance notification of all exports and imports of Schedule 1 chemicals to or from other States Parties and changes in production of Schedule 1 chemicals. Note that BXA published an interim rule in the **Federal Register** on May 18, 1999 (64 FR 27138), amending the Export Administration Regulations (EAR) to implement the export control provisions of the CWC that are subject to Department of Commerce jurisdiction. The EAR also requires prior notification of all exports of Schedule 1 chemicals and annual reports of exports of such chemicals. Upon publication of the CWC as a final rule, the EAR will be amended to remove the duplicate advance notification and other reporting provisions for exports of Schedule 1 chemicals. The export license requirements pertaining to Schedule 1 chemicals, and other scheduled chemicals, will continue to be set forth in the EAR. Schedule 1 chemicals are included in Supplement No. 1 to this part.

Part 713—Activities Involving Schedule 2 Chemicals

This part prohibits imports of any Schedule 2 chemical on or after April 29, 2000, from any country that is not a party to the Convention. (Part 713 cross-references similar export restrictions on Schedule 2 chemicals in the EAR.) This part also describes declaration and other reporting requirements for activities involving Schedule 2 chemicals, including production of any amount of a Schedule 2 chemical at any time since January 1, 1946, for chemical weapons purposes; production, processing, or consumption of Schedule 2 chemicals in excess of specified quantities; and imports and exports of a Schedule 2 chemical in excess of specified quantities. Further, this part requires declarations on anticipated production, processing, or consumption in the next calendar year of a Schedule 2 chemical in excess of specified quantities as well as any changes to the declarations on anticipated activities that results in an increase of anticipated production,

processing or consumption by 20% or more. Declaration requirements apply also to Schedule 2 chemicals contained in mixtures. Note, however, that the quantity of a Schedule 2 chemical contained in a mixture must be counted for declaration purposes only if the concentration of the Schedule 2 chemical in the mixture is:

- 10% or more by volume or by weight, whichever yields the lesser percent, for activities involving either production or consumption of a mixture containing a Schedule 2 chemical; or
- 30% or more by volume or by weight, whichever yields the lesser percent, for activities involving the processing of a mixture containing a Schedule 2 chemical.

If the mixture contains more than the stated percentage concentration for the activity (*i.e.*, more than 10% for production or consumption activities or more than 30% for processing activities), you must count only the amount (weight) of the Schedule 2 chemical in the mixture, not the total weight of the mixture. Schedule 2 chemicals are included in Supplement No. 1 to this part.

Part 714—Activities Involving Schedule 3 Chemicals

This part describes declaration and other reporting requirements for activities involving Schedule 3 chemicals, including production of any amount of a Schedule 3 chemical at any time since January 1, 1946, for chemical weapons purposes; production of Schedule 3 chemical in excess of specified quantities; and imports and exports of a Schedule 3 chemical in excess of specified quantities. Further, this part requires declaration of anticipated production in the next calendar year of a Schedule 3 chemical in excess of specified quantities as well as any changes to the declaration of anticipated activities that result in an increase of anticipated production by 20% or more. Declaration requirements apply also to Schedule 3 chemicals contained in mixtures. Note, however, that the quantity of a Schedule 3 chemical contained in a mixture must be counted for declaration purposes only if the concentration of the Schedule 3 chemical in the mixture is 80% or more by volume or by weight, whichever yields the lesser percent. Schedule 3 chemicals are included in Supplement No. 1 to this part.

Part 715—Activities Involving Unscheduled Discrete Organic Chemicals (UDOCs)

This part describes declaration requirements for the production of UDOCs in excess of specified quantities. However, note that declarations are not required for chemicals and chemical mixtures produced through a biological or bio-mediated process; polymers and oligomers; certain synthetic mixtures of organic chemicals; unscheduled discrete organic chemicals produced coincidentally as byproducts of a manufacturing or production process that are not isolated or captured for use or sale during the process and are routed to, or escape from, the waste stream of a stack, incinerator, or wastewater treatment system or any other waste stream; hydrocarbons; or explosives.

Part 716—Inspections

This part implements the inspection provisions of the Convention, consistent with the Act. It describes notification procedures, the responsibilities of the Department of Commerce as host and escort for inspections, types of inspections, and scope and conduct of inspections. The USNA will provide written notification to the owner and operator, occupant or agent in charge of the premises to be inspected. The Department of Commerce will provide preliminary notice to the point of contact identified in declaration forms submitted by the facility. This part also describes the duration and frequency of inspections, and the role of a facility agreement. A facility agreement is a site-specific agreement between the U.S. Government and the Organization for the Prohibition of Chemical Weapons. The purpose for a facility agreement is to define the inspection scope and procedures for a given facility under the Convention and to facilitate future inspections of the facility by enhancing efficiency and predictability and reducing preparation costs for the facility. The U.S. Government and the OPCW will begin negotiating such facility agreements during the initial inspections of facilities that require facility agreements pursuant to the Convention. Supplement Nos. 2 and 3 include model facility agreements for Schedule 1 and Schedule 2 facilities, respectively.

Part 717—Clarification and Challenge Inspection Procedures

This part describes clarification procedures under the Convention and the scope and purpose of on-site challenge inspections. On-site challenge

inspections may be conducted at any facility or location in the United States for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the provisions of the CWC. The USNA will provide written notification of a challenge inspection to the owner and operator, occupant or agent in charge of the premises. The Department of Commerce will provide preliminary notification to the point of contact of a declared facility, or to the owner or occupant of a facility that has not been declared under the declaration requirements of the Convention.

Part 718—Interpretations

This part is reserved for future use. It will provide explanations and examples for declaration requirements and other interpretations to guide industry and other U.S. persons in determining obligations under the CWC.

Part 719—Enforcement

This part sets forth the civil and criminal penalties and enforcement procedures that apply to violations of the reporting and inspections requirements and provisions relating to the importation of Schedule 1 and 2 chemicals.

Part 720—Denial of Export Privileges

This part sets forth the penalties and enforcement procedures that apply to violations of 18 U.S.C. 229.

Part 721—Recordkeeping Requirements

This part includes the recordkeeping requirements of the CWC, including retention and reproduction requirements.

Comments on this proposed rule must be submitted to BXA by August 20, 1999. To aid in discussions between interested persons and the U.S. Government on the requirements of this proposed rule, BXA will conduct a seminar in Washington, D.C. prior to the expiration of the comment period. Interested persons should contact the Office of Chemical and Biological Controls and Treaty Compliance on (202) 501-7876 for information concerning the seminar.

Rulemaking Requirements

1. This proposed rule has been determined to be significant for purposes of E.O. 12866. BXA invites the public to comment on the extent to which this rule complies with the principle stated in section (1)(b)(12) of E.O. 12866 that agencies draft regulations that are simple and easy to understand, with the goal of minimizing the potential for uncertainty and

litigation arising from such uncertainty. Comments should be submitted to BXA by August 20, 1999, and sent to Nancy Crowe, Regulatory Policy Division, Office of Exporter Services, Bureau of Export Administration, Room 2705, 14th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20230.

2. Notwithstanding any other provision of law, no person is required to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid OMB Control Number. This rule revises an existing collection of information requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), which we have submitted for approval to the Office of Management and Budget. The public reporting burdens for the new collections of information are estimated to average 9 hours for Schedule 1 Chemicals, 7.2 hours for Schedule 2 chemicals, 2.5 hours for Schedule 3 chemicals, 5.3 for Unscheduled Discrete Organic Chemicals, and .17 hours for Schedule 1 notifications. These estimates include the time required to complete the required forms.

Comments are invited on (a) whether the collection of information is necessary for the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarify of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Send comments regarding these or any other aspects of the collection of information to: Nancy Crowe, Regulatory Policy Division, Bureau of Export Administration, U.S. Department of Commerce Room 2705, 14th Street and Pennsylvania Ave., NW, Washington, DC 20230.

3. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

4. BXA has completed a Cost Benefit Analysis (CBA) pursuant to Executive Order 12866 and an Initial Regulatory Flexibility Analysis (IRFA) pursuant to 5 U.S.C. 603 for this proposed rule. A summary of this IRFA follows. Copies of the CBA and the complete IRFA may be obtained from Henry Gaston, Bureau of Export Administration Freedom of

Information Officer, Bureau of Export Administration Freedom of Information Records Inspection Facility, Room 6883, Department of Commerce, 14th Street and Pennsylvania Avenue, NW, Washington, DC 20230 or by calling (202) 482-0500. BXA invites the public to comment on the CBA and the IRFA. Send comments to Nancy Crowe, Regulatory Policy Division, Office of Exporter Services, Bureau of Export Administration, Room 2705, 14th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20230.

The IRFA identifies the Small Business Administration's (SBA) small business size standards, in terms of number of employees, for "Chemicals and Allied Products" by four-digit Standard Industrial Classification (SIC) codes. These SBA standards indicate that a "small business" in the chemical industry can cover a range of sizes, from up to 500 employees to up to 1,000 employees. The IRFA states that BXA does not have information on which SIC code categories will include companies that will be subject to the reporting, declaration or inspection requirements of this proposed rule, and therefore, BXA is unable to estimate with certainty the number of small businesses that will be affected by the proposed rule. BXA anticipates some 2,000 firms will be affected by the CWC, and many of them may have no more than 500 employees, thus falling under the SBA generic definition of "small business". However, BXA invites and encourages affected companies commenting on this proposed rule to inform BXA of their size and their SIC codes.

The IRFA reports BXA's estimate that compliance with the requirements of this proposed rule will total approximately \$377,654 to gather and maintain relevant data and to fill out declarations, and approximately \$2,166,880 for inspections. The average cost of an inspection, based on the assumption that 40 facilities will undergo inspections each year, is \$54,150. The IRFA describes the expected benefits to the United States of implementing the requirements of the Convention, including increased national and economic security.

The IRFA explains that BXA's discretion in drafting the declaration forms and formulating the reporting requirements is limited by the Convention requirements. The OPCW has issued forms for States Parties to use in submitting declarations. In drafting the declaration forms for U.S. persons to use in drafting the CWC, BXA has consistently made the reporting requirements as narrow as possible to ensure that only information required to

be "declared" to the OPCW set forth in the Convention is to be reported to BXA. Other States Parties, such as Canada, have imposed much broader reporting requirements on their industries, with the government taking on the responsibility of determining which information must be forwarded to the OPCW. In addition, there are certain declaration requirements of the Convention that are subject to interpretation. Until the Conference of States Parties establishes clear rules for these requirements, States Parties may use their "national discretion" to implement them. "National discretion" generally means a reasonable interpretation of the requirement. For such reporting requirements currently subject to "national discretion", BXA has adopted the minimum requirements consistent with a reasonable reading of the Convention, keeping in mind its purposes and objectives.

5. Comments will be considered on provisions included in the regulations as well as provisions or guidance which commenters believe should be included in the regulations. The Department encourages interested persons who wish to comment to do so at the earliest possible time.

The period for submission of comments will close August 20, 1999. The Department will consider all comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered, if possible, but their consideration cannot be assured. The Department will not accept public comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the person submitting the comments and will not consider them in the development of final regulations. All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, the Department requires comments in written form.

Oral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

The public record concerning these regulations will be maintained in the Bureau of Export Administration Freedom of Information Records

Inspection Facility, Room 6883, Department of Commerce, 14th Street and Pennsylvania Avenue, N.W., Washington, DC 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications, may be inspected and copied in accordance with regulations published in Part 4 of Title 15 of the Code of Federal Regulations. Information about the inspection and copying of records at the facility may be obtained from Henry Gaston, Bureau of Export Administration Freedom of Information Officer, at the above address or by calling (202) 482-0500.

List of Subjects

Part 710

Chemicals, Exports, Foreign Trade, Imports, Treaties.

Part 711

Chemicals, Confidential business information, Reporting and recordkeeping requirements.

Part 712

Chemicals, Exports, Foreign Trade, Imports, Reporting and recordkeeping requirements.

Part 713

Chemicals, Exports, Foreign Trade, Imports, Reporting and recordkeeping requirements.

Part 714

Chemicals, Exports, Foreign Trade, Imports, Reporting and recordkeeping requirements.

Part 715

Chemicals, Exports, Foreign Trade, Imports, Reporting and recordkeeping requirements.

Part 716

Chemicals, Confidential business information, Reporting and recordkeeping requirements, Search warrant, Treaties.

Part 717

Chemicals, Confidential business information, Reporting and recordkeeping requirements, Search warrant, Treaties.

Part 719

Administrative proceedings, Exports, Imports, Penalties, Violations.

Part 720

Penalties, violations.

Part 721

Reporting and recordkeeping requirements.

1. In 15 CFR, Chapter VII, Subchapter B is designated as Chemical Weapons Convention Regulations.

2. In 15 CFR, Subchapter B, Parts 710 through 721 are added to read as follows:

PART 710—GENERAL INFORMATION AND OVERVIEW OF THE CHEMICAL WEAPONS CONVENTION REGULATIONS (CWCR)

Sec.

710.1 Definitions of terms used in the Chemical Weapons Convention Regulations (CWCR).

710.2 Scope of the CWCR.

710.3 Purposes of the Convention and CWCR.

710.4 Overview of Scheduled chemicals and examples of affected industries.

710.5 Authority.

710.6 Relationship between the Chemical Weapons Convention Regulations and the Export Administration Regulations.

Supplement No. 1 To Part 710—States Parties To The Convention On The Prohibition of The Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction

Authority: Pub. L. 105-277, 112 Stat. 2681; E.O. 13128, 64 FR 36703.

§ 710.1 Definitions of terms used in the Chemical Weapons Convention Regulations (CWCR).

The following are definitions of terms used in the CWCR (parts 710 through 721 of this subchapter):

Bureau of Export Administration (BXA). Means the Bureau of Export Administration of the United States Department of Commerce, including the Office of Export Administration and the Office of Export Enforcement.

Chemical Weapon. Means the following, together or separately:

(a) A toxic chemical and its precursors, except where intended for purposes not prohibited under the Chemical Weapons Convention (CWC), provided that the type and quantity are consistent with such purposes;

(b) A munition or device, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in paragraph (a) of this definition, which would be released as a result of the employment of such munition or device; or (c) Any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in paragraph (b) of this definition.

Chemical Weapons Convention (CWC or Convention). Means the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their

Destruction, and its annexes opened for signature on January 13, 1993, and entered into force on April 29, 1997.

Chemical Weapons Convention Regulations (CWCRC). Means the regulations contained in 15 CFR parts 710 through 721.

Consumption. Consumption of a chemical means its conversion into another chemical via a chemical reaction.

Declaration form. Means a multi-purpose form due to BXA regarding activities involving Schedule 1, Schedule 2, Schedule 3, or unscheduled discrete organic chemicals. Declaration forms will be used by facilities that have data declaration obligations under the CWCRC and are "declared" facilities whose facility-specific information will be transmitted to the OPCW. Certain declaration forms will also be used by entities that are not "declared" facilities, but that have limited reporting requirements under the CWCRC. Information from such facilities will be used to compile U.S. national aggregate figures on the production, processing, consumption, import and export of specific chemicals. See also definition of "declared facility."

Declared facility or plant site. Means a facility or plant site required to complete data declarations of activities involving Schedule 1, Schedule 2, Schedule 3, or unscheduled discrete organic chemicals above specified threshold quantities. Only certain declared facilities and plant sites are subject to routine inspections under the CWCRC. Plant sites that produced either Schedule 2 or Schedule 3 chemicals for CW purposes at any time since January 1, 1946, are also "declared" plant sites. However, such plant sites are not subject to routine inspection if they are not subject to declaration requirements because of past production, processing or consumption of Scheduled or unscheduled discrete organic chemicals above specified threshold quantities.

Discrete organic chemical. Means any chemical belonging to the class of chemical compounds consisting of all compounds of carbon except for its oxides, sulfides, metal carbonates and metal carbides identifiable by chemical name, by structural formula, if known, and by Chemical Abstract Service registry number, if assigned.

Domestic transfer (of Schedule 1 chemicals). Means, with regard to reporting requirements for Schedule 1 chemicals under the CWCRC, any movement of any amount of Schedule 1 chemical outside the geographical boundary of a facility in the U.S. to another destination in the U.S. for any purpose. Domestic transfer includes

movement between two divisions of one company or a sale from one company to another. Note that any movement to or from a facility outside the United States is considered an import or export for reporting purposes, not a domestic transfer.

EAR. Means the Export Administration Regulations (15 CFR parts 730 through 799).

Facility. Means any plant site, plant or unit.

Facility agreement. Means an agreement or arrangement between a State Party and the Organization relating to a specific facility subject to on-site verification pursuant to Article IV, V, and VI of the Convention.

Host Team. The United States Government team that accompanies the inspection team from the Organization for the Prohibition of Chemical Weapons during a CWC inspection for which the regulations in this subchapter apply.

Host Team Leader. Means the representative from the Department of Commerce who heads the U.S. Government team that accompanies the inspection team during a CWC inspection for which the regulations in this subchapter apply.

ITAR. Means the International Traffic in Arms Regulations (22 CFR parts 120 through 130).

Organization for the Prohibition of Chemical Weapons (OPCW). Means the international organization, located in The Hague, Netherlands, that administers the CWC.

Person. Means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, any State or any political subdivision thereof, or any political entity within a State, any foreign government or nation or any agency, instrumentality or political subdivision of any such government or nation, or other entity located in the United States.

Plant. Means a relatively self-contained area, structure or building containing one or more units with auxiliary and associated infrastructure, such as:

- (a) Small administrative area;
- (b) Storage/handling areas for feedstock and products;
- (c) Effluent/waste handling/treatment area;
- (d) Control/analytical laboratory;
- (e) First aid service/related medical section; and
- (f) Records associated with the movement into, around, and from the site, of declared chemicals and their feedstock or product chemicals formed from them, as appropriate.

Plant site. Means the local integration of one or more plants, with any intermediate administrative levels, which are under one operational control, and includes common infrastructure, such as:

- (a) Administration and other offices;
- (b) Repair and maintenance shops;
- (c) Medical center;
- (d) Utilities;
- (e) Central analytical laboratory;
- (f) Research and development laboratories;
- (g) Central effluent and waste treatment area; and
- (h) Warehouse storage.

Processing. Means a physical process such as formulation, extraction and purification in which a chemical is not converted into another chemical.

Purposes not prohibited by the CWC. Means the following:

- (a) Any peaceful purpose related to an industrial, agricultural, research, medical or pharmaceutical activity or other activity;
- (b) Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons;
- (c) Any military purpose of the United States that is not connected with the use of a chemical weapon and that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm; or
- (d) Any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

Report. Means information due to BXA on imports and exports of Schedule 1, Schedule 2 or Schedule 3 chemicals. Such information is included in the national aggregate prior to transmittal to the OPCW.

Schedules of Chemicals. Means specific lists of toxic chemicals, groups of chemicals, and precursors contained in the CWC. See Supplements No. 1 to parts 712, 713 and 714 of this subchapter.

State Party. Means a country for which the CWC is in force. See Supplement No. 1 to this part.

Storage. For purposes of Schedule 1 chemical reporting, means any quantity that is not accounted for under the categories of production, import, export, consumption or domestic transfer.

Synthesis. Means production of a chemical from its reactants.

Technical Secretariat. Means the organ of the OPCW charged with carrying out administrative and technical support functions for the OPCW, including carrying out the verification measures delineated in the CWC.

Trading company. Means any entity involved in the export or import of

chemicals in amounts greater than specified thresholds, but not in the production, processing or consumption of chemicals in amounts greater than threshold amounts requiring declaration. Such companies are not subject to routine inspections.

Transfer. See domestic transfer.

Undeclared facility. Means a facility that is not subject to declaration requirements because of past or anticipated production, processing or consumption involving Scheduled or unscheduled discrete organic chemicals above specified threshold quantities. However, such facilities may have a reporting requirement for imports or exports of such chemicals.

Unit. Means the combination of those items of equipment, including vessels and vessel set up, necessary for the production, processing or consumption of a chemical.

United States. Means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States, and includes all places under the jurisdiction or control of the United States, including any of the places within the provisions of paragraph (41) of section 40102 of Title 49 of the United States Code, any civil aircraft of the United States or public aircraft, as such terms are defined in paragraphs (1) and (37), respectively, of section 40102 of Title 49 of the United States Code, and any vessel of the United States, as such term is defined in section 3(b) of the Maritime Drug Enforcement Act, as amended (section 1903(b) of Title 46 App. of the United States Code).

United States National Authority (USNA). Means the State Department serving as the national focal point for the effective liaison with the Organization for the Prohibition of Chemical Weapons and other States Parties to the Convention and implementing the provisions of the Chemical Weapons Convention Implementation Act of 1998 in coordination with an interagency group designated by the President consisting of the Secretary of Commerce, Secretary of Defense, Secretary of Energy, the Attorney General, and the heads of other agencies considered necessary or advisable by the President, or their designees. The Secretary of State is the Director of the USNA.

Unscheduled chemical. Means a chemical that is not contained in Schedule 1, Schedule 2, or Schedule 3 (see Supplement No. 1 to parts 712, 713 and 714 of this subchapter).

Unsheduled Discrete Organic Chemical (UDOC). Means any chemical:

(a) Belonging to the class of chemical compounds consisting of all compounds of carbon except for its oxides, sulfides, metal carbonates and metal carbides identifiable by chemical name, by structural formula, if known, and by Chemical Abstract Service registry number, is assigned, and

(b) That is not contained in the Schedules of Chemicals (see Supplements No. 1 to parts 712, 713 and 714 of this subchapter). Unscheduled discrete organic chemicals subject to declaration under this subchapter are those produced by synthesis that were isolated for use or sale as a specific end-product.

You. The term "you" or "your" means any person (See also definition of "person"). With regard to the declaration and reporting requirements of the CWCR, "you" refers to persons that have an obligation to report certain activities under the provisions of the CWCR.

§ 710.2 Scope of the CWCR.

The Chemical Weapons Convention Regulations (parts 710 through 721 of this subchapter), or CWCR, implement certain obligations of the United States under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, known as the CWC or Convention.

(a) *Persons and facilities subject to the CWCR.* The CWCR reporting and inspection requirements apply to all facilities in the United States, except for Department of Defense and Department of Energy facilities and other United States Government agencies that notify the USNA of their decision to be excluded from the CWCR. The CWCR also apply to all U.S. persons and facilities, wherever located, for imports of Scheduled chemicals and activities involving Schedule 1 chemicals, except for Department of Defense and Department of Energy facilities and other United States Government facilities that notify the USNA of their decision to be excluded from the CWCR. United States Government facilities are those owned by or leased to the U.S. Government, including facilities that are contractor-operated.

(b) *Activities subject to the CWCR.* The CWCR compel data declarations and reports from facilities subject to the CWCR (parts 710 through 721 of this subchapter) on activities including production, processing, consumption, imports and exports, involving organic chemicals further described in parts 712 through 715 of this subchapter. Those regulations do not apply to activities

involving inorganic chemicals other than those listed in the Schedule of Chemicals or to other specifically exempted organic chemicals. In addition, those regulations set forth procedures for routine inspections of "declared" facilities by teams of international inspectors in part 716 of this subchapter, and set forth clarification procedures and procedures for challenge inspections that could be requested at any facility or location in the United States. Finally, the CWCR restrict imports of Schedule 1 and 2 chemicals, limit production of Schedule 1 chemicals to specified annual amounts and prohibit other activities involving Schedule 1 chemicals except for research, medical, pharmaceutical or protective purposes.

§ 710.3 Purposes of the Convention and CWCR.

(a) *Purposes of the Convention.* (1) The Convention imposes upon the United States Government (USG), as a State Party, certain declaration, inspection, and other obligations. In addition, the USG and each other State Party to the Convention undertake never under any circumstances to:

(i) Develop, produce, otherwise acquire, stockpile, or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;

(ii) Use chemical weapons;

(iii) Engage in any military preparations to use chemical weapons; or

(iv) Assist, encourage or induce, in any way, anyone to engage in any activity prohibited by the Convention.

(2) One objective of the Convention is to assure State Parties that lawful activities of the chemical producers and users are not converted to unlawful activities related to chemical weapons. To achieve this objective and to give States Parties a mechanism to verify compliance, the Convention requires the United States and all other States Parties to submit declarations concerning chemical production, consumption, processing and other activities, and to permit international inspections within their borders.

(b) *Purposes of the Chemical Weapons Convention Regulations.* To fulfill the United States obligations under the Convention, the CWCR (parts 710 through 721 of this subchapter) prohibit certain activities, and compel the submission of information from all facilities in the United States, except for Department of Defense and Department of Energy facilities and other United States Government agencies that notify the USNA of their decision to be excluded from the CWCR on activities,

including imports and exports, involving Scheduled chemicals and unscheduled Discrete Organic Chemicals as described in parts 712 through 715 of this subchapter. United States Government facilities are those owned by or leased to the U.S. Government, including facilities that are contractor-operated. The CWC also require access for on-site inspections and monitoring by the OPCW, as described in parts 716 and 717 of this subchapter.

§ 710.4 Overview of Scheduled chemicals and examples of affected industries.

The following provides examples of the types of industries that may be affected by the CWC (parts 710 through 721 of this subchapter). These examples are not exhaustive, and you should refer to parts 712 through 715 of this subchapter to determine your obligations.

(a) Schedule 1 chemicals are listed in Supplement No. 1 to part 712 of this subchapter. Schedule 1 chemicals have little or no use in industrial and agricultural industries, but may have limited use in the pharmaceutical or medical industries.

(b) Schedule 2 chemicals are listed in Supplement No. 1 to part 713 of this subchapter. Although Schedule 2 chemicals may be useful in the production of chemical weapons, they also have legitimate uses in areas such as:

- (1) Flame retardant additives and research;
- (2) Dye and photographic industries (e.g., printing ink, ball point pen fluids, copy mediums, paints, etc.);
- (3) Medical and pharmaceutical preparation (e.g., anticholinergics, arsenicals, tranquilizer preparations);
- (4) Metal plating preparations;
- (5) Epoxy resins; and
- (6) Insecticides, herbicides, fungicides, defoliants, and rodenticides.

(c) Schedule 3 chemicals are listed in Supplement No. 1 to part 714 of this subchapter. Although Schedule 3 chemicals may be useful in the production of chemical weapons, they also have legitimate uses in areas such as:

- (1) The production of:
 - (i) Resins;
 - (ii) Plastics;
 - (iii) Pharmaceuticals;
 - (iv) Pesticides;
 - (v) Batteries;
 - (vi) Cyanic acid;
 - (vii) Toiletries, including perfumes and scents;
 - (viii) Organic phosphate esters (e.g., hydraulic fluids, flame retardants, surfactants, and sequestering agents); and

(2) Leather tannery and finishing supplies.

(d) Unscheduled discrete organic chemicals are used in a wide variety of commercial industries, and include acetone, benzoyl peroxide and propylene glycol.

§ 710.5 Authority.

The CWC (parts 710 through 721 of this subchapter) implement certain provisions of the Chemical Weapons Convention under the authority of the Chemical Weapons Convention Implementation Act of 1998 (CWCIA), the National Emergencies Act, the International Emergency Economic Powers Act of 1997 (IEEPA), as amended, and the Export Administration Act of 1979, as amended, by extending verification and trade restriction requirements under Article VI and related parts of the Verification Annex of the Convention to U.S. persons. In Executive Order 13128 of June 25, 1999, the President delegated authority to the Department of Commerce to promulgate regulations to implement the CWCIA, and consistent with the CWCIA, to carry out appropriate functions not otherwise assigned in the CWCIA but necessary to implement certain reporting, monitoring and inspection requirements of the Convention and the CWCIA.

§ 710.6 Relationship between the Chemical Weapons Convention Regulations and the Export Administration Regulations.

Certain obligations of the U.S. Government under the CWC pertain to exports, including the transfer of technology during an on-site inspection. These obligations are implemented in the Export Administration Regulations (EAR) (15 CFR parts 730 through 799) and the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 through 130). See in particular §§ 740.11 and 742.18 and part 745 of the EAR, and Export Control Classification Numbers 1C350, 1C351 and 1C355 of the Commerce Control List (Supplement No. 1 to part 774 of the EAR).

Supplement No. 1 To Part 710—States Parties to the convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction

List of States Parties as of [EFFECTIVE DATE OF THE FINAL RULE].

Albania
Algeria
Argentina
Armenia
Australia
Austria

Bahrain
Bangladesh
Belarus
Belgium
Benin
Bolivia
Bosnia-Herzegovina
Botswana
Brazil
Brunei Darussalam
Bulgaria
Burkina Faso
Burundi
Cameroon
Canada
Chile
China *
Cook Islands
Costa Rica
Cote d'Ivoire (Ivory Coast)
Croatia
Cuba
Cyprus
Czech Republic
Denmark
Ecuador
El Salvador
Equatorial Guinea
Ethiopia
Estonia
Fiji
Finland
France
Gambia
Georgia
Germany
Ghana
Greece
Guinea
Guyana
Holy See
Hungary
Iceland
India
Indonesia
Iran
Ireland
Italy
Japan
Jordan
Kenya
Korea (Republic of)
Kuwait
Laos (P.D.R.)
Latvia
Lesotho
Lithuania
Luxembourg
Macedonia
Malawi
Maldives
Mali
Malta
Mauritius
Mauritania
Mexico

* For CWC States Parties purposes, China includes Hong Kong.

Moldova (Republic of)
 Monaco
 Mongolia
 Morocco
 Namibia
 Nepal
 Netherlands
 New Zealand
 Niger
 Nigeria
 Norway
 Oman
 Pakistan
 Panama
 Papua New Guinea
 Paraguay
 Peru
 Philippines
 Poland
 Portugal
 Qatar
 Romania
 Russian Federation
 Saint Lucia
 Saudi Arabia
 Senegal
 Seychelles
 Singapore
 Slovak Republic
 Slovenia
 South Africa
 Spain
 Sri Lanka
 Sudan
 Suriname
 Swaziland
 Sweden
 Switzerland
 Tajikistan
 Tanzania, United
 Republic of Togo
 Trinidad and Tobago
 Tunisia
 Turkey
 Turkmenistan
 Ukraine
 United Kingdom
 United States
 Uruguay
 Uzbekistan
 Venezuela
 Vietnam
 Zimbabwe

PART 711—GENERAL INFORMATION REGARDING DECLARATION REQUIREMENTS

- Sec.
 711.1 Overview of declaration, notification and reporting requirements.
 711.2 Confidential business information.
 711.3 Who submits declarations, notifications and reports.
 711.4 Assistance in determining your obligations and classifications.
 711.5 Where to obtain forms.

Supplement No. 1 to Part 711—Confidential Business Information To Be Declared or Reported

Authority: Pub. L. 105-277, 112 Stat. 2681; E.O. 13128, 64 FR 36703.

§ 711.1 Overview of declaration, notification and reporting requirements.

Parts 712 through 715 of the CWC (parts 710 through 721 of this subchapter) describe the declaration, notification and reporting requirements for Schedule 1, 2 and 3 chemicals and for unscheduled discrete organic chemicals (UDOCs). For each type of chemical, the Convention requires an initial declaration and subsequent annual declarations. If, after reviewing parts 712 through 715 of this subchapter, you determine that you have declaration, notification or reporting requirements, you may obtain the appropriate forms by contacting the Bureau of Export Administration (see § 711.4).

§ 711.2 Confidential business information.

(a) *Provisions of the Act relating to confidential business information.* (1) The Act provides a statutory exemption from disclosure in response to a Freedom of Information Act request for information submitted to the U.S. National Authority by private entities in declarations and reports for:

- (i) Information included in categories specifically enumerated in sections 103(g)(1) and 304(e)(2) of the Act:
 - (A) Financial data;
 - (B) Sales and marketing data (other than shipment data);
 - (C) Pricing data;
 - (D) Personnel data;
 - (E) Research data;
 - (F) Patent data;
 - (G) Data maintained for compliance with environmental or occupational health and safety regulations;
 - (H) Data on personnel and vehicles entering and personnel passenger vehicles exiting the facility;
 - (I) Any chemical structure;
 - (J) Any plant design, process, technology or operating method;
 - (K) Any operating requirement, input, or result that identifies any type or quantity of chemicals used, processed or produced; or
 - (L) Any commercial sale, shipment or use of a chemical, or
- (ii) Information that qualifies as a trade secret under 5 U.S.C. 552(b)(4) (Freedom of Information Act), provided such trade secret is obtained from a U.S. person or through the U.S. Government.

Note to paragraph (a)(1): See §§ 716.4(e) and 717.2(e)(5) of this subchapter for related provisions dealing with information obtained through the conduct of inspections in the United States under the Convention.

(2) The Act provides for disclosure of confidential business information to the OPCW, to federal law enforcement agencies, and, upon written request, to Congressional committees of appropriate jurisdiction.

(3) The United States Government must also disclose confidential business information when such disclosure is deemed to be in the national interest. The USNA, in coordination with the CWC interagency group shall determine if disclosure of such confidential business information is in the national interest. The Act provides for notification to the affected person of intent to disclose confidential business information, unless such notification of intent to disclose is contrary to national security or law enforcement needs. If, after coordination with the agencies that constitute the CWC interagency group, the USNA determines that such notification of intent to disclose is not contrary to national security or law enforcement needs, the USNA will notify the person that submitted the information or the person to whom the information pertains of the intent to disclose the information.

(b) *Provisions of the Convention relating to confidential business information.* The Convention provides that States Parties may designate information submitted to the Organization for the Prohibition of Chemical Weapons (OPCW) as confidential, and requires the OPCW to limit access to, and prevent disclosure of, information so designated, except that the OPCW may disclose certain confidential information submitted in declarations to other States Parties if requested. The OPCW has developed a classification system whereby States Parties may designate the information they submit in their declarations as "restricted," "protected," or "highly protected," depending on the sensitivity of the information. Other States Parties are obligated, under the Convention, to store and allow access to information which it receives from the OPCW in accordance with the level of confidentiality established for that information.

§ 711.3 Who submits declarations, notifications and reports.

The operator of a facility required to submit declarations, notifications or reports under the CWC (parts 710 through 721 of this subchapter) is responsible for the submission of all required documents in accordance with all applicable provisions of the CWC.

§ 711.4 Assistance in determining your obligations and classifications.

(a) If you need assistance in determining your obligations under the CWC (parts 710 through 721 of this subchapter), including whether a chemical is classified as a Schedule 1, Schedule 2, or Schedule 3 chemical, or

is an unscheduled discrete organic chemical, submit your request to the Bureau of Export Administration. BXA will only review properly submitted requests, which must include the following information:

- (1) Date of request;
- (2) Company name and complete street address;
- (3) Point of contact;
- (4) Phone and fax number of contact;
- (5) Chemical name;
- (6) Structural formula;
- (7) Chemical abstract registry number, if assigned.

(b) Requests for chemical determinations may be faxed to (703) 235-1481 or mailed to the following address: Information Technology Team, Bureau of Export Administration, U.S. Department of Commerce, 1555 Wilson Boulevard, Suite 710, Arlington, Virginia 22209-2405.

(c) BXA will respond to properly submitted requests within 10 calendar days of receipt.

§ 711.5 Where to obtain forms.

U.S. Department of Commerce, Information Technology Team, 1555 Wilson Blvd., Suite 710 Arlington, VA 22209-2405, Telephone: (703) 235-1335.

SUPPLEMENT NO. 1 TO PART 711.— CONFIDENTIAL BUSINESS INFORMATION TO BE DECLARED OR REPORTED¹

	Fields containing confidential business information
Schedule 1 Forms:	
Certification Form ..	None.
Form 1-1	None.
Form 1-2	All fields.
Form 1-2A	All fields.
Form 1-2B	All fields.
Form 1-3	All fields.
Schedule 2 Forms:	
Certification	None.
Form 2-1	None.
Form 2-2	Question 2-2.9.
Form 2-3	All fields.
Form 2-3A	All fields.
Form 2-3B	All fields.
Form 2-3C	All fields.
Form 2-4	All fields.
Schedule 3 Forms:	
Certification Form ..	None.
Form 3-1	None.
Form 3-2	None.
Form 3-3	All fields.
Form 3-4	All fields.
Unscheduled Discrete Organic Chemicals Forms:	
Certification Form ..	None.

SUPPLEMENT NO. 1 TO PART 711.— CONFIDENTIAL BUSINESS INFORMATION TO BE DECLARED OR REPORTED¹—Continued

	Fields containing confidential business information
Form UDOC	None.

Note: Information contained in Form A attachments will be evaluated on a case-by-case basis, except that Schedule 1 facility technical descriptions submitted with initial declarations are confidential business information.

¹This table lists those data fields on the Declaration and Report forms that request "confidential business information" (CBI) as defined by the CWCIA (sections 103(g) and 304(e)(2)). As provided by section 404(a) of the CWCIA, CBI is exempt from disclosure in response to a Freedom of Information Act (FOIA) request under sections 552(b)(3) and 552(b)(4) (5 U.S.C.A. 552(b)(3)-(4)), unless a determination is made, pursuant to section 404(c) of the CWCIA, that such disclosure is in the national interest. Other FOIA exemptions to disclosure may also apply. CBI may be disclosed to the Technical Secretariat of the OPCW, and certain CBI may be disclosed to other States Parties to the Convention.

PART 712—ACTIVITIES INVOLVING SCHEDULE 1 CHEMICALS

Sec.

- 712.1 Prohibitions involving imports of Schedule 1 chemicals.
- 712.2 Initial and annual declaration requirements for facilities engaged in the production of Schedule 1 chemicals.
- 712.3 New Schedule 1 production facility.
- 712.4 Advance notification and annual report of all exports and imports of Schedule 1 chemicals to, or from, other States Parties.
- 712.5 Frequency and timing of declarations, reports and notifications.
- 712.6 Amended declaration or report.

Supplement No. 1 To Part 712—Schedule 1 Chemicals

Authority: Pub. L. 105-277, 112 Stat. 2681; 50 U.S.C. 1601 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12938 (59 FR 59099; 3 CFR, 1994 Comp., p. 950), as amended by E.O. 13094 (63 FR 40803; 3 CFR, 1998 Comp., p. 200); E.O. 13128, 64 FR 36703.

§ 712.1 Prohibitions involving imports of Schedule 1 chemicals.

See § 711.5 of this subchapter for information on obtaining the forms you will need to declare and report activities involving Schedule 1 chemicals. See § 711.2 and Supplement No. 1 to part 711 of this subchapter for information pertaining to the protection of confidential business information.

(a) You may not import any Schedule 1 chemical unless:

- (1) The import is from a State Party;

(2) The import is for research, medical, pharmaceutical, or protective purposes;

(3) The import is in types and quantities strictly limited to those that can be justified for such purposes; and

(4) You have notified the Department of Commerce 45 calendar days prior to the import pursuant to § 712.4.

(b) The provisions of paragraph (a) of this section do not apply to:

(1) The retention, ownership, possession, transfer, or receipt of a Schedule 1 chemical by a department, agency, or other entity of the United States, or by a person described in paragraph (b)(2) of this section, pending destruction of the Schedule 1 chemical;

(2) A person referred to in paragraph (b)(1) of this section means:

(i) Any person, including a member of the Armed Forces of the United States, who is authorized by law or by an appropriate officer of the United States to retain, own, possess, transfer, or receive the Schedule 1 chemical; or

(ii) In an emergency situation, any otherwise non-culpable person if the person is attempting to seize or destroy the Schedule 1 chemical.

Note to § 712.1: For specific provisions relating to the prior notification of exports of all Schedule 1 chemicals, see § 742.18 of the Export Administration Regulations (EAR) (15 CFR parts 730 through 799). For specific provisions relating to license requirements for exports of Schedule 1 chemicals, see §§ 742.2 and 742.18 of the EAR for Schedule 1 chemicals subject to the jurisdiction of the Department of Commerce and of the International Traffic in Arms Regulations (22 CFR parts 120 through 130) for Schedule 1 chemicals subject to the jurisdiction of the Department of State.

§ 712.2 Initial and annual declaration requirements for facilities engaged in the production of Schedule 1 chemicals.

(a) *Declaration requirements.* (1) *Initial declaration.* You must complete the forms specified in paragraph (b)(1) of this section, providing a current technical description of your facility or its relevant parts, if you produced Schedule 1 chemicals at your facility in excess of 100 grams aggregate in calendar year 1997, 1998 or 1999.

(2) *Annual declaration on past activities.* You must complete the forms specified in paragraph (b)(2) of this section if you produced at your facility in excess of 100 grams aggregate of Schedule 1 chemicals in the previous calendar year, beginning with calendar year 1997. Note that as part of this declaration, in addition to declaring the production of each Schedule 1 chemical that comprises your aggregate production of Schedule 1 chemicals, you must also declare the total amount

of each Schedule 1 chemical used (consumed) and stored at your facility, and domestically transferred from your facility during the previous calendar year, whether or not you produced that Schedule 1 chemical at your facility.

(3) *Annual declaration on anticipated activities.* You must complete the forms specified in paragraph (b)(3) of this section if you anticipate that you will produce at your facility more than 100 grams aggregate of Schedule 1 chemicals in the next calendar year. If you are not already a declared facility, you must complete an initial declaration (see paragraph (a)(1) of this section), and wait 200 calendar days before commencing operations or increasing production that will result in production of more than 100 grams aggregate of Schedule 1 chemicals (see § 712.4).

(b) *Declaration forms to be used.* (1) *Initial declaration.* (i) You must complete the Certification Form, Form 1-1 and Form A if you produced at your facility in excess of 100 grams aggregate of Schedule 1 chemicals in calendar year 1997, 1998 or 1999. You must provide a detailed current technical description of your facility or its relevant parts including a narrative statement, a detailed diagram of the declared areas in the facility, and an inventory of equipment in the declared area.

(ii) If you plan to change the technical description of your facility from your initial declaration completed and submitted pursuant to paragraph (a)(1) of this section and § 712.5, you must notify BXA 200 calendar days prior to the change. Such notifications must be made through an amended declaration by completing a Certification Form, Form 1-1 and Form A, including the new description of the facility. See § 712.7 for additional instructions on amending Schedule 1 declarations.

(2) *Annual declaration on past activities.* If you are subject to the declaration requirement of paragraph (a)(2) of this section, you must complete the Certification Form and Forms 1-1, 1-2, 1-2A, 1-2B, and Form A if your facility was involved in the production of Schedule 1 chemicals in the previous calendar year, beginning with calendar year 1997. Form B is optional.

(3) *Annual declaration on anticipated activities.* If you anticipate that you will produce at your facility in excess of 100 grams aggregate of Schedule 1 chemicals in the next calendar year you must complete the Certification Form and Forms 1-1, 1-4, and Form A. Form B is optional.

(c) *Quantities to be declared or reported.* If you produced in excess of

100 grams aggregate of Schedule 1 chemicals in the previous calendar year, you must declare the entire quantity of such production, rounded to the nearest gram. You must also declare for each Schedule 1 chemical produced the quantity consumed and stored, and the quantity of any Schedule 1, Schedule 2 or Schedule 3 chemical precursor used to produce the declared Schedule 1 chemicals, rounded to the nearest gram.

(d) *"Declared" Schedule 1 facilities and routine inspections.* Only facilities that produced in excess of 100 grams aggregate of Schedule 1 chemicals during the previous calendar year, or that anticipate producing in excess of 100 grams aggregate of Schedule 1 chemicals during the next calendar year are considered Schedule 1 "declared" facilities. A "declared" Schedule 1 facility is subject to routine inspection by the OPCW (see part 716 of this subchapter).

(e) *Approval of declared Schedule 1 production facilities.* Facilities that submit declarations pursuant to this section are considered approved Schedule 1 production facilities for purposes of the CWC, unless otherwise notified by BXA within 30 days of receipt by BXA of an annual declaration on past activities (see paragraph (a)(2) of this section). If your facility does not produce more than 100 grams aggregate of Schedule 1 chemicals, no approval by BXA is required.

§ 712.3 New Schedule 1 production facility.

(a) *Establishment of a new Schedule 1 production facility.* If your facility was not declared under § 712.2 in the previous calendar year, but you intend to begin production of Schedule 1 chemicals at your facility in quantities greater than 100 grams aggregate per year for research, medical, or pharmaceutical purposes, you must notify BXA at least 200 calendar days in advance of commencing such production. Such facilities are considered "new Schedule 1 production facilities" and cannot begin operation or be used until the United States and the OPCW have concluded a facility agreement for the new facility.

(b) *Types of declaration forms required.* If your new Schedule 1 production facility will produce in excess of 100 grams aggregate of Schedule 1 chemicals, you must complete the Certification Form, Form 1-1 and Form A. You must also provide a detailed technical description of the new facility or its relevant parts, including a detailed diagram of the declared areas in the facility, and an

inventory of equipment in the declared area.

§ 712.4 Advance notification and annual report of all exports¹ and imports of Schedule 1 chemicals to, or from, other States Parties.

Pursuant to the Convention, the United States is required to notify the OPCW not less than 30 days in advance of every export or import of a Schedule 1 chemical, in any quantity, to or from another State Party. In addition, the United States is required to provide a report of all exports and imports of Schedule 1 chemicals to or from other States Parties during each calendar year. If you plan to export or import any quantity of a Schedule 1 chemical from or to your declared facility, undeclared facility or trading company, you must notify BXA in advance of the export or import, and complete an annual report of exports and imports that actually occurred during the previous calendar year. The United States will transmit the advance notifications and a detailed annual declaration of each actual export or import of a Schedule 1 chemical from/to the United States. Note that company-specific information relating to export and import transactions, including the names and addresses of all declared facilities, undeclared facilities and trading companies, is submitted to the OPCW as part of the U.S. annual declaration on exports and imports. Also note that the notification and annual report requirements of this section do not relieve you of any requirement to obtain a license from the Department of Commerce for the export of Schedule 1 chemicals subject to the Export Administration Regulations (15 CFR parts 730 through 799) or from the Department of State for the export of Schedule 1 chemicals subject to the International Traffic in Arms Regulations (22 CFR parts 120 through 130). Only facilities that produce in excess of 100 grams aggregate of Schedule 1 chemicals annually are "declared" facilities and are subject to routine inspections pursuant to part 716 of this subchapter.

(a) *Advance notification of exports and imports.* (1) You must notify BXA at least 45 calendar days prior to exporting or importing any quantity of a Schedule 1 chemical listed in Supplement No. 1 to this part to or from another State Party. Note that notifications for exports may be sent to BXA prior to or after submission of a

¹ Effective May 18, 1999, these advance notification and annual report requirements for exports are set forth in parts 742 and 745 of the Export Administration Regulations (EAR) (15 CFR parts 742 and 745).

license application to BXA for Schedule 1 chemicals subject to the EAR and controlled under ECCNs 1C350 or 1C351 or to the Department of State for Schedule 1 chemicals controlled on the ITAR. Such notices must be submitted separately from license applications.

(i) Notifications should be on company letterhead or must clearly identify the reporting entity by name of company, complete address, name of contact person and telephone and fax numbers, along with the following information:

- (A) Chemical name;
- (B) Structural formula of the chemical;
- (C) Chemical Abstract Service (CAS) Registry Number;
- (D) Quantity involved in grams;
- (E) Planned date of export or import;
- (F) Purpose (end-use) of export or import (i.e., research, medical, pharmaceutical, or protective purpose)
- (G) Name(s) of recipient and exporter;
- (H) Complete street address(es) of recipient and exporter;
- (I) Export license or control number, if known; and
- (J) Company identification number, once assigned by BXA.

(ii) Send the notification by fax to (703) 235-1481 or to the following address:

For mail and courier deliveries:
Information Technology Team, Bureau

of Export Administration, Department of Commerce, 1555 Wilson Boulevard, Suite 710, Arlington, VA 22209-2405, Attn: "Advance Notification of Schedule 1 Chemical [Export][Import]".

(iii) Upon receipt of the notification, BXA will inform the exporter of the earliest date the shipment may occur under the notification procedure. To export the Schedule 1 chemical, the exporter must have applied for and been granted a license (see §§ 742.2 and 742.18 of the EAR, or the ITAR at 22 CFR parts 120 through 130).

(b) *Annual declaration or report on exports and imports.* (1) *Declaration or report requirements.* You must complete the forms specified in paragraph (b)(2) of this section if you exported to or imported from another State Party any quantity of a Schedule 1 chemical during the previous calendar year.

(2) *Forms to be used.* (i) *Facilities declared pursuant to § 712.2(d).* If you are a Schedule 1 declared facility because you produced in excess of 100 grams aggregate of Schedule 1 chemicals in the previous calendar year, you must complete Form 1-3 as part of the annual declaration on past activities. (See § 712.2(b)(2)).

(ii) *Undeclared facilities and trading companies.* If your facility is not a "declared" facility because it did not produce over 100 grams aggregate of

Schedule 1 chemicals, and you exported or imported any quantity of a Schedule 1 chemical to or from another State Party, you must complete the Certification Form, Form 1-1, and Form 1-3. Form B is optional.

(c) Paragraph (a) of this section does not apply to the activities and persons set forth in paragraph 712.1(c).

§ 712.5 Frequency and timing of declarations, reports and notifications.

Declarations, reports and notifications required under this part are due to BXA according to the dates identified in Table 1 of this section. Required declarations, reports and notifications include:

- (a) Initial declarations;
- (b) Annual declarations or reports on activities, including exports and imports, during the previous calendar year, beginning with activities in calendar year 1997;
- (c) Annual declarations on anticipated production in the next calendar year, beginning in calendar year 1999 for production anticipated for calendar year 2000;
- (d) Advance notification of any export to or import from another State Party; and
- (e) Advance notification of new Schedule 1 production facility.

TABLE 1 TO § 712.5.—DEADLINES FOR SUBMISSION OF SCHEDULE 1 DECLARATIONS

Declarations and notifications	Applicable forms	Due dates
Initial Declaration: Declared facility (technical description)	Certification, 1-1, A	See Note to Table 1.
Annual Declaration on Past Activities (previous calendar year): Declared facility (past production, exports and imports).	Certification, 1-1, 1-2, 1-2A, 1-2B, 1-3 (if also exported or imported), A, and B (optional).	See Note to Table 1.
Annual report of exports and imports (undeclared facility, trading company).	Certification, 1-1, 1-3, B (optional)	See Note to Table 1.
Annual Declaration on Anticipated Production for a Facility (next calendar year).	Certification, 1-1, 1-4, A, B (optional)	August 3 of each year prior to the calendar year in which anticipated activities will take place.
Advance Notification of any export to or import from another State Party.	Notify on letterhead. See § 712.4 of this sub-chapter.	45 calendar days prior to the import or export.
Advance Notification of new Schedule 1 production facility.	Certification, 1-1, A	200 calendar days before commencing such production.

Note to Table 1: Initial declarations and annual reports of past production, exports and imports pursuant to the provisions of this part are due [90 days after the publication of a final rule]. Declared facilities must provide annual declarations on past production of Schedule 1 chemicals in aggregate quantities exceeding 100 grams for both calendar years 1997 and 1998. Thereafter, annual declarations and reports of past Schedule 1 activities will be due to the Department of Commerce by February 13th of each year.

§ 712.6 Amended declaration or report.

If, after submitting the original declaration or report, you discover that the previously submitted information is not accurate (e.g., change of quantity,

addition of a new chemical, relocation of facility, etc.), you must complete a new Certification Form and the specific form being amended (e.g. annual declaration on past activities, annual

declaration on anticipated activities). Only complete that portion of each form that corrects the previously submitted information that changed.

SUPPLEMENT NO. 1 TO PART 712—SCHEDULE 1 CHEMICALS

	(CAS registry No.)
A. Toxic chemicals:	
(1) O-Alkyl ($\leq C_{10}$, incl. cycloalkyl) alkyl (Me, Et, n-Pr or i-Pr)-phosphonofluoridates e.g. Sarin: O-Isopropyl methylphosphonofluoridate	(107-44-8)
Soman: O-Pinacolyl methylphosphonofluoridate	(96-64-0)
(2) O-Alkyl ($\leq C_{10}$, incl. cycloalkyl) N,N-dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidocyanidates e.g. Tabun: O-Ethyl N,N-dimethyl phosphoramidocyanidate	(77-81-6)
(3) O-Alkyl (H or $\leq C_{10}$, incl. cycloalkyl) S-2-dialkyl (Me, Et, n-Pr or i-Pr)-aminoethyl alkyl (Me, Et, n-Pr or i-Pr) phosphonothiolates and corresponding alkylated or protonated salts e.g. VX: O-Ethyl S-2-diisopropylaminoethyl methyl phosphonothiolate	(50782-69-9)
(4) Sulfur mustards:	
2-Chloroethylchloromethylsulfide	(2625-76-5)
Mustard gas: Bis(2-chloroethyl)sulfide	(505-60-2)
Bis(2-chloroethylthio)methane	(63869-13-6)
Sesquimustard: 1,2-Bis(2-chloroethylthio)ethane	(3563-36-8)
1,3-Bis(2-chloroethylthio)-n-propane	(63905-10-2)
1,4-Bis(2-chloroethylthio)-n-butane	(142868-93-7)
1,5-Bis(2-chloroethylthio)-n-pentane	(142868-94-8)
Bis(2-chloroethylthiomethyl)ether	(63918-90-1)
O-Mustard: Bis(2-chloroethylthioethyl)ether	(63918-89-8)
(5) Lewisites:	
Lewisite 1: 2-Chlorovinylchloroarsine	(541-25-3)
Lewisite 2: Bis(2-chlorovinyl)chloroarsine	(40334-69-8)
Lewisite 3: Tris(2-chlorovinyl)arsine	(40334-70-1)
(6) Nitrogen mustards:	
HN1: Bis(2-chloroethyl)ethylamine	(538-07-8)
HN2: Bis(2-chloroethyl)methylamine	(51-75-2)
HN3: Tris(2-chloroethyl)amine	(555-77-1)
(7) Saxitoxin	(35523-89-8)
(8) Ricin	(9009-86-3)
B. Precursors:	
(9) Alkyl (Me, Et, n-Pr or i-Pr) phosphonyldifluorides. e.g. DF: Methylphosphonyldifluoride	(676-99-3)
(10) O-Alkyl (H or $\leq C_{10}$, incl. cycloalkyl) O-2-dialkyl (Me, Et, n-Pr or i-Pr)-aminoethyl alkyl (Me, Et, N-Pr or i-Pr) phosphonites and corresponding alkylated or protonated salts e.g. QL: O-Ethyl O-2-diisopropylaminoethyl methylphosphonite	(57856-11-8)
(11) Chlorosarin: O-Isopropyl methylphosphonochloridate	(1445-76-7)
(12) Chlorosoman: O-Pinacolyl methylphosphonochloridate	(7040-57-5)

Notes to Supplement No. 1:

Note 1: Note that the following Schedule 1 chemicals are controlled for export purposes under the Export Administration Regulations (see part 774 of the EAR, the Commerce Control List): O-Ethyl-2-diisopropylaminoethyl methylphosphonite (QL) (C.A.S. #57856-11-8), Ethylphosphonyl difluoride (C.A.S. #753-98-0), Methylphosphonyl difluoride (C.A.S. #676-99-3), Saxitoxin (35523-89-8), Ricin (9009-86-3).

Note 2: All Schedule 1 chemicals not listed in Note 1 to this Supplement are controlled for export purposes by the Office of Defense Trade Control of the Department of State under the International Traffic in Arms Regulations (22 CFR parts 120 through 130).

PART 713—ACTIVITIES INVOLVING SCHEDULE 2 CHEMICALS

Sec.

713.1 Prohibition on imports of Schedule 2 chemicals from non-States Parties.

713.2 Declaration of past production of Schedule 2 chemicals for chemical weapons purposes.

713.3 Initial and annual declaration and reporting requirements for plant sites that produce, process or consume Schedule 2 chemicals in excess of specified thresholds.

713.4 Initial and annual declaration and reporting requirements for exports and imports of Schedule 2 chemicals.

713.5 Advance declaration requirements for additionally planned production, processing or consumption of a Schedule 2 chemical.

713.6 Frequency and timing of declarations and reports.

713.7 Amended declaration or report.

Supplement No. 1 to Part 713—Schedule 2 Chemicals

Authority: Pub. L. 105-277, 112 Stat. 2681; 50 U.S.C. 1601 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12938 (59 FR 59099; 3 CFR, 1994 Comp., p. 950), as amended by E.O. 13094 (63 FR 40803; 3 CFR, 1998 Comp., p. 200); E.O. 13128, 64 FR 36703.

§ 713.1 Prohibition on imports of Schedule 2 chemicals from non-States Parties.

See § 711.4 of this subchapter for information on obtaining the forms you will need to declare and report activities involving Schedule 2 chemicals.

(a) You may not import any Schedule 2 chemical (see Supplement No. 1 to this part) on or after April 29, 2000, from any country other than a State Party to the Convention. See Supplement No. 1 to part 710 of this subchapter for a list of States that are party to the Convention.

Note to paragraph (a). See § 742.18 of the EAR for prohibitions that apply to exports of Schedule 2 chemicals on or after April 29, 2000 to non-States Parties and for End-Use Certificate requirements for exports of Schedule 2 chemicals prior to April 29, 2000 to such destinations.

(b) Paragraph (a) of this section does not apply to the activities and persons set forth in paragraph 712.1(c) of this subchapter.

§ 713.2 Declaration of past production of Schedule 2 chemicals for chemical weapons purposes.

You must complete the Certification Form and Forms 2-1, 2-2, 2-4, Form A and Form B (which is optional), if you produced at your plant site any quantity of a Schedule 2 chemical at any time since January 1, 1946, for chemical weapons purposes. You must declare the total quantity of such a chemical produced, rounded to the nearest

kilogram. Note that you are not subject to routine inspection unless you are a declared facility pursuant to § 713.3.

§ 713.3 Initial and annual declaration and reporting requirements for plant sites that produce, process or consume Schedule 2 chemicals in excess of specified thresholds.

See Supplement No. 1 to part 711 of this subchapter for information pertaining to the protection of confidential business information.

(a) *Production, processing or consumption of Schedule 2 chemicals for purposes not prohibited by the CWC.*

(i) *Quantities of production, processing or consumption that trigger declaration requirements.* You must complete the forms specified in paragraph (c) of this section if you have been or will be involved in the following activities:

(i) *Initial declaration.* You produced, processed or consumed at one or more plants on your plant site during any of the calendar years 1994, 1995 or 1996, a Schedule 2 chemical in excess of the following declaration threshold quantities:

(A) 1 kilogram of chemical BZ: 3-Quinuclidinyl benzilate (see Schedule 2, paragraph A.3 included in Supplement No. 1 to this part);

(B) 100 kilograms of chemical PFIB: 1,1,3,3,3-Pentafluoro-2(trifluoromethyl)-1-propene or any chemical belonging to Amiton and corresponding alkylated or protonated salts (see Schedule 2, paragraph A.1 and A.2 A.3 included in Supplement No. 1 to this part); or

(C) 1 metric ton of any chemical listed in Schedule 2, Part B (see Supplement No. 1 to this part).

Note to paragraph (a)(1)(i). To determine whether you have an initial declaration requirement for Schedule 2 activities, you must determine whether you produced, processed or consumed a Schedule 2 chemical above the applicable threshold at one or more plants on your plant site in calendar years 1994, 1995 or 1996. For example, if you are preparing your initial declaration, and you determine that one plant on your plant site produced greater than 1 kilogram of the chemical BZ: 3-Quinuclidinyl benzilate in calendar year 1995, and no plants on your plant site produced, processed or consumed any Schedule 2 chemical above the declaration threshold in calendar years 1994 or 1996, you still have a declaration requirement under this paragraph, and you must declare on the required forms production, processing and consumption data for calendar years 1994, 1995 and 1996.

(ii) *Annual declaration on past activities.* You produced, processed or consumed at one or more plants on your plant site during any of the previous three calendar years, a Schedule 2

chemical in excess of the applicable declaration threshold quantity specified in paragraphs (a)(1)(i)(A) through (C) of this section; or

Note to paragraph (a)(1)(ii). To determine whether you have an annual declaration requirement of Schedule 2 activities, you must determine whether you produced, processed or consumed a Schedule 2 chemical above the applicable threshold at one or more plants on your plant site in any one of the previous three calendar years. For example, if you are preparing your annual declaration on past activities for 1997, and you determine that one plant on your plant site produced greater than 1 kilogram of the chemical BZ: 3-Quinuclidinyl benzilate in calendar year 1995, and no plants on your plant site produced, processed or consumed any Schedule 2 chemical above the declaration threshold in calendar years 1996 or 1997, you still have a declaration requirement under this paragraph. However, you must only declare on the required forms production, processing and consumption data for calendar year 1997.

(iii) *Annual declaration on anticipated activities.* You anticipate you will produce, process or consume at one or more plants on your plant site during the next calendar year, starting with activities anticipated for calendar year 2000, a Schedule 2 chemical in excess of the applicable declaration threshold quantity set forth in paragraphs (a)(1)(i)(A) through (C) of this section.

(2) *Mixtures containing Schedule 2 chemicals.* (i) The quantity of a Schedule 2 chemical contained in a mixture must be counted for declaration purposes only if the concentration of the Schedule 2 chemical in the mixture is;

(A) 10% or more by volume or by weight, whichever yields the lesser percent, for activities involving either production or consumption of a mixture containing a Schedule 2 chemical; or

(B) 30% or more by volume or by weight, whichever yields the lesser percent, for activities involving the processing of a mixture containing a Schedule 2 chemical.

(ii) *Counting the amount of the Schedule 2 chemical in a mixture.* If your mixture contains more than the stated percentage concentration of a Schedule 2 chemical for the activity (i.e., more than 10% for production or consumption activities or more than 30% for processing activities), you must count only the amount (weight) of the Schedule 2 chemical in the mixture, not the total weight of the mixture. Only count amounts for activities for which you meet the applicable percentage threshold. For example, if a plant at your plant site produces and/or consumes a Schedule 2 chemical at a concentration over 10% but does not

process that chemical at a concentration over 30%, only count the amount of the Schedule 2 chemical involved in the production and/or consumption activity or activities. Likewise, if a plant on your plant site processes a Schedule 2 chemical at a concentration in excess of 30% but does not produce or consume that chemical at a concentration in excess of 10%, only count the amount of that Schedule 2 chemical involved in the processing activity.

(iii) *Determining declaration requirements for production, processing and consumption.* You must include the amount (weight) of a Schedule 2 chemical in a produced, processed or consumed mixture when determining the total production, total processing, or total consumption of that Schedule 2 chemical at a plant on your plant site. If the total amount of the produced, processed or consumed Schedule 2 chemical exceeds the applicable declaration threshold set forth in paragraphs (a)(1)(i)(A) through (C) of this section, you have a declaration requirement. For example, if during calendar year 1997, a plant on your plant site produced a mixture containing 300 kilograms of thiodiglycol in a concentration of 12% and also produced 800 kilograms of thiodiglycol, that plant produced 1100 kilograms and, exceeded the declaration threshold of 1 metric ton for that Schedule 2 chemical. You must declare past production of thiodiglycol at that plant site for calendar year 1997. If, on the other hand, a plant on your plant site processed a mixture containing 300 kilograms of thiodiglycol in a concentration of 25% and also processed 800 kilograms of thiodiglycol in other than mixture form, the total amount of thiodiglycol processed at that plant for CWC purposes would be 800 kilograms and would not trigger a declaration requirement. This is because the concentration of thiodiglycol in the mixture did not exceed 30% and therefore did not have to be "counted" and added to the other 800 kilograms of processed thiodiglycol at that plant.

(b) *Types of declaration forms to be used.* (1) *Initial declaration.* You must complete the Certification Form and Forms 2-1, 2-2, 2-3, 2-3A, and Form A if you produced, processed or consumed at one or more plants on your plant site a Schedule 2 chemical in excess of the applicable declaration threshold quantity specified in paragraphs (a)(1)(i)(A) through (C) of this section during any of the three calendar years 1994, 1995 or 1996. Form B is optional. If you are subject to initial declaration requirements, you must included data

for each of the calendar years 1994, 1995 and 1996.

(2) *Annual declaration on past activities.* You must complete the Certification Form and Forms 2-1, 2-2, 2-3, 2-3A, and Form A if one or more plants on your plant site produced, processed or consumed more than the applicable threshold quantity of a Schedule 2 chemical described in paragraphs (a)(1)(i)(A) through (C) of this section in any of the three previous calendar years. Form B is optional. If you are subject to annual declaration requirements, you must include data for the previous calendar year only.

(3) *Annual declaration on anticipated activities.* You must complete the Certification Form and Forms 2-1, 2-2, 2-3, 2-3A, 2-3C, and Form A if you plan to produce, process, or consume at any plant on your plant site a Schedule 2 chemical above the applicable threshold quantity set forth in paragraphs (a)(1)(i)(A) through (C) of this section during the following calendar year, beginning with activities planned for calendar year 2000. Form B is optional.

(c) *Quantities to be declared.*

(1) *Production, processing and consumption of a Schedule 2 chemical above the declaration threshold.*

(i) *Initial declaration.* If you are required to complete forms pursuant to paragraph (a)(1)(i) of this section, you must declare the aggregate quantity resulting from each type of activity (production, processing or consumption) from each plant on your plant site that exceeds the applicable threshold quantity for that Schedule 2 chemical for each of the calendar years 1994, 1995 and 1996. Do not aggregate amounts of production, processing or consumption from plants on the plant site that did not individually produce, process or consume Schedule 2 chemicals in amounts greater than the applicable threshold levels.

(ii) *Annual declaration on past activities.* If you are required to complete forms pursuant to paragraph (a)(1)(ii) of this section, you must declare the aggregate quantity resulting from each type of activity (production, processing or consumption) from each plant on your plant site that exceeds the applicable threshold quantity for that Schedule 2 chemical. Do not aggregate amounts of production, processing or consumption from plants on the plant site that did not individually produce, process or consume Schedule 2 chemicals in amounts greater than the applicable threshold levels.

(2) *Rounding.* For the chemical BZ, report quantities to the nearest hundredth of a kilogram. For PFIB and

the Amiton family, report quantities to the nearest 1 kg. For all other Schedule 2 chemicals, report quantities to the nearest 10 kg.

(d) *"Declared" Schedule 2 plant sites.* A plant site that comprises one or more plants that produced, processed or consumed a Schedule 2 chemical above the applicable threshold quantity set forth in paragraphs (a)(1)(i)(A) through (C) of this section during any of the previous three calendar years or is anticipated to produce, process or consume a Schedule 2 chemical above the applicable threshold quantity in the next calendar year is a "declared plant site."

(e) *Declared Schedule 2 plant sites subject to routine inspections.* A "declared" Schedule 2 plant site is subject to routine inspection by the OPCW if it produced, processed or consumed in any of the three previous calendar years or is anticipated to produce, process or consume in the next calendar year in excess of ten times the applicable declaration threshold quantity set forth in paragraphs (a)(1)(i)(A) through (C) of this section (see part 716 of this subchapter).

§ 713.4 Initial and annual declaration and reporting requirements for exports and imports of Schedule 2 chemicals.

(a) *Quantities of exports and imports that must be declared or reported.* You must complete the forms specified in paragraph (c) of this section if you have been or will be involved in any of the following activities.

(1) *Initial declaration or report.* (i) *Initial declaration from a declared plant site.* Your plant site is declared pursuant to § 713.3 and you exported from and/or imported to your plant site during any of calendar years 1994, 1995 or 1996, a Schedule 2 chemical in excess of the following declaration threshold quantities:

(A) 1 kilogram of chemical BZ: 3-Quinuclidinyl benzilate (see Schedule 2, paragraph A.3);

(B) 100 kilograms of chemical PFIB: 1,1,3,3,3-Pentafluoro-2(trifluoromethyl)-1-propene or any chemical belonging to Amiton and corresponding alkylated or protonated salts (see Schedule 2, paragraph A.1 and A.2);

(C) 1 metric ton of any chemical listed in Schedule 2, Part B.

(ii) *Initial report on exports and imports from undeclared plant site or trading company.* You exported from and/or imported to your undeclared plant site or trading company during calendar year 1996 a Schedule 2 chemical in excess of the threshold quantity specified in paragraphs (a)(1)(i)(A) through (C) of this section.

(2) *Annual declaration or report on past activities.* (i) *Declared plant site.* You exported from and/or imported to your plant site during the previous calendar year a Schedule 2 chemical in excess of the applicable declaration threshold quantity specified in paragraphs (a)(1)(i)(A) through (C) of this section; or

(ii) *Annual report of exports and imports from undeclared plant site or trading company.* You exported from and/or imported to your undeclared plant site trading company during the previous calendar year a Schedule 2 chemical in excess of the threshold quantity specified in paragraphs (a)(1)(i)(A) through (C) of this section. (See part 710 of this subchapter for a definition of trading company.)

Notes to paragraph (a): **Note 1:** You must obtain an End-Use Certificate to export any Schedule 2 chemical to a non-State Party prior to April 29, 2000. (See §§ 742.18, 745.2 and 748.8 of the EAR.) Exports of Schedule 2 chemicals to non-States Parties are prohibited beginning April 29, 2000.

Note 2: You may need a license to export a Schedule 2 chemical. (See §§ 742.2 and 742.18 of the EAR for chemicals under the jurisdiction of the Department of Commerce and the ITAR (22 CFR parts 120 through 130) for chemicals under the jurisdiction of the Department of State.)

(b) *Mixtures.* Note that the quantity of a Schedule 2 chemical contained in a mixture must be counted for declaration purposes only if the concentration of the Schedule 2 chemical in the mixture is:

- (1) 10% or more by volume or by weight, whichever yields the lesser percent, for activities involving either production or consumption of a mixture containing a Schedule 2 chemical, or
- (2) 30% or more by volume or by weight, whichever yields the lesser percent, for activities involving the processing of a mixture containing a Schedule 2 chemical.

Note to paragraph (b): See § 713.3(a)(2) for information on counting amounts of Schedule 2 chemicals contained in mixtures and determining declaration requirements.

(c) *Types of declarations and declaration forms to be used.* (1) *Initial declaration.* (i) *Declared plant sites.* If your plant site is subject to the declaration requirements of § 713.3 for a specific Schedule 2 chemical, and if your plant site also exported or imported that Schedule 2 chemical in excess of the applicable threshold quantity set forth in paragraph (a) of this section in calendar years 1994, 1995 or 1996, you must also complete Form 2-3B in addition to the forms required by § 713.3(b)(1). You must declare exports from or imports to your plant site of that Schedule 2 chemical for each of

calendar years 1994, 1995, and 1996 during which the imports or exports exceeded the applicable threshold quantity.

(ii) *Undeclared plant sites and trading companies.* If your plant site is not subject to the declaration requirements of § 713.2 for a specific Schedule 2 chemical and if your plant site exported or imported more than the applicable threshold quantity of that Schedule 2 chemical during calendar year 1996, or if your trading company as that term in defined in part 710 of this subchapter exported or imported more than the applicable threshold quantity of a Schedule 2 chemical during calendar year 1996, you must complete the Certification Form, Forms 2-1 and 2-3B, and Form A. Form B is optional.

Note to paragraph (c)(1)(ii): Under the Convention, the United States is obligated to provide the OPCW an aggregate annual report of the quantities of each Schedule 2 chemical exported and imported. The U.S. Government will not submit your company-specific information relating to the export or import of a Schedule 2 chemical reported under this paragraph (c)(1)(ii). The U.S. Government will add all export and import information submitted by various undeclared plant sites and trading companies under this paragraph (c)(1)(ii) to export and import information submitted by declared plant sites under paragraph (c)(1)(i) of this section to produce a national aggregate initial declaration of country-by-country trade for each Schedule 2 chemical.

(2) *Annual declaration or report on past activities exports and imports.* (i) *Declared plant sites.* If your plant site is subject to the declaration requirements of § 713.3 for a specific Schedule 2 chemical and your plant site also exported or imported more than the applicable threshold quantity of that Schedule 2 chemical in the previous calendar year, you must also complete Form 2-3B in addition to the forms required by § 713.3(b)(2).

(ii) *Undeclared plant sites and trading companies.* If your plant site is not subject to the declaration requirements of § 713.3 for a specific Schedule 2 chemical and your plant site exported or imported more than the applicable threshold quantity of that chemical in the previous calendar year, or if you are a trading company as that term is defined in part 710 of this subchapter and your trading company imported or exported more than the applicable threshold quantity of a Schedule 2 chemical in the previous calendar year,

you must complete the Certification Form, Forms 2-1 and 2-3B. Form B is optional.

Note to (c)(2)(ii): Under the Convention, the United States is obligated to provide the OPCW an aggregate annual report of the quantities of each Schedule 2 chemical exported and imported. The U.S. Government will not submit your company-specific information relating to the export or import of a Schedule 2 chemical reported under this paragraph (c)(2)(ii). The U.S. Government will add all export and import information submitted by various undeclared plant sites and trading companies under this paragraph (c)(2)(ii) to export and import information submitted by declared plant sites under paragraph (c)(2)(i) of this section to produce a national aggregate annual declaration of country-by-country trade for each Schedule 2 chemical.

(d) *Quantities to be declared.* (1) *Country-by-country reporting.* If you exported from or imported to your plant site or trading company more than the applicable threshold quantity of a Schedule 2 chemical, you must report all exports and imports by country, and indicate the total amount exported to or imported from each country. Only indicate the total annual quantity exported to or imported from a specific country if the total annual quantity to or from that country is more than 1% of the applicable threshold (i.e., more than 10 grams of BZ, 1 kilogram of PFIB and Amiton and corresponding alkylated or protonated salts, or 10 kilograms of all other Schedule 2 chemicals). However, in determining whether your total exports and imports worldwide for the year in question trigger declaration or reporting requirements, you must include all exports and imports, including exports and imports falling within the 1% exemption in your calculation.

(2) *Rounding.* For purposes of reporting exports and imports of a Schedule 2 chemical, you must total all exports and imports per calendar year per recipient or source country and then round as follows: for the chemical BZ, the total quantity for each country should be reported to the nearest hundredth of a kilogram (10 grams); for PFIB and Amiton and corresponding alkylated or protonated salts, the total quantity for each country should be reported to the nearest 1 kg; for all other Schedule 2 chemicals, the total quantity for each country should be reported to the nearest 10 kg.

§ 713.5 Advance declaration requirements for additionally planned production, processing or consumption of a Schedule 2 chemical.

(a) *Declaration requirements.* You must declare additionally planned production, processing or consumption of a Schedule 2 chemical after the annual declaration on anticipated activities has been delivered to BXA if:

(1) You plan to increase production, processing or consumption of a previously declared Schedule 2 chemical at any plant on your plant site by 20% or more of the originally declared amount; or

(2) You plan to begin new production, processing or consumption of an additional Schedule 2 chemical in amounts greater than the applicable threshold quantities set forth in § 713.3(a)(1)(i)(A) through (C).

(b) *Declaration forms to be used.* If you are required to declare additionally planned activities pursuant to paragraph (a) of this section, you must complete the Certification Form and Form 2-1 and 2-3C. Such forms are due to BXA at least 21 days in advance of the beginning of the additional or new production, processing or consumption.

§ 713.6 Frequency and timing of declarations and reports.

Declarations and reports required under this part are due to BXA according to the dates identified in Table 1 of this section. Required declarations and reports include:

(a) Declaration on past production of Schedule 2 chemicals for CW purposes since January 1, 1946;

(b) Initial declaration on past production, processing, consumption, import or export of Schedule 2 chemicals (activities in calendar years 1994, 1995 and 1996);

(c) Annual declaration on past production, processing, consumption, export or import of Schedule 2 chemicals (activities during the previous calendar year);

(d) Annual declaration on anticipated activities (production, processing or consumption) beginning in calendar year 1999 for activities anticipated for calendar year 2000; and

(e) Annual reports on exports and imports from trading companies and plant sites that do not have declaration requirements for a specific Schedule 2 chemical (exports and imports during the previous calendar year).

TABLE 1 TO § 713.6.—DEADLINES FOR SUBMISSION OF SCHEDULE 2 DECLARATIONS

Declarations	Applicable forms	Due dates
Initial Declaration:		

TABLE 1 TO § 713.6.—DEADLINES FOR SUBMISSION OF SCHEDULE 2 DECLARATIONS—Continued

Declarations	Applicable forms	Due dates
Declared Plant Site (1994, 1995 and 1996 for production, processing and consumption; and exports and imports for 1996).	Certification, 2-1, 2-2, 2-3, 2-3A, 2-3B (if also exported or imported), A, B (optional).	See note to Table 1.
Initial Report on Exports and Imports: Undeclared Plant Site and Trading Company (previous year exports and imports).	Certification, 2-1, 2-3B, B (optional)	See note to Table 1.
Annual Declaration on Past Activities: Declared Plant Site production, processing, consumption, exports and imports (previous calendar year only).	Certification, 2-1, 2-2, 2-3, 2-3A, 2-3B (if also exported or imported), A, B (optional).	See note to Table 1.
Annual Report of Exports and Imports: Undeclared Plant Site and Trading Company (exports and imports).	Certification, 2-1, 2-3B, B (optional)	See note to Table 1.
Annual Declaration on Anticipated Activities (next calendar year).	Certification, 2-1, 2-2, 2-3, 2-3A, 2-3C, A, B (optional).	September 3 of each year prior to the calendar year in which anticipated activities will take place.
Declaration of additionally planned production, processing and consumption.	Certification, 2-1, 2-3C	21 calendar days before the additionally planned activity begins.
Declaration on Past Production of Schedule 2 Chemicals for CW Purposes.	Certification, 2-1, 2-2, 2-4 A, B (optional)	See note to Table 1.

Note to Table 1: The declaration of past production for CW purposes, initial declaration of production, processing and consumption, export and imports and annual declarations for calendar years 1997 and 1998 of past production, processing, consumption, exports and imports pursuant to the provisions of this part will be due [90 days after the effective date of the final rule]. Thereafter, annual declarations of past Schedule 2 activities will be due to BXA by February 13th of each year.

§ 713.7 Amended declaration or report.

If, after submitting the original declaration or report, you discover that the previously submitted information is not accurate (e.g., change of quantity,

addition of a new chemical, relocation of facility, etc.), you must complete a new Certification Form and the specific form being amended (e.g. annual declaration on past activities, annual

declaration on anticipated activities). Only complete that portion of each form that corrects the previously submitted information that changed.

SUPPLEMENT NO. 1 TO PART 713—SCHEDULE 2 CHEMICALS

A. Toxic chemicals:	
(1) Amiton: O,O-Diethyl S-[2-(diethylamino)ethyl] phosphorothiolate and corresponding alkylated or protonated salts	(78-53-5)
(2) PFIB: 1,1,3,3,3-Pentafluoro-2-(trifluoromethyl)-1-propene	(382-21-8)
(3) BZ: 3-Quinuclidinyl benzilate	(6581-06-2)
B. Precursors:	
(4) Chemicals, except for those listed in Schedule 1, containing a phosphorus atom to which is bonded one methyl, ethyl or propyl (normal or iso) group but not further carbon atoms, e.g. Methylphosphonyl dichloride	(676-97-1)
Dimethyl methylphosphonate	(756-79-6)
Exemption: Fonofos: O-Ethyl S-phenyl ethylphosphono-thiolothionate	(944-22-9)
(5) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidic dihalides	
(6) Dialkyl (Me, Et, n-Pr or i-Pr) N,N-dialkyl (Me, Et, n-Pr or i-Pr)-phosphoramidates	
(7) Arsenic trichloride	(7784-34-1)
(8) 2,2-Diphenyl-2-hydroxyacetic acid	(76-93-7)
(9) Quinuclidine-3-ol	(1619-34-7)
(10) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethyl-2-chlorides and corresponding protonated salts	
(11) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-ols and corresponding protonated salts	
Exemptions: N,N-Dimethylaminoethanol and corresponding protonated salts	(108-01-0)
N,N-Diethylaminoethanol and corresponding protonated salts	(100-37-8)
(12) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-thiols and corresponding protonated salts	
(13) Thiodiglycol: Bis(2-hydroxyethyl)sulfide	(111-48-8)
(14) Pinacolyl alcohol: 3,3-Dimethylbutane-2-ol	(464-07-3)

PART 714—ACTIVITIES INVOLVING SCHEDULE 3 CHEMICALS

Sec.

714.1 Declaration of past production of Schedule 3 chemicals for chemical weapons purposes.

714.2 Initial and annual declaration requirements for production of Schedule 3 chemicals.

714.3 Initial and annual declaration and reporting requirements for exports and imports of Schedule 3 chemicals.

714.4 Advance declaration requirements for additionally planned production of a Schedule 3 chemical.

714.5 Frequency and timing of declarations.

714.6 Amended declaration or report.

Supplement No. 1 to Part 714—Schedule 3 Chemicals

Authority: Pub. L. 105-277, 112 Stat. 2681; E.O. 13128, 64 FR 36703.

§ 714.1 Declaration of past production of Schedule 3 chemicals for chemical weapons purposes.

See § 711.5 of this subchapter for information on obtaining the forms you will need to declare and report activities

involving Schedule 3 chemicals. You must complete the Certification Form, Forms 3-1, 3-2, 3-4, Form A and Form B (which is optional) if you produced at one or more plants on your plant site any quantity of a Schedule 3 chemical at any time since January 1, 1946, for chemical weapons purposes. You must declare the total quantity of such chemical produced, rounded to the nearest tenth of a metric ton (or 100 kg). Note that you are not subject to routine inspection unless you are a declared facility pursuant to § 714.2.

§ 714.2 Initial and annual declaration requirements for production of Schedule 3 chemicals.

(a) *Declaration of production of Schedule 3 chemicals for purposes not prohibited by the CWC.* (1) *Production quantities that trigger the declaration requirement.* You must complete the appropriate forms specified in paragraph (c) of this section if you have been or anticipate being involved in the following activities:

(i) *Initial declaration.* You produced at one or more plants on your plant site in excess of 30 metric tons of any single Schedule 3 chemical during calendar year 1996; or

(ii) *Annual declaration on past activities.* You produced at your plant site in excess of 30 metric tons of any single Schedule 3 chemical during the previous calendar year, beginning with figures for calendar year 1997.

(iii) *Annual declaration on anticipated activities.* You anticipate that you will produce at one or more plants on your plant site in excess of 30 metric tons of any single Schedule 3 chemical in the next calendar year.

(2) *Mixtures.* The quantity of a Schedule 3 chemical contained in a mixture must be counted for declaration purposes only if the concentration of the Schedule 3 chemical in the mixture is 80% or more by volume or by weight, whichever yields the lesser percent.

(b) *Types of declarations and declaration forms to be used.* (1) *Initial declaration.* You must complete the Certification Form and Forms 3-1, 3-2, 3-3, and Form A if you produced at one or more plants on your plant site in excess of 30 metric tons of any single Schedule 3 chemical during calendar year 1996. Form B is optional.

(2) *Annual declaration on past activities.* You must complete the Certification Form and Forms 3-1, 3-2, 3-3, and Form A if one or more plants on your plant site produced in excess of 30 metric tons of any single Schedule 3 chemical during the previous calendar year, beginning with production during calendar year 1997. Form B is optional.

(3) *Annual declaration on anticipated activities.* You must complete the Certification Form, and Forms 3-1 and 3-3 if you anticipate that you will produce at one or more plants on your plant site in excess of 30 metric tons of any single Schedule 3 chemical in the next calendar year.

(c) *Quantities to be declared.*

(1) *Production of a Schedule 3 chemical in excess of 30 metric tons.* If your plant site is subject to the declaration requirements of paragraph (a) of this section, you must declare the range within which the production at your plant site falls (30 to 200 metric tons, 200 to 1,000 metric tons, etc.) as specified on Form 3-3. When specifying the range of production for your plant site, you must aggregate the production quantities of all plants on the plant site that produced the Schedule 3 chemical in amounts greater than 30 metric tons. You must complete a separate Form 3-3 for each Schedule 3 chemical for which production at your plant site exceeds 30 metric tons.

(2) *Rounding.* To determine the production range into which your plant site falls, add all the production of the declared Schedule 3 chemical during the calendar year from all plants on your plant site and round to the nearest ten metric tons.

(3) *Mixtures.* The quantity of a Schedule 3 chemical contained in a mixture must be counted when determining the total quantity of a Schedule 3 chemical produced at your plant site only if the concentration of the Schedule 3 chemical in the mixture is 80% or more by volume or by weight, whichever yields the lesser percent.

(d) *"Declared" Schedule 3 plant sites.* A plant site that comprises one or more plants that produced in excess of 30 metric tons of a single Schedule 3 chemical during the previous calendar year, or that you anticipate will produce more than 30 metric tons of a single Schedule 3 chemical in the next calendar year, is a Schedule 3 "declared" plant site.

(e) *Routine inspections of declared Schedule 3 plant sites.* A "declared" Schedule 3 plant site is subject to routine inspection by the OPCW (see part 716 of this subchapter) if it produced during the previous calendar year or you anticipate it will produce during the next calendar year in excess of 200 metric tons aggregate of any Schedule 3 chemical.

§ 714.3 Initial and annual declaration and reporting requirements for exports and imports of Schedule 3 chemicals.

(a) *Quantities of exports and imports that must be declared or reported.* You

must complete the forms specified in paragraph (c) of this section if you have been or will be involved in any of the following activities:

(1) You exported from or imported to your declared plant site, during calendar year 1996 (for the initial declaration) or the previous calendar year (for all annual declarations starting with calendar year 1997) a Schedule 3 chemical in excess of 30 metric tons; or

(2) You exported from or imported to your undeclared plant site or trading company (see part 710 of this subchapter for a definition of a trading company) a Schedule 3 chemical in excess of 30 metric tons.

Notes to paragraph (a): **Note 1:** You must obtain an End-Use Certificate before exporting a Schedule 3 chemical to a non-State Party. See §§ 742.18, 745.2 and 748.8 of the EAR.

Note 2: You may need a license to export a Schedule 2 chemical. See §§ 742.2 and 742.18 of the EAR for Schedule 3 chemicals under the jurisdiction of the Department of Commerce and the ITAR (22 CFR parts 120 through 130) for chemicals under the jurisdiction of the Department of State.

(b) *Mixtures.* Note that the quantity of a Schedule 3 chemical contained in a mixture must be counted for declaration purposes only if the concentration of the Schedule 3 chemical in the mixture is 80% or more by volume or by weight, whichever yields the lesser percent. This requirement applies to each Schedule 3 chemical imported or exported in a previous calendar year.

(c) *Types of declarations and declaration forms to be used.*

(1) *Initial declaration.* (i) *Declared plant sites.* If you are subject to the declaration requirements of § 714.2 because one or more plants at your plant site produced more than 30 metric tons of a specific Schedule 3 chemical, and you also exported from or imported to your plant site that Schedule 3 chemical in excess of 30 metric tons in 1996, you must also report the total quantity of exports or imports of that Schedule 3 chemical, specifying the quantity associated with each country, by completing additional parts of Form 3-3.

(ii) *Undeclared plant sites and trading companies.* If your plant site is not subject to the declaration requirements of § 714.2 for a specific Schedule 3 chemical, and if you exported from or imported to your plant site more than 30 metric tons of that Schedule 3 chemical during calendar year 1996, or if you are a trading company and you exported or imported more than 30 metric tons of a Schedule 3 chemical during calendar year 1996, you must complete the

Certification Form, Forms 3-1, 3-3.3 and/or 3-3.4.

(2) *Annual declaration for a specific chemical.* (i) *Declared plant sites.* If you are subject to the declaration requirements of § 714.2 because one or more plants at your plant site produced more than 30 metric tons of a specific Schedule 3 chemical, and you also exported from or imported to any plant on your plant site that Schedule 3 chemical in excess of 30 metric tons in the previous calendar year beginning with exports and imports during calendar year 1997, you must also declare the total quantity of such exports or imports, specifying the quantity associated with each country, by completing additional parts of Form 3-3.

(ii) *Undeclared plant sites and trading companies.* If your plant site is not subject to the declaration requirements of § 714.2 for a specific Schedule 3 chemical and if you exported from or imported to your plant site more than 30 metric tons of that Schedule 3 chemical during the previous calendar year starting with calendar year 1997, or if you are a trading company and you exported or imported more than 30 metric tons of a Schedule 3 chemical during the previous calendar year starting with exports and imports during calendar year 1997, you must complete the Certification Form, Form 3-1 and relevant parts of Form 3-3.

(d) *Quantities to be declared or reported.*

(1) *Country-by-country reporting.* If you exported or imported more than 30 metric tons of any one Schedule 3 chemical in the previous calendar year, you must report all exports and imports

of that Schedule 3 chemical by country, and indicate the total amount exported to or imported from that country. Only indicate the total annual quantity exported to or imported from a specific country if the total annual quantity to or from that country is more than 1% of the applicable threshold (i.e., more than 0.3 metric tons) of all other Schedule 3 chemicals). However, in determining whether your total exports and imports worldwide for the year in question trigger declaration or reporting requirements, you must include all exports and imports, including exports and imports falling within the 1% exemption in your calculation.

(2) *Rounding.* For purposes of reporting exports and imports of a Schedule 3 chemical, you must total all exports or imports per calendar year per recipient country or source country, and round to the nearest 10 metric tons.

Note to § 714.3: Under the Convention, the United States is obligated to provide the OPCW an aggregate annual report of the quantities of each Schedule 3 chemical imported and exported. The U.S. Government will not submit your company-specific information relating to the export or import of a Schedule 3 chemical declared under this § 714.3. The U.S. Government will add all import and export information submitted by various facilities under this section to produce a national aggregate annual report of country-by-country trade for each Schedule 3 chemical.

§ 714.4 Advance declaration requirements for additionally planned production of a Schedule 3 chemical.

You must notify BXA of any additional Schedule 3 production planned after the annual declaration on anticipated activities has been delivered

to BXA. Only anticipated increases in production that will increase production by an amount that changes the production range originally declared in Block 3-3.1 on Form 3-3 must be declared. For example, if you submitted a declaration on planned production that indicated you anticipate producing between 200 and 1,000 metric tons of a Schedule 3 chemical, and you now plan to produce between 1,000 and 10,000 metric tons of that same Schedule 3 chemical, you must notify BXA of the additional planned production. You must notify BXA by completing the Certification Form and Forms 3-1 and 3-3, and submitting them to BXA no later than 21 days before the additional activity begins.

§ 714.5 Frequency and timing of declarations.

Declarations and reports required under this part are due to BXA according to the dates identified in Table 1 of this section. Required declarations and reports include:

(a) Initial declarations on past production of any amount of Schedule 3 chemicals for CW purposes since January 1, 1946;

(b) Initial declarations and reports on past production, imports and exports during calendar year 1996;

(c) Annual declarations and reports on production, imports and exports during the previous calendar year, beginning with declarations for calendar year 1997; and

(d) Annual declarations on anticipated production during the next calendar year beginning in calendar year 1999 for activities anticipated for calendar year 2000.

TABLE 1 TO § 714.5.—DEADLINES FOR SUBMISSION OF SCHEDULE 3 DECLARATIONS

Declarations	Applicable forms	Due dates
Initial Declaration (for calendar year 1996): Declared Plant Site (production)	Certification, 3-1, 3-2, 3-3 (if also exported or imported), A, B (optional).	See note to this table.
Initial Report on Exports and Imports: Undeclared Plant Site, Trading Company ..	Certification, 3-1, 3-3.3 and 3-3.4	See note to this table.
Annual Declaration on Past Activities (previous calendar year, starting with 1997): Declared plant site (production)	Certification, 3-1, 3-2, 3-3 (if also exported or imported), A, B (optional).	See note to this table.
Annual Report on Exports and Imports: Undeclared Plant Site and Trading Company.	Certification, 3-1, 3-3.3 and 3-3.4	See note to this table.
Annual Declaration on Anticipated Production (next calendar year).	Certification, 3-1, 3-3.1 and 3-3.2	September 3 of each year prior to the calendar year in which anticipated activities will take place.
Declaration of Additionally Planned Activities	Certification, 3-1, 3-3.1 and 3-3.2	21 calendar days before the additionally planned activity begins.

TABLE 1 TO § 714.5.—DEADLINES FOR SUBMISSION OF SCHEDULE 3 DECLARATIONS—Continued

Declarations	Applicable forms	Due dates
Initial Declaration on Past Production of Schedule 3 Chemicals for CW Purposes.	Certification, 3-1, 3-2, 3-4, A, B (optional)	See note to this table.

Note to Table 1: The declaration of past production for CW purposes, the initial declaration of past production, exports and imports during calendar year 1996 and annual declarations and reports for production, exports and imports during calendar years 1997 and 1998 pursuant to the provisions of this part will be due [90 days after the effective date of the final rule]. Thereafter, annual declarations and reports of past Schedule 3 activities will be due to BXA by February 13th of each year.

§ 714.6 Amended declaration or report.

If, after submitting the original declaration or report, you discover that the previously submitted information is not accurate (e.g., change of quantity,

addition of a new chemical, relocation of facility, etc.), you must complete a new Certification Form and the specific form being amended (e.g., annual declaration on past activities, annual

declaration on anticipated activities). Only complete that portion of each form that corrects the previously submitted information.

SUPPLEMENT NO. 1 TO PART 714—SCHEDULE 3 CHEMICALS

A. Toxic chemicals:	
(1) Phosgene: Carbonyl dichloride	(75-44-5)
(2) Cyanogen chloride	(506-77-4)
(3) Hydrogen cyanide	(74-90-8)
(4) Chloropicrin: Trichloronitromethane	(76-06-2)
B. Precursors:	
(5) Phosphorus oxychloride	(10025-87-3)
(6) Phosphorus trichloride	(7719-12-2)
(7) Phosphorus pentachloride	(10026-13-8)
(8) Trimethyl	(121-45-9)
(9) Triethyl phosphite	(122-52-1)
(10) Dimethyl phosphite	(868-85-9)
(11) Diethyl phosphite	(762-04-9)
(12) Sulfur monochloride	(10025-67-9)
(13) Sulfur dichloride	(10545-99-0)
(14) Thionyl chloride	(7719-09-7)
(15) Ethyldiethanolamine	(139-87-7)
(16) Methyl-diethanolamine	(105-59-9)
(17) Triethanolamine	(102-71-6)

Note to Supplement No. 1: Refer to Supplement No. 1 to part 774 of the Export Administration Regulations (the Commerce Control List), ECCN 1C355, Related Controls for chemicals controlled under the International Traffic in Arms Regulations (22 CFR parts 120 through 130).

PART 715—ACTIVITIES INVOLVING UNSCHEDULED DISCRETE ORGANIC CHEMICALS

Sec.

715.1 Declaration requirements for the production of unscheduled discrete organic chemicals (i.e. discrete organic chemicals not declared under parts 712 through 714 of this subchapter).

715.2 Amended declaration.

715.3 Frequency and timing of declarations.

Supplement No. 1 to Part 715—Examples of Unscheduled Discrete Organic Chemicals and Production Processes

Authority: Pub. L. 105-277, 112 Stat. 2681; E.O. 13128, 64 FR 36703.

§ 715.1 Declaration requirements for the production of unscheduled discrete organic chemicals (i.e., discrete organic chemicals not declared under parts 712 through 714 of this subchapter).

See § 711.6 of this subchapter for information on obtaining the forms you will need to declare production of unscheduled discrete organic chemicals. See Supplement No. 1 to part 711 of this subchapter for information pertaining to

the protection of certain confidential business information.

(a) *Unscheduled discrete organic chemicals (UDOCs) subject to declaration requirements under this part.* Unscheduled discrete organic chemicals (UDOCs) subject to declaration requirements under this part are all chemicals containing carbon, except for the following:

(1) Those listed in Schedule 1, Schedule 2 or Schedule 3 (Supplement No. 1 to part 712, Supplement No. 1 to part 713 or Supplement No. 1 to part 714 of this subchapter);

(2) Inorganic chemicals (e.g., carbon oxides, carbon sulfides, metal carbonates, metal carbides or compounds of only a metal and carbon);

Note to paragraph (a): Carbon oxides consist of chemical compounds that contain only the elements carbon and oxygen and have the chemical formula C_xO_y , where x and y denote integers. The two most common carbon oxides are carbon monoxide (CO) and carbon dioxide (CO₂). Carbon sulfides consist of chemical compounds that contain only the elements carbon and sulfur, and have the chemical formula C_aS_b , where a and b denote

integers. The most common carbon sulfide is carbon disulfide (CS₂). Metal carbonates consist of chemical compounds that contain a metal (i.e., the Group I Alkalis, Groups II Alkaline Earths, the Transition Metals, or the elements aluminum, gallium, indium, thallium, tin, lead, bismuth or polonium), and the elements carbon and oxygen. Metal carbonates have the chemical formula $M_d(CO_3)_e$, where d and e denote integers and M represents a metal. Common metal carbonates are sodium carbonate (Na₂CO₃) and calcium carbonate (CaCO₃). Metal carbides or other compounds consisting of only a metal as described above, and carbon, (e.g., calcium carbide (CaC₂)).

(3) Chemicals and chemical mixtures produced through a biological or bio-mediated process;

(4) Polymer substances and oligomers consisting of two or more repeating units, and formed by the chemical reaction of monomeric or polymeric substances;

(b) *Declaration of production of unscheduled discrete organic chemicals.* (1)(i) *Production quantities that trigger declaration requirements.* You must complete the Certification

Form, Form UDOC (consisting of 2 pages), and Form A if:

(A) One or more plants at your plant site produced by synthesis in calendar year 1996 (for the initial declaration) or in the previous calendar year (for an annual declaration) in excess of 30 metric tons of an individual unscheduled discrete organic chemical containing phosphorus, sulfur or fluorine ("PSF-chemicals") that was, isolated for:

(1) Use; or

(2) sale as a specific end product; or

(B) Your plant site produced by synthesis in calendar year 1996 (for the initial declaration) or the previous calendar year (for an annual declaration) in excess of 200 metric tons aggregate of all unscheduled discrete organic chemicals (including PSF-chemicals) that were, isolated or captured for:

(1) Use; or

(2) Sale as a specific end product.

(ii) Completion of Form B is optional.

(2) *Exception.* You are not required to complete declarations under this paragraph if your plant site exclusively produced hydrocarbons or explosives.

(3) *Examples.* See Supplement No. 1 to this part for examples of UDOCs subject to the declaration requirements of this part, examples of chemicals not produced by synthesis and therefore not subject to declaration requirements of this part, and for examples of processes that are not considered production by synthesis.

(c) If you are exempt from declaration requirements under the provisions of paragraph (a)(1) through (a)(4) of this section, you need not complete and submit forms. If you need assistance on chemical determinations or other CWC-related matters, contact the Office of Chemical & Biological Controls and Treaty Compliance, Treaty Compliance Division at (703) 235-1335.

§ 715.2 Amended declaration.

If, after submitting the original declaration, you discover that the previously submitted information is not accurate (e.g., change of quantity, addition of a new chemical, relocation of facility, etc.), you must complete a new Certification Form and the specific form being amended. Only complete that portion of each form that corrects the previously submitted information.

§ 715.3 Frequency and timing of declarations.

Declarations required under this part are due to BXA according to the dates identified in Table 1 of this section. Required declarations include:

(a) Initial declarations for production of unscheduled discrete organic chemicals during calendar year 1996.

(b) Annual declarations on past production of unscheduled discrete organic chemicals beginning with production figures for calendar year 1997.

TABLE 1 TO § 715.3.—DEADLINES FOR SUBMISSION OF DECLARATIONS FOR UNSCHEDULED DISCRETE ORGANIC CHEMICALS FACILITIES

Declarations	Applicable forms	Due dates
Initial Declaration (calendar year 1996): Plant Site	Certification, UDOC, A, B (optional)	See note to this table.
Annual Declaration on Past Activities (previous calendar year, starting with 1997): Plant Site	Certification, UDOC, A, B (optional)	See note to this table. February 13 of each year following past activities requiring declaration.

Note to Table 1: The initial declaration and annual declaration of past production for calendar years 1997 and 1998 pursuant to the provisions of this part will be due [90 days after the effective date of the final rule]. Thereafter, annual reports of past unscheduled discrete organic chemical activities will be due to BXA by February 13th of each year.

Supplement No. 1 to Part 715—Examples of Unscheduled Discrete Organic Chemicals (UDOCs) and Production Processes

(1) Examples of UDOCs that you must report under the provisions of this part include, but are not limited to, the following, unless they are involved in processes other than "production" (i.e. chemical synthesis), or were not isolated for:

(i) Use; or

(ii) Sale as a specific end product:

(A) Acetophenone (CAS #98-86-2);

(B) 6-Chloro-2-Methyl Aniline (CAS #87-63-8);

(C) 2-Amino-3-Hydroxy benzoic Acid (CAS #548-93-6); and

(D) Acetone (CAS #67-64-1).

(2) The following examples illustrate those chemicals not produced by synthesis and therefore not subject to declaration requirements:

(i) UDOCs produced coincidentally as byproducts of a manufacturing, production or waste treatment process that are not isolated or captured for:

(A) Use; or

(B) Sale as a specific end product during the process and are routed to, or escape from,

the waste stream of a stack, incinerator, or waste treatment system or any other waste stream;

(ii) Mixtures of UDOCs produced coincidentally and not isolated for:

(A) Use; or

(B) Sale as a specific end-product;

(iii) UDOCs produced by recycling (i.e. involving one of the processes listed in paragraph (3) of this supplement) of previously reported unscheduled UDOCs;

(iv) UDOCs produced by the mixing (i.e. the process of combining or blending into one mass) of previously reported UDOCs; and

(v) Intermediate UDOCs in transient form completely converted to another reportable UDOC in the same process, whether batch or continuous, and not isolated for:

(A) Use; or

(B) Sale as a specific end product.

(3) Following are examples of processes that involve chemicals or mixtures of chemicals that are not considered production by synthesis, and, thus, the end products would not be reported under the provisions of this part:

(i) Fermentation;

(ii) Extraction;

(iii) Purification;

(iv) Distillation; and

(v) Filtration.

PART 716—INITIAL AND ROUTINE INSPECTIONS OF DECLARED FACILITIES

Sec.

716.1 General information on the conduct of initial and routine inspections.

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Supplement No. 1 To Part 716—Notification, Duration, and Frequency of Inspections**Supplement No. 2 To Part 716—Schedule 1 Model Facility Agreement****Supplement No. 3 To Part 716—Schedule 2 Model Facility Agreement**

Authority: Pub. L. 105-277, 112 Stat. 2681; E.O. 13128, 64 FR 36703.

§ 716.1 General information on the conduct of initial and routine inspections.

This part provides general information about the conduct of initial and routine inspections of declared facilities subject to inspection under CWC Verification Annex Part VI (E), Part VII(B), Part VIII(B) and Part IX(B).

(a) *Overview.* Each State Party to the CWC, including the United States Government, has agreed to allow certain inspections of declared facilities by inspectors employed by the Organization for the Prohibition of Chemical Weapons (OPCW) to ensure that activities are consistent with obligations under the CWC. The Department of Commerce is responsible for leading, hosting and escorting inspections of all facilities in the United States, except Department of Defense and Department of Energy facilities and other United States Government facilities that notify the USNA of their decision to be excluded from the CWC. United States Government facilities are those owned by or leased to the U.S. Government, including facilities that are contractor-operated.

(b) *Declared facilities subject to initial and routine inspections.* (1) *Schedule 1 facilities.* Your declared facility is subject to inspection if it produced in excess of 100 grams aggregate of Schedule 1 chemicals in the previous calendar year.

(2) *Schedule 2 facilities.* Your declared plant site is subject to inspection if one or more plants on your plant site produced, processed or consumed, in any of the three previous calendar years, or you anticipate it will produce, process or consume in the next calendar year, any Schedule 2 chemical in excess of the following:

(i) 10 kg of chemical BZ: 3-Quinuclidinyl benzilate (see Schedule 2, Part A, paragraph 3 in Supplement No. 1 to part 713 of this subchapter);

(ii) 1 metric ton of chemical PFIB: 1,1,3,3,3-Pentafluoro-2(trifluoromethyl)-1-propene or any chemical belonging to the Amiton family (see Schedule 2, Part A, paragraphs 1 and 2 in Supplement No. 1 to part 713 of this subchapter); or

(iii) 10 metric tons of any chemical listed in Schedule 2, Part B in Supplement No. 1 to part 713 of this subchapter.

(3) *Schedule 3 facilities.* Your declared plant site is subject to inspection if one or more plants on your plant site produced during the previous calendar year, or you anticipate it will produce in the next calendar year, in excess of 200 metric tons aggregate of any Schedule 3 chemical (see Supplement No. 1 to part 714 of this subchapter).

(4) *Unscheduled discrete organic chemical facilities.* Your declared plant site is subject to inspection if your plant site produced by synthesis during the previous calendar year:

(i) More than 200 metric tons of unscheduled discrete organic chemicals; or

(ii) More than 200 tons of an unscheduled discrete organic chemical containing the elements phosphorus, sulfur or fluorine.

(c) *Responsibilities of the Department of Commerce.* As the host and escort for the international inspector team for all industry inspections, the Department of Commerce will lead on-site inspections, provide preliminary notification to the operator of the industry site of an impending inspection, dispatch an advance team to the site to assist with inspection preparation, secure an appropriate warrant in the event the facility does not consent to the inspection, escort the inspection team on-site throughout the inspection process, assist the inspection team with verification activities, during the initial inspection, negotiate the development of a site-specific facility agreement, if appropriate (see § 716.6), and ensure that a routine inspection adheres to the Convention, the Act, and any site-specific facility agreement.

§ 716.2 Purposes and types of inspections of declared facilities.

(a) *Schedule 1 facilities.* (1) *Purposes of inspections.* The aim of inspections of Schedule 1 facilities is to verify that:

(i) The facility is not used to produce any Schedule 1 chemical, except for the declared Schedule 1 chemicals;

(ii) The quantities of Schedule 1 chemicals produced, processed or consumed are correctly declared and consistent with needs for the declared purpose; and

(iii) The Schedule 1 chemical is not diverted or used for purposes other than those declared.

(2) *Types of inspections.* (i) *Initial inspections.* During initial inspections of declared Schedule 1 facilities, in addition to the verification activities listed in paragraph (a)(1) of this section, the U. S. Government team, led by the Department of Commerce, and the OPCW Technical Secretariat inspection

team will develop draft site-specific facility agreements (see § 716.6) for the conduct of subsequent, routine inspections.

(ii) *Routine inspections.* During routine inspections of declared Schedule 1 facilities, the verification activities listed in paragraph (a)(1) of this section will be carried out pursuant to site-specific facility agreements (§ 716.6) developed during the initial inspections and concluded between the United States Government and the OPCW pursuant to the Convention.

(3) *On-site monitoring.* Declared Schedule 1 facilities are subject to monitoring by on-site instruments.

(b) *Schedule 2 facilities.* (1) *Purposes of inspections.*

(i) The general aim of inspections of declared Schedule 2 plant sites is to verify that activities are in accordance with obligations under the Convention and consistent with the information provided in declarations. Particular aims of inspections of declared Schedule 2 facilities are to verify:

(A) The absence of any Schedule 1 chemical, especially its production, except if in accordance with the provisions of the Convention;

(B) Consistency with declarations of levels of production, processing or consumption of Schedule 2 chemicals; and

(C) That Schedule 2 chemicals are not diverted to activities prohibited under the Convention.

(ii) During initial inspections, inspectors shall collect data to determine the frequency and intensity of subsequent inspections by assessing the risk to the object and purpose of the Convention posed by the relevant chemicals, the characteristics of the plant site and the nature of the activities carried out there, taking into account, *inter alia*, the following criteria:

(A) The toxicity of the scheduled chemicals and of the end-products produced with it, if any;

(B) The quantity of the scheduled chemicals typically stored at the inspected site;

(C) The quantity of feedstock chemicals for the scheduled chemicals typically stored at the inspected site;

(D) The production capacity of the Schedule 2 plants; and

(E) The capability and convertibility for initiating production, storage and filling of toxic chemicals at the inspected site.

(2) *Types of inspections.* (i) *Initial inspections.* During initial inspections of declared Schedule 2 facilities, in addition to the verification activities listed in paragraph (b)(1) of this section, the U.S. Government team, led by the

Department of Commerce, and the OPCW Technical Secretariat inspection team will develop draft site-specific facility agreements for the conduct of subsequent, routine inspections (see § 716.6).

(ii) *Routine inspections.* During routine inspections of declared Schedule 2 facilities, the verification activities listed in paragraph (b)(1) of this section will be carried out pursuant to site-specific facility agreements developed during the initial inspections (see § 716.6), and concluded between the United States Government and the OPCW pursuant to the Convention and the Act.

(c) *Schedule 3 facilities.* (1) *Purposes of inspections.* The general aim of inspections of declared Schedule 3 facilities is to verify that activities are consistent with the information provided in declarations. The particular aim of inspections is to verify the absence of any Schedule 1 chemical, especially its production, except in accordance with the Convention.

(2) *Types of inspections.* (i) *Initial inspections.* During initial inspections of declared Schedule 3 facilities, in addition to the verification activities listed in paragraph (c)(1) of this section, the U.S. Government team, led by the Department of Commerce, and the OPCW Technical Secretariat inspection team may develop draft site-specific facility agreements for the conduct of subsequent, routine inspections (see § 716.6). Although the Convention does not require facility agreements for declared Schedule 3 facilities, the owner, operator, occupant or agent in charge of a facility or plant site may request one.

(ii) *Routine inspections.* During routine inspections of declared Schedule 3 facilities, the verification activities listed in paragraph (c)(1) of this section will be carried out pursuant to site-specific facility agreements developed during the initial inspections, if applicable (see § 716.6) and concluded between the United States Government and the OPCW pursuant to the Convention and the Act.

(d) *Unscheduled Discrete Organic Chemicals Facilities.* Unscheduled discrete organic chemical (UDOC) facilities will be subject to inspection beginning April 29, 2000, (i.e., the fourth year after entry into force of the Convention), unless the OPCW decides otherwise.

(1) *Purposes of inspections.* The general aim of inspections of declared UDOC facilities is to verify that activities are consistent with the information provided in declarations. The particular aim of inspections is to

verify the absence of any Schedule 1 chemical, especially its production, except in accordance with the Convention.

(2) *Types of inspections.* (i) *Initial inspections.* During initial inspections of declared UDOC facilities, in addition to the verification activities listed in paragraph (d)(1) of this section, the U.S. Government team, led by the Department of Commerce, and the OPCW Technical Secretariat inspection team may develop draft site-specific facility agreements for the conduct of subsequent, routine inspections (see § 716.6). Although the Convention does not require facility agreements for declared UDOC facilities, the owner, operator, occupant or agent in charge of a facility or plant site may request one.

(ii) *Routine inspections.* During routine inspections of declared UDOC facilities, the verification activities listed in paragraph (d)(1) of this section will be carried out pursuant to site-specific facility agreements developed during the initial inspections, if applicable (see § 716.6), and concluded between the United States Government and the OPCW pursuant to the Convention and the Act.

§ 716.3 Warrants for inspections.

In instances where consent is not provided by the owner, operator, occupant or agent in charge for an initial or routine inspection, the Department of Commerce will obtain administrative warrants as provided by the Act.

§ 716.4 Scope and conduct of inspections.

(a) *General.* Each inspection shall be limited to the purposes described in § 716.2 and conducted in the least intrusive manner, consistent with the effective and timely accomplishment of its purpose as provided in the Convention. During inspections, inspectors will: tour the plants producing scheduled chemicals, including storage areas, feed lines, reaction vessels and ancillary equipment, control equipment, and waste and effluent handling areas; will examine relevant records; and may take samples as provided by the Convention and the Act, and the facility agreement, if applicable.

(b) *Effect of Facility Agreements.* Routine inspections at facilities or plant sites for which the United States has concluded a facility agreement with the OPCW will be conducted in accordance with the facility agreement. The existence of a facility agreement does not in any way limit the right of the operator of the facility to withhold consent to an inspection request.

(c) *Hours of inspections.* Consistent with the provisions of the Convention, the Department of Commerce will ensure, to the extent possible, that each inspection is commenced, conducted, and concluded during ordinary working hours, but no inspection shall be prohibited or otherwise disrupted from commencing, continuing or concluding during other hours.

(d) *Health and safety regulations.* In carrying out their activities, inspectors and U.S. Government representatives accompanying the inspectors shall observe health and safety regulations established at the inspection site, including those for the protection of controlled environments within a facility and for personal safety. Such health and safety regulations will be set forth in the facility agreement for Schedule 1 and Schedule 2 facilities, and for Schedule 3 and UDOC facilities, if applicable.

(e) *Confidential business information.* (1) *Provisions of the Act relating to confidential business information.* The Act provides a statutory exemption from disclosure in response to a Freedom of Information Act request for certain information related to initial and routine inspections reported to, or otherwise acquired by, the U. S. Government as follows:

(i) Information included in categories specifically enumerated in sections 103(g)(1) and 304(e)(2) of the Act:

- (A) Financial data;
- (B) Sales and marketing data (other than shipment data);
- (C) Pricing data;
- (D) Personnel data;
- (E) Research data;
- (F) Patent data;
- (G) Data maintained for compliance with environmental or occupational health and safety regulations;
- (H) Data on personnel and vehicles entering and personnel passenger vehicles exiting the facility.
- (I) Any chemical structure;
- (J) Any plant design, process, technology or operating method,
- (K) Any operating requirement, input, or result that identifies any type or quantity of chemicals used, processed or produced;

(L) Any commercial sale, shipment or use of a chemical; or

(ii) Information that qualifies as a trade secret under 5 U.S.C. 552(b)(4) (Freedom of Information Act) that is obtained:

- (A) From a U.S. person; or
- (B) Through the U.S. Government or the conduct of an inspection on U.S. territory under the Convention.

(2) *Exceptions to the Freedom of Information Act exemption.* The Act

provides that the United States Government may disclose confidential business information to the OPCW, to federal law enforcement agencies, and, upon written request, to Congressional committees of appropriate jurisdiction.

(3) *Provisions of the Convention relating to confidential business information.* The Convention provides that States Parties may designate information submitted to the Organization for the Prohibition of Chemical Weapons (OPCW) as confidential, and requires the OPCW to limit access to and to prevent disclosure of information so designated, including specific information on inspections. The OPCW has developed a classification system whereby States Parties may designate the information they submit in their declarations as "restricted," "protected," or "highly protected," depending on the sensitivity of the information.

(4) *Disclosure of confidential business information during inspections.* During inspections, certain confidential business information, as defined by the Act, may be disclosed to OPCW inspectors and U.S. Government representatives hosting and escorting the inspectors. Facilities being inspected are responsible for identifying confidential business information to the U.S. Government before it is disclosed to inspectors, so that appropriate marking and handling can be arranged, in accordance with the provisions of the Convention, to prevent further, unauthorized disclosure. Confidential business information not related to the purpose of an inspection or not necessary to the accomplishment of an inspection, as agreed by the U.S. Government, may be removed from sight, shrouded, or otherwise not disclosed.

(5) *Disclosure of confidential business information following inspections.*

(i) Inspection-related confidential business information, as defined by the Act, contained in inspection reports or otherwise in the possession of the U.S. Government, is exempt from disclosure in response to a Freedom of Information Act request.

(ii) The U.S. Government must disclose confidential business information when such disclosure is deemed to be in the national interest. The USNA, in coordination with the CWC interagency group, will determine if disclosure of the confidential business information is in the national interest. The Act provides for notification to the affected person of intent to disclose confidential business information, unless such notification of intent to disclose is contrary to national security

or law enforcement needs. If, after coordination with the agencies that comprise the CWC interagency group, the USNA determines that such disclosure is not contrary to national security or law enforcement needs, the USNA will notify the person that submitted the information or the person to whom the information pertains of the intent to disclose the information.

(iii) OPCW inspectors are prohibited, under the terms of their employment contracts and pursuant to the Confidentiality Annex of the Convention, from disclosing to any unauthorized persons any confidential information coming to their knowledge in the performance of their official duties, even after termination of their employment.

§ 716.5 Notification, duration and frequency of inspections.

(a) *Notification.* (1)(i) *Content of notice.* Inspections of facilities or plant sites may be made only upon issuance of written notice by the U.S. National Authority to the owner and to the operator, occupant or agent in charge of the premises to be inspected. The Department of Commerce will provide preliminary notification to the point of contact identified in declarations submitted by the facility. If the United States is unable to provide actual written notice to the inspection point of contact, the Department of Commerce, or if the Department of Commerce is unable, the Federal Bureau of Investigation may post notice prominently at the plant, plant site or other facility or location to be inspected. The notice shall include all appropriate information provided by the OPCW to the United States National Authority concerning:

- (i) The type of inspection;
- (ii) the basis for the selection of the facility or locations for the type of inspection sought;
- (iii) the time and date that the inspection will begin and the period covered by the inspection; and
- (iv) the names and titles of the inspectors.

(ii) In addition to appropriate information provided by the OPCW in its notification to the United States National Authority, the Department of Commerce's preliminary notification will state whether an advance team is available to assist the site in preparation for the inspection.

(2) *Timing of notice.* (i) *Schedule 1 facilities.* For declared Schedule 1 facilities, the Technical Secretariat will notify the USNA of an initial inspection not less than 72 hours prior to arrival of the inspection team in the United

States, and will notify the U.S. National Authority of a subsequent ("routine") inspection not less than 24 hours prior to arrival of the inspection team in the United States. The USNA will provide written notice to the owner and to the operator, occupant or agent in charge of the premises within six hours of receiving notification from the OPCW Technical Secretariat or as soon as possible thereafter. The Department of Commerce will provide preliminary notice to the inspection point of contact of the facility as soon as possible after the OPCW notifies the United States of the inspection.

(ii) *Schedule 2 facilities.* For declared Schedule 2 facilities, the Technical Secretariat will notify the USNA of an initial or routine inspection not less than 48 hours prior to arrival of the inspection team at the plant site to be inspected. The USNA will provide written notice to the owner and to the operator, occupant or agent in charge of the premises within six hours of receiving notification from the OPCW Technical Secretariat or as soon as possible thereafter and the Department of Commerce will provide preliminary notice to the inspection point of contact of the facility as soon as possible after the OPCW notifies the United States of the inspection.

(iii) *Schedule 3 and unscheduled discrete organic chemical facilities.* For declared Schedule 3 and discrete organic chemical facilities, the Technical Secretariat will notify the USNA of an initial or routine inspection not less than 120 hours prior to arrival of the inspection team at the plant site to be inspected. The USNA will provide written notice to the owner and to the operator, occupant or agent in charge of the premises within six hours of receiving notification from the OPCW Technical Secretariat or as soon as possible thereafter. The Department of Commerce will provide preliminary notice to the inspection point of contact of the facility as soon as possible after the OPCW notifies the United States of the inspection.

(b) *Duration of inspections.* (1) *Schedule 1 facilities.* For a declared Schedule 1 facility, the Convention does not specify a maximum duration for an initial inspection. The maximum duration of routine inspections will be as stated in the facility agreement, unless extended by agreement between the inspection team and the Department of Commerce.

(2) *Schedule 2 facilities.* For declared Schedule 2 facilities, the maximum duration of initial and routine inspections shall be 96 hours, unless extended by agreement between the

inspection team and the Department of Commerce.

(3) *Schedule 3 and discrete organic chemical facilities.* For declared Schedule 3 or discrete organic chemical facilities, the maximum duration of initial and routine inspections shall be 24 hours, unless extended by agreement between the inspection team and the Department of Commerce.

(c) *Frequency of inspections.* The frequency of initial and routine inspections are as follows:

(1) *Schedule 1 facilities.* As provided by the Convention, the frequency of routine inspections at declared Schedule 1 facilities is determined by the OPCW based on the risk to the object and purpose of the Convention posed by the quantities of chemicals produced, the characteristics of the facility and the nature of the activities carried out at the facility. The frequency of inspections will be stated in the facility agreement.

(2) *Schedule 2 facilities.* As provided by the Convention and the Act, the maximum number of routine inspections at Schedule 2 plant sites is 2 per calendar year per plant site. The OPCW will determine the frequency of routine inspections for each declared Schedule 2 plant site based on the inspectors' assessment of the risk to the object and purpose of the Convention posed by the relevant chemicals, the characteristics of the plant site, and the nature of the activities carried out there. The frequency of inspections will be stated in the facility agreement.

(3) *Schedule 3 facilities.* As provided by the Convention, no plant site may receive more than two inspections per calendar year and the combined number of inspections of Schedule 3 and unscheduled discrete organic chemical facilities in the United State may not exceed 20 per calendar year. If a facility agreement is developed for a declared Schedule 3 plant site, the frequency of inspections will be stated in any facility agreement.

(4) *Unscheduled Discrete Organic Chemicals.* As provided by the Convention, no plant site may receive more than two inspections per calendar year and the combined number of inspections of Schedule 3 and unscheduled discrete organic chemical facilities in the United State may not exceed 20 per calendar year. If a facility agreement is developed for a declared unscheduled discrete organic chemical plant site, the frequency of inspections will be stated in any facility agreement.

§ 716.6 Facility agreements.

(a) *Description and requirements.* A facility agreement is a site-specific

agreement between the U.S. Government and the OPCW. Its purpose is to define procedures for inspections of a specific declared facility that is subject to inspection because of the type or amount of chemicals it produces, processes or consumes.

(1) *Schedule 1 facilities.* The Convention requires that facility agreements be concluded between the United States and the OPCW for all declared Schedule 1 facilities. For Schedule 1 facilities required to complete an initial declaration pursuant to part 713 of this subchapter, the USNA will ensure that facility agreements between the United States and the OPCW will be concluded within 180 days after submission of data declarations to the OPCW. However, for any new Schedule 1 facility, a facility agreement must be concluded before the new Schedule 1 facility begins operations.

(2) *Schedule 2 facilities.* The Convention requires that a facility agreement be concluded by the United States and the OPCW not later than 90 days after completion of the initial inspection of a Schedule 2 facility that is subject to on-site inspection. The USNA will ensure that such facility agreements are concluded with the OPCW unless the owner, operator, occupant or agent in charge of the facility and the OPCW Technical Secretariat agree that such a facility agreement is not necessary.

(3) *Schedule 3 and unscheduled discrete organic chemical facilities.* If the owner, operator, occupant or agent in charge of a Schedule 3 or unscheduled discrete organic chemical facility that is subject to inspection requests a facility agreement prior to the first routine inspection, the USNA will ensure that a facility agreement for such a facility is concluded with the OPCW.

(b) *Notification; negotiation of draft and final facility agreements; and conclusion of facility agreements.* Prior to the development of a facility agreement, the Department of Commerce shall notify the owner, operator, occupant, or agent in charge of the facility, and if the owner, operator, occupant or agent in charge so requests, the notified person may participate in preparations with Department of Commerce representatives for the negotiation of such an agreement. During the initial inspection of a declared facility, inspectors from the OPCW Technical Secretariat and the United States Government team, led by the Department of Commerce accompanying such inspectors, will negotiate a draft facility agreement. The Department of Commerce will

participate in the negotiation of, and approve, all final facility agreements with the OPCW. The United States National Authority shall ensure that facility agreements for Schedule 1, Schedule 2, Schedule 3 and unscheduled discrete organic chemical plant sites are concluded with the OPCW in coordination with the Department of Commerce.

(c) *Format and content.* Schedule 1 and Schedule 2 model facility agreements are included in Supplement No. 2 and Supplement No. 3 to this part. These model facility agreements implement the general provisions of the Convention pertaining to inspections, including health and safety procedures, confidentiality of information, media and public relations, information about the plant site, inspection equipment, pre-inspection activities, conduct of the inspection (including access to and inspection of areas, buildings and structures, access to and inspection of records and documentation, arrangements for interviews of facility personnel, photographs, sampling, and measurements), and logistical arrangements for the inspectors, such as communications and lodging. Attachments to the facility agreements will provide site-specific information such as working hours, special safety and health procedures, as well as site-specific agreement as to documents and records to be provided, specific areas of a facility to be inspected, site diagrams, sampling, photography, and interview procedures, use of inspection equipment, procedures for protection of confidential business information, and administrative arrangements.

(d) *Further information.* For further information about facility agreements, please write or call: U.S. Department of Commerce, Bureau of Export Administration, Treaty Compliance Division, 14th Street and Pennsylvania Avenue, N.W., Room 2705, Washington, D.C. 20230-0001, Telephone: (202) 501-7876.

§ 716.7 Requirements for provisions of samples.

The owner, operator, occupant or agent in charge of a facility must provide a sample, as provided for in the Convention and consistent with requirements set forth by the Director of the United States National Authority in 22 CFR part 103, if the leader from the U.S. Department of Commerce of the U.S. host team accompanying the OPCW Inspection Team notifies the owner, operator, occupant or agent in charge of the inspected facility that a sample is required. The owner, operator, occupant or agent in charge of the premises shall

determine whether the sample shall be taken by representatives of the premises or the inspection team or other individuals present during the inspection.

§ 716.8 Report of inspection-related costs.

Pursuant to section 309(b)(5) of the Act, any facility that has undergone any

inspections pursuant to this subchapter during a given calendar year must report to BXA within 90 days of an inspection on its total costs related to that inspection. Although not required, such reports should identify categories of costs separately if possible, such as personnel costs (production-line, administrative, legal), costs of

producing records, and costs associated with shutting down chemical production or processing during inspections. This information should be reported to BXA on company letterhead at the address given in § 716.6(c), with the following notation: "ATTN: Report of Inspection-related Costs."

SUPPLEMENT NO. 1 TO PART 716.—NOTIFICATION, DURATION AND FREQUENCY OF INSPECTIONS

Agents	Schedule 1	Schedule 2	Schedule 3	Other (Unscheduled discrete organic chemicals)
Notice of routine inspection to USG. Duration of routine inspection. Maximum number of routine inspections.	24 hours prior to arrival at the point of entry. As specified in facility agreement. Determined by OPCW based on characteristics of facility and the nature of the activities carried out at the facility.	48 hours prior to arrival at the plant site. 96 hours 2 per year per plant site ...	120 hours prior to arrival at the plant site. 24 hours 2 per calendar year per plant site.	120 hours prior to arrival at the plant site. 24 hours. 2 per calendar year per plant site.
Notification of challenge inspection to USG*. Duration of Challenge inspection*.	12 hours prior to arrival of inspection team at the point of entry 84 hours			

*See part 717 of this subchapter.

Supplement No. 2 to Part 716—Schedule 1 Model Facility Agreement

Draft Model Agreement Specifying the General Form and Content for Facility Agreements to be Concluded Pursuant to Verification Annex, Part VI, Paragraph 31 (Other Facilities)

Facility Agreement Between the Organization for the Prohibition of Chemical Weapons and the Government of the United States of America Regarding On-Site Inspections at the Facility Located at the _____

The Organization for the Prohibition of Chemical Weapons, hereinafter referred to as "Organization", and the Government of the United States of America, hereinafter referred to as "inspected State Party", both constituting the Parties to this Agreement, have agreed on the following arrangements in relation to the conduct of inspections pursuant to paragraph 3 of Article VI of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, hereinafter referred to as "Convention", at _____ (insert name of the facility, its precise location, including the address), declared under paragraphs 7 and 8 of Article VI, hereinafter referred to as "facility".

Section 1. General Provisions

1. The purpose of this Agreement is to facilitate the implementation of the provisions of the Convention in relation to inspections conducted at the facility pursuant to paragraph 3 of Article VI of the Convention and in accordance with the obligations of the inspected State Party and the Organization under the Convention.

2. Nothing in this Agreement shall be applied or interpreted in a way that is

contradictory to the provisions of the Convention, including paragraph 1 of Article VII.¹ In case of inconsistency between this Agreement and the Convention, the Convention shall prevail.

3. The Parties have agreed to apply for planning purposes the general factors contained in Attachment 1.

4. The frequency and intensity of inspections at the facility are given in Part B of Attachment 1 and reflect the risk assessment of the Organization conducted pursuant to paragraphs 23 or 30 of Part VI of the Verification Annex, whichever applies.

5. The inspection team shall consist of no more than ____ persons.

6. The language for communication between the inspection team and the inspected State Party during inspections shall be English.

7. In case of any development due to circumstances brought about by unforeseen events or acts of nature, which could affect inspection activities at the facility, the inspected State Party shall notify the Organization and the inspection team as soon as practically possible.

8. In case of need for the urgent departure, emergency evacuation or urgent travel of inspector(s) from the territory of the inspected State Party, the inspection team leader shall inform the inspected State Party of such a need. The inspected State Party shall arrange without undue delay such departure, evacuation or travel. In all cases, the inspected State Party shall determine the means of transportation and routes to be taken. The costs of such departure,

¹ Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention.

evacuation or travel of inspectors shall be borne by the Organization.

9. Inspectors shall wear identification badges at all times when on the premises of the facility.

Section 2. Health and Safety

1. Health and safety matters during inspections are governed by the Convention, the Organization's Health and Safety Policy and Regulations, and applicable national, local and facility safety and environmental regulations. The specific arrangements for implementing the relevant provisions of the Convention and the Organization's Health and Safety Policy in relation to inspections at the facility are contained in Attachment 2.

2. Pursuant to paragraph 1 of this section, all applicable health and safety regulations relevant to the conduct of the inspection at the facility are listed in Attachment 2 and shall be made available for use by the inspection team at the facility.

3. In case of the need to modify any health- and safety-related arrangements at the facility contained in Attachment 2 to this Agreement bearing on the conduct of inspections, the inspected State Party shall notify the Organization. Any such modification shall apply provisionally until the inspected State Party and the Organization have reached agreement on this issue. In case no agreement has been reached by the time of the completion of the inspection, the relevant information may be included in the preliminary factual findings. Any agreed modification shall be recorded in Attachment 2 to this Agreement in accordance with paragraph 2 of Section 13 of this Agreement.

4. In the course of the pre-inspection briefing the inspection team shall be briefed by the representatives of the facility on all health and safety matters which, in the view

of those representatives, are relevant to the conduct of the inspection at the facility, including:

(a) the health and safety measures at the Schedule 1 facilities to be inspected and the likely risks that may be encountered during the inspection;

(b) any additional health and safety or regulations that need to be observed at the facility;

(c) procedures to be followed in case of an accident or in case of other emergencies, including a briefing on emergency signals, routes and exits, and the location of emergency meeting points and medical facilities; and

(d) specific inspection activities which must be limited within particular areas at the facility, and in particular within those Schedule 1 facilities to be inspected under the inspection mandate, for reasons of health and safety.

Upon request, the inspection team shall certify receipt of any such information if it is provided in written form.

5. During the course of an inspection, the inspection team shall refrain from any action which by its nature could endanger the safety of the team, the facility, or its personnel or could cause harm to the environment. Should the inspected State Party refuse certain inspection activities, it may explain the circumstances and safety considerations involved, and shall provide alternative means for accomplishing the inspection activities.

6. In the case of emergency situations or accidents involving inspection team members while at the facility, the inspection team shall comply with the facility's emergency procedures and the inspected State Party shall to the extent possible provide medical and other assistance in a timely and effective manner with due regard to the rules of medical ethics if medical assistance is requested. Information on medical services and facilities to be used for this purpose is contained in Part D of Attachment 2. If the Organization undertakes other measures for medical support in regard to inspection team members involved in emergency situations or accidents, the inspected State Party will render assistance to such measures to the extent possible. The Organization will be responsible for the consequences of such measures.

7. The inspected State party shall, to the extent possible, assist the Organization in carrying out any inquiry into an accident or incident involving a member of the inspection team.

8. If, for health and safety reasons given by the inspected State Party, health and safety equipment of the inspected State Party is required to be used by the inspection team, the cost so incurred shall be borne by the inspected State Party.

9. The inspection team may use its own approved health and safety equipment. If the inspected State Party determines it to be necessary, the inspected State Party shall conduct a fit test on masks brought with the inspection team. If the inspected State Party so requests on the basis of confirmed contamination or hazardous waste requirements or regulations, any such piece

of equipment involved in the inspection activities will be left at the facility at the end of the inspection. The inspection team reserves the right to destroy equipment left at the facility or witness its destruction by agreed procedures. The inspected State Party will reimburse the Organization for the loss of the inspection team's equipment.

10. In accordance with the Organization's Health and Safety Policy, the inspected State Party may provide available data based on detection and monitoring, to the agreed extent necessary to satisfy concerns that may exist regarding the health and safety of the inspection team.

Section 3. Confidentiality

1. Matters related to confidentiality are governed by the Convention, including its Confidentiality Annex and paragraph 1 of Article VII, and the Organization's Policy on Confidentiality. The specific arrangements for implementing the provisions of the Convention and the Organization's Policy on Confidentiality in relation to the protection of confidential information at the facility are contained in Attachment 3.

2. Upon request, the inspected State Party will procure a container to be placed under joint seal to maintain documents that the inspection team, inspected State Party, or the facility representative decides to keep as reference for future inspections. The inspected State Party shall be reimbursed by the Organization for the purchase of such container.

3. All documents, including photographs, provided to the inspection team will be controlled as follows:

(a) *Information to be taken off-site.* Information relevant to the finalization of the preliminary factual findings that the inspected State Party permits the inspection team to take off-site will be marked and numbered by the inspected State Party. In accordance with the inspected State Party's Procedures for Information Control, markings on the information will clearly state that the inspection team may take it off-site and will contain a classification pursuant to the Organization's Policy on Confidentiality at a level requested by the inspected State Party. The representative of the facility will acknowledge the release of such information in writing prior to disclosure to the inspection team.

(b) *Information restricted for use on-site.* Information that the inspected State Party permits the inspection team to use on-site during inspections but not take off-site will be marked and numbered by the inspected State Party. In accordance with the inspected State Party's Procedures for Information Control, markings on the information will clearly restrict its use on-site and will contain a classification pursuant to the Organization's Policy on Confidentiality at a level requested by the inspected State Party. The representative of the facility will acknowledge the release of such information in writing prior to disclosure to the inspection team. Upon conclusion of the inspection, the inspection team shall return the information to the inspected State Party, and the facility representative shall acknowledge receipt in writing. If so requested by the inspection team, the

information can be placed in the joint sealed container for future reference.

(c) *Information restricted for use on-site and requiring direct supervision.* Information that the inspected State Party permits the inspection team to use on-site only under direct supervision of the inspected State Party or the representative of the inspected facility will be marked and numbered by the inspected State Party. In accordance with the inspected State Party's Procedures for Information Control, markings on the information will clearly restrict its use on-site under direct supervision and will contain a classification pursuant to the Organization's Policy on Confidentiality at a level requested by the inspected State Party. The representative of the facility will acknowledge the release of such information in writing prior to disclosure to the inspection team. The inspection team shall return the information to the inspected State Party immediately upon completion of review and the facility representative shall acknowledge receipt in writing. If so requested by the inspection team, the information can be placed in the joint sealed container for future reference.

Section 4. Media and Public Relations

1. Inspection team media and public relations are governed by the Organization's Media and Public Relations Policy. The specific arrangements for the inspection team's contacts with the media or the public, if any, in relation to inspections of the facility are contained in Attachment 4.

Section 5. Inspection Equipment

1. As agreed between the inspected State Party and the Organization, the approved equipment listed in Part A of Attachment 5 and with which the inspected State Party has been given the opportunity to familiarize itself will, at the discretion of the Organization and on a routine basis, be used specifically for the Schedule 1 inspection. The equipment will be used in accordance with the Convention, the relevant decisions taken by the Conference of States Parties, and any agreed procedures contained in Attachment 5.

2. The provisions of paragraph 1 above are without prejudice to paragraphs 27 to 29 of Part II of the Verification Annex.

3. The items of equipment available on-site, not belonging to the Organization, which the inspected State Party has volunteered to provide to the inspection team upon its request for use on-site during the conduct of inspections, together with any procedures for the use of such equipment, if required, any requested support which can be provided, and conditions for the provision of equipment are listed in Part B of Attachment 5. Prior to any use of such equipment, the inspection team may confirm that the performance characteristics of such equipment are consistent with those for similar Organization-approved equipment, or, with respect to items of equipment which are not on the list of Organization-approved equipment, are consistent with the intended purpose for using such equipment.²

² I.e. The inspection team may confirm that the performance characteristics of such equipment meet

4. Requests from the inspection team for the inspected State Party during the inspection to provide equipment mentioned in paragraph 3 above shall be made in writing by an authorized member of the inspection team using the form contained in Attachment 5. The same procedure will also apply to other requests of the inspection team in accordance with paragraph 30 of Part II of the Verification Annex.

5. Agreed procedures for the decontamination of any equipment are contained in Part C of Attachment 5.

6. For the purpose of verification, the list of agreed on-site monitoring instruments, if any, as well as agreed conditions, procedures for use, maintenance, repair, modification, replacement and provisions for the inspected State Party's support, if required, installation points, and security measures to prevent tampering with such on-site monitoring instruments are contained in Part D of Attachment 5.

Section 6. Pre-Inspection Activities

1. The inspection team shall be given a pre-inspection briefing by the representatives of the facility in accordance with paragraph 37 of Part II of the Verification Annex. The pre-inspection briefing shall include:

(a) information on the facility as described in Attachment 6;

(b) health and safety specifications described in Section 2 above and detailed in Attachment 2;

(c) any changes to the above-mentioned information since the last inspection; and

(d) information on administrative and logistical arrangements additional to those contained in Attachment 10, if any, that shall apply during the inspection, as contained in Section 10.

2. Any information about the facility that the inspected State Party has volunteered to provide to the inspection team during the pre-inspection briefing with indications as to which information may be transferred off-site is referenced in Part B of Attachment 6.

Section 7. Conduct of the Inspection

7.1 Standing Arrangements

1. The inspection period shall begin immediately upon completion of the pre-inspection briefing unless agreed otherwise. Upon completion of the pre-inspection briefing, the inspected State Party may, on a voluntary basis, provide a site tour at the request of the inspection team. Arrangements for the conduct of a site tour, if any, are contained in Attachment 7.

2. Upon conclusion of the pre-inspection briefing, the inspection team leader shall provide to the designated representative of the inspected State Party a preliminary inspection plan to facilitate the conduct of the inspection.

3. Before commencement of inspection activities, the inspection team leader shall inform the representative of the inspected State Party about the initial steps to be taken in implementing the inspection plan. The plan will be adjusted by the inspection team as circumstances warrant throughout the inspection process in consultation with the

the technical requirements necessary to support the inspection task intended to be accomplished.

inspected State Party as to its implementability in regard to paragraph 40 of Part II of the Verification Annex.

4. The activities of the inspection team shall be so arranged as to ensure the timely and effective discharge of its functions and the least possible inconvenience to the inspected State Party and disturbance to the facility inspected. The inspection team shall avoid unnecessarily hampering or delaying the operation of a facility and avoid affecting safety. In particular, the inspection team shall not operate the facility. If the inspection team considers that, to fulfil the mandate, particular operations should be carried out in the facility, it shall request the designated representative of the facility to have them performed.

5. At the beginning of the inspection, the inspection team shall have the right to confirm the precise location of the facility utilizing visual and map reconnaissance, a site diagram, or other suitable techniques.

6. The inspection team shall, upon request of the inspected State Party, communicate with the personnel of the facility only in the presence of or through a representative of the inspected State Party.

7. The inspected State Party shall, upon request, provide a securable work space for the inspection team, including adequate space for the storage of equipment. The inspection team shall have the right to seal its work space.

7.2 Access to the Declared Facility

1. The object of the inspection shall be the declared Schedule 1 facility as referenced in Attachment 6.

2. Pursuant to paragraph 45 of Part II of the Verification Annex, the inspection team shall have unimpeded access to the declared facility in accordance with the relevant Articles and Annexes of the Convention and Attachments 6, 8, and 9.

7.3 Access to and Inspection of Documentation and Records

1. The agreed list of the documentation and records to be routinely made available for inspection purposes to the inspection team by the inspected State Party during an inspection, as well as arrangements with regard to access to such records for the purpose of protecting confidential information, are contained in Attachment 8. Such documentation and records will be provided to the inspection team upon request.

2. Only those records placed in the custody of the inspection team that are attached to the preliminary factual findings in accordance with Section 3 may leave the premises. Those records placed in the custody of the inspection team that are not attached to the preliminary factual findings must be retained in the inspection team's on-site container or returned to the inspected State Party.

7.4 Sampling and Analysis

1. Without prejudice to paragraphs 52 to 58 of Part II of the Verification Annex, procedures for sampling and analysis for verification purposes are contained in Attachment 9.

2. Sampling and analysis, for inspection purposes, may be carried out to fulfill the

inspection mandate. Each such sample will be split into a minimum of four parts at the request of the inspection team in accordance with Part C of Attachment 9. One part shall be analyzed in a timely manner on-site. The second part of the split sample may be held for the inspection team for future reference and, if necessary, analysis off-site at laboratories designated by the Organization. That part of the sample may be destroyed at any time in the future upon the decision of the inspection team but in any case no later than 60 days after it was taken. The third part may be retained by the inspected State Party. The fourth part may be retained by the facility.

3. Pursuant to paragraph 52 of the Part II of the Verification Annex, representatives of the inspected State Party or facility shall take samples at the request of the inspection team in the presence of inspectors. The inspected State Party will inform the inspection team of the authorized facility representative's³ determination of whether the sample shall be taken by representatives of the facility or the inspection team or other individuals present. If inspectors are granted the right to take samples themselves in accordance with paragraph 52 of Part II of the Verification Annex, the relevant advance agreement between the inspection team and the inspected State Party shall be in writing. The representatives of the inspected State Party or of the inspected facility shall have the right to be present during sampling. Agreed conditions and procedures for such sample collection are contained in Part B of Attachment 9 to this Agreement.

4. Facility sampling equipment shall as a rule be used for taking samples required for the purposes of the inspection. This is without prejudice to the right of the inspection team pursuant to paragraph 27 of Part II of the Verification Annex to use its own approved sampling equipment in accordance with paragraph 1 of Section 5 and Parts A and B of Attachment 5 to this Agreement.

5. Should the inspection team request that a sample be taken and the inspected State Party be unable to accede or agree to the request, the inspected State Party will make every reasonable effort to satisfy the inspection team's concerns by other means to enable the inspection team to fulfil its mandate. The inspected State Party will provide a written explanation for its inability to accede or agree to the request. Any such response shall be supported by relevant document(s). The explanation of the inspected State Party shall be included in the preliminary factual findings.

6. In accordance with paragraph 53 of Part II of the Verification Annex, where possible, the analysis of samples shall be performed on-site and the inspection team shall have the right to perform on-site analysis of samples using approved equipment brought by it for the splitting, preparation, handling, analysis, integrity and transport of samples. The assistance that will be provided by the inspected State Party and the analysis

³The authorized facility representative is the owner or the operator, occupant or agent in charge of the premises being inspected.

procedures to be followed are contained in Part D of Attachment 9 to this Agreement.

7. The inspection team may request the inspected State Party to perform the analysis in the inspection team's presence. The inspection team shall have the right to be present during any sampling and analysis conducted by the inspected State Party.

8. The results of such analysis shall be reported in writing as soon as possible after the sample is taken.

9. The inspection team shall have the right to request repeat analysis or clarification in connection with ambiguities.

10. If at any time, and for any reason, on-site analysis is not possible, the inspection team has the right to have sample(s) analyzed off-site at Organization-designated laboratories. In selecting such designated laboratories for the off-site analysis, the Organization will give due regard to requirements of the inspected State Party.

11. Transportation of samples will be in accordance with the procedures outlined in Part E of Attachment 9.

12. If at any time, the inspected State Party or facility representative determines that inspection team on-site analysis activities are not in accordance with the facility agreement or agreed analysis procedures, or otherwise pose a threat to safety or environmental regulations or laws, all analysis activities will immediately cease at the direction of the facility representative. If both parties cannot agree to proceed with the analysis, the inspection team will document this in its preliminary factual findings.

13. Conditions and procedures for the disposal of hazardous materials generated during sampling and on-site analysis during the inspection are contained in Part F of Attachment 9 to this Agreement.

7.5 Arrangements for Interviews

1. The inspection team shall have the right, subject to applicable United States legal protections for individuals, to interview any facility personnel in the presence of representatives of the inspected State Party with the purpose of establishing relevant facts in accordance with paragraph 46 of Part II of the Verification Annex and inspected State Party's policy and procedures. Agreed procedures for conducting interviews are contained in Attachment 11.

2. The inspection team will submit to the inspected State Party names and/or positions of those desired for interviews. The requested individual(s) will be made available to the inspection team no later than 24 hours after submission of the formal request, unless agreed otherwise. The inspection team may also be requested to submit questions in writing prior to conducting interviews. The specific timing and location of interviews will be determined with the facility in coordination with the inspected State Party and consistent with adequate notification of the interviewees, and minimizing the operation impacts on the facility and individuals to be interviewed.

3. The inspected State Party may recommend to the inspection team that interviews be conducted in either "panel" or individual formats. At a minimum, interviews will be conducted with a member of the facility staff and an inspected State

Party representative. Legal counsel may also be required to be present by the inspected State Party. The interview may be interrupted for consultation between the interviewee, the facility representative, and the inspected State Party representative.

4. The inspected State Party will have the right to restrict the content of interviews to information directly related to the mandate or purpose of the inspection.

5. Outside the interview process and in discharging their functions, inspectors shall communicate with personnel of the facility only through the representative(s) of the inspected State Party.

7.6 Communications

1. In accordance with paragraph 44 of Part II of the Verification Annex, the inspection team shall have the right to communicate with the headquarters of the Technical Secretariat. For this purpose they may use their own, duly certified approved equipment, in accordance with paragraph 1 of Section 5.

2. In case the inspection team and the inspected State Party agree to use any of the inspected State Party's communications equipment, the list of such equipment and the provisions for its use are contained in Part B of Attachment 5 to this Agreement.

3. The agreed means of communication between inspection team sub-teams in accordance with paragraph 44 of Part II of the Verification Annex are contained in Part E of Attachment 5.

7.7 Photographs

1. In accordance with the provisions of paragraph 48 of Part II of the Verification Annex, the Confidentiality Annex and inspected State Party's policy and procedures, the inspection team shall have the right to have photographs taken at their request by the representatives of the inspected State Party or the inspected facility. One camera of the instant development type furnished by the inspection team or the inspected State Party shall be used for taking identical photographs in sequence. Cameras furnished by the inspection team will remain either in their work space or equipment storage area except when carried by inspection team members for a specific inspection activity. Cameras will only be used for specified inspection purposes. Personal cameras are not allowed to be taken to the facility unless otherwise agreed by the inspected State Party.

2. Pursuant to the Confidentiality Annex, the inspected State Party shall have the right to determine that contents of the photographs conform to the stated purpose of the photographs. The inspection team shall determine whether photographs conform to those requested and, if not, repeat photographs shall be taken. Photographs that do not meet the satisfaction of both sides will be destroyed by the inspected State Party in the presence of the inspection team. The inspection team, the inspected State Party and the facility, if so requested, shall each retain one copy of every photograph. The copies shall be signed, dated, and classified, in accordance with Section 3, and note the location and subject of the photograph and carry the same identification number. Agreed

procedures for photography are contained in Attachment 12.

3. The representative of the inspected facility has the right to object to the use of photographic equipment in specific areas, buildings or structures if such use would be incompatible with safety or fire regulations given the characteristics of the chemicals stored in the area in question. Restrictions for use are contained in Parts A and/or B of Attachment 5 to this Agreement. If the objection is raised due to safety concerns, the inspected State Party will, if possible, furnish photographic equipment that meets the regulations. If the use of photographic equipment is not permissible at all in specific areas, buildings or structures for the reasons stated above, the inspected State Party shall provide a written explanation of its objection to the inspection team leader. The explanation, along with the inspection team leader's comments will be included in the inspection team's preliminary factual findings.

Section 8. Visits

1. This section applies to visits conducted pursuant to paragraphs 15 and 16 of Part III of the Verification Annex.

2. The size of a team on such a visit shall be kept to the minimum number of personnel necessary to perform the specific tasks for which the visit is being conducted and shall in any case not exceed the size of inspection team referenced in paragraph 5 of Section 1.

3. The duration of the visit pursuant to this Section shall be limited to the minimum time required to perform the specific tasks relating to monitoring systems for which the visit is being conducted and in any case shall not exceed the estimated period of inspection referenced in Part B of Attachment 1 of this Agreement.

4. Access provided to the monitoring systems during the visit shall be limited to that required to perform the specific tasks for which the visit is being conducted, unless otherwise agreed to with the inspected State Party.

5. General arrangements and notifications for a visit shall be the same as for the conduct of an inspection.

Section 9. Debriefing and Preliminary Findings

1. In accordance with paragraph 60 of Part II of the Verification Annex, upon completion of an inspection the inspection team shall meet with representatives of the inspected State Party and the personnel responsible for the inspection site to review the preliminary findings of the inspection team and to clarify any ambiguities. The inspection team shall provide to the representatives of the inspected State Party its preliminary findings in written form according to a standardized format, together with a list of any samples and copies of written information and data gathered and other material to be taken off-site. The document shall be signed by the head of the inspection team. In order to indicate that he has taken notice of the contents of the document, the representative of the inspected State Party shall countersign the document. The meeting shall be completed not later than 24 hours after the completion of the inspection.

2. The document on preliminary findings shall also include, inter alia, the list of results of analysis, if conducted on-site, records of seals, results of inventories, copies of photographs to be retained by the inspection team, and results of specified measurements. It will be prepared in accordance with the preliminary findings format referenced in Annex 5. Any substantive changes to this format will be made only after consultation with the inspected State Party.

3. Before the conclusion of the debriefing, the inspected State Party may provide comments and clarifications to the inspection team on any issue related to the conduct of the inspection. The inspection team shall provide to the representative of the inspected State Party its preliminary findings in written form sufficiently prior to the conclusion of the debriefing to permit the inspected State Party to prepare any comments and clarifications. The inspected State Party's written comments and clarifications shall be attached to the document on preliminary findings.

4. The inspection team shall depart from the site upon the conclusion of the meeting on preliminary findings.

Section 10. Administrative Arrangements

1. The inspected State Party shall provide or arrange for the provision of the amenities listed in detail in Attachment 10 to the inspection team throughout the duration of the inspection. The inspected State Party shall be reimbursed by the Organization for such costs incurred by the inspection team, unless agreed otherwise.

2. Requests from the inspection team for the inspected State Party to provide or arrange amenities shall be made in writing by an authorized member of the inspection team⁴ using the form contained in Attachment 10. Requests shall be made as soon as the need for amenities has been identified. The provision of such requested amenities shall be certified in writing by the authorized member of the inspection team. Copies of all such certified requests shall be kept by both parties.

3. The inspection team has the right to refuse extra amenities that in its view are not needed for the conduct of the inspection.

Section 11. Liabilities

1. Any claim by the inspected State Party against the Organization or by the Organization against the inspected State Party in respect of any alleged damage or injury resulting from inspections at the facility in accordance with this Agreement, without prejudice to paragraph 22 of the Confidentiality Annex, shall be settled in accordance with international law and, as appropriate, with the provisions of Article XIV of the Convention.

Section 12. Status of Attachments

1. The Attachments form an integral part of this Agreement. Any reference to the Agreement includes the Attachments. However, in case of any inconsistency

between this Agreement and any Attachment, the sections of the Agreement shall prevail.

Section 13. Amendments, Modifications and Updates

1. Amendments to the sections of this Agreement may be proposed by either Party and shall be agreed to and enter into force under the same conditions as provided for under paragraph 1 of Section 15.

2. Modifications to the Attachments of this Agreement, other than Attachment 1 and Part B of Attachment 5, may be agreed upon at any time between the representative of the Organization and the representative of the inspected State Party, each being specifically authorized to do so. The Director-General shall inform the Executive Council about any such modifications. Each Party to this Agreement may revoke its consent to a modification not later than four weeks after it had been agreed upon. After this time period the modification shall take effect.

3. The inspected State Party will update Part A of Attachment 1 and Part B of Attachment 5 and Attachment 6 as necessary for the effective conduct of inspections. The Organization will update Part B of Attachment 1 and Annex 5, subject to paragraph 2 of Section 9, as necessary for the effective conduct of inspections.

Section 14. Settlement of Disputes

1. Any dispute between the Parties that may arise out of the application or interpretation of this Agreement shall be settled in accordance with Article XIV of the Convention.

Section 15. Entry Into Force

1. This Agreement shall enter into force after approval by the Executive Council and signature by the two Parties. If the inspected State Party has additional internal requirements, it shall so notify the Organization in writing by the date of signature. In such cases, this Agreement shall enter into force on the date that the inspected State Party gives the Organization written notification that its internal requirements for entry into force have been met.

Section 16. Duration and Termination.

1. This Agreement shall cease to be in force when, as determined by the Executive Council, the provisions of paragraphs 3 and 8 of Article VI and Part VI of the Verification Annex no longer apply to this facility.

Done at _____ in _____ copies, in English, each being equally authentic.⁵

ATTACHMENTS

The following attachments shall be completed where applicable.

Attachment 1: General Factors for the

Conduct of Inspections

Attachment 2: Health and Safety Requirements and Procedures

Attachment 3: Specific Arrangements in Relation to the Protection of Confidential Information at the Facility

Attachment 4: Arrangements for the Inspection Team's Contacts with the Media or the Public

Attachment 5: Inspection Equipment

Attachment 6: Information on the Facility

Provided in Accordance with Section 6

Attachment 7: Arrangements for Site Tour

Attachment 8: Records Routinely Made

Available to the Inspection Team at the Facility

Attachment 9: Sampling and Analysis for Verification Purposes

Attachment 10: Administrative Arrangements

Attachment 11: Agreed Procedures for Conducting Interviews

Attachment 12: Agreed Procedures for Photography

ATTACHMENT 1

General Factors for the Conduct of Inspections

Part A. To Be Provided and Updated by the inspected State Party:

1. Schedule 1 facility(s) working hours, if applicable: ⁶ ____ hrs to ____ hrs (local time) (days)

2. Working days: _____

3. Holidays or other non-working days: _____

4. Inspection activities which could/could not ⁷ be supported during non-working hours with notation of times and activities: _____

5. Any other factors that could adversely affect the effective conduct of inspections:

(a) inspection requests:

Should the facility withhold consent to an inspection, the inspected State Party shall obtain a search warrant from a United States magistrate judge. Upon receipt of a warrant, the inspected State Party will accede to the Organization's request to conduct an inspection. Such inspection will be carried out in accordance with the terms and conditions of the warrant.

(b) other: _____

6. Other: notification procedures are contained in Annex 6.

Part B. To Be Provided and Updated by the Organization:

1. Inspection frequency: _____

2. Inspection intensity:

(a) maximum estimated period of inspection (for panning purposes): _____

(b) approximate inspection team size: _____

(c) estimated volume and weight of equipment to be brought on-site: _____

ATTACHMENT 2

Health and Safety Requirements and Procedures

Part A. Basic Principles

1. Applicable health and safety regulations of the Organization, with agreed variations from strict implementation, if any: _____

2. Health and safety regulations applicable at the facility: _____

⁶ All references to time use a 24 hour clock.

⁷ Choose one option.

⁴ The name of the authorized member(s) of the inspection team should be communicated to the inspected State Party no later than at the Point of Entry.

⁵ The language(s) to be chosen by the inspected State Party from the languages of the Convention shall be the same as the language(s) referred to in paragraph 6 of Section 1 of this Agreement.

(a) federal regulations:	Part D. Medical Requirements	Part B. Specific Procedures for Access by the Inspection Team to Confidential Areas or Materials		
(b) state regulations:	1. Applicable medical standards of the inspected State Party and, in particular, the inspected facility:			
(c) local regulations:	2. Medical screening procedures for members of the inspection team:	Procedures in Relation to the Certification by the Inspection Team of the Receipt of Any Documents Provided by the Inspected Facility:		
(d) facility regulations:	3. Agreed medical assistance to be provided by the inspected State Party:			
3. Health and safety requirements and regulations agreed between the inspected State Party and the Organization:	4. Emergency medical evacuation procedures:	Part D. Storage of Confidential Documents at the Inspected Facility		
Part B. Detection and Monitoring	5. Agreed additional medical measures to be taken by the inspection team:	1. Procedures in relation to the storage of confidential documents or use of a dual control container on-site, if applicable: Information under restrictions provided for in the Confidentiality Annex and as such to be kept in the dual control container under joint seal shall be available to the inspection team leader and/or an inspector designated by him from the beginning of the pre-inspection briefing until the end of the debriefing upon completion of the inspection. If copies of information under dual control are permitted to be attached to the preliminary factual findings by the inspected State Party, they shall be made by the inspected State Party and retained under dual control until the debriefing. Should the medium on which such information is recorded become unusable, it shall be replaced without delay by the representative of the inspected State Party.		
1. Applicable specific safety standards for workplace chemical exposure limits and/or concentrations which should be observed during the inspection, if any:	6. Procedures for emergency response to chemical casualties of the inspection team:			
2. Procedures for detection and monitoring in accordance with the Organization’s Health and Safety Policy, including data to be collected by, or provided to, the inspection team:	Part E. Modification of Inspection Activities			
Part C. Protection	1. Modification of inspection activities due to health and safety reasons, and agreed alternatives to accomplish the inspection goals:	2. The dual control container will be placed		
1. Protective equipment to be provided by the Organization and agreed procedures for equipment certification and use, if required:	ATTACHMENT 3	3. Information meeting the strict requirements for restriction pursuant to the Confidentiality Annex, and to be maintained in the dual control container located at the inspected facility between inspections is listed below:		
2. Protective equipment to be provided by the inspected State Party, and agreed procedures, personnel training, and personnel qualification tests and certification required; and agreed procedures for use of the equipment:	Specific Arrangements in Relation to the Protection of Confidential Information at the Facility			
	Part A. Inspected State Party’s Procedures for Designating and Classifying Documents Provided to the Inspection Team			
	See Annex 3 for the Organization’s Policy on Confidentiality and Annex 7 for the inspected State Party’s Procedures for Information Control.			
Reference	Type of data	Recorded media	Volume	Reasons for restrictions/re-marks

Part E. Procedures for the Removal Off-Site of Any Written Information, Data, and Other Material Gathered by the Inspection Team

Part F. Procedures for Providing the Representatives of the inspected State Party with Copies of Written Information, Inspector's Notebooks, Data and Other Material Gathered by the Inspection Team

Part G. Other Arrangements, If Any

1. Unless specified otherwise, all facility information shall be returned to the

inspected State Party at the completion of the inspection. No copies of facility information shall be made in any manner by the inspection team or the Organization.

2. Facility information shall not be released to the public, other States Parties, or the media without the specific permission of the inspected State Party, after consultation with the facility.

3. Facility information shall not be transmitted, copied or retained electronically without the specific permission of the inspected State Party after consultation with the facility. All transmissions of information off-site shall be done in the presence of the inspected State Party.

4. Information not relevant to the purpose of the inspection will be purged from documents, photographs, etc. prior to release to the inspection team.

ATTACHMENT 4

Arrangements for the Inspection Team's Contacts with the Media or the Public

ATTACHMENT 5

Inspection Equipment

Part A: List of Equipment

Item of approved inspection equipment	Agreed procedures for use			
	Nature of restriction(s) (location, time, periods, etc.), if any	Indication of reason(s) (safety, confidentiality, etc.)	Special handling or storage requirements	Alternative for meeting inspection requirement(s), if so required by the inspection team

Part B. Equipment which the inspected State Party Has Volunteered to Provide

Item of equipment	Procedures for use	Support to be provided, if required	Conditions (timing, costs, if any)

Part C. Procedures for the Decontamination of Equipment

Item of equipment	Procedures for use

Part D. Agreed On-Site Monitoring Instruments

ATTACHMENT 6

Information on the Facility Provided in Accordance with Section 6

Attachment 8

Records Routinely Made Available to the Inspection Team at the Facility (i.e., Identify Records and Data):

Part E. Means of Communication between Inspection Team Sub-Teams

Part A. Topics of Information for the Pre-Inspection Briefing

Attachment 9

Sampling and Analysis for Verification Purposes

REQUEST FOR AND CERTIFICATION OF EQUIPMENT AVAILABLE ON SITE TO BE PROVIDED IN ACCORDANCE WITH PARAGRAPH 3 OF SECTION 5

Date: _____
 Facility: _____
 Inspection number: _____
 Name of the authorized member of the inspection team: _____
 Type and number of item(s) of equipment requested: _____

1. Specification of the elements constituting the declared facility, including their physical location(s) (i.e., detail the areas, equipment, and computers), with indications as to which information may be transferred off-site: _____

Part A. Agreed Sampling Points Chosen With Due Consideration to Existing Sampling Points Used by the Facility(s) Operator(s)

Approval of the request by inspected State Party: _____

2. Procedures for unimpeded access within the declared facility: ^s _____

Part B. Procedures for Taking Samples

Comments on the request by the inspected State Party: _____

3. Other: _____

Part C. Procedures for Sample Handling and Sample Splitting

Indication of the costs, if any, for the use of the equipment requested/volunteered: _____

Part B. Any Information about the Facility that the inspected State Party Volunteers to Provide to the Inspection Team during the Pre-Inspection Briefing with Indications as to which May Be Transferred Off-Site _____

Part D. Procedures for On-Site Sample Analysis, If Any

Certification of the authorized member of the inspection team that the requested item(s) of equipment have been provided: _____

ATTACHMENT 7

Arrangements for Site Tour

Part E. Procedures for Off-Site Analysis, If Any

Comments, if any, by the authorized member of the inspection team in regard to the equipment provided: _____

The inspected State Party may provide a site tour at the request of the inspection team. The inspected State Party may provide explanations to the inspection team during the site tour. _____

Part F. Procedures for Transporting Samples

Name and signature of the authorized member of the inspection team: _____

Part G. Arrangements in Regard to the Payment of Costs Associated with the Disposal or Removal by the inspected State Party of Hazardous Waste Generated during Sampling and On-Site Analysis during the Inspection _____

Name and signature of the representative of the inspected State Party: _____

^sList the areas, equipment, and computers, if any, that are not relevant to the inspection mandate or that contain confidential business information that does not need to be divulged in order to comply with the inspection mandate.

Attachment 10

Administrative Arrangements

Part A. The Amenities Detailed Below Shall Be Provided to the Inspection Team by the inspected State Party, Subject to Payment as Indicated in Part B Below

1. International and local official communication (telephone, fax), including calls/faxes between site and headquarters:

2. Vehicles: _____
 3. Working room, including adequate space for the storage of equipment: _____
 4. Lodging: _____
 5. Meals: _____

6. Medical care: _____
 7. Interpretation Services: _____
 (a) number of interpreters: _____
 (b) estimated interpretation time: _____
 (c) languages: _____
 8. Other: _____

Part B. Distribution of Costs for Provision of Amenities by the inspected State Party (check one option for each amenity provided as appropriate):

Paragraphs 1–8 in part A above	To be paid directly by the organization after the inspection	To be paid by the inspection team on behalf of the organization during the in-country period	To be paid by the inspected state party and subsequently reimbursed by the organization	To be paid by the inspected state party
1				
2				
3				
4				
5				
6				
7				
8				

Part C. Other Arrangements.

1. Number of sub-teams (consisting of no less than two inspectors per sub-team) to be accommodated: _____

REQUEST FOR AND CERTIFICATION OF AMENITIES TO BE PROVIDED OR ARRANGED

Date: _____
 Facility: _____
 Inspection number: _____
 Category of amenities requested: _____

Description of amenities requested: _____

Approval of the request by the inspected State Party: _____

Comments on the request by the inspected State Party: _____

Indication of the costs for the amenities requested: _____

Certification of the authorized member of the inspection team that the requested amenities have been provided: _____

Comments by the authorized member of the inspection team in regard to the quality of the amenities provided: _____

Name and signature of the authorized member of the inspection team: _____

Name and signature of the representative of the inspected State Party: _____

ATTACHMENT 11

Agreed Procedures for Conducting Interviews

ATTACHMENT 12

Agreed Procedures for Photography

ANNEXES

Note: These annexes, inter alia, can be attached if requested by the inspected State Party.

Annex 1: Organization's Media and Public Relations Policy

Annex 2: Organization's Health and Safety Policy and Regulations

Annex 3: Organization's Policy on Confidentiality

Annex 4: Facility Declaration

Annex 5: Preliminary and Final Inspection Report Formats

Annex 6: Inspected State Party's Procedures for Inspection Notification

Annex 7: Inspected State Party's Procedures for Information Control

Supplement No. 3 to Part 716—Schedule 2 Model Facility Agreement

Draft Facility Agreement Between the Organization for the Prohibition of Chemical Weapons and the Government of the United States of America Regarding On-Site Inspections at the _____ Schedule 2 Plant Site Located at _____

The Organization for the Prohibition of Chemical Weapons, hereinafter referred to as "Organization," and the Government of the United States of America, hereinafter referred to as "inspected State Party," both constituting the Parties to this Agreement, have agreed on the following arrangements in relation to the conduct of inspections pursuant to paragraph 4 of Article VI of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, hereinafter referred to as "the Convention," at (insert name of the plant site, its precise location, including the address), declared under paragraphs 7 and 8 of Article VI, hereinafter referred to as "plant site":

Section 1. General Provisions

1. The purpose of this Agreement is to facilitate the implementation of the provisions of the Convention in relation to inspections conducted at the plant site pursuant to paragraph 4 of Article VI of the Convention, and in accordance with the

obligations of the inspected State Party and the Organization under the Convention.

2. Nothing in this Agreement shall be applied or interpreted in a way that is contradictory to the provisions of the Convention, including paragraph 1 of Article VII.¹ In case of inconsistency between this Agreement and the Convention, the Convention shall prevail.

3. The Parties have agreed to apply for planning purposes the general factors contained in Attachment 1.

4. The frequency and intensity of inspections at the plant site are given in Part B of Attachment 1 and reflect the risk assessment of the Organization conducted pursuant to paragraphs 18, 20 and 24 of Part VII of the Verification Annex.

5. The inspection team shall consist of no more than _____ persons.

6. The language for communication between the inspection team and the inspected State Party during inspections shall be English.

7. The period of inspection shall not last more than ninety-six (96) hours, unless an extension has been agreed to by the inspected State Party and the inspection team.

8. In case of any development due to circumstances brought about by unforeseen events or acts of nature, which could affect inspection activities at the plant site, the inspected State Party shall notify the Organization and the inspection team as soon as practically possible.

9. In case of need for the urgent departure, emergency evacuation or urgent travel of inspector(s) from the territory of the inspected State Party, the inspection team leader shall inform the inspected State Party of such a need. The inspected State Party shall arrange without undue delay such departure, evacuation or travel. In all cases, the inspected State Party shall determine the means of transportation and routes to be taken. The costs of such departure, evacuation or travel of inspectors shall be borne by the Organization.

¹ Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention.

10. Inspectors shall wear identification badges at all times when on the premises of the plant site.

Section 2. Health and Safety

1. Health and safety matters during inspections are governed by the Convention, the Organization's Health and Safety Policy and Regulations, and applicable national, local and plant site safety and environmental regulations. The specific arrangements for implementing the relevant provisions of the Convention and the Organization's Health and Safety Policy in relation to inspections at the plant site are contained in Attachment 2.

2. Pursuant to paragraph 1 of this section, all applicable health and safety regulations relevant to the conduct of the inspection at the plant site are listed in Attachment 2 and shall be made available for use by the inspection team at the plant site.

3. In case of the need to modify any health- and safety-related arrangements at the plant site contained in Attachment 2 to this Agreement bearing on the conduct of inspections, the inspected State Party shall notify the Organization. Any such modification shall apply provisionally until the inspected State Party and the Organization have reached agreement on this issue. In case no agreement has been reached by the time of the completion of the inspection, the relevant information may be included in the preliminary factual findings. Any agreed modification shall be recorded in Attachment 2 to this Agreement in accordance with paragraph 2 of Section 12 of this Agreement.

4. In the course of the pre-inspection briefing the inspection team shall be briefed by the representatives of the plant site on all health and safety matters which, in the view of those representatives, are relevant to the conduct of the inspection at the plant site, including:

(a) the health and safety measures at the Schedule 2 plant(s) to be inspected and the likely risks that may be encountered during the inspection;

(b) any additional health and safety or regulations that need to be observed at the plant site;

(c) procedures to be followed in case of an accident or in case of other emergencies, including a briefing on emergency signals, routes and exits, and the location of emergency meeting points and medical facilities; and

(d) specific inspection activities which must be limited within particular areas at the plant site, and in particular within those Schedule 2 plant(s) to be inspected under the inspection mandate, for reasons of health and safety.

Upon request, the inspection team shall certify receipt of any such information if it is provided in written form.

5. During the course of an inspection, the inspection team shall refrain from any action which by its nature could endanger the safety of the team, the plant site, or its personnel or could cause harm to the environment. Should the inspected State Party refuse certain inspection activities, it may explain the circumstances and safety considerations involved, and shall provide alternative

means for accomplishing the inspection activities.

6. In the case of emergency situations or accidents involving inspection team members while at the plant site, the inspection team shall comply with the plant site's emergency procedures and the inspected State Party shall to the extent possible provide medical and other assistance in a timely and effective manner with due regard to the rules of medical ethics if medical assistance is requested. Information on medical services and facilities to be used for this purpose is contained in Part D of Attachment 2. If the Organization undertakes other measures for medical support in regard to inspection team members involved in emergency situations or accidents, the inspected State Party will render assistance to such measures to the extent possible. The Organization will be responsible for the consequences of such measures.

7. The inspected State party shall, to the extent possible, assist the Organization in carrying out any inquiry into an accident or incident involving a member of the inspection team.

8. If, for health and safety reasons given by the inspected State Party, health and safety equipment of the inspected State Party is required to be used by the inspection team, the cost so incurred shall be borne by the inspected State Party.

9. The inspection team may use its own approved health and safety equipment. If the inspected State Party determines it to be necessary, the inspected State Party shall conduct a fit test on masks brought with the inspection team. If the inspected State Party so requests on the basis of confirmed contamination or hazardous waste requirements or regulations, any such piece of equipment involved in the inspection activities will be left at the plant site at the end of the inspection. The inspection team reserves the right to destroy equipment left at the plant site or witness its destruction by agreed procedures. The inspected State Party will reimburse the Organization for the loss of the inspection team's equipment.

10. In accordance with the Organization's Health and Safety Policy, the inspected State Party may provide available data based on detection and monitoring, to the agreed extent necessary to satisfy concerns that may exist regarding the health and safety of the inspection team.

Section 3. Confidentiality

1. Matters related to confidentiality are governed by the Convention, including its Confidentiality Annex and paragraph 1 of Article VII, and the Organization's Policy on Confidentiality. The specific arrangements for implementing the provisions of the Convention and the Organization's Policy on Confidentiality in relation to the protection of confidential information at the plant site are contained in Attachment 3.

2. Upon request, the inspected State Party will procure a container to be placed under joint seal to maintain documents that the inspection team, inspected State Party, or the plant site representative decides to keep as reference for future inspections. The inspected State Party shall be reimbursed by

the Organization for the purchase of such container.

3. All documents, including photographs, provided to the inspection team will be controlled as follows:

(a) *Information to be taken off-site.* Information relevant to the finalization of the preliminary factual findings that the inspected State Party permits the inspection team to take off-site will be marked and numbered by the inspected State Party. In accordance with the inspected State Party's Procedures for Information Control, markings on the information will clearly state that the inspection team may take it off-site and will contain a classification pursuant to the Organization's Policy on Confidentiality at a level requested by the inspected State Party. The representative of the facility will acknowledge the release of such information in writing prior to disclosure to the inspection team.

(b) *Information restricted for use on-site.* Information that the inspected State Party permits the inspection team to use on-site during inspections but not take off-site will be marked and numbered by the inspected State Party. In accordance with the inspected State Party's Procedures for Information Control, markings on the information will clearly restrict its use on-site and will contain a classification pursuant to the Organization's Policy on Confidentiality at a level requested by the inspected State Party. The representative of the facility will acknowledge the release of such information in writing prior to disclosure to the inspection team. Upon conclusion of the inspection, the inspection team shall return the information to the inspected State Party, and the facility representative shall acknowledge receipt in writing. If so requested by the inspection team, the information can be placed in the joint sealed container for future reference.

(c) *Information restricted for use on-site and requiring direct supervision.* Information that the inspected State Party permits the inspection team to use on-site only under direct supervision of the inspected State Party or the representative of the inspected facility will be marked and numbered by the inspected State Party. In accordance with the inspected State Party's Procedures for Information Control, markings on the information will clearly restrict its use on-site under direct supervision and will contain a classification pursuant to the Organization's Policy on Confidentiality at a level requested by the inspected State Party. The representative of the facility will acknowledge the release of such information in writing prior to disclosure to the inspection team. The inspection team shall return the information to the inspected State Party immediately upon completion of review and the facility representative shall acknowledge receipt in writing. If so requested by the inspection team, the information can be placed in the joint sealed container for future reference.

Section 4. Media and Public Relations

1. Inspection team media and public relations are governed by the Organization's Media and Public Relations Policy. The specific arrangements for the inspection

team's contacts with the media or the public, if any, in relation to inspections of the plant site are contained in Attachment 4.

Section 5. Inspection Equipment

1. As agreed between the inspected State Party and the Organization, the approved equipment listed in Part A of Attachment 5 and with which the inspected State Party has been given the opportunity to familiarize itself will, at the discretion of the Organization and on a routine basis, be used specifically for the Schedule 2 inspection. The equipment will be used in accordance with the Convention, the relevant decisions taken by the Conference of States Parties, and any agreed procedures contained in Attachment 5.

2. The provisions of paragraph 1 above are without prejudice to paragraphs 27 to 29 of Part II of the Verification Annex.

3. The items of equipment available on-site and not belonging to the Organization which the inspected State Party has volunteered to provide to the inspection team upon its request for use on-site during the conduct of inspections, together with any procedures for the use of such equipment, if required, any requested support which can be provided, and conditions for the provision of equipment are listed in Part B of Attachment 5. Prior to any use of such equipment, the inspection team may confirm that the performance characteristics of such equipment are consistent with those for similar Organization-approved equipment, or—with respect to items of equipment which are not on the list of Organization-approved equipment—are consistent with the intended purpose for using such equipment.²

4. Requests from the inspection team for the inspected State Party during the inspection to provide equipment mentioned in paragraph 3 above shall be made in writing by an authorized member of the inspection team using the form contained in Attachment 5. The same procedure will also apply to other requests of the inspection team in accordance with paragraph 30 of Part II of the Verification Annex.

5. Agreed procedures for the decontamination of any equipment are contained in Part C of Attachment 5.

Section 6. Pre-Inspection Activities

1. The inspection team shall be given a pre-inspection briefing by the representatives of the plant site in accordance with paragraph 37 of Part II of the Verification Annex. The pre-inspection briefing shall include:

- (a) information on the plant site as described in Attachment 6;
- (b) health and safety specifications described in Section 2 above and detailed in Attachment 2;
- (c) any changes to the above-mentioned information since the last inspection; and
- (d) information on administrative and logistical arrangements additional to those contained in Attachment 11, if any, that shall apply during the inspection, as contained in Section 9.

² i.e., The inspection team may confirm that the performance characteristics of such equipment meet the technical requirements necessary to support the inspection task intended to be accomplished.

2. Any information about the plant site that the inspected State Party has volunteered to provide to the inspection team during the pre-inspection briefing with indications as to which information may be transferred off-site is referenced in Part B of Attachment 6.

Section 7. Conduct of the Inspection

7.1 Standing Arrangements

1. The inspection period shall begin immediately upon completion of the pre-inspection briefing unless agreed otherwise.

2. Upon conclusion of the pre-inspection briefing, the inspection team leader shall provide to the designated representative of the inspected State Party a preliminary inspection plan to facilitate the conduct of the inspection.

3. Arrangements for the conduct of a site tour, if any, are contained in Attachment 7 to this Agreement.

4. Before commencement of inspection activities, the inspection team leader shall inform the representative of the inspected State Party about the initial steps to be taken in implementing the inspection plan. The plan will be adjusted by the inspection team as circumstances warrant throughout the inspection process in consultation with the inspected State Party as to its implementability in regard to paragraph 40 of Part II of the Verification Annex.³

5. The inspection team leader shall inform the representative of the inspected State Party during the inspection in a timely manner about each subsequent step to be taken by the inspection team in implementing the inspection plan. Without prejudice to paragraph 40 of Part II of the Verification Annex, this shall be done in time to allow the inspected State Party to arrange for the necessary measures to be taken to provide access and support to the inspection team as appropriate without causing unnecessary delay in the conduct of inspection activities.

6. At the beginning of the inspection, the inspection team shall have the right to confirm the precise location of the plant site utilizing visual and map reconnaissance, a site diagram, or other suitable techniques.

7. The inspection team shall, upon request of the inspected State Party, communicate with the personnel of the plant site only in the presence of or through a representative of the inspected State Party.

8. The inspected State Party shall, upon request, provide a securable work space for the inspection team, including adequate space for the storage of equipment. The inspection team shall have the right to seal its work space.

³ The activities of the inspection team shall be so arranged as to ensure the timely and effective discharge of its functions and the least possible inconvenience to the inspected State Party and disturbance to the plant site inspected. The inspection team shall avoid unnecessarily hampering or delaying the operation of the plant site and avoid affecting its safety. In particular, the inspection team shall not operate the plant site. If the inspection team considers that, to fulfil the mandate, particular operations should be carried out at the plant site, it shall request the designated representative of the plant site to have them performed.

7.2 Access to and Inspection of Areas, Buildings and Structures

1. The focus of the inspection shall be the declared Schedule 2 plant(s) within the declared plant site as referenced in Attachment 8. If the inspection team requests access to other parts of the plant site, access to these areas shall be granted in accordance with the obligation to provide clarification pursuant to paragraph 51 of Part II and paragraph 25 of Part VII of the Verification Annex, and in accordance with Attachment 8.

2. Pursuant to paragraph 45 of Part II of the Verification Annex, the inspection team shall have unimpeded access to the declared Schedule 2 plant(s) in accordance with the relevant Articles and Annexes of the Convention and Attachments 8, 9, and 10. Areas of the declared plant(s) likely to be inspected are mentioned in paragraph 28 of Part VII of the Verification Annex. Pursuant to Section C of Part X of the Verification Annex, the inspection team shall have managed access to the other areas of the plant site. Procedures for access to these areas are contained in Attachment 8.

7.3 Access to and Inspection of Documentation and Records

1. The agreed list of the documentation and records to be routinely made available for inspection purposes, mentioned in paragraph 26 of Part VII of the Verification Annex, to the inspection team by the inspected State Party during an inspection, as well as arrangements with regard to access to such records for the purpose of protecting confidential information, are contained in Attachment 9. Such documentation and records will be provided upon request.

2. Only those records placed in the custody of the inspection team that are attached to the preliminary factual findings in accordance with Section 3 may leave the premises. Those records placed in the custody of the inspection team that are not attached to the preliminary factual findings must be retained in the on-site container or returned to the inspected State Party.

7.4 Sampling and Analysis

1. Without prejudice to paragraphs 52 to 58 of Part II of the Verification Annex, procedures for sampling and analysis for verification purposes as mentioned in paragraph 27 of Part VII of the Verification Annex are contained in Attachment 10 of this Agreement.

2. Sampling and analysis, for inspection purposes, may be carried out to check for the absence of undeclared scheduled chemicals. Each such sample will be split into a minimum of four parts at the request of the inspection team in accordance with Part C of Attachment 10. One part shall be analyzed in a timely manner on-site. The second part of the split sample may be held for the inspection team for future reference and, if necessary, analysis off-site at laboratories designated by the Organization. That part of the sample may be destroyed at any time in the future upon the decision of the inspection team but in any case no later than 60 days after it was taken. The third part may be retained by the inspected State Party. The fourth part may be retained by the plant site.

3. Pursuant to paragraph 52 of the Part II of the Verification Annex, representatives of the inspected State Party or plant site shall take samples at the request of the inspection team in the presence of inspectors. The inspected State Party will inform the inspection team of the authorized plant site representative's⁴ determination of whether the sample shall be taken by representatives of the plant site or the inspection team or other individuals present. If inspectors are granted the right to take samples themselves in accordance with paragraph 52 of Part II of the Verification Annex, the relevant advance agreement between the inspection team and the inspected State Party shall be in writing. The representatives of the inspected State Party or of the inspected plant site shall have the right to be present during sampling. Agreed conditions and procedures for such sample collection are contained in Part B of Attachment 10 to this Agreement.

4. Plant site sampling equipment shall as a rule be used for taking samples required for the purposes of the inspection. This is without prejudice to the right of the inspection team pursuant to paragraph 27 of Part II of the Verification Annex to use its own approved sampling equipment in accordance with paragraph 1 of Section 5 and Parts A and B of Attachment 5 to this Agreement.

5. Should the inspection team request that a sample be taken and the inspected State Party be unable to accede or agree to the request, the inspected State Party will make every reasonable effort to satisfy the inspection team's concerns by other means to enable the inspection team to fulfil its mandate. The inspected State Party will provide a written explanation for its inability to accede or agree to the request. Any such response shall be supported by relevant document(s). The explanation of the inspected State Party shall be included in the preliminary factual findings.

6. In accordance with paragraph 53 of Part II of the Verification Annex, where possible, the analysis of samples shall be performed on-site and the inspection team shall have the right to perform on-site analysis of samples using approved equipment brought by it for the splitting, preparation, handling, analysis, integrity and transport of samples. The assistance that will be provided by the inspected State Party and the analysis procedures to be followed are contained in Part D of Attachment 10 to this Agreement.

7. The inspection team may request the inspected State Party to perform the analysis in the inspection team's presence. The inspection team shall have the right to be present during any sampling and analysis conducted by the inspected State Party.

8. The results of such analysis shall be reported in writing as soon as possible after the sample is taken.

9. The inspection team shall have the right to request repeat analysis or clarification in connection with ambiguities.

10. If at any time, and for any reason, on-site analysis is not possible, the inspection

team has the right to have sample(s) analyzed off-site at Organization-designated laboratories. In selecting such designated laboratories for the off-site analysis, the Organization will give due regard to requirements of the inspected State Party.

11. Transportation of samples will be in accordance with the procedures outlined in Part E of Attachment 10.

12. If at any time, the inspected State Party or plant site representative determines that inspection team on-site analysis activities are not in accordance with the facility agreement or agreed analysis procedures, or otherwise pose a threat to safety or environmental regulations or laws, all analysis activities will immediately cease at the direction of the plant site representative. If both parties cannot agree to proceed with the analysis, the inspection team will document this in its preliminary factual findings.

13. Conditions and procedures for the disposal of hazardous materials generated during sampling and on-site analysis during the inspection are contained in Part F of Attachment 10 to this Agreement.

7.5 Arrangements for Interviews

1. The inspection team shall have the right, subject to applicable United States legal protections for individuals, to interview any plant site personnel in the presence of representatives of the inspected State Party with the purpose of establishing relevant facts in accordance with paragraph 46 of Part II of the Verification Annex and inspected State Party's policy and procedures. Agreed procedures for conducting interviews are contained in Attachment 12.

2. The inspection team will submit to the inspected State Party names and/or positions of those desired for interviews. The requested individual(s) will be made available to the inspection team no later than 24 hours after submission of the formal request, unless agreed otherwise. The inspection team may also be requested to submit questions in writing prior to conducting interviews. The specific timing and location of interviews will be determined with the plant site in coordination with the inspected State Party and consistent with adequate notification of the interviewees, and minimizing the operation impacts on the plant site and individuals to be interviewed.

3. The inspected State Party may recommend to the inspection team that interviews be conducted in either "panel" or individual formats. At a minimum, interviews will be conducted with a member of the plant site staff and an inspected State Party representative. Legal counsel may also be required to be present by the inspected State Party. The interview may be interrupted for consultation between the interviewee, the plant site representative, and the inspected State Party representative.

4. The inspected State Party will have the right to restrict the content of interviews to information directly related to the mandate or purpose of the inspection.

5. Outside the interview process and in discharging their functions, inspectors shall communicate with personnel of the plant site only through the representative(s) of the inspected State Party.

7.6 Communications

1. In accordance with paragraph 44 of Part II of the Verification Annex, the inspection team shall have the right to communicate with the headquarters of the Technical Secretariat. For this purpose they may use their own, duly certified approved equipment, in accordance with paragraph 1 of Section 5.

2. In case the inspection team and the inspected State Party agree to use any of the inspected State Party's communications equipment, the list of such equipment and the provisions for its use are contained in Part B of Attachment 5 to this Agreement.

3. The agreed means of communication between inspection team sub-teams in accordance with paragraph 44 of Part II of the Verification Annex are contained in Part D of Attachment 5.

7.7 Photographs

1. In accordance with the provisions of paragraph 48 of Part II of the Verification Annex, the Confidentiality Annex and inspected State Party's policy and procedures, the inspection team shall have the right to have photographs taken at their request by the representatives of the inspected State Party or the inspected plant site. One camera of the instant development type furnished by the inspection team or the inspected State Party shall be used for taking identical photographs in sequence. Cameras furnished by the inspection team will remain either in their work space or equipment storage area except when carried by inspection team members for a specific inspection activity. Cameras will only be used for specified inspection purposes. Personal cameras are not allowed to be taken to the plant site unless otherwise agreed by the inspected State Party.

2. Pursuant to the Confidentiality Annex, the inspected State Party shall have the right to determine that contents of the photographs conform to the stated purpose of the photographs. The inspection team shall determine whether photographs conform to those requested and, if not, repeat photographs shall be taken. Photographs that do not meet the satisfaction of both sides will be destroyed by the inspected State Party in the presence of the inspection team. The inspection team, the inspected State Party and the plant site, if so requested, shall each retain one copy of every photograph. The copies shall be signed, dated, and classified, in accordance with Section 3, and note the location and subject of the photograph and carry the same identification number. Agreed procedures for photography are contained in Attachment 13.

3. The representative of the inspected plant site has the right to object to the use of photographic equipment in specific areas, buildings or structures if such use would be incompatible with safety or fire regulations given the characteristics of the chemicals stored in the area in question. Restrictions for use are contained in Parts A and/or B of Attachment 5 to this Agreement. If the objection is raised due to safety concerns, the inspected State Party will, if possible, furnish photographic equipment that meets the regulations. If the use of photographic

⁴ The authorized plant site representative is the owner or the operator, occupant or agent in charge of the premises being inspected.

equipment is not permissible at all in specific areas, buildings or structures for the reasons stated above, the inspected State Party shall provide a written explanation of its objection to the inspection team leader. The explanation, along with the inspection team leader's comments will be included in the inspection team's preliminary factual findings.

Section 8. Debriefing and Preliminary Findings

1. In accordance with paragraph 60 of Part II of the Verification Annex, upon completion of an inspection the inspection team shall meet with representatives of the inspected State Party and the personnel responsible for the inspection site to review the preliminary findings of the inspection team and to clarify any ambiguities. The inspection team shall provide to the representatives of the inspected State Party its preliminary findings in written form according to a standardized format, together with a list of any samples and copies of written information and data gathered and other material to be taken off-site. The document shall be signed by the head of the inspection team. In order to indicate that he has taken notice of the content of this document, the representative of the inspected State Party shall countersign the document. The meeting shall be completed not later than 24 hours after the completion of the inspection.

2. The document on preliminary findings shall also include, inter alia, the list of results of analysis, if conducted on-site, records of seals, and copies of photographs to be retained by the inspection team. It will be prepared in accordance with the preliminary findings format referenced in Annex 5. Any substantive changes to this format will be made only after consultation with the inspected State Party.

3. Before the conclusion of the debriefing, the inspected State Party may provide comments and clarifications to the inspection team on any issue related to the conduct of the inspection. The inspection team shall provide to the representative of the inspected State Party its preliminary findings in written form sufficiently prior to the conclusion of the debriefing to permit the inspected State Party to prepare any comments and clarifications. The inspected State Party's written comments and clarifications shall be attached to the document on preliminary findings.

4. The inspection team shall depart from the site upon the conclusion of the meeting on preliminary findings.

Section 9. Administrative Arrangements

1. The inspected State Party shall provide or arrange for the provision of the amenities listed in detail in Attachment 11 to the inspection team in a timely manner throughout the duration of the inspection. The inspected State Party shall be reimbursed by the Organization for such costs incurred by the inspection team, unless agreed otherwise.

2. Requests from the inspection team for the inspected State Party to provide or arrange amenities shall be made in writing by an authorized member of the inspection

team⁵ using the form contained in Attachment 11. Requests shall be made as soon as the need for amenities has been identified. The provision of such requested amenities shall be certified in writing by the authorized member of the inspection team. Copies of all such certified requests shall be kept by both parties.

3. The inspection team has the right to refuse extra amenities that in its view are not needed for the conduct of the inspection.

Section 10. Liabilities

1. Any claim by the inspected State Party against the Organization or by the Organization against the inspected State Party in respect of any alleged damage or injury resulting from inspections at the plant site in accordance with this Agreement, without prejudice to paragraph 22 of the Confidentiality Annex, shall be settled in accordance with international law and, as appropriate, with the provisions of Article XIV of the Convention.

Section 11. Status of Attachments

1. The Attachments form an integral part of this Agreement. Any reference to the Agreement includes the Attachments. However, in case of any inconsistency between this Agreement and any Attachment, the sections of the Agreement shall prevail.

Section 12. Amendments, Modifications and Updates

1. Amendments to the sections of this Agreement may be proposed by either Party and shall be agreed to and enter into force under the same conditions as provided for under paragraph 1 of Section 14.

2. Modifications to the Attachments of this Agreement, other than Attachment 1 and Part B of Attachment 5, may be agreed upon at any time between the representative of the Organization and the representative of the inspected State Party, each being specifically authorized to do so. The Director-General shall inform the Executive Council about any such modifications. Each Party to this Agreement may revoke its consent to a modification not later than four weeks after it had been agreed upon. After this time period the modification shall take effect.

3. The inspected State Party will update Part A of Attachment 1 and Part B of Attachment 5, and Attachment 6 as necessary for the effective conduct of inspections. The Organization will update Part B of Attachment 1 and Annex 5, subject to paragraph 2 of Section 8, as necessary for the effective conduct of inspections.

Section 13. Settlement of Disputes

1. Any dispute between the Parties that may arise out of the application or interpretation of this Agreement shall be settled in accordance with Article XIV of the Convention.

Section 14. Entry into Force

1. This Agreement shall enter into force after approval by the Executive Council and signature by the two Parties. If the inspected

⁵ The name of the authorized member(s) of the inspection team should be communicated to the inspected State Party no later than at the Point of Entry.

State Party has additional internal requirements, it shall so notify the Organization in writing by the date of signature. In such cases, this Agreement shall enter into force on the date that the inspected State Party gives the Organization written notification that its internal requirements for entry into force have been met.

Section 15. Duration and Termination

1. This Agreement shall cease to be in force when the provisions of paragraph 12 of Part VII of the Verification Annex no longer apply to this plant site, except if the continuation of the Agreement is agreed by mutual consent of the Parties.

Done at _____ in _____ copies, in English, each being equally authentic.⁶

ATTACHMENTS

The following attachments shall be completed where applicable.

Attachment 1: General Factors for the Conduct of Inspections

Attachment 2: Health and Safety Requirements and Procedures

Attachment 3: Specific Arrangements in Relation to the Protection of Confidential Information at the Plant Site

Attachment 4: Arrangements for the Inspection Team's Contacts with the Media or the Public

Attachment 5: Inspection Equipment

Attachment 6: Information on the Plant Site Provided in Accordance with Section 6

Attachment 7: Arrangements for Site Tour

Attachment 8: Access to the Plant Site in Accordance with Section 7.2

Attachment 9: Records Routinely Made Available to the Inspection Team at the Plant Site

Attachment 10: Sampling and Analysis for Verification Purposes

Attachment 11: Administrative Arrangements

Attachment 12: Agreed Procedures for Conducting Interviews

Attachment 13: Agreed Procedures for Photography

ATTACHMENT 1

General Factors for the Conduct of Inspections

Part A. To Be Provided and Updated by the inspected State Party

1. Plant site:
 - (a) working hours: ⁷ ____ hrs to ____ hrs (local time) (days)
 - (b) working days: _____
 - (c) holidays or other non-working days: ____

2. Schedule 2 plant(s):
 - (a) working hours, if applicable: ____ hrs to ____ hrs (days)
 - (b) working days: _____
 - (c) holidays or other non-working days: ____

⁶ The language(s) to be chosen by the inspected State Party from the languages of the Convention shall be the same as the language(s) referred to in paragraph 6 of Section 1 of this Agreement.

⁷ All references to time use a 24 hour clock.

3. Inspection activities which could/could not⁸ be supported during non-working hours with notation of times and activities:

4. Any other factors that could adversely affect the effective conduct of inspections:
(a) inspection requests:

Should the plant site withhold consent to an inspection, the inspected State Party shall obtain a search warrant from a United States magistrate judge. Upon receipt of a warrant, the inspected State Party will accede to the Organization's request to conduct an inspection. Such inspection will be carried out in accordance with the terms and conditions of the warrant.

(b) other:

5. Other: Notification procedures are contained in Annex 6.

Part B. To Be Provided and Updated by the Organization

1. Inspection frequency: _____
2. Inspection intensity:
(a) maximum estimated period of inspection (for planning purposes): _____⁹
(b) approximate inspection team size: _____

(c) estimated volume and weight of equipment to be brought on-site: _____

ATTACHMENT 2

Health and Safety Requirements and Procedures

Part A. Basic Principles

1. Applicable health and safety regulations of the Organization, with agreed variations from strict implementation, if any:

2. Health and safety regulations applicable at the plant site:

(a) federal regulations:

(b) state regulations:

(c) local regulations:

(d) plant site regulations:

3. Health and safety requirements and regulations agreed between the inspected State Party and the Organization:

Part B. Detection and Monitoring

1. Applicable specific safety standards for workplace chemical exposure limits and/or concentrations which should be observed during the inspection, if any:

2. Procedures, if any, for detection and monitoring in accordance with the Organization's Health and Safety Policy, including data to be collected by, or provided to, the inspection team:

Part C. Protection

1. Protective equipment to be provided by the Organization and agreed procedures for equipment certification and use, if required:

2. Protective equipment to be provided by the inspected State Party, and agreed procedures, personnel training, and personnel qualification tests and certification required; and agreed procedures for use of the equipment:

Part D. Medical Requirements

1. Applicable medical standards of the inspected State Party and, in particular, the inspected plant site:

2. Medical screening procedures for members of the inspection team:

3. Agreed medical assistance to be provided by the inspected State Party:

4. Emergency medical evacuation procedures:

5. Agreed additional medical measures to be taken by the inspection team:

6. Procedures for emergency response to chemical casualties of the inspection team:

Part E. Modification of Inspection Activities

1. Modification of inspection activities due to health and safety reasons, and agreed alternatives to accomplish the inspection goals:

ATTACHMENT 3

Specific Arrangements in Relation to the Protection of Confidential Information at the Plant Site

Part A. Inspected State Party's Procedures for Designating and Classifying Documents Provided to the Inspection Team

See Annex 3 for the Organization's Policy on Confidentiality and Annex 7 for the inspected State Party's Procedures for Information Control.

Part B. Specific Procedures for Access by the Inspection Team to Confidential Areas or Materials

Part C. Procedures in Relation to the Certification by the Inspection Team of the Receipt of Any Documents Provided by the Inspected Plant Site

Part D. Storage of Confidential Documents at the Inspected Plant Site

1. Procedures in relation to the storage of confidential documents or use of a dual control container on-site, if applicable:

Information under restrictions provided for in the Confidentiality Annex and as such to be kept in the dual control container under joint seal shall be available to the inspection team leader and/or an inspector designated by him from the beginning of the pre-inspection briefing until the end of the debriefing upon completion of the inspection in accordance with Section 3. If copies of information under dual control are permitted to be attached to the preliminary factual findings by the inspected State Party, they shall be made by the inspected State Party and retained under dual control until the debriefing. Should the medium on which such information is recorded become unusable, it shall be replaced without delay by the representative of the inspected State Party.

2. The dual control container will be placed _____

3. Information meeting the strict requirements for restriction pursuant to the Confidentiality Annex, and to be maintained in the dual control container located at the inspected plant site between inspections is listed below:

Reference	Type of data	Recorded media	Volume	Reasons for restrictions/re-mark S

Part E. Procedures for the Removal Off-Site of Any Written Information, Data, and Other Materials Gathered by the Inspection Team

Part F. Procedures for Providing the Representatives of the inspected State Party with Copies of Written Information, Inspector's Notebooks, Data and Other Material Gathered by the Inspection Team

Part G. Other Arrangements, If Any

1. Unless specified otherwise, all plant site information shall be returned to the inspected State Party at the completion of the inspection. No copies of plant site

⁸ Choose one option.

⁹ Any figure indicated is without prejudice to paragraph 29 of Part VII of the Verification Annex.

information shall be made in any manner by the inspection team or the Organization.

2. Plant site information shall not be released to the public, other States Parties, or the media without the specific permission of the inspected State Party, after consultation with the plant site.

3. Plant site information shall not be transmitted, copied or retained electronically

without the specific permission of the inspected State Party after consultation with the plant site. All transmissions of information off-site shall be done in the presence of the inspected State Party.

4. Information not relevant to the purpose of the inspection will be purged from documents, photographs, etc. prior to release to the inspection team.

ATTACHMENT 4

Arrangements for the Inspection Team's Contacts with the Media or the Public

ATTACHMENT 5

Inspection Equipment

Part A: List of Equipment

Item of approved inspection equipment	Agreed procedures for use			
	Nature of restrictions(s) (location, time, periods, etc.), if any	Indication of reason(s) (safety, confidentiality, etc.)	Special handling or storage requirements	Alternative for meeting inspection requirement(s), if so required by the inspection team

Part B. Equipment which the inspected State Party Has Volunteered to Provide

Item of equipment	Procedures for use	Support to be provided, if required	Conditions (timing, costs, if any)

Part C. Procedures for the Decontamination of Equipment

Item of equipment	Procedures for use

Part D. Means of Communication between Inspection Team Sub-Teams:

REQUEST FOR AND CERTIFICATION OF EQUIPMENT AVAILABLE ON SITE TO BE PROVIDED IN ACCORDANCE WITH PARAGRAPH 3 OF SECTION 5

Date: _____
 Plant Site: _____
 Inspection number: _____
 Name of the authorized member of the inspection team: _____
 Type and number of item(s) of equipment requested: _____
 Approval of the request by inspected State Party: _____
 Comments on the request by the inspected State Party: _____
 Indication of the costs, if any, for the use of the equipment requested/volunteered: _____

Certification of the authorized member of the inspection team that the requested item(s) of equipment have been provided: _____

Comments, if any, by the authorized member of the inspection team in regard to the equipment provided: _____

Name and signature of the authorized member of the inspection team: _____

Name and signature of the representative of the inspected State Party: _____

ATTACHMENT 6

Information on the Plant Site Provided in Accordance with Section 6

Part A. Topics of Information for the Pre-Inspection Briefing

Part B. Any Information about the Plant Site that the inspected State Party Volunteers to Provide to the Inspection Team during the Pre-Inspection Briefing and which May Be Transferred Off-Site

ATTACHMENT 7

Arrangements for Site Tour

The inspected State Party may provide a site tour at the request of the inspection team. Such tour shall take no more than 2 hours. The inspected State Party may provide explanations to the inspection team during the site tour.

ATTACHMENT 8

Access to the Plant Site in Accordance with Section 7.2

Part A. Areas of the Declared Plant Site to which Inspectors Are Granted Access (i.e., detail the areas, equipment, and computers)

1. Declared Plant:^{10 11}

¹⁰ Plant means a relatively self-contained area, structure or building containing one or more units with auxiliary and associated infrastructure, such as:

- (a) small administrative section;
- (b) storage/handling areas for feedstock and products;
- (c) effluent/waste handling/treatment area;
- (d) control/analytical laboratory;
- (e) first aid service/related medical section;
- (f) records associated with the movement into, around and from the site, of declared chemicals and their feedstock or product chemicals formed from them, as appropriate.

¹¹ Areas to be inspected may include:

- (a) areas where feed chemicals (reactants) are delivered or stored;
- (b) areas where manipulative processes are performed upon the reactants prior to addition to the reaction vessels;
- (c) feed lines as appropriate from the areas referred to in subparagraph (a) or subparagraph (b) to the reaction vessels together with any associated valves, flow meters, etc.;
- (d) the external aspect of the reaction vessels and ancillary equipment;
- (e) lines from the reaction vessels leading to long- or short-term storage or to equipment further processing the declared Schedule 2 chemicals;
- (f) control equipment associated with any of the items under subparagraphs (a) to (e);

Continued

2. Declared Plant Site:¹²
 Part B. Arrangements with Regard to the Scope of the Inspection Effort in Agreed Areas Referenced in Part A¹³

ATTACHMENT 9

Records Routinely Made Available to the Inspection Team at the Plant Site:¹⁴

ATTACHMENT 10

Sampling and Analysis for Verification Purposes

Part A. Agreed Sampling Points Chosen with Due Consideration to Existing Sampling Points Used by the Plant(s) Operator(s)

Part B. Procedures for Taking Samples

Part C. Procedures for Sample Handling and Sample Splitting

Part D. Procedures for Sample Analysis

Part E. Procedures for Transporting Samples

Part F. Arrangements in Regard to the Payment of Costs Associated with the Disposal or Removal by the inspected State Party of Hazardous Waste Generated during Sampling and On-Site Analysis during the Inspection

ATTACHMENT 11

Administrative Arrangements

Part A. The Amenities Detailed Below Shall Be Provided to the Inspection Team by the inspected State Party, Subject to Payment as Indicated in Part B Below

1. International and local official communication (telephone, fax), including calls/faxes between site and headquarters:

2. Vehicles: _____
 3. Working room, including adequate space for the storage of equipment: _____
 4. Lodging: _____
 5. Meals: _____
 6. Medical care: _____
 7. Interpretation Services:
 (a) number of interpreters: _____
 (b) estimated interpretation time: _____
 (c) languages: _____
 8. Other: _____

Part B. Distribution of Costs for Provision of Amenities by the inspected State Party (check one option for each amenity provided as appropriate)

Paragraphs 1–8 in Part A above	To be paid directly by the organization after the inspection	To be paid by the inspection team on behalf of the organization during the in-country period	To be paid by the inspected state party and subsequently reimbursed by the organization	To be paid by the inspected State Party
1				
2				
3				
4				
5				
6				
7				
8				

Part C. Other Arrangements

1. Number of sub-teams (consisting of no less than two inspectors per sub-team) to be accommodated:
 Z _____

REQUEST FOR AND CERTIFICATION OF AMENITIES TO BE PROVIDED OR ARRANGED

Date: _____
 Plant site: _____
 Inspection number: _____
 Category of amenities requested: _____
 Description of amenities requested: _____

(g) equipment and areas for waste and effluent handling;

(h) equipment and areas for disposition of chemicals not up to specification.

¹² Plant Site means the local integration of one or more plants, with any intermediate administrative levels, which are under one operational control, and includes common infrastructure, such as:

- (a) administration and other offices;
- (b) repair and maintenance shops;
- (c) medical center;
- (d) utilities;
- (e) central analytical laboratory;
- (f) research and development laboratories;
- (g) central effluent and waste treatment area; and
- (h) warehouse storage.

¹³ List the areas, equipment, and computers, if any, that are not relevant to the inspection mandate

Approval of the request by the inspected State Party: _____

Comments on the request by the inspected State Party: _____

Indication of the costs for the amenities requested:

Certification of the authorized member of the inspection team that the requested amenities have been provided:

or that contain confidential business information that does not need to be divulged in order to comply with the inspection mandate.

¹⁴ Some illustrative examples of records and data to be detailed are given below. The actual list will be dependent on the specifics of the inspection site. Information about the format and language in which records are kept at the plant site should be mentioned. It is understood that confidential information not related to the implementation of the Convention, such as prices, will be excluded by the State Party from scrutiny.

(a) inventory and accountancy records in relation to the production, processing or consumption of the declared Schedule 2 chemicals and their storage or transportation on to or off the site;

(b) operational records for the unit(s) producing, processing or consuming Schedule 2 chemicals (units) (batch cards, log books);

Comments by the authorized member of the inspection team in regard to the quality of the amenities provided:

Name and signature of the authorized member of the inspection team:

Name and signature of the representative of the inspected State Party:

ATTACHMENT 12

Agreed Procedures for Conducting Interviews

(c) Schedule 2 plant(s) dispatch records within the plant site and off-site dispatches;

(d) Schedule 2 plant(s) maintenance schedule records;

(e) Schedule 2 plant(s) waste disposal records;

(f) Schedule 2 plant(s) (unit) calibration records;

(g) Schedule 2 plant(s) sales reports, as appropriate;

(h) sales or transfers, whether to another industry, trader, or other destination, and if possible, of final product types;

(i) data on direct exports/imports and to/from which States;

(j) other shipments, including specification of these other purposes; and

(k) other.

Attachment 13

Agreed Procedures for Photography

ANNEXES

Note: These annexes, inter alia, can be attached if requested by the inspected State Party

Annex 1: Organization's Media and Public Relations Policy

Annex 2: Organization's Health and Safety Policy and Regulations

Annex 3: Organization's Policy on Confidentiality

Annex 4: Plant Site Declaration

Annex 5: Preliminary and Final Inspection Report Formats

Annex 6: Inspected State Party's Procedures for Inspection Notification

Annex 7: Inspected State Party's Procedures for Information Control

PART 717—CLARIFICATION OF POSSIBLE NON-COMPLIANCE WITH THE CONVENTION; CHALLENGE INSPECTION PROCEDURES

Sec.

717.1 Clarification procedures; challenge inspection requests pursuant to Article IX of the Convention.

717.2 Challenge inspections.

717.3 Requirements for provisions of samples.

717.4 Report of inspection-related costs.

Authority: Pub. L. 105-277, 112 Stat. 2681; E.O. 13128, 64 FR 36703.

§ 717.1 Clarification procedures; challenge inspection requests pursuant to Article IX of the Convention.

(a) Article IX of the Convention sets forth procedures for clarification, between States Parties, of issues about compliance with the Convention. If States Parties are unable, through consultation between themselves or through the OPCW, to resolve such issues, a State Party may request the OPCW to conduct an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party. Such an on-site challenge inspection request shall be for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the Convention.

(b) Any person or facility subject to the CWC (parts 710 through 721 of this subchapter) must provide information required by the Commerce Department pursuant to an Article IX clarification request from another State Party or the OPCW concerning possible non-compliance with the reporting, declaration, notification, or inspection requirements set forth in parts 712 through 716 of this subchapter.

§ 717.2 Challenge inspections.

(a) *Facilities subject to challenge inspection.* Any person or facility in the United States is subject to a challenge inspection by the OPCW concerning possible non-compliance with the requirements of the Convention. Any person or facility subject to the CWC (parts 710 through 721 of this subchapter) (i.e., not owned by the Department of Defense, Department of Energy or other United States government agency that notifies the USNA of their decision to be excluded from the CWC), whether a declared facility or not, may be subject to a challenge inspection by the OPCW concerning possible non-compliance with the requirements set forth in parts 712 through 716 of this subchapter. The Department of Commerce will host and escort the international inspector team for all challenge inspections of persons or facilities subject to CWC, will assist the inspection team in fulfilling its mandate, and will ensure that a challenge inspection adheres to the Convention, the Act, and any site-specific facility agreement.

(b) *Warrants.* In instances where consent is not provided by the owner, operator, occupant or agent in charge of the facility or location, the Department of Commerce will seek criminal warrants as provided by the Act.

(c) *Notification of challenge inspection.* Challenge inspections may be made only upon issuance of written notice by the U.S. National Authority to the owner and to the operator, occupant or agent in charge of the premises. The Department of Commerce will provide preliminary notification to the owner and the operator, occupant or agent in charge of the premises selected for a challenge inspection. If the United States is unable to provide actual written notice to the inspection point of contact, the Department of Commerce, or if the Department of Commerce is unable, the Federal Bureau of Investigation may post notice prominently at the plant, plant site or other facility or location to be inspected.

(1) *Timing.* The OPCW will notify the USNA of a challenge inspection not less than 12 hours before the planned arrival of the inspection team at the U.S. point of entry. The USNA will provide written notice to the owner and to the operator, occupant or agent in charge of the premises within six hours of receiving notification from the OPCW Technical Secretariat or as soon as possible thereafter.

(2)(i) *Content of notice.* The notice shall include all appropriate information provided by the OPCW to

the United States National Authority concerning:

(A) The type of inspection;

(B) The basis for the selection of the facility or locations for the type of inspection sought;

(C) The time and date that the inspection will begin and the period covered by the inspection;

(D) The names and titles of the inspectors; and

(E) The evidence or reasons provided by the requesting State Party to the Convention for seeking the inspection.

(ii) In addition to appropriate information provided by the OPCW in its notification to the United States National Authority, the Department of Commerce's preliminary notification at the facility or plant site will state whether an advance team is available to assist the site in preparation for the inspection.

(d) *Duration of challenge inspections.* Challenge inspections will not exceed 84 hours, unless extended by agreement between the inspection team and the Department of Commerce.

(e) *Scope and conduct of inspections.*

(1) *General.* Each inspection shall be limited to the purposes described in § 717.2 and conducted in the least intrusive manner, consistent with the effective and timely accomplishment of its purpose as provided in the Convention.

(2) *Hours of inspections.* Consistent with the provisions of the Convention, the Department of Commerce will ensure, to the extent possible, that each inspection is commenced, conducted, and concluded during ordinary working hours, but no inspection shall be prohibited or otherwise disrupted from commencing, continuing or concluding during other hours.

(3) *Effect of facility agreements.* For facilities with facility agreements, access and activities within the final perimeter shall be unimpeded within the boundaries established by the agreements. Challenge inspections will be conducted in accordance with facility agreements concluded between the U.S. Government and the OPCW, as applicable. The existence of a facility agreement does not in any way limit the right of the operator of the facility to withhold consent to a challenge inspection request. For facilities without facility agreements or in areas outside the boundaries established by facility agreements, challenge inspections will be conducted on a managed access basis.

(4) *Health and safety regulations.* In carrying out their activities, inspectors and U.S. Government representatives accompanying the inspectors shall

observe health and safety regulations established at the inspection site, including those for the protection of controlled environments within a facility and for personal safety.

(5) *Confidential business information.*

(i) *Provisions of the Act relating to confidential business information.* The Act provides a statutory exemption from disclosure in response to a Freedom of Information Act request for certain information related to initial and routine inspections reported to, or otherwise acquired by, the U. S. Government as follows:

(A) Information included in categories specifically enumerated in sections 103(g)(1) and 304(e)(2) of the Act:

- (1) Financial data;
- (2) Sales and marketing data (other than shipment data);
- (3) Pricing data;
- (4) Personnel data;
- (5) Research data;
- (6) Patent data;
- (7) Data maintained for compliance with environmental or occupational health and safety regulations;
- (8) Data on personnel and vehicles entering and personnel passenger vehicles exiting the facility;
- (9) Any chemical structure;
- (10) Any plant design, process, technology or operating method;
- (11) Any operating requirement, input, or result that identifies any type or quantity of chemicals used, processed or produced;
- (12) Any commercial sale, shipment or use of a chemical; or

(B) Information that qualifies as a trade secret under 5 U.S.C. 552(b)(4) (Freedom of Information Act) that is obtained:

- (1) From a U.S. person; or
- (2) Through the U.S. Government or the conduct of an inspection on U.S. territory under the Convention.

(ii) *Exception to Freedom of Information Act exemption.* The Act provides that the United States Government may disclose confidential business information to the OPCW, to federal law enforcement agencies, and, upon written request, to Congressional committees of appropriate jurisdiction.

(iii) *Provisions of the Convention relating to confidential business information.* The Convention provides that States Parties may designate information submitted to the Organization for the Prohibition of Chemical Weapons (OPCW) as confidential, and requires the OPCW to limit access to and to prevent disclosure of information so designated, including specific information on inspections. The OPCW has developed a classification system whereby States Parties may

designate the information they submit in their declarations as "restricted," "protected," or "highly protected," depending on the sensitivity of the information.

(iv) *Disclosure of confidential business information during inspections.* During inspections, certain confidential business information, as defined by the Act, may be disclosed to OPCW inspectors and U.S. Government representatives hosting and escorting the inspectors. Facilities being inspected are responsible for identifying confidential business information to the U.S. Government before it is disclosed to inspectors, so that appropriate marking and handling can be arranged, in accordance with the provisions of the Convention, to prevent further, unauthorized disclosure. Confidential business information not related to the purpose of an inspection or not necessary to the accomplishment of an inspection, as agreed by the United States Government team accompanying the OPCW Inspection Team, may be removed from sight, shrouded, or otherwise not disclosed.

(v) *Disclosure of confidential business information following inspections.* (A) Inspection-related confidential business information, as defined by the Act, contained in inspection reports or otherwise in the possession of the U.S. Government, is exempt from disclosure in response to a Freedom of Information Act request.

(B) The United States Government must disclose confidential business information when such disclosure is deemed to be in the national interest. The USNA, in coordination with the CWC interagency group, shall determine whether disclosure of the confidential business information is in the national interest and not contrary to national security or law enforcement needs. The Act provides for notification to the affected person of intent to disclose confidential business information, unless such notification of intent to disclose is contrary to national security or law enforcement needs. If, after coordination with the agencies that constitute the CWC interagency group, the USNA determines that such disclosure is not contrary to national security or law enforcement needs, the USNA will notify the person that submitted the information or the person to whom the information pertains of the intent to disclose the information.

(C) OPCW inspectors are prohibited, under the terms of their employment contracts and pursuant to the Confidentiality Annex of the Convention, from disclosing to any unauthorized persons any confidential

information coming to their knowledge in the performance of their official duties, even after termination of their employment.

§ 717.3 Requirements for provisions of samples.

The owner, operator, occupant or agent in charge of a facility must provide a sample, as provided for in the Convention and consistent with requirements set forth by the Director of the United States National Authority in 22 CFR part 103, if the leader from the U.S. Department of Commerce of the U.S. host team accompanying the OPCW Inspection Team notifies the owner, operator, occupant or agent in charge of the inspected facility that a sample is required. The owner, operator, occupant or agent in charge of the premises shall determine whether the sample shall be taken by representatives of the premises or the inspection team or other individuals present during the inspection.

§ 717.4 Report of inspection-related costs.

Pursuant to section 309(b)(5) of the Act, any facility that has undergone any inspections pursuant to this subchapter during a given calendar year must report to BXA within 90 days of an inspection on its total costs related to that inspection. Although not required, such reports should identify categories of costs separately if possible, such as personnel costs (production-line, administrative, legal), costs of producing records, and costs associated with shutting down chemical production or processing during inspections. This information should be reported to BXA on company letterhead at the address given in § 716.6(c) of this subchapter, with the following notation: "ATTN: Report of Inspection-related Costs."

PART 718—INTERPRETATIONS

[RESERVED]

Note: This part is reserved for interpretations of the CWC (parts 710 through 721 of this subchapter) and also for applicability of OPCW decisions.

PART 719—ENFORCEMENT

Sec.

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- 719.20 Record for decision.
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- 719.22 Reporting a violation.

Authority: Pub. L. 105-277, 112 Stat. 2681; 50 U.S.C. 1601 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12938 (59 FR 59099; 3 CFR, 1994 Comp., p. 950), as amended by E.O. 13094 (63 FR 40803; 3 CFR, 1998 Comp., p. 200); E.O. 13128, 64 FR 36703.

§ 719.1 Scope and definitions.

(a) *Scope.* This part 719 covers administrative enforcement proceedings for two categories of violations:

(1) *Violations of the CWCRC (parts 710 through 721 of this subchapter) that are subject to the imposition of civil penalties by BXA* ("§ 719.1(a)(1) cases"). BXA will investigate possible violations, prepare charges, initiate administrative proceedings, negotiate settlements, and issue orders that resolve the cases. BXA will be represented in these proceedings by the Office of Chief Counsel; and

(2) *Violations of Section 306 or 405 of the CWCIA, which are subject to the imposition of civil penalties by the Department of State pursuant to section 501(a) of the CWCIA and 22 CFR Part 103* ("§ 719.1(a)(2) cases"). The Department of Commerce will investigate possible violations, prepare charges, provide legal representation, negotiate settlements, and make requests and recommendations to State Department officials with respect to the initiation and resolution of administrative proceedings. Notice will be given and orders will be issued by State Department officials under 22 CFR part 103, but, in all other respects, this part 719 shall apply.

Note to paragraph (a): This part 719 does not apply to violations of the export requirements imposed pursuant to the Chemical Weapons Convention and set forth in the Export Administration Regulations (EAR) (15 CFR parts 730 through 799) and in the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 through 130).

(b) *Definitions.* The following are definitions of terms as used in this part 719 only. For definitions of terms applicable to the whole CWCRC, see part 710 of this subchapter.

Administrative law judge (ALJ). The person authorized to conduct hearings in administrative enforcement proceedings.

Assistant Secretary for Export Enforcement. The Assistant Secretary

for Export Enforcement, Bureau of Export Administration, United States Department of Commerce.

CWCIA. The Chemical Weapons Convention Implementation Act of 1998 (Pub. L. 105-277, Division I).

Final decision. A decision or order assessing a civil penalty, or otherwise disposing of or dismissing a case, which is not subject to further administrative review, but which may be subject to collection proceedings or judicial review in an appropriate Federal court as authorized by law.

Office of Chief Counsel. The Office of Chief Counsel for Export Administration, United States Department of Commerce.

Party. For purposes of a § 719.1(a)(1) case, BXA and any person named as a respondent under this part are parties. For purposes of a § 719.1(a)(2) case, the Department of State and any person named as a respondent under this part are parties.

Respondent. Any person named as the subject of a letter of intent to charge, or a Notice of Violation and Assessment (NOVA) and proposed order.

Under Secretary for Export Administration. The Under Secretary for Export Administration, Bureau of Export Administration, United States Department of Commerce.

§ 719.2 Violations and civil penalties.

(a) *Violations subject to civil penalties under the CWCRC (parts 710 through 721 of this subchapter).* (1) *Violations.* (i) *Import restrictions involving Schedule 1 chemicals.* Except as otherwise provided in § 712.1 of this subchapter, no person may import any Schedule 1 chemical (See Supplement No. 1 to part 712 of this subchapter) *unless:*

(A) The import is from a State Party;

(B) The import is for research, medical, pharmaceutical, or protective purposes;

(C) The import is in types and quantities strictly limited to those that can be justified for such purposes; and

(D) The importing person has notified the Department of Commerce 45 calendar days prior to the import pursuant to § 712.4 of this subchapter.

(ii) *Import restrictions involving Schedule 2 chemicals.* Except as otherwise provided in § 713.1 of this subchapter, no person may, on or after April 29, 2000, import any Schedule 2 chemical (see Supplement No. 1 to part 713) from any country other than a State Party.

(2) *Civil penalty.* A civil penalty not to exceed \$11,000 may be imposed by the Assistant Secretary for Export Enforcement in accordance with this

part on any person for each violation of paragraph (a)(1)(i) or (ii) of this section.¹

(b) *Violations subject to civil penalties under section 501(a) of the CWCIA.* (1) *Violations.* (i) *Refusal to permit entry or inspection.* No person may willfully fail or refuse to permit entry or inspection, or to disrupt, delay or otherwise impede an inspection, authorized by the CWCIA.

(ii) *Failure to establish or maintain records.* No person may willfully fail or refuse:

(A) To establish or maintain any record required by the CWCIA or the CWCRC; or

(B) To submit any report, notice, or other information to the United States Government in accordance with the CWCIA or the CWCRC; or

(C) To permit access to or copying of any record required by the CWCIA or regulations issued thereunder, including information that is exempt from disclosure under the Freedom of Information Act pursuant to section 103(g) of the CWCIA or § 711.2 or Supplement No. 1 to part 711 of this subchapter.

(2) *Civil penalties.* (i) *Civil penalty for refusal to permit entry or inspection.*

Any person that is determined to have willfully failed or refused to permit entry or inspection, or to have disrupted, delayed or otherwise impeded an authorized inspection, as set forth in paragraph (b)(1)(i) of this section, shall pay a civil penalty in an amount not to exceed \$25,000 for each violation. Each day the violation continues constitutes a separate violation.

(ii) *Civil penalty for failure to establish or maintain records.* Any person that is determined to have willfully failed or refused to establish or maintain records or submit reports, notices or other information required by the CWCIA or CWCRC, or to permit access to or copying of records exempt from disclosure under the CWCIA or CWCRC, as set forth in paragraph (b)(1)(ii) of this section, shall pay a civil penalty in an amount not to exceed \$5,000 for each violation.

§ 719.3 Denial of export privileges.

Any person in the United States or any U.S. national may be subject to a denial of export privileges after notice and opportunity for hearing pursuant to part 720 of this subchapter if that person has been convicted under Title 18, Section 229 of the United States Code, of knowingly:

¹ The maximum civil penalty allowed under the International Emergency Economic Powers Act is \$11,000 for any violation committed on or after October 23, 1996 (15 CFR 6.4(a)(3)).

(a) Developing, producing, otherwise acquiring, transferring directly or indirectly, receiving, stockpiling, retaining, owning, possessing, or using, or threatening to use, a chemical weapon; or

(b) Assisting or inducing, in any way, any person in, or attempting or conspiring to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, a chemical weapon. See part 720 of this subchapter for administrative provisions relating to violations of 18 U.S.C. 229.

§ 719.4 Additional sanctions and other remedial action available.

(a) *Criminal penalties for § 719.1(a)(1) cases.* Whoever willfully violates § 719.2(a)(1)(i) or (ii) shall, upon conviction, be fined not more than \$50,000, or, if a natural person, imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by like fine, imprisonment, or both.

(b) *Criminal penalties for § 719.1(a)(2) cases.* Any person that knowingly violates the CWCIA by willfully failing or refusing to permit entry or inspection; or by willfully disrupting, delaying or otherwise impeding an inspection authorized by the CWCIA; or by willfully failing or refusing to establish or maintain any required record, or to submit any required report, notice or other information; or by willfully failing or refusing to permit access to or copying of any record exempt from disclosure under the CWCIA or CWCER (parts 710 through 721 of this subchapter), shall, in addition to or in lieu of any civil penalty that may be imposed, be fined under Title 18 of the United States Code, be imprisoned for not more than one year, or both.

(c) *Criminal penalties for development or use of a chemical weapon.* Any person that violates the CWCIA by knowingly:

(1) Developing, producing, otherwise acquiring, transferring directly or indirectly, receiving, stockpiling, retaining, owning, possessing, or using, or threatening to use, any chemical weapon; or

(2) Assisting or inducing, in any way, any person to violate the activities specified in paragraph (c)(1) of this section, or attempting or conspiring to violate the activities specified in paragraph (c)(1) of this section, shall be fined or imprisoned for a term of years, or both, or, if the death of another person results, shall be punished by death or imprisoned for life, in

accordance with Section 229A of Title 18 of the United States Code.

(d) *Civil penalty for development or use of a chemical weapon.* Any person that violates the CWCIA as set forth in paragraph (c) of this section, may also, upon proof of such violation by preponderance of the evidence, be subject to a civil penalty in an amount not to exceed \$100,000 for each violation.

(e) *Criminal forfeiture.* Any person convicted under Section 229A(a) of Title 18 of the United States Code shall forfeit to the United States irrespective of any provision of State law:

(1) Any property, real or personal, owned, possessed, or used by a person involved in the offense;

(2) Any property constituting, or derived from, and proceeds the person obtained, directly or indirectly, as the result of such violation; and

(3) Any of the property used in any manner or part, to commit, or to facilitate the commission of, such violation. In lieu of a fine otherwise authorized by section 229A(a) of Title 18 of the United States Code, a defendant who derived profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(f) *Injunction.* (1) The United States may, in a civil action, obtain an injunction against:

(i) The conduct prohibited under section 229 or 229C of Title 18 of the United States Code; or

(i) The preparation or solicitation to engage in conduct prohibited under section 229 or 229D of Title 18 of the United States Code.

(2) In addition, the United States may, in a civil action, restrain any violation of section 306 or 405 of the CWCIA, or compel the taking of any action required by or under the CWCIA or the Convention.

§ 719.5 Initiation of administrative proceedings.

(a) *Initiation of a § 719.1(a)(1) case.*

(1) *Notice of Violation and Assessment (NOVA).* The Director of the Office of Export Enforcement, Bureau of Export Administration, may initiate an administrative enforcement proceeding in a § 719.1(a)(1) case by issuing a NOVA and a proposed order.

(2) *Letter of intent to charge.* The Director of the Office of Export Enforcement, Bureau of Export Administration, may notify a respondent by letter of the intent to charge, attaching a draft NOVA and proposed order, and giving the respondent a specified period of time in which to contact BXA to discuss

settlement of the proposed allegations.

An administrative enforcement proceeding is not initiated by a letter of intent to charge. If the respondent does not contact BXA within the specified time, or if the respondent requests it, BXA will initiate an administrative enforcement proceeding as set forth in paragraphs (a)(1) and (c) of this section.

(b) *Initiation of § 719.1(a)(2) case.* (1) *Request for Notice of Violations and Assessment (NOVA).* The Director of the Office of Export Enforcement, Bureau of Export Administration, may request that the Secretary of State initiate an administrative enforcement proceeding in a § 719.1(a)(2) case under this § 719.5(b)(1) and 22 CFR 103.4. If the request is in accordance with applicable law, the Assistant Secretary for Arms Control will provide notice of the initiation of proceedings through issuance of a NOVA. The Office of Chief Counsel shall serve the NOVA as directed by the Secretary of State.

(2) *Letter of intent to charge.* The Director of the Office of Export Enforcement, Bureau of Export Administration may notify a respondent by letter of the intent to charge. This letter of intent to charge will advise a respondent that the Department of Commerce has conducted an investigation and intends to recommend that the Secretary of State issue a NOVA. The letter of intent to charge will be accompanied by a draft NOVA and proposed order, and will give the respondent a specified period of time to contact BXA to discuss settlement of the allegations set forth in the draft NOVA. An administrative enforcement proceeding is not initiated by a letter of intent to charge. If the respondent does not contact BXA within the specified time, or if the respondent requests it, BXA will make its request for initiation of an administrative enforcement proceeding to the Secretary of State in accordance with paragraph (b)(1) of this part.

(c) *Provisions applicable to all proceedings.* (1) *Content of NOVA.* The NOVA shall constitute a formal complaint, and will set forth the basis for the issuance of the proposed order. It will set forth the alleged violation(s) and the essential facts with respect to the alleged violation(s), reference the relevant statutory, regulatory or other provisions, and state the amount of the civil penalty to be assessed. The NOVA will inform the respondent of the right to request a hearing pursuant to § 719.6, inform the respondent that failure to request such a hearing shall result in the proposed order becoming final and, in a § 719.2(a)(1) case, unappealable on signature of the Assistant Secretary for

Export Enforcement, or, in a § 719.2(a)(2) case, unappealable on signature of the Secretary of State, and provide payment instructions. A copy of the regulations that govern the administrative proceedings will accompany the NOVA.

(2) *Proposed order.* A proposed order shall accompany every NOVA, letter of intent to charge, and draft NOVA. It will briefly set forth the substance of the alleged violation(s) and the statutory, regulatory or other provisions violated. It will state the amount of the civil penalty to be assessed.

(3) *Notice.* Notice of the intent to charge or of the initiation of formal proceedings, shall be given to the respondent by sending, via first class mail, facsimile, or by personal delivery, the relevant documents to the respondent (or respondent's agent for service of process or attorney).

§ 719.6 Demand for hearing and answer.

(a) *Section 719.1(a)(1) case.* (1) *Time to answer.* If the respondent wishes to contest the NOVA and proposed order, the respondent must answer the NOVA within 30 days from the date of service of the NOVA. The answer must be filed with the ALJ and served on the Office of Chief Counsel, and any other address(es) specified in the NOVA, in accordance with § 719.8.

(2) *Demand for hearing.* If the respondent wishes to have a hearing, a written demand for hearing must be submitted with the respondent's answer. If BXA wishes to have a hearing, it must file a written demand for hearing with the ALJ within 30 days after service of the respondent's answer. The failure of BXA or the respondent to make a timely written demand for hearing shall be deemed a waiver of the party's right to a hearing, except for good cause shown.

(b) *Section 719.1(a)(2) case.* If the respondent wishes to contest the NOVA and proposed order issued by the Secretary of State, the respondent must demand a hearing in writing within 15 days from the date of the NOVA. If the respondent demands a hearing, the respondent must answer the NOVA within 30 days from the date of the demand for hearing. The request for hearing and answer must be filed with the Administrative Law Judge, along with a copy of the NOVA and proposed order, and served on the Office of Chief Counsel, and any other address(es) specified in the NOVA, in accordance with § 719.8.

(c) *Provisions applicable to all proceedings.* (1) *Content of answer.* The respondent's answer must be responsive to the NOVA and proposed order, and

must fully set forth the nature of the respondent's defense(s). The answer must specifically admit or deny each separate allegation in the NOVA; if the respondent is without knowledge, the answer will so state and will operate as a denial. Failure to deny or controvert a particular allegation will be deemed an admission of that allegation. The answer must also set forth any additional or new matter the respondent believes supports a defense or claim of mitigation. Any defense or partial defense not specifically set forth in the answer shall be deemed waived, and evidence thereon may be refused, except for good cause shown.

(2) *English required.* The request for hearing, answer, and all other papers and documentary evidence must be submitted in English.

(3) *Waiver.* The failure of the respondent to file a request for a hearing and an answer within the times provided constitutes a waiver of the respondent's right to appear and contest the allegations set forth in the NOVA and proposed order. If no hearing is requested and no answer is provided, the proposed order will be signed and become final and unappealable.

§ 719.7 Representation.

A respondent individual may appear and participate in person, a corporation by a duly authorized officer or employee, and a partnership by a partner. If a respondent is represented by counsel, counsel shall be a member in good standing of the bar of any State, Commonwealth or Territory of the United States, or of the District of Columbia, or be licensed to practice law in the country in which counsel resides, if not the United States. The United States Government will be represented by the Office of Chief Counsel. A respondent personally, or through counsel or other representative who has the power of attorney to represent the respondent, shall file a notice of appearance with the Administrative Law Judge, or, in cases where settlement negotiations occur before any filing with the Administrative Law Judge, with the Office of Chief Counsel.

§ 719.8 Filing and service of papers other than the NOVA.

(a) *Filing.* All papers to be filed with the Administrative Law Judge (ALJ) shall be addressed to "CWC Administrative Enforcement Proceedings" at the address set forth in the NOVA, or such other place as the ALJ may designate. Filing by United States mail (first class postage prepaid), by express or equivalent parcel delivery service, via facsimile, or by hand

delivery, is acceptable. Filing from a foreign country shall be by airmail or via facsimile. A copy of each paper filed shall be simultaneously served on all parties.

(b) *Service.* Service shall be made by personal delivery, by facsimile, or by mailing (first class mail or express mail, postage prepaid) one copy of each paper to each party in the proceeding. The Department of State is a party to § 719.1(a)(2) cases under this subchapter, but will be represented by the Office of Chief Counsel. Therefore, service on the government party in all proceedings shall be addressed to Chief Counsel for Export Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Room H-3839, Washington, D.C. 20230, or faxed to (202) 482-0085. Service on a respondent shall be to the address to which the NOVA and proposed order was sent, or to such other address as the respondent may provide. When a party has appeared by counsel or other representative, service on counsel or other representative shall constitute service on that party.

(c) *Date.* The date of filing or service is the day when the papers are deposited in the mail or are delivered in person, by delivery service, or by facsimile. Refusal by the person to be served, or by the person's agent or attorney, of service of a document or other paper will be considered effective service of the document or other paper as of the date of such refusal.

(d) *Certificate of service.* A certificate of service signed by the party making service, stating the date and manner of service, shall accompany every paper, other than the NOVA and proposed order, filed and served on the parties.

(e) *Computation of time.* In computing any period of time prescribed or allowed by this part, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a legal holiday (as defined in Rule 6(a) of the Federal Rules of Civil Procedure), in which case the period runs until the end of the next day which is neither a Saturday, a Sunday, nor a legal holiday. Intermediate Saturdays, Sundays, and legal holidays are excluded from the computation when the period of time prescribed or allowed is 7 days or less.

§ 719.9 Summary decision.

The ALJ may render a summary decision disposing of all or part of a proceeding on the motion of any party to the proceeding, provided that there is no genuine issue as to any material fact

and the party is entitled to summary decision as a matter of law.

§ 719.10 Discovery.

(a) *General.* The parties are encouraged to engage in voluntary discovery regarding any matter, not privileged, which is relevant to the subject matter of the pending proceeding. The provisions of the Federal Rules of Civil Procedure relating to discovery apply to the extent consistent with this part and except as otherwise provided by the ALJ or by waiver or agreement of the parties. The ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. These orders may include limitations on the scope, method, time and place of discovery, and provisions for protecting the confidentiality of classified or otherwise sensitive information, including confidential business information as defined by the CWCIA.

(b) *Interrogatories and requests for admission or production of documents.* A party may serve on any party interrogatories, requests for admission, or requests for production of documents for inspection and copying, and a party concerned may apply to the ALJ for such enforcement or protective order as that party deems warranted with respect to such discovery. The service of a discovery request shall be made at least 20 days before the scheduled date of the hearing unless the ALJ specifies a shorter time period. Copies of interrogatories, requests for admission and requests for production of documents and responses thereto shall be served on all parties and a copy of the certificate of service shall be filed with the ALJ. Matters of fact or law of which admission is requested shall be deemed admitted unless, within a period designated in the request (at least 10 days after service, or within such additional time as the ALJ may allow), the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party to whom the request is directed cannot truthfully either admit or deny such matters.

(c) *Depositions.* Upon application of a party and for good cause shown, the ALJ may order the taking of the testimony of any person by deposition and the production of specified documents or materials by the person at the deposition. The application shall state the purpose of the deposition and set

forth the facts sought to be established through the deposition.

(d) *Enforcement.* The ALJ may order a party to answer designated questions, to produce specified documents or things or to take any other action in response to a proper discovery request. If a party does not comply with such an order, the ALJ may make a determination or enter any order in the proceeding as the ALJ deems reasonable and appropriate. The ALJ may strike related charges or defenses in whole or in part or may take particular facts relating to the discovery request to which the party failed or refused to respond as being established for purposes of the proceeding in accordance with the contentions of the party seeking discovery. In addition, enforcement by any district court of the United States in which venue is proper may be sought as appropriate.

§ 719.11 Subpoenas.

(a) *Issuance.* Upon the application of any party, supported by a satisfactory showing that there is substantial reason to believe that the evidence would not otherwise be available, the ALJ may issue subpoenas requiring the attendance and testimony of witnesses and the production of such books, records or other documentary or physical evidence for the purpose of the hearing, as the ALJ deems relevant and material to the proceedings, and reasonable in scope. Witnesses shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contempt, challenge or refusal to obey a subpoena served upon any person pursuant to this paragraph, any district court of the United States, in which venue is proper, has jurisdiction to issue an order requiring any such person to comply with such subpoena. Any failure to obey such order of the court is punishable by the court as a contempt thereof.

(b) *Service.* Subpoenas issued by the ALJ shall be to the address to which the NOVA was sent or to such other address as respondent may provide. When a party has appeared by counsel or other representative, service on counsel or other representative shall constitute service on that party.

(c) *Timing.* Applications for subpoenas must be submitted at least 10 days before the scheduled hearing or deposition, unless the ALJ determines, for good cause shown, that extraordinary circumstances warrant a shorter time.

§ 719.12 Matters protected against disclosure.

(a) *Protective measures.* The ALJ may limit discovery or introduction of evidence or issue such protective or other orders as in the ALJ's judgment may be needed to prevent undue disclosure of classified or sensitive documents or information, including confidential business information as defined by the CWCIA. Where the ALJ determines that documents containing classified or sensitive matter must be made available to a respondent in order to avoid prejudice, the ALJ may direct the government party to prepare an unclassified and nonsensitive summary or extract of the documents. The ALJ may compare the extract or summary with the original to ensure that it is supported by the source document and that it omits only so much as must remain undisclosed. The summary or extract may be admitted as evidence in the record.

(b) *Arrangements for access.* If the ALJ determines that the summary procedure outlined in paragraph (a) of this section is unsatisfactory, and that classified or otherwise sensitive matter must form part of the record in order to avoid prejudice to a party, the ALJ may provide the parties opportunity to make arrangements that permit a party or a representative to have access to such matter without compromising sensitive information. Such arrangements may include obtaining security clearances or giving counsel for a party access to sensitive information and documents subject to assurances against further disclosure, including a protective order, if necessary.

§ 719.13 Prehearing conference.

(a) On the ALJ's own motion, or on request of a party, the ALJ may direct the parties to participate in a prehearing conference, either in person or by telephone, to consider:

- (1) Simplification of issues;
- (2) The necessity or desirability of amendments to pleadings;
- (3) Obtaining stipulations of fact and of documents to avoid unnecessary proof; or
- (4) Such other matters as may expedite the disposition of the proceedings.

(b) The ALJ may order the conference proceedings to be recorded electronically or taken by a reporter, transcribed and filed with the ALJ.

(c) If a prehearing conference is impracticable, the ALJ may direct the parties to correspond with the ALJ to achieve the purposes of such a conference.

(d) The ALJ will prepare a summary of any actions agreed on or taken pursuant to this section. The summary will include any written stipulations or agreements made by the parties.

§ 719.14 Hearings.

(a) *Scheduling.* Upon receipt of a written and dated request for a hearing, the ALJ shall, by agreement with all the parties or upon notice to all parties of at least 30 days, schedule a hearing. All hearings will be held in Washington, D.C., unless the ALJ determines, for good cause shown, that another location would better serve the interests of justice.

(b) *Hearing procedure.* Hearings will be conducted in a fair and impartial manner by the ALJ. The ALJ may limit attendance at any hearing or portion thereof to the parties, their representatives and witnesses if the ALJ deems this necessary or advisable in order to protect sensitive matters from improper disclosure. The rules of evidence prevailing in courts of law do not apply, and all evidentiary material deemed by the ALJ to be relevant and material to the proceeding and not unduly repetitious will be received and given appropriate weight.

(c) *Testimony and record.* (1) Witnesses will testify under oath or affirmation. A verbatim record of the hearing and of any other oral proceedings will be taken by reporter or by electronic recording, transcribed and filed with the ALJ. A respondent may examine the transcript and may obtain a copy by paying any applicable costs.

(2) Upon such terms as the ALJ deems just, the ALJ may direct that the testimony of any person be taken by deposition and may admit an affidavit or declaration as evidence, provided that any affidavits or declarations have been filed and served on the parties sufficiently in advance of the hearing to permit a party to file and serve an objection thereto on the grounds that it is necessary that the affiant or declarant testify at the hearing and be subject to cross-examination.

(d) *Failure to appear.* If a party fails to appear in person or by counsel at a scheduled hearing, the hearing may nevertheless proceed. The party's failure to appear will not affect the validity of the hearing or any proceeding or action taken thereafter.

§ 719.15 Procedural stipulations.

Unless otherwise ordered and subject to § 719.16, a written stipulation agreed to by all parties and filed with the ALJ will modify the procedures established by this part.

§ 719.16 Extension of time.

The parties may extend any applicable time limitation by stipulation filed with the ALJ before the time limitation expires, or the ALJ may, on the ALJ's own initiative or upon application by any party, either before or after the expiration of any applicable time limitation, extend the time within which to file and serve an answer to a NOVA and proposed order, except that for § 719.1(a)(2) cases, the requirement that a hearing be demanded within 15 days, and the requirement that a final agency decision be made within 30 days, may not be modified.

§ 719.17 Post-hearing submissions.

All parties shall have the opportunity to file post-hearing submissions that may include findings of fact and conclusions of law, supporting evidence and legal arguments, exceptions to the ALJ's rulings or to the admissibility of evidence, and proposed orders and settlements.

§ 719.18 Decisions.

(a) *Decisions in § 719.1(a)(1) cases.* (1) *Initial decision.* After considering the entire record in a § 719.1(a)(1) case, the ALJ will issue an initial decision based on a preponderance of the evidence. The decision will include findings of fact, conclusions of law, and a decision based thereon as to whether the respondent has violated the CWCRC (parts 710 through 721 of this subchapter). If the ALJ finds that the evidence of record is insufficient to sustain a finding that a violation has occurred with respect to one or more allegations, the ALJ shall order dismissal of the allegations in whole or in part, as appropriate. If the ALJ finds that one or more violations have been committed, the ALJ shall issue an order imposing administrative sanctions, as provided in this part. The decision and order shall be served on each party, and shall become effective as the final decision of the Department 30 days after service, unless an appeal is filed in accordance with paragraph (a)(2) of this section.

(2) *Grounds for appeal.* (i) A party may, within 30 days of the ALJ's initial decision, petition the Under Secretary for Export Administration for review of the initial decision and order. A petition for review must be filed with the Office of Under Secretary for Export Administration, Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, and shall be served on the Chief Counsel for Export Administration and all other parties. Petitions for review

may be filed only on one or more of the following grounds:

(A) That a necessary finding of fact is omitted, erroneous or unsupported by substantial evidence of record;

(B) That a necessary legal conclusion or finding is contrary to law;

(C) That prejudicial procedural error occurred; or

(D) That the decision or the extent of sanctions is arbitrary, capricious or an abuse of discretion.

(ii) The appeal must specify the grounds on which the appeal is based and the provisions of the order from which the appeal was taken.

(3) *Effect of appeal.* The filing of an appeal shall not stay the operation of any order, unless the order by its express terms so provides or unless the Under Secretary for Export Administration, upon application by a party and with opportunity for response, grants a stay.

(4) *Appeal procedure.* The Under Secretary for Export Administration normally will not hold hearings or entertain oral arguments on appeals. A full written statement in support of the appeal must be filed with the appeal and be simultaneously served on all parties, who shall have 30 days from service to file a reply. At his/her discretion, the Under Secretary may accept new submissions, but will not ordinarily accept those submissions filed more than 30 days after the filing of the reply to the appellant's first submission.

(5) *Decisions.* The decision will be in writing and will be accompanied by an order signed by the Under Secretary for Export Administration giving effect to the decision. The order may either dispose of the case by affirming, modifying or reversing the order of the ALJ, or may refer the case back to the ALJ for further proceedings.

(b) *Decisions in § 719.1(a)(2) cases.* (1) *Initial decision.* After considering the entire record in § 719.1(a)(2) cases, the ALJ will issue an initial decision based on a preponderance of the evidence. The decision will include findings of fact, conclusions of law, and a decision based thereon as to whether the respondent has violated the CWCIA or 22 CFR part 103. If the ALJ finds that the evidence of record is insufficient to sustain a finding that a violation has occurred with respect to one or more allegations, the ALJ shall order dismissal of the allegations in whole or in part, as appropriate. If the ALJ finds that one or more violations have been committed, the ALJ shall issue an order imposing administrative sanctions.

(2) *Factors considered in assessing penalties.* In determining the amount of

a civil penalty, the ALJ shall take into account the nature, circumstances, extent and gravity of the violation(s), and, with respect to the respondent, the respondent's ability to pay the penalty, the effect on the respondent's ability to continue to do business, the respondent's history of prior violations, the respondent's degree of culpability, the existence of an internal compliance program, and such other matters as justice may require.

(3) *Certification of initial decision.* The ALJ shall immediately certify the initial decision and order to the Executive Director of the Office of Legal Adviser, U.S. Department of State, 2201 C Street, NW, Room 5519, Washington, DC 20520, and to the Office of Chief Counsel at the address in § 719.8, by personal delivery or overnight mail.

(4) *Review of initial decision.* The initial decision shall become the final agency decision and order unless, within 30 days, the Director of the USNA and International Security modifies or vacates it, with or without conditions, in accordance with 22 CFR 103.8.

§ 719.19 Settlement.

(a) *Section 719.1(a)(1) cases.* (1) *Settlements based on letter of intent to charge.* In § 719.1(a)(1) cases in which settlement is reached on the basis of a letter of intent to charge, the draft NOVA, proposed order, and a recommended settlement agreement will be submitted to the Assistant Secretary for Export Enforcement for approval and signature. If the Assistant Secretary for Export Enforcement refuses to approve the settlement, the Assistant Secretary for Export Enforcement will notify the parties and the case will proceed as though no settlement proposal had been made. If the Assistant Secretary for Export Enforcement does approve the settlement, the Assistant Secretary for Export Enforcement will issue an appropriate order, and no action will be required of the ALJ.

(2) *Settlements following demand for hearing.* The parties may enter into settlement negotiations at any time during the time a case is pending before the ALJ. If necessary, the parties may extend applicable time limitations or otherwise request that the ALJ stay the proceedings while settlement negotiations continue. If settlement is reached, a draft NOVA, proposed order, and recommended settlement agreement will be submitted to the Assistant Secretary for Export Enforcement for approval and signature. If the Assistant Secretary for Export Enforcement approves the proposal, he/she will issue

an appropriate order, and notify the ALJ that the case is withdrawn from adjudication. If the Assistant Secretary for Export Enforcement does not approve the proposal, then he/she will notify the parties of the disapproval, and settlement negotiations will resume or the case will proceed to adjudication by the ALJ as though no settlement proposal had been made.

(b) *Section 719.1(a)(2) cases.* (1) *Settlements before demand for hearing.* When the parties have agreed to a settlement of the case, the Director of the Office of Export Enforcement will recommend the settlement to the Secretary of State, forwarding a proposed settlement agreement and order, which, in accordance with 22 CFR 103.9(a), the Secretary of State will sign if the recommended settlement is in accordance with applicable law.

(2) *Settlements following demand for hearing.* The parties may enter into settlement negotiations at any time during the time a case is pending before the ALJ. If necessary, the parties may extend applicable time limitations or otherwise request that the ALJ stay the proceedings while settlement negotiations continue. When the parties have agreed to a settlement of the case, the Office of Chief Counsel will recommend the settlement to the Secretary of State, forwarding a proposed settlement agreement and order, which, in accordance with 22 CFR 103.9(b), the Assistant Secretary will sign if the recommended settlement is in accordance with applicable law.

(c) *Provisions applicable to all proceedings.* (1) *Settlement scope.* Any respondent who agrees to an order imposing any administrative sanction does so solely for the purpose of resolving the claims in the administrative enforcement proceeding brought under this part. This reflects the fact that the government officials involved have neither the authority nor the responsibility for initiating, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and the Department of Justice.

(2) *Finality.* Cases that are settled may not be reopened or appealed.

§ 719.20 Record for decision.

(a) *The record.* The transcript of hearings, exhibits, rulings, orders, all papers and requests filed in the proceedings, and, for purposes of any appeal under § 719.18 or under 22 CFR 103.8, the decision of the ALJ and such submissions as are provided for under § 719.18 or 22 CFR 103.8 will constitute the record and the exclusive basis for

decision. When a case is settled, the record will consist of any and all of the foregoing, as well as the NOVA or draft NOVA, settlement agreement, and order.

(b) *Restricted access.* On the ALJ's own motion, or on the motion of any party, the ALJ may direct that there be a restricted access portion of the record for any material in the record to which public access is restricted by law or by the terms of a protective order entered in the proceedings. A party seeking to restrict access to any portion of the record is responsible for submitting a version of the document(s) proposed for public availability that reflects the requested deletion. The restricted access portion of the record will be placed in a separate file and the file will be clearly marked to avoid improper disclosure and to identify it as a portion of the official record in the proceedings. The ALJ may act at any time to permit material that becomes declassified or unrestricted through passage of time to be transferred to the unrestricted access portion of the record.

(c) *Availability of documents.*

(1) *Scope.* All NOVAs and draft NOVAs, answers, settlement agreements, decisions and orders disposing of a case will be made available for public inspection in the BXA Freedom of Information Records Inspection Facility, U.S. Department of Commerce, Room H-6624, 14th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20230. The complete record for decision, as defined in paragraphs (a) and (b) of this section will be made available on request.

(2) *Timing.* Documents filed with the ALJ are available immediately upon filing, except for any portion of the record for which a request for segregation is made. Parties that seek to restrict access to any portion of the record under paragraph (b) of this section must make such a request, together with the reasons supporting the claim of confidentiality, simultaneously with the submission of material for the record.

§ 719.21 Payment of final assessment.

(a) *Time for payment.* Full payment of the civil penalty must be made within 30 days of the date upon which the final order becomes effective, or within the time specified in the order. Payment shall be made in the manner specified in the NOVA.

(b) *Enforcement of order.* The government party may, through the Attorney General, file suit in an appropriate district court if necessary to enforce compliance with a final order issued under these CWC (parts 710 through 721 of this subchapter). This

suit will include a claim for interest at current prevailing rates from the date payment was due or ordered.

(c) *Offsets.* The amount of any civil penalty imposed by a final order may be deducted from any sum(s) owed by the United States to a respondent.

§ 719.22 Reporting a violation.

If a person learns that a violation of the Convention, the CWCIA, or the CWCRC (parts 710 through 721 of this subchapter) has occurred or may occur, that person may notify: Office of Export Enforcement, Bureau of Export Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Room H-4520, Washington, D.C. 20230, Telephone: (202) 482-1208, Facsimile: (202) 482-0964.

PART 720—DENIAL OF EXPORT PRIVILEGES

Sec.

720.1 Penalties for violations of 18 U.S.C. 229.

720.2 Administration action denying export privileges.

Authority: Pub. L. 105-277, 112 Stat. 2681; E.O. 13128, 64 FR 36703.

§ 720.1 Penalties for violations of 18 U.S.C. 229.

(a) *Denial of export privileges for violations of 18 U.S.C. 229.* Any person in the United States or any U.S. national may be subject to a denial of export privileges after notice and opportunity for hearing pursuant to § 719.21 of this subchapter if that person has been convicted under Title 18, Section 229 of the United States Code of knowingly:

(1) Developing, producing, otherwise acquiring, transferring directly or indirectly, receiving, stockpiling, retaining, owning, possessing, or using, or threatening to use, a chemical weapon; or

(2) Assisting or inducing, in any way, any person to violate paragraph (a)(1) of this section, or attempting or conspiring to violate paragraph (a)(1).

(b) [Reserved]

§ 720.2 Administrative action denying export privileges.

(a) *Denial of export privileges.* The Assistant Secretary for Export Enforcement may deny the export privileges, including permission to apply for or use any export license or license exception, of any person who has been convicted of violating Section 229 of Title 18, United States Code.

(b) *Notice.* The Office of Chief Counsel for Export Administration shall notify any person convicted of Section 229, Title 18, United States Code, of any

intent by BXA to deny that person's export privileges pursuant to paragraph (a) of this section. The notification letter shall reference the person's conviction, specify the number of years for which BXA intends to deny export privileges, set forth the statutory and regulatory authority for the action, and provide that the person may request a hearing before the Administrative Law Judge within 30 days on the issue of the proposed length of the denial of export privileges.

(c) *Waiver.* The failure of the convicted person to file a request for a hearing within the time provided constitutes a waiver of the person's right to appear and contest the denial of export privileges that BXA intends to impose. If no hearing is requested, the Assistant Secretary for Export Enforcement will order that export privileges be denied as provided in the notification letter.

(d) *Hearing.* Any hearing that is granted by the ALJ shall be conducted in accordance with the procedures set forth in part 719 of this subchapter. The only issue that is a proper subject of a hearing is the length of the denial of export privileges.

(e) *Initial decision and order.* After considering the entire record in the proceeding, the ALJ will issue a initial decision, based on a preponderance of the evidence, as to whether or for what length of time the convicted person will be denied export privileges. The ALJ may consider factors such as the seriousness of the criminal offense that is the basis for conviction, the nature and duration of the criminal sanctions imposed, and whether the person has undertaken any corrective measures. The ALJ may dismiss the proceeding if the evidence is insufficient to sustain a denial of export privileges, or may issue an order imposing the denial. The ALJ shall immediately certify any initial decision and order to the Under Secretary for Export Administration, and shall also immediately serve the initial decision and order on all parties by personal delivery or overnight mail.

(f) *Appeal from initial decision or order.* The initial decision of the ALJ, imposed after a requested hearing, may be appealed to the Under Secretary in accordance with the procedures set forth in § 719.16(b) of this subchapter. The order of the Assistant Secretary, imposed when no hearing was requested, may be appealed to the ALJ through a motion to show cause why the order should be set aside and a hearing granted. The ALJ has discretion to set aside the Assistant Secretary's order and schedule a hearing on the issue of the length of denial of export privileges.

(g) *Final decision.* Unless the Under Secretary, within 30 days of the date of the initial decision, modifies or vacates the initial decision and order, the ALJ's decision and order shall become effective as the final decision of the Department of Commerce. If the Under Secretary does modify or vacate the initial decision and order, the order of the Under Secretary becomes the final order of the Department of Commerce and the United States. The final decision and order shall be served on the parties and will be publicly available.

(h) *Effect of denial.* Any person denied export privileges pursuant to this part shall be considered a "person denied export privileges" for purposes of the Export Administration Act. The name and address of the denied person will be published on the Denied Persons List found in Supplement 2 to part 764 of the Export Administration Regulations (15 CFR parts 730 through 799).

PART 721—RECORDKEEPING

Sec.

721.1 Records to be retained.

721.2 Original records required.

721.3 Reproduction of original records.

721.4 Retention of records.

721.5 Inspection of records.

Authority: Pub. L. 105-277, 112 Stat. 2681; E.O. 13128, 64 FR 36703.

§ 721.1 Records to be retained.

(a) You must maintain records relating to your activities that are regulated by the CWCRC (parts 710 through 721 of this subchapter), including the following:

(1) Forms, reports, chemical determinations (classifications) and notifications submitted to BXA pursuant to parts 712 through 715 of this subchapter; and

(2) Notes, memoranda, correspondence or other records pertaining to documentation listed in paragraph (a)(1) of this section, including records pertaining to production, processing, consumption, export or import of chemicals subject to declaration under parts 712 through 715 of this subchapter, including records of your acquisition or disposition of any products or chemicals that are subject to the provisions of the CWCRC.

(b) [Reserved]

§ 721.2 Original records required.

You must maintain the original records in the form in which you receive or create them unless you meet all of the conditions of § 721.3 relating to reproduction of records. If the original record does not meet the

standards of legibility and readability described in § 721.3 and you intend to rely on that record to meet the recordkeeping requirements of the EAR, you must retain the original record.

§ 721.3 Reproduction of original records.

(a) You may maintain reproductions instead of the original records provided all of the requirements of paragraph (b) of this section are met.

(b) If you must maintain records under this part, you may use any photostatic, miniature photographic, micrographic, automated archival storage, or other process that completely, accurately, legibly and durably reproduces the original records (whether on paper, microfilm, or through electronic digital storage techniques). The process must meet all of the following requirements, which are applicable to all systems:

(1) The system must be capable of reproducing all records on paper.

(2) The system must record and be able to reproduce all marks, information, and other characteristics of the original record, including both obverse and reverse sides of paper documents in legible form.

(3) When displayed on a viewer, monitor, or reproduced on paper, the records must exhibit a high degree of legibility and readability. (For purposes of this section, legible and legibility mean the quality of a letter or numeral that enable the observer to identify it positively and quickly to the exclusion of all other letters or numerals. Readable and readability mean the quality of a group of letters or numerals being recognized as complete words or numbers.)

(4) The system must preserve the initial image (including both obverse and reverse sides of paper documents) and record all changes, who made them and when they were made. This information must be stored in such a manner that none of it may be altered once it is initially recorded.

(5) You must establish written procedures to identify the individuals who are responsible for the operation, use and maintenance of the system.

(6) You must establish written procedures for inspection and quality assurance of records in the system and document the implementation of those procedures.

(7) The system must be complete and contain all records required to be kept by this part or the regulated person must provide a method for correlating, identifying and locating records relating to the same transaction(s) that are kept in other record keeping systems.

(8) You must keep a record of where, when, by whom, and on what equipment the records and other information were entered into the system.

(c) *Requirements applicable to a system based on digital images.* For systems based on the storage of digital images, the system must provide accessibility to any digital image in the system. The system must be able to locate and reproduce all records relating to a particular transaction based on any one of the following criteria:

(1) The name(s) of the parties to the transaction;

(2) Any country(ies) connected with the transaction;

(3) Chemical Abstract Service Registry number; or

(4) A document reference number that was on any original document.

(d) *Requirements applicable to a system based on photographic processes.* For systems based on photographic, photostatic, or miniature photographic processes, the regulated person must maintain a detailed index of all records in the system that is arranged in such a manner as to allow immediate location of any particular record in the system.

§ 721.4 Retention of records.

(a) *Five year retention period.* All records required to be kept by this part must be retained for five years from the due date of forms, notifications, chemical determinations (classifications) or reports required by parts 712 through 715, 716 and 717 of this subchapter.

(b) *Destruction or disposal of records.* If the Department of Commerce or other authorized U.S. government agency makes a formal or informal request for a certain record or records, such record or records may not be destroyed or disposed of without the written authorization of the requesting entity.

§ 721.5 Inspection of records.

Upon request by the Department of Commerce or any other agency of competent jurisdiction, you must permit access to and copying of any record in accordance with section 405(3) of the Act. This requires that you make available the equipment and, if necessary, knowledgeable personnel for locating, reading, and reproducing any record in the system.

Dated: July 7, 1999.

R. Roger Majak,
Assistant Secretary for Export
Administration.

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DEPARTMENT OF STATE

22 CFR Part 103

[Public Notice 3057]

RIN 1400-ZA01

Chemical Weapons Convention and the Chemical Weapons Convention Implementation Act of 1998; Taking of Samples; Record Keeping and Inspections

AGENCY: Bureau of Arms Control, Department of State.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of State is proposing to establish regulations to implement the provisions of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, also known as the Chemical Weapons Convention (CWC or Convention) and the Chemical Weapons Convention Implementation Act of 1998 (Act) on the taking of samples and on the enforcement of the requirements concerning record keeping and inspections. The Act authorizes the United States Government to implement provisions of the Convention. These regulations will enable the United States Government to execute the relevant provisions of the Convention and the Act.

DATES: Comments must be received on or before August 20, 1999.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Michael Coffee, Office of the Legal Adviser (L/ACN), 2201 C Street, N.W., Washington, DC 20520.

FOR FURTHER INFORMATION CONTACT: Michael Coffee, Office of the Legal Adviser (L/ACN), 2201 C Street, N.W., Washington, DC 20520.

SUPPLEMENTARY INFORMATION: On April 25, 1997, the United States ratified the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, also known as the Chemical Weapons Convention (CWC or Convention). The Convention is both an arms control and nonproliferation treaty. As such, the Convention bans the development, production, stockpiling, and use of chemical weapons, and prohibits States Parties from assisting or encouraging anyone to engage in an activity prohibited by the Convention. States Parties to the Convention, including the United States, have agreed to a comprehensive verification regime that provides transparency and ensures that no State Party to the Convention is

engaging in activity prohibited by the Convention. The verification regime includes declaration and on-site inspection of facilities engaged in activities involving certain chemicals. To further its nonproliferation objectives, the Convention requires restrictions on the import and export of chemicals.

Implementation of the CWC requirements will occur pursuant to the authority of the Chemical Weapons Convention Implementation Act of 1998 (Pub. L. 105-277, Div. I) and the International Emergency Economic Powers Act. Export control related provisions will be enforced by the Departments of State and Commerce under relevant export control authorities. While most of the regulatory provisions will be contained in the Chemical Weapons Convention Regulations (15 CFR Parts 710-721), other State and Commerce Department regulations will contain additional or related provisions. The following outline summarizes the scope of these implementing and related regulations:

Chemical Weapons Convention Regulations (CWCRC) (15 CFR Parts 710-721) (Department of Commerce). In accordance with the Chemical Weapons Convention Implementation Act of 1998, the Department of Commerce is proposing to promulgate regulations that set forth, among other things, reporting and inspection requirements and trade restrictions that affect U.S. private entities. The CWCRC will contain recordkeeping requirements and administrative procedures and penalties related to violations of reporting and inspection requirements and importation restrictions. Finally, the CWCRC will implement section 211 of the Chemical Weapons Convention Implementation Act, which authorizes the revocation of the export privileges of any person determined to have violated the chemical weapons provision of 18 U.S.C. 229.

Regulations Implementing Provisions of the Chemical Weapons Convention and the Chemical Weapons Convention Implementation Act of 1998 on the Taking of Samples and on Enforcement of Requirements Concerning Reporting and Inspections (22 CFR Part 103) (Department of State). These regulations will implement the provisions of the Convention and the Chemical Weapons Convention Implementation Act of 1998 concerning the taking of samples during on-site inspections in the United States. These regulations will contain the enforcement provisions for violations of the provisions of the Chemical Weapons Convention Implementation Act of 1998 concerning reporting and inspection requirements.

Export Administration Regulations (EAR) (15 CFR Parts 730-774) (Department of Commerce). The EAR implement the Convention's requirements on annual reporting on exports of schedule 1 chemicals, advance notification of exports of schedule 1

chemicals, and end-use certificate requirements for exports of schedule 2 and 3 chemicals to States not Party to the Convention. The EAR include a license requirement for all exports of schedule 1 chemicals subject to Commerce Department jurisdiction to all destinations, including Canada. The EAR also bans the export, after April 28, 2000, of schedule 2 chemicals subject to Commerce Department jurisdiction to States not Party to the Convention. *International Traffic in Arms Regulations (ITAR) (22 CFR Parts 120-130) (Department of State).*

This proposed rule is intended to implement sections 304(f)(1) and 501 of the Chemical Weapons Convention Implementation Act of 1998, Pub. L. 105-277, Div. I. These regulations will provide the guidelines under which the taking of a sample may be required during an on-site inspection conducted pursuant to the Convention. These regulations will also establish the civil enforcement regime for a violation of §§ 306 or 405 of the Act.

Administrative Procedure Act Requirements

Because this proposed rule involves a foreign affairs function of the United States, it is not subject to 5 U.S.C. 553 and 554. However, the Department is issuing this rule in proposed form and comments are encouraged for the development of a final rule.

Form of Comments

The Department will not accept public comments accompanied by a request that a part or all of the material be treated confidentially for any reason. All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. Comments will be available for inspection between 8:15 a.m. and 5:00 p.m. at the address listed above. In the interest of accuracy and completeness, the Department requires comments in written form. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

Initial Regulatory Flexibility Analysis

Because this proposed rule involves a foreign affairs function of the United States, the Department of State is not required to prepare and make available for public comment an initial regulatory flexibility analysis.

Executive Order 12866 Determination

This proposed rule is exempt from Executive Order 12866, but has been reviewed internally by the Department to ensure consistency with the purposes thereof.

Paperwork Reduction Act Statement

Section 103.5(b) of this rule states that no person may willfully fail or refuse: (1) to establish or maintain any record required under the Chemical Weapons Convention Implementation Act or 15 CFR Parts 710 through 721; (2) to submit any report, notice or other information prescribed by the Act or 15 CFR Parts 710 through 721; or (3) to permit access to or copying of any record that is exempt from disclosure under the Act or 15 CFR Parts 710 through 721.

Notwithstanding any other provision of law, no person is required to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid OMB Control Number. In promulgating 15 CFR Parts 710 through 721, the Department of Commerce revised an existing collection of information requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), which has been submitted for approval to the Office of Management and Budget. Accordingly, the Department of State will not seek the approval of the Office of Management and Budget. The public reporting burdens for the new collections of information are estimated to average 9 hours for Schedule 1 chemicals, 7.2 hours for Schedule 2 chemicals, 2.5 hours for Schedule 3 chemicals, 5.3 hours for Unscheduled Discrete Organic Chemicals, and .17 hours for Schedule 1 notifications. These estimates include the time required to complete the required forms.

Comments are invited on (a) whether the collection of information is necessary for the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarify the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through use of automated collection techniques or other forms of information technology. Send comments regarding these or any other aspects of the collection of information to: Nancy Crowe, Regulatory Policy Division, Bureau of Export Administration, U.S. Department of Commerce, Room 2705, 14th Street and Pennsylvania Avenue, N.W., Washington, DC 20230.

Unfunded Mandates Reform Act Requirements

No actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Federalism Assessment

Because this proposed rule will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, a Federalism Assessment is not warranted.

List of Subjects in 22 CFR Part 103

Administrative practice and procedures, Chemicals, Foreign relations, Freedom of information, International organizations, Investigations, National security information, Penalties, Reporting and recordkeeping requirements, Treaties.

For the reasons set forth in the preamble, the Department proposes to add to subchapter K the following part 103 to Title 22 of the Code of Federal Regulations:

PART 103—REGULATIONS FOR IMPLEMENTATION OF THE CHEMICAL WEAPONS CONVENTION AND THE CHEMICAL WEAPONS CONVENTION IMPLEMENTATION ACT OF 1998 ON THE TAKING OF SAMPLES AND ON ENFORCEMENT OF REQUIREMENTS CONCERNING RECORD KEEPING AND INSPECTIONS

Subpart A—General

Sec.

103.1 Purpose.

103.2 Definitions.

Subpart B—Samples

103.3 Requirement to provide a sample.

Subpart C—Record Keeping and Inspection Requirements

103.4 General.

103.5 Violations.

103.6 Penalties.

103.7 Initiation of administrative enforcement procedures.

103.8 Final agency decisions after administrative proceedings.

103.9 Final agency decision after settlement negotiations.

103.10 Appeals.

103.11 Payment of final assessment.

103.12 Reporting a violation.

Authority: Pub. L. 105-277, 112 Stat. 2681, Div. I.

Subpart A—General

§ 103.1 Purpose.

This part is intended to implement sections 304(f)(1) and 501 of the Chemical Weapons Convention

Implementation Act of 1998, Public Law 105-277, Div. I. The Chemical Weapons Convention Regulations promulgated by the Department of Commerce, 15 CFR Parts 710 through 721, also implement sections of the Act.

§ 103.2 Definitions.

The following are definitions of terms as used in this part only.

Administrative law judge (ALJ). The person authorized to conduct hearings in administrative enforcement proceedings brought under this part.

Bureau of Export Administration (BXA). The Bureau of Export Administration of the United States Department of Commerce, including the Office of Export Administration and the Office of Export Enforcement.

Chemical Weapons Convention (CWC or Convention). The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, and its annexes opened for signature on January 13, 1993, and entered into force on April 29, 1997.

CWCIA. The Chemical Weapons Convention Implementation Act of 1998. (Pub. L. 105-277, Div. I.)

CWCR. The Chemical Weapons Convention Regulations promulgated by the Department of Commerce. (15 CFR parts 710 through 721.)

Executive Director. The Executive Director, Office of the Legal Adviser, U.S. Department of State.

Facility agreement. An agreement or arrangement between a State Party to the Convention and the Organization for the Prohibition of Chemical Weapons relating to a specific facility subject to on-site verification pursuant to Articles IV, V, and VI of the Convention.

Final decision. A decision or order assessing a civil penalty, or otherwise disposing of or dismissing a case, which is not subject to further review under this part, but which may be subject to collection proceedings or judicial review in an appropriate federal court as authorized by law.

Host team. The U.S. Government team that accompanies the inspection team during a CWC inspection to which this part applies.

Host team leader. The head of the U.S. Government team that accompanies the inspection team during a CWC inspection to which this part applies.

Inspection team. The group of inspectors and inspection assistant assigned by the Director-General of the Technical Secretariat to conduct a particular inspection.

Lead agency. The executive department or agency responsible for implementation of the CWC declaration

and inspection requirements for specified facilities. The lead agencies are the Department of Defense (DOD) for facilities owned or leased by DOD, whether DOD-operated or contractor-operated; the Department of Energy (DOE) for facilities owned or leased by DOE, whether DOE-operated or contractor-operated, including the National Laboratories and components of the nuclear weapons complex; and the Department of Commerce (DOC) for all facilities that are not owned or leased by DOD or DOE or other U.S. Government agencies. Other departments and agencies that have notified the United States National Authority of their decision to be excluded from the CWCR shall also have lead agency responsibilities for facilities that they own or lease.

Office of Chemical and Biological Weapons Conventions. The office in the Bureau of Arms Control of the United States Department of State that includes the United States National Authority Coordinating Staff.

Party. The United States Department of State and any person named as a respondent under this part.

Person. Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, any State or any political subdivision thereof, or any political entity within a State, any foreign government or nation or any agency, instrumentality or political subdivision of any such government or nation, or other entity located in the United States.

Respondent. Any person named as the subject of a Notice of Violation and Assessment (NOVA) proposed order.

Secretary. The Secretary of State.

Technical Secretariat. The Technical Secretariat of the Organization for the Prohibition of Chemical Weapons established by the Chemical Weapons Convention.

United States National Authority. The Department of State serving as the national focal point for effective liaison with the Organization for the Prohibition of Chemical Weapons and States Parties to the Convention and implementing the provisions of the CWCIA in coordination with an interagency group designated by the President consisting of the Secretary of Defense, the Attorney General, the Secretary of Commerce, the Secretary of Energy, and the heads of agencies considered necessary or advisable by the President, or their designees. The Secretary of State is the Director of the United States National Authority.

Subpart B—Samples**§ 103.3 Requirement to provide a sample.**

(a) *Notification of requirement to provide a sample.* The host team leader will notify the owner or operator, occupant or agent in charge of an inspected premises of any requirement to provide a sample pursuant to a request, in accordance with paragraph (j) of this section, of an inspection team of the Technical Secretariat under paragraph (b) or (d) of this section.

(b) *Requirement to provide a sample.* Pursuant to section 304(f)(1) of the CWCIA, unless a consultation occurs pursuant to paragraph (c) of this section, the owner or operator, occupant or agent in charge of the premises to be inspected is hereby required to provide a sample pursuant to a request, in accordance with paragraph (j) of this section, of an inspection team of the Technical Secretariat that a sample be taken in accordance with the applicable provisions contained in the Chemical Weapons Convention and the CWCIA.

(c) *Consultations with the United States National Authority.* After consulting with the host team leader, a lead agency that finds that the following conditions, unless they have been modified pursuant to paragraph (i) of this section, may not have been satisfied shall promptly advise the United States National Authority, which, in coordination with the interagency group designated by the President in section 2 of Executive Order 13128, shall make a decision.

(1) The taking of a sample is consistent with the inspection aims under the Convention and with its Confidentiality Annex;

(2) The taking of a sample does not unnecessarily hamper or delay the operation of a facility or affect its safety, and is arranged so as to ensure the timely and effective discharge of inspection team's functions with the least possible inconvenience and disturbance to the facility;

(3) The taking of samples is consistent with the applicable facility agreement. In particular:

(i) Samples will be taken at sampling points agreed to in the relevant facility agreement; and

(ii) Samples will be taken according to procedures agreed to in the relevant facility agreement;

(4) In the absence of a facility agreement, due consideration is given to existing sampling points used by the owner or operator, occupant or agent in charge of the premises, consistent with any procedures developed pursuant to the CWCIA (15 CFR parts 710 through 721);

(5) The taking of samples does not affect the safety of the premises and will be consistent with safety regulations established at the premises, including those for protection of controlled environments within a facility and for personal safety;

(6) The taking of the sample does not pose a threat to the national security interests of the United States; and

(7) The taking of the sample is consistent with any conditions negotiated pursuant to paragraph (i) of this section.

(d) *Determination by United States National Authority.* If, after consulting with the lead agency pursuant to paragraph (c) of this section, the United States National Authority, in coordination with the interagency group designated by the President to implement the provisions of the CWCIA, determines that the conditions of paragraph (c) are satisfied and that a sample shall be required, then the owner or operator, occupant or agent in charge of the premises shall provide a sample pursuant to a request of the inspection team of the Technical Secretariat.

(e) *Person to take a sample.* If a sample is required, the owner or the operator, occupant or agent in charge of the inspected premises will determine whether the sample will be taken by a representative of the premises, the inspection team, or any other individual present.

(f) *Requirement that samples remain in the United States.* No sample collected in the United States pursuant to an inspection permitted by the CWCIA may be transferred for analysis to any laboratory outside the territory of the United States.

(g) *Handling of samples.* Samples will be handled in accordance with the Convention, the CWCIA, other applicable law, and the provisions of any applicable facility agreement.

(h) *Failure to comply with this section.* Failure by any person to comply with this section may be treated as a violation of section 306 of the Act and § 103.5(a).

(i) *Conditions that restrict sampling activities during challenge inspections.* During challenge inspections within the inspected premises the host team may negotiate conditions that restrict activities regarding sampling, e.g., conditions that restrict where, when, and how samples are taken, whether samples are removed from the site, and how samples are analyzed. Samples taken during challenge inspections within the inspected premises will be analyzed only for substances relevant to the inspection mandate.

(j) *Format of inspection team request.* It is the policy of the United States Government that inspection team requests for samples should be in written form from the head of the inspection team. When necessary, before a sample is required to be provided, the host team leader should seek a written request from the head of the inspection team.

Subpart C—Record Keeping and Inspection Requirements**§ 103.4 General.**

This subpart implements the enforcement of the civil penalty provisions of section 501 of the Chemical Weapons Convention Implementation Act of 1998 (CWCIA), and sets forth relevant administrative proceedings by which such violations are adjudicated. Both the Department of State (in this subpart), and the Department of Commerce (in part 719 of the CWCIA at 15 CFR parts 710 through 721) are involved in the implementation and enforcement of section 501.

§ 103.5 Violations.

(a) *Refusal to permit entry or inspection.* No person may willfully fail or refuse to permit entry or inspection, or to disrupt, delay or otherwise impede an inspection, authorized by the CWCIA.

(b) *Failure to establish or maintain records.* No person may willfully fail or refuse:

(1) To establish or maintain any record required by the CWCIA or the Chemical Weapons Convention Regulations (CWCIA, 15 CFR parts 710 through 721) of the Department of Commerce; or

(2) To submit any report, notice, or other information to the United States Government in accordance with the CWCIA or CWCIA; or

(3) To permit access to or copying of any record required by the CWCIA or regulations thereunder, including information that is exempt from disclosure under the Freedom of Information Act pursuant to section 103(g) or section 404 of the CWCIA or § 711.2 or Supplement 1 of Part 711 of the CWCIA.

§ 103.6 Penalties.

(a) *Civil penalties—(1) Civil penalty for refusal to permit entry or inspection.* Any person that is determined to have willfully failed or refused to permit entry or inspection, or to have disrupted, delayed or otherwise impeded an inspection authorized by the CWCIA, in violation of § 103.5 (a) of this part, shall pay a civil penalty in an

amount not to exceed \$25,000 for each violation. Each day the violation continues constitutes a separate violation.

(2) *Civil penalty for failure to establish or maintain records.* Any person that is determined to have willfully failed or refused to establish or maintain any record required by the CWCIA or CWCER (15 CFR parts 710 through 721), or to submit any report, notice, or other information, required by the CWCIA or the CWCER, or to permit access to or copying of any record exempt from disclosure under the CWCIA or CWCER, in violation of § 103.5 (b) of this part, shall pay a civil penalty in an amount not to exceed \$5,000 for each violation.

(b) *Criminal penalties—Fine or imprisonment for refusal to permit entry or inspection.* Any person that knowingly violates the CWCIA by willfully failing or refusing to permit entry or inspection, or by disrupting, delaying or otherwise impeding an inspection authorized by the CWCIA, or that knowingly violates the CWCIA by willfully failing or refusing to establish or maintain any required record, or to submit any required report, notice, or other information, or by willfully failing or refusing to permit access to or copying of any record exempt from disclosure under the CWCIA or CWCER, shall, in addition to or in lieu of any civil penalty that may be imposed, be fined under Title 18 of the United States Code, or be imprisoned for not more than one year, or both.

(c) *Other remedial action—(1) Injunction.* The United States may, in a civil action, obtain an injunction against:

(i) The conduct prohibited under 18 U.S.C. 229 or 229C; or

(ii) The preparation or solicitation to engage in conduct prohibited under 18 U.S.C. 229 or 229D.

(2) In addition, the United States may, in a civil action, restrain any violation of section 306 or section 405 of the CWCIA, or compel the taking of any action required by or under the CWCIA or the Convention.

§ 103.7 Initiation of administrative enforcement proceedings.

(a) *Issuance of Notice of Violation and Assessment (NOVA).* The Director of the Office of Export Enforcement, Bureau of Export Administration, Department of Commerce, may request that the Secretary initiate an administrative enforcement proceeding. If the request is in accordance with applicable law, the Secretary of State shall initiate an administrative enforcement proceeding under 15 CFR 719.1(a)(2) by providing

notice of the initiation of proceedings through issuance of a Notice of Violation and Assessment (NOVA), so long as the initiation of such a proceeding is in accordance with applicable law. The Office of Chief Counsel for Export Administration, Department of Commerce shall serve the NOVA as directed by the Secretary.

(b) *Content of NOVA.* The NOVA shall constitute a formal complaint, and will set forth the basis for the issuance of the proposed order. It will set forth the alleged violation(s) and the essential facts with respect to the alleged violation(s), reference the relevant statutory, regulatory or other provisions, and state the amount of the civil penalty to be assessed. The NOVA will inform the respondent of the right to request a hearing pursuant to the CWCER (15 CFR parts 710 through 721) at 15 CFR 719.6, inform the respondent that failure to request such a hearing shall result in the proposed order becoming final and unappealable on signature of the Secretary of State and provide payment instructions. A copy of this section, and the Department of Commerce regulations that govern the administrative proceedings, will accompany the NOVA.

(c) *Proposed order.* A proposed order shall accompany every NOVA. It will briefly set forth the substance of the alleged violation(s) and the statutory, regulatory or other provisions violated. It will state the amount of the civil penalty to be assessed.

(d) *Notice of initiation of proceedings.* The Secretary shall notify, via the Department of Commerce, the respondent (or respondent's agent for service of process, or attorney) of the initiation of administrative proceedings by sending, via overnight mail, facsimile, or by personal delivery, the NOVA and proposed order to the respondent (or respondent's agent for service of process or attorney).

(e) *Demand for hearing and answer.* If the respondent wishes to contest the NOVA and proposed order, the respondent must demand a hearing in writing within 15 days from the date of the NOVA, and must answer the NOVA within 30 days from the date of the demand for hearing.

(f) *Waiver.* The failure of the respondent to file a request for a hearing and an answer within the times provided constitutes a waiver of the respondent's right to appear and contest the allegations set forth in the NOVA and proposed order. If no hearing is requested or no answer is provided, the Secretary will sign the proposed order, which shall, upon signature, become a final and unappealable order.

(g) *Administrative procedures.* The regulations that govern the administrative procedures that apply when a hearing is requested are set forth in the CWCER at 15 CFR part 719.

§ 103.8 Final agency decisions after administrative proceedings.

(a) *Review of initial decision—(1) Petition for review.* Any party may, within 3 days of the Administrative Law Judge's (ALJ) certification of the initial decision, petition the Secretary for review of the initial decision. A petition for review shall be addressed to and served on Executive Director of the Office of the Legal Adviser, U.S. Department of State, 2201 C Street, N.W., Room 5519, Washington D.C. 20520, and shall also be served on the Chief Counsel for Export Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Room H-3839, Washington, D.C. 20230, and all other parties. Petitions for review may be based only on one or more of the following grounds:

(i) A finding of material fact is clearly erroneous based on the evidence in the record;

(ii) A necessary legal conclusion is contrary to law or precedent;

(iii) A substantial and important question of law, policy, or discretion is involved (including the amount of the civil penalty); or

(iv) A prejudicial procedural error has occurred.

(2) *Content of petition for review.* The petition must specifically set forth the reason that review is requested and be supported by citations to the record, statutes, regulations, and principal authorities. Issues of fact or law not argued before the Administrative Law Judge may not be raised on review unless they were raised for the first time in the initial decision and could not reasonably have been foreseen and raised by the parties during the hearing. New or additional evidence that is not a part of the record before the ALJ will not be considered.

(3) *Decision to review.* Review of the initial decision by the Secretary is discretionary, and is not a matter of right. The Secretary shall accept or decline review of the initial decision within 3 days after a petition for review is filed. If no such petition is filed, the Secretary may, on his or her own initiative, notify the parties within 6 days after the ALJ's certification of the initial decision that he or she intends to exercise his or her discretion to review the initial decision.

(4) *Effect of decision to review.* The initial decision is stayed until further

order of the Secretary upon a timely petition for review, or upon action to review taken by the Secretary on his or her own initiative.

(5) *Review declined.* If the Secretary declines to exercise discretionary review, such order will be served on all parties personally, by overnight mail, or by registered or certified mail, return receipt requested. The Secretary need not give reasons for declining review.

(6) *Review accepted.* If the Secretary grants a petition for review or decides to review the initial decision on his or her own initiative, he or she will issue an order confirming that acceptance and specifying any issues to be briefed by all parties within 12 days after the order. Briefing shall be limited to the issues specified in the order. Only those issues specified in the order will be considered by the Secretary. The parties may, within 5 days after the filing of any brief of the issues, file and serve a reply to that brief. No oral argument will be permitted. The Department of Commerce shall review all written submissions, and, based on the record, make a recommendation to the Secretary as to whether the ALJ's initial decision should be modified or vacated. The Secretary will make a final decision within 30 days after the initial decision.

(b) *Factors considered in assessing penalties.* In reviewing the amount of the civil penalty determined by the ALJ, the Secretary shall take into account the nature, circumstances, extent and gravity of the violation(s), and, with respect to the respondent, the respondent's ability to pay the penalty, the effect on the respondent's ability to continue to do business, the respondent's history of prior violations, the respondent's degree of culpability, the existence of an internal compliance program, and such other matters as justice may require.

(c) *Final decision.* Unless the Secretary, within 30 days after the date of the initial decision and order, modifies or vacates the decision and order, with or without conditions, the ALJ's initial decision and order shall become effective as the final decision and order of the United States Government. If the Secretary does modify or vacate the initial decision and order, that decision and order of the Secretary shall become the final decision and order of the United States Government. The final decision and order shall be served on the parties and will be made available to the public.

§ 103.9 Final agency decision after settlement negotiations.

(a) *Settlements based on letter of intent to charge—*(1) *Approval of settlement.* Pursuant to § 719.5(b)(2) of the CWC (15 CFR parts 710 through 721), the Department of Commerce may notify a respondent by letter of the intent to charge. If, following the issuance of such a letter of intent to charge, the Department of Commerce and respondent reach an agreement to settle a case, the Department of Commerce will submit the draft NOVA, proposed order and a recommended settlement agreement signed by a representative of the Department of Commerce and respondent to the Secretary for approval and signature, if the recommended settlement agreement is in accordance with applicable law. No action is required by the ALJ in cases where the Secretary issues such an order.

(2) *Refusal to approve settlement.* If the Secretary refuses to approve the settlement, the Secretary will notify the parties and the case will proceed as though no settlement proposal had been made.

(b) *Settlements reached during administrative proceedings—*(1) *Approval of settlement.* When the Department of Commerce and respondent reach an agreement to settle the allegations after administrative proceedings have been initiated before an ALJ, the Department of Commerce will submit the NOVA, the proposed order, and the recommended settlement agreement signed by a representative of the Department of Commerce and respondent to the Secretary of State for approval and signature, if the recommended settlement agreement is in accordance with applicable law. If the Secretary approves the settlement, the Secretary shall notify the ALJ that the case is withdrawn from adjudication.

(2) *Refusal to approve settlement.* If the Secretary of State refuses to approve the settlement, the Secretary of State will notify the parties of the disapproval, and settlement negotiations will resume or the case will proceed to adjudication by the ALJ as though no settlement proposal had been made. See CWC at 15 CFR 719.19.

(c) *Scope of settlement.* Any respondent who agrees to an order imposing any administrative sanction does so solely for the purpose of resolving the claims in the administrative enforcement proceeding brought pursuant to this part. This

reflects the fact that the Government officials involved have neither the authority nor the responsibility for initiating, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility is vested in the Attorney General and the Department of Justice.

(d) *Finality.* Cases that are settled may not be reopened or appealed.

§ 103.10 Appeals.

Any person adversely affected by a final order respecting an assessment may, within 30 days after the order is issued, file a petition in the Court of Appeals for the District of Columbia Circuit, or in any other circuit in which the person resides or transacts business, to appeal the order. No other reopening or appeal is permitted.

§ 103.11 Payment of final assessment.

(a) *Time for payment.* Full payment of the civil penalty must be made within 30 days of the date upon which the final order becomes effective, or within the time specified in the order. Payment shall be made in the manner specified in the NOVA.

(b) *Enforcement of order.* The Secretary, through the Attorney General, may file suit in an appropriate district court if necessary to enforce compliance with a final order issued pursuant to this part. This suit will include a claim for interest at current prevailing rates from 30 days after a final order was issued or, if an appeal was filed pursuant to § 103.10 of this part, from the date of final judgment of the court of appeals pursuant to § 103.10 of this part.

(c) *Offsets.* The amount of any civil penalty imposed by a final order may be deducted from any sum(s) owed by the United States to a respondent.

§ 103.12 Reporting a violation.

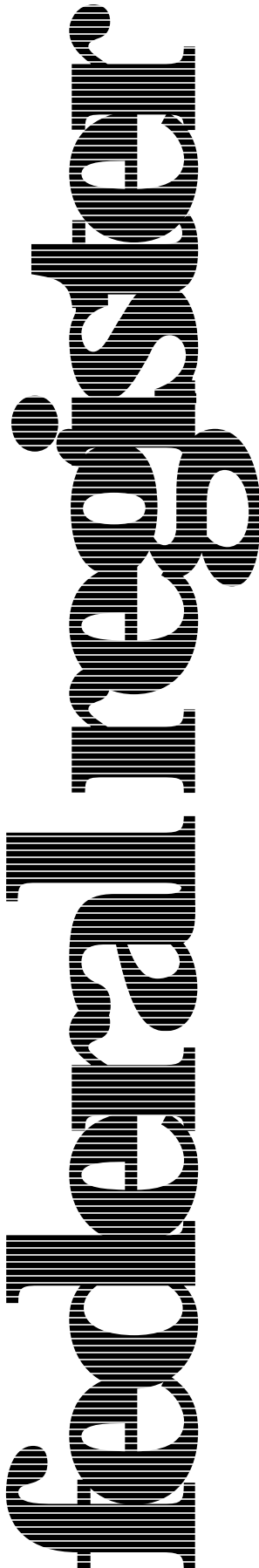
If a person learns that a violation of the Convention, the CWCIA, or the CWC (15 CFR parts 710 through 721) has occurred or may occur, that person may notify: United States National Authority, Office of Chemical and Biological Weapons Conventions, Bureau of Arms Control, U.S. Department of State, Washington, DC 20520, Telephone: (703) 235-1204, Facsimile: (703) 235-1065.

J. Michael Lekson,

Deputy Assistant Secretary of State for Multilateral Conventional Arms Control, Bureau of Arms Control.

[FR Doc. 99-17617 Filed 7-20-99; 8:45 am]

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Wednesday
July 21, 1999

Part III

**Department of
Defense**

Department of the Army, Corps of
Engineers

**Proposal To Issue and Modify Nationwide
Permits; Notice**

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Proposal To Issue and Modify Nationwide Permits; Notice

AGENCY: Army Corps of Engineers, DoD.

ACTION: Notice of intent and request for comments.

SUMMARY: To improve protection of the aquatic environment, the Corps of Engineers is proposing to issue 5 new Nationwide Permits (NWP) and modify 6 existing NWPs to replace NWP 26 when it expires. The Corps is also proposing to modify 9 NWP general conditions and add three new general conditions. These general conditions will apply to the proposed new and modified NWPs, as well as the NWPs issued on December 13, 1996, when the new and modified NWPs become effective. The proposed new NWPs are activity-specific and authorize activities in all non-tidal waters of the United States, except for non-tidal wetlands adjacent to tidal waters. These proposed new and modified NWPs will allow Corps districts to enhance protection of the aquatic environment, by utilizing the Corps limited resources to review proposed projects, based on the degree of adverse effects on the aquatic environment. The Corps will spend more time on projects with the potential for more environmental damage and less time on projects with minimal adverse effects on the aquatic environment. The Corps has developed, with public and Federal, Tribal, and State agency comments, terms and conditions to ensure that the adverse effects of authorized activities are minimal. A key element of this process by the Corps to develop NWPs with minimal adverse effects on the aquatic environment is regional conditioning developed by district and division engineers. Regional conditioning of NWPs is critical to ensure that the NWPs help the Corps achieve these goals. Regional conditioning of NWPs is necessary to account for differences in aquatic resource functions and values across the country. Regional conditions will be added to the proposed new and modified NWPs by division engineers to ensure that the NWPs authorize only those activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. Concurrent with this **Federal Register** notice, each Corps district will issue a public notice to solicit comments on their final draft

regional conditions for the proposed new and modified NWPs.

The purpose of this **Federal Register** notice is to solicit comments on the final draft of the proposed new and modified NWPs that will replace NWP 26, as well as the NWP general conditions and definitions. Concurrent with this **Federal Register** notice, each Corps district will publish a public notice to solicit comments on their final draft regional conditions for the new and modified NWPs. The comment period for these district public notices will be 45 days. After reviewing the comments received in response to this **Federal Register** notice, the Corps will issue another **Federal Register** notice announcing the issuance of the new and modified NWPs to start the final 60 days for the State and Tribal Section 401 Water Quality Certification and Coastal Zone Management Act consistency determination decisions. After this 60-day period, the new and modified NWPs will become effective as NWP 26 expires.

To improve the implementation of the NWP program, the Corps has combined the NWP general conditions and Section 404 Only conditions into one set of general conditions. The Corps will issue a set of definitions for use with all of the NWPs to provide more consistency in the application of terms commonly used in the NWP program.

Although NWP 26 was scheduled to expire on September 15, 1999, the Corps has extended the expiration date of NWP 26 to December 30, 1999, or until the effective date of the new and modified NWPs, whichever comes first. **DATES:** Comments on the proposed new and modified NWPs must be received by September 7, 1999.

ADDRESSES: HQUSACE, ATTN: CECW-OR, 20 Massachusetts Avenue, NW, Washington, DC 20314-1000. Submit electronic comments to cecwor@hq02.usace.army.mil. See **SUPPLEMENTARY INFORMATION** for file formats and other information about electronic filing of comments.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson or Mr. Sam Collinson at (202) 761-0199 or access the Corps of Engineers Regulatory Home Page at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

SUPPLEMENTARY INFORMATION:**Background**

On December 13, 1996, the Corps of Engineers (Corps) reissued NWP 26 for a period of two years and announced its intention to replace NWP 26 with activity-specific NWPs prior to the expiration date of NWP 26. In the July

1, 1998, issue of the **Federal Register** (63 FR 36040-36078), the Corps published its proposal to replace NWP 26 by issuing 6 new NWPs, modifying 6 existing NWPs, modifying 6 NWP general conditions, and adding one new NWP general condition. NWP 26 authorizes discharges of dredged or fill material into headwaters and isolated waters, provided the discharge does not result in the loss of greater than 3 acres of waters of the United States or 500 linear feet of stream bed. Isolated waters are non-tidal waters of the United States that are not part of a surface tributary system to interstate or navigable waters of the United States and are not adjacent to interstate or navigable waters. Headwaters are non-tidal streams, lakes, and impoundments that are part of a surface tributary system to interstate or navigable waters of the United States with an average annual flow of less than 5 cubic feet per second.

The new and modified NWPs proposed in the July 1, 1998, **Federal Register** notice could authorize many of the same activities with minimal adverse effects on the aquatic environment that are currently authorized by NWP 26. Most of the proposed new and modified NWPs authorize activities in all non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. These proposed NWPs will ensure that the NWP program is based on the types of authorized activities. Regional conditioning of these proposed NWPs will limit or prohibit their use in high quality waters.

The terms and limits of the proposed new and modified NWPs are intended to authorize activities that typically result in minimal adverse effects on the aquatic environment. For these proposed NWPs, the Corps has also established preconstruction notification (PCN) thresholds to ensure that any activity that may potentially have more than minimal adverse effects will be reviewed by district engineers on a case-by-case basis. Most of the proposed NWPs require submission of a PCN for losses of greater than 1/4 acre of waters of the United States. Most of the proposed NWPs require PCNs for filling open waters, including streams, and for certain proposed NWPs a PCN may be required for filling more than 500 linear feet of stream bed. The PCN requirements for filling stream beds may differ, depending on whether a perennial, intermittent, or ephemeral stream bed is filled. For most of these NWPs, there is no PCN requirement for filling ephemeral stream beds. Excavation of stream beds may require a PCN if the excavation activity results

in a discharge of dredged material, including redeposit other than incidental fallback, into waters of the United States. Regional conditions may be added to NWP by district or division engineers to lower notification thresholds or require notification for all activities authorized by an NWP in order to ensure no more than minimal adverse effects on the aquatic environment.

The 5 new NWPs proposed in this **Federal Register** notice will expire 5 years from their effective date. The proposed 6 modified NWPs (i.e., NWPs 3, 7, 12, 14, 27, and 40) will expire on February 11, 2002, with the other NWPs that were issued, reissued, or modified in the December 13, 1996, **Federal Register** notice (61 FR 65874-65922). The proposed new and modified NWPs are scheduled to become effective on December 21, 1999, and we have extended the expiration date of NWP 26 to December 30, 1999, or the effective date of the new and modified NWPs, whichever occurs first. The extension of the expiration date for NWP 26 is discussed in more detail below.

Compensatory mitigation will be required when the District Engineer determines such mitigation is necessary to ensure that the activities authorized by NWPs will result only in minimal adverse effects on the aquatic environment. For a particular project, the District Engineer may determine that compensatory mitigation is not necessary, because the activity will result in no more than minimal adverse effects on the aquatic environment without compensatory mitigation. Some of the NWPs contain requirements for compensatory mitigation for certain activities, particularly for activities that require notification to the District Engineer. Compensatory mitigation will be used to support the goal of no net loss of aquatic resource functions and values by offsetting impacts to the aquatic environment. Compensatory mitigation can be accomplished through the restoration, creation, enhancement, and/or in exceptional circumstances, preservation of aquatic resources either by individual projects constructed by the permittee or the use of mitigation banks, in lieu fee programs, or other consolidated mitigation efforts. For the new and modified NWPs, an important component of compensatory mitigation is the establishment and maintenance of vegetated buffers adjacent to open and flowing waters. Vegetated buffers adjacent to open waters or streams may consist of either uplands or wetlands and help protect and enhance local water quality and aquatic habitat features in the waterbody. Vegetated

buffers can be established by maintaining an existing vegetated area adjacent to open or flowing waters or by planting native trees, shrubs, and herbaceous perennials in areas with little existing perennial native vegetation. The benefits and requirements for vegetated buffers are discussed in further detail below.

During the review of PCNs, district and division engineers can exercise discretionary authority and require an individual permit for those activities that result in more than minimal adverse effects on the aquatic environment. District engineers can also place conditions, including compensatory mitigation requirements, on NWP authorizations on a case-by-case basis to ensure that the activity authorized by the NWP results only in minimal adverse effects on the aquatic environment.

For these NWPs, we are placing greater emphasis on regional conditioning to ensure that the NWPs authorize only activities with minimal adverse effects on the aquatic environment. Regional conditions allow the NWP program to take into account regional differences in aquatic resource functions and values across the country. Each district will identify areas of high value waters that require lower PCN thresholds or notification for all activities in those waterbodies to ensure that the NWPs authorize only activities with minimal adverse effects on the aquatic environment. Division engineers can also suspend or revoke certain NWPs in high value waters if the use of those NWPs would result in more than minimal adverse effects on the aquatic environment, individually or cumulatively. The regional conditioning process is discussed in more detail below.

The Corps believes that the new and modified NWPs, with regional conditions, will increase the overall protection of the aquatic environment when compared to the existing NWP program. However, the scope of applicable waters for the proposed NWPs and the proposed NWP General Condition 27, which prohibits the use of certain NWPs to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain, will substantially increase the Corps individual permit workload. The proposed new and modified NWPs, in addition to the existing NWPs, will allow the Corps to efficiently authorize activities with minimal adverse effects on the aquatic environment and focus its efforts on protecting high value aquatic resources. NWPs will be used to authorize most activities in low value

waters. Higher value waters, including wetlands, will receive additional protection through regional conditioning of the NWPs, special conditions on specific NWP authorizations, and case-specific discretionary authority to require an individual permit when necessary. Regional conditions will be required by each district to restrict or prohibit the use of NWPs in high value waters. The Corps will require compensatory mitigation, where appropriate, to ensure that the individual or cumulative adverse effects on the aquatic environment authorized by these NWPs are no more than minimal. NWPs may also be suspended or revoked in some high value waters if the use of those NWPs would result in more than minimal adverse effects on the aquatic environment.

The proposed new and modified NWPs also reflect the Corps increased focus on open or flowing waters. One of the goals of the proposed new and modified NWPs is to improve protection of open waters and streams, especially water quality and aquatic habitat, while continuing to fully protect wetlands. District engineers will not place less consideration on adverse effects to other types of waters for the sake of wetlands, especially low value wetlands. The establishment and maintenance of vegetated buffers adjacent to open waters and streams will protect, restore, and enhance water quality and aquatic habitat. Vegetated buffers can be used to provide out-of-kind compensatory mitigation for wetland impacts where the District Engineer determines that such mitigation for wetland impacts is the best, ecologically, for the aquatic environment.

In addition to regional conditioning of the proposed new and modified NWPs, additional substantial protection of the aquatic environment will result from the modification of two NWP general conditions. We are proposing to modify General Condition 9, Water Quality, to require that postconstruction conditions do not result in more than minimal degradation of downstream water quality. An important component of this general condition is the requirement that, for certain NWPs, the permittee implement a water quality management plan to protect water quality. The water quality management plan may consist of stormwater management facilities or vegetated buffers adjacent to open or flowing waters or wetlands. It is not our intent to replace existing State or local water quality safeguards if those current safeguards are adequate. However, where the State or local program does not ensure that an authorized activity

results in no more than minimal impacts on downstream water quality, the Corps will condition its NWP authorization to contain a water quality management plan. We are also proposing to modify former Section 404 Only condition 6 (now designated as General Condition 21) to require that neither upstream nor downstream areas are subject to more than minimal flooding or dewatering after the project has been constructed and while the authorized activity is operated. General Condition 21 will help ensure that postconstruction effects on local surface water flows are minimal.

On October 14, 1998, the Corps published a supplemental notice in the **Federal Register** (63 FR 55095–55098) requesting comments on additional proposed limitations for the NWP program, including the proposed new and modified NWPs. This **Federal Register** notice also announced the withdrawal of NWP B for master planned development activities from the July 1, 1998, proposal. The additional NWP limitations proposed in the October 14, 1998, **Federal Register** notice, include prohibiting the use of NWPs in certain designated critical resource waters, limiting the use of NWPs in impaired waters, and prohibiting the use of the new NWPs to authorize permanent, above-grade wetland fills in waters of the United States within the 100-year floodplain as mapped by the Federal Emergency Management Agency.

As a result of the proposal published on October 14, 1998, we are proposing to add 3 new NWP general conditions. General Condition 25, Designated Critical Resource Waters, prohibits the use of certain NWPs to authorize discharges of dredged or fill material into designated critical resource waters, including wetlands adjacent to those waters. General Condition 25 also requires notification to the District Engineer for activities authorized by certain other NWPs in Designated Critical Resource Waters. General Condition 26, Impaired Waters, restricts the use of NWPs to authorize discharges of dredged or fill material into waters of the United States designated through the Clean Water Act Section 303(d) process as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, or the loss of wetlands. General Condition 26 prohibits the use of NWPs to authorize discharges of dredged material resulting in the loss of greater than 1 acre of impaired waters of the United States,

including wetlands adjacent to those impaired waters. For discharges of dredged material resulting in the loss of 1 acre or less of impaired waters of the United States, including adjacent wetlands, General Condition 26 requires the prospective permittee to notify the District Engineer and clearly demonstrate that the project will not result in further impairment of the listed water. General Condition 27, Fills Within the 100-year Floodplain, prohibits or restricts the use of certain NWPs to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

The October 14, 1998, **Federal Register** notice also announced the extension of the expiration date for NWP 26 to September 15, 1999. As a result of the additional time needed to finalize the proposed new and modified NWPs, the Corps has decided to extend the expiration date of NWP 26 to December 30, 1999, or the effective date of the new and modified NWPs, whichever comes first, to ensure that there is no gap between the effective date of the new and modified NWPs and the expiration date of NWP 26. Extending the expiration date of NWP 26 is necessary to ensure fairness to the regulated public by continuing to provide an NWP for activities in headwaters and isolated waters that have minimal adverse effects on the aquatic environment until the new and modified NWPs proposed in this **Federal Register** notice become effective. In response to the July 1, 1998, **Federal Register** notice, many commenters recommended that the Corps extend the expiration date of NWP 26 until the proposed new and modified NWPs are issued and become effective. NWP 26 can continue to be used to authorize activities in headwaters and isolated waters until its expiration date. A permittee who receives an NWP 26 authorization prior to the expiration date will have up to 12 months to complete the authorized activity, provided the permittee commences construction, or is under contract to commence construction, prior to the date NWP 26 expires (see 33 CFR Part 330.6(b)). This provision applies to all NWP authorizations unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the NWP authorization in accordance with 33 CFR Part 330.4(e) and 33 CFR Part 330.5 (c) or (d).

The existing NWPs, with the exception of NWP 26, will remain in effect until they expire on February 11, 2002, unless otherwise modified, reissued, or revoked. Some of the

proposed new and modified NWPs can be used with existing NWPs to authorize activities with minimal adverse effects on the aquatic environment. The use of more than one NWP to authorize a single and complete project is addressed in the proposed modification of General Condition 15, Use of Multiple Nationwide Permits.

The October 14, 1998, **Federal Register** notice also discussed the need for additional opportunities for public comment on the new and modified NWPs and regional conditions. We have modified the process for additional opportunities for public comment to allow for more effective implementation of the proposed new and modified NWPs.

The revised process for issuing the proposed new and modified NWPs is illustrated in Figure 1. Figure 1 does not contain the previous steps in the development of the proposed new and modified NWPs. The revised process starts with today's publication of the draft new and modified NWPs in the **Federal Register** for a 45-day comment period, with concurrent public notices issued by Corps district offices to solicit comments on draft Corps regional conditions for these NWPs. Comments addressing the draft new and modified NWPs, general conditions, and definitions should be sent to HQUSACE, at the address cited in the ADDRESSES section of this **Federal Register** notice. Comments addressing draft Corps regional conditions should be sent to the appropriate Corps district office. After this 45-day comment period, we will review the comments concerning the proposed NWPs that were received in response to this **Federal Register** notice, each district will review the comments concerning their final draft regional conditions that were received in response to their public notices, and Corps divisions will complete the supplemental decision documents for the Corps regional conditions. On October 22, 1999, the Corps will announce the issuance of the final new and modified NWPs in the **Federal Register** to begin the final 60-day State and Tribal Section 401 water quality certification and Coastal Zone Management Act (CZMA) consistency determination processes. Concurrent with the publication of the final new and modified NWPs in the **Federal Register**, each Corps district will publish a public notice announcing their final Corps regional conditions for the new and modified NWPs, so that the 401 and CZMA agencies can make their decisions based on the new and modified NWPs and the Corps regional conditions. After this 60-day 401/CZMA

period, the new and modified NWP
and Corps regional conditions will
become effective.

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The proposed new and modified NWP's will help implement the President's Wetlands Plan, which was issued by the White House Office on Environmental Policy on August 23, 1993. A major goal of this plan is that Federal wetlands protection programs be fair, flexible, and effective. To achieve this goal, the Corps regulatory program must continue to provide effective protection of wetlands and other aquatic resources and avoid unnecessary impacts to private property, the regulated public, and the aquatic environment. The proposed new and modified NWP's will more clearly address individual and cumulative adverse effects on the aquatic environment, ensure that those adverse effects are minimal, address specific applicant group needs, and provide more predictability and consistency to the regulated public. Throughout the development of these NWP's, the Corps recognized the concerns of the natural resource agencies and environmental groups for the potential adverse effects on the aquatic environment resulting from activities authorized by these NWP's and the regulated public's need for certainty and flexibility in the NWP program.

Electronic Access and Filing Addresses

You may submit comments by sending electronic mail (e-mail) to: cecwor@hq02.usace.army.mil

Submit electronic comments as an ASCII file and avoid the use of any special characters and any form of encryption. Identify all electronic comments by including the phrase "Draft 1999 NWP's" in the subject line of electronic mail messages. Comments sent as attachments to electronic mail messages should be in ASCII format to ensure that those attachments can be read by HQUSACE.

Discussion of Public Comments

I. Overview

Approximately 10,000 comments were received in response to the July 1, 1998 **Federal Register** notice, district public notices, and national and regional public hearings. The Corps reviewed and fully considered all comments received in response to the July 1, 1998, **Federal Register** notice. Most of these comments were in opposition to the proposed NWP's. Less than 300 commenters were in favor of the proposed new and modified NWP's. A number of commenters stated that NWP 26 is currently working well and does not need to be replaced. Of the 10,000 comments, approximately 8,000 were form letters and postcards that

provided no substantive or constructive comments. Members of environmental groups and development groups were typically in opposition to the proposed new and modified NWP's. The environmental community opposed the proposed NWP's, asserting they would allow too much impact on the aquatic environment. The development community opposed the proposed NWP's, asserting they are too restrictive on the regulated public. Many commenters provided specific comments, recommending changes to the NWP's, general conditions, and definitions. A few commenters provided comments relating to 33 CFR Part 330, the regulations for the implementation of the NWP program. It should be noted that the proposal published in the July 1, 1998, **Federal Register** was a proposal to issue new and modified NWP's and modify some NWP general conditions. We did not propose any changes to 33 CFR Part 330. We have reviewed these comments, but will not modify 33 CFR Part 330 at this time. Some commenters suggested additional issues for the Corps to consider for the NWP program. These new issues are discussed elsewhere in this **Federal Register** notice.

On August 19, 1998, the Corps held a public hearing in Washington, D.C. on the proposed NWP's. In addition to the national public hearing, Corps division offices held 12 regional public hearings in other parts of the country. The purpose of these public hearings was to provide interested parties with another forum to comment on the proposed new and modified NWP's. Transcripts from these public hearings were also reviewed and considered for changes to the NWP's and general conditions.

The Corps received nearly 1,000 comments in response to the October 14, 1998, **Federal Register** notice. Many commenters objected to the proposed additional restrictions to the NWP and some favored the proposed changes. The comments received in response to the October 14, 1998, **Federal Register** notice are also discussed below.

II. General Comments

Most commenters opposed the new and modified NWP's, but many commenters expressed support for the activity-based nature of the NWP's and the balanced approach of the general conditions and preconstruction notification (PCN) requirements. Some commenters stated that the NWP's should be based on impacts, not activities. Some commenters considered the proposed NWP's to be too restrictive, but the majority of commenters believe that the proposed NWP's are too broad

in scope. Many commenters objected to the new and modified NWP's, because they authorize the loss of up to 3 acres of wetlands without the opportunity for public comment. A large number of commenters remarked that the proposed NWP's and general conditions are too complex. Some of these commenters stated that the complexity of the new and modified NWP's is contrary to the goal of streamlining the Corps regulatory program. One commenter stated that the Corps should revise NWP 26 to make it specific to the needs of each state, instead of developing broad NWP's with national applicability. Many commenters requested that the Corps extend the comment period, due to the complexity of the proposal.

Commenters opposed to the issuance of the proposed NWP's stated that the NWP's should be more restrictive. These commenters cited the fact that the new NWP's apply to virtually all non-tidal waters of the United States, which they believe results in less protection of the aquatic environment. Many of these commenters stated that the Corps intent to replace NWP 26 with NWP's that are more protective of the aquatic environment is not accomplished by the proposed NWP's. These commenters requested that the Corps withdraw the proposed new and modified NWP's and develop NWP's that are more protective of aquatic resources. Some commenters said that the environmental protection provided by the NWP's will be reduced by the absence of review by the Corps and the absence of site visits. Many commenters requested that the Corps modify the proposed new NWP's to provide more protection for wetlands and small streams. Several commenters stated that the proposed NWP's help promote sprawl development by making it easier to fill wetlands.

We disagree with the assertion that the proposed new and modified NWP's reduce protection of the aquatic environment. The terms and conditions of these NWP's contain provisions that provide more protection of aquatic resources. For example, NWP's 39 and 43 require that prospective permittees submit a statement with the PCN describing how impacts to waters of the United States have been avoided and minimized and explaining why additional avoidance and minimization cannot be achieved on the project site. In addition, some of the proposed NWP's require compensatory mitigation to ensure that the adverse effects of the authorized work on the aquatic environment are minimal, a water quality management plan to protect the local aquatic environment, especially downstream water quality, and

management of water flows to ensure that downstream flow conditions are maintained and that the authorized work can withstand expected high flows.

For the proposed new and modified NWP, we have directed our district offices to regionally condition these NWP to provide additional protection for high value waters. Most of these NWP do not authorize activities in non-tidal wetlands adjacent to tidal waters.

The proposed new and modified NWP require submittal of a PCN to the Corps for many activities authorized by those NWP. We believe that we have established PCN thresholds that will require Corps review of any activity that has the potential to result in more than minimal adverse effects on the aquatic environment, individually or cumulatively. District engineers will review these activities to ensure that they comply with the terms and conditions of the NWP and result in minimal adverse effects on the aquatic environment. District and division engineers can lower PCN thresholds when necessary to review additional projects. Through the PCN process, district engineers can add case-specific conditions and require compensatory mitigation to further protect the aquatic environment and replace aquatic resource functions and values that are lost as a result of the authorized work. The PCNs will also allow district engineers to monitor the cumulative adverse effects of activities authorized by NWP. The new NWP do not promote sprawl development. Zoning and land use are the responsibilities of State, Tribal, and local governments. If the construction of a new development involves the discharge of dredged or fill material into waters of the United States, the NWP can be used to satisfy Section 404 permit requirements, provided the activity complies with the terms and conditions of the NWP and results in minimal adverse effects on the aquatic environment. If the proposed work does not comply with the NWP, then a regional general permit, if applicable, or an individual permit will be required.

Many commenters objected to the proposed NWP, stating that these NWP are contrary to the Administration's Clean Water Action Plan (CWAP). These commenters cited one of the goals of the CWAP, which is to achieve a net gain of 100,000 acres of wetlands per year by 2005.

This goal of the CWAP will be achieved primarily through other Federal programs, including the Wetland Reserve Program and the

Conservation Reserve Program of the U.S. Department of Agriculture (USDA), the Corps environmental restoration programs, the Department of Interior's Partners for Fish and Wildlife program, and the North American Wetlands Conservation Act. Non-federal programs will also contribute to this goal. USDA's programs are estimated to provide 125,000 to 150,000 acres of wetlands per year and the other Federal programs are expected to provide an additional 40,000 to 60,000 acres of wetlands per year toward this goal. The Corps regulatory program is not expected to contribute substantial additional wetland acreage to this CWAP goal, but the District Engineer may require compensatory mitigation for activities authorized by NWP to offset losses of waters of the United States and ensure that the net adverse effects on the aquatic environment are minimal. The Corps does expect to continue its documented programmatic no net loss of wetlands approach to the Regulatory Program.

A number of commenters stated that the proposed NWP increase the complexity of the NWP program, thereby decreasing efficiency and flexibility. Many commenters assert that the proposed NWP are too restrictive and will increase the burden on the regulated public because of the notification requirements and the difficulty in interpreting these NWP. A number of commenters stated that the proposed NWP will increase the processing time and workload for permit applicants and the Corps.

We recognize that the proposed new and modified NWP increase the complexity of the NWP program, but we believe that this increase in complexity is necessary to protect the aquatic environment while authorizing activities with minimal adverse effects on the aquatic environment in an efficient and effective manner. The proposed new and modified NWP will be used to prioritize workload in non-tidal waters. In high value waters, additional protection will be provided by regional conditioning or suspending or revoking certain NWP if the use of those NWP would result in more than minimal adverse effects on the aquatic environment. The NWP will be used to efficiently authorize activities in low value waters. It is likely that most project proponents will design their projects to comply with the new and modified NWP rather than applying for authorization through the individual permit process. The proposed new and modified NWP, with the three proposed NWP general conditions, will substantially increase processing times

and the Corps workload. Prohibiting the use of NWP 21, 29, 39, 40, 42, 43, and 44 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain will result in large increases in the number of individual permit applications processed by the Corps.

Some commenters remarked that the proposed NWP have taken on elements of the individual permit review process, such as Section 404(b)(1) analysis, mitigation sequencing, and no net loss. One of these commenters recommended replacing the proposed NWP with NWP that authorize activities on a generic basis with specific limits but no reporting requirements. One commenter recommended retaining NWP 26, but modifying it to authorize activities below headwaters, because it would be simpler than the proposed NWP.

While there are some similarities between the individual permit review process and the NWP, there are also important differences. General Condition 19 requires that permittees avoid and minimize losses of waters of the United States on the project site to the maximum extent practicable and states that the District Engineer can require compensatory mitigation to offset losses of waters of the United States that result from the authorized work to ensure that the adverse effects on the aquatic environment are minimal. This general condition is similar, but not identical to the Section 404(b)(1) analysis required for Section 404 individual permits. It is important to note that an off-site alternatives analysis is not required for activities authorized by NWP, or any other general permit. The Section 404(b)(1) analysis required for individual permits requires analysis of off-site alternatives to determine if a practicable, less environmentally damaging, alternative exists to the proposed work on the original site.

To replace NWP 26 with NWP that authorize activities on a generic basis would be contrary to Section 404(e) of the Clean Water Act. Activities authorized by general permits, including NWP, must be similar in nature and result only in minimal adverse effects on the aquatic environment, individually or cumulatively. Each of the proposed new and modified NWP is activity-specific, authorizing activities that are similar in nature. Removing the reporting requirements from the new and modified NWP would increase the probability that the NWP would be used to authorize activities that result in more than minimal adverse effects on the aquatic environment. District

engineers utilize the PCN process to review proposed activities to determine if they comply with the terms and conditions of the NWP, including the statutory requirements of Section 404(e). The only way the Corps can issue an NWP without PCN requirements would be to lower the acreage limit to an extremely low level to ensure that all activities authorized by the NWP would result in minimal adverse effects on the aquatic environment. This would substantially reduce the utility of the NWPs, result in unacceptable increases in the number of individual permits for minor activities processed by the Corps, and severely limit the effectiveness and utility of the NWP program.

Modifying NWP 26 to authorize activities below headwaters would not accomplish the intent of the new and modified NWPs because such a modification of NWP 26 may not satisfy the statutory requirements of Section 404(e). One of the criticisms of NWP 26 is that many people believe that it does not satisfy the "similar in nature" requirement of Section 404(e) of the Clean Water Act. We believe that the activity-specific new and modified NWPs clearly satisfy all of the requirements of Section 404(e).

One commenter stated that the proposed NWPs change a goal of the Section 404 program from one of "no net loss" of wetlands to one of "no net loss of aquatic resource functions and values." This commenter also said that focusing on the effects of non-point source discharges on water quality is the responsibility of the states, not the Corps. A couple of commenters stated that, in the July 1, 1998, **Federal Register** notice, the Corps is inappropriately expanding the Administration's "no net loss" goal for wetlands to other types of waters of the United States. These commenters believe that this expansion should be subject to public comment instead of including it with the proposed new and modified NWPs. One of these commenters objected to requiring compensatory mitigation for losses of non-wetland waters of the United States and that the Corps should focus only on achieving the goal of "no net loss" of wetland acreage. This commenter also objected to applying the "no net loss" goal to a watershed basis instead of to the nation as a whole. Some commenters recommended that the final NWPs contain a statement that the "no net loss" principle is applicable only for wetlands and that compensatory mitigation for losses of other types of waters of the United States should only be required to ensure that the authorized work, with compensatory

mitigation, results in minimal adverse effects on the aquatic environment. Another commenter recommended that "no net loss" should be required for the NWP program.

Although one of the Administration's five principles for Federal wetlands policy is the goal of no net loss of wetlands, it is important to consider the functions and values of wetlands, as well as other aquatic resources. The Section 404 program has always regulated activities in all waters of the United States, not just wetlands. Streams and other open water habitats are extremely important components of the aquatic environment, and are as important as wetlands. The proposed new and modified NWPs place a greater emphasis on open waters to provide those areas with the additional protection that we believe is warranted. It is also important to remember the goals of the Clean Water Act and the importance of Section 404 in meeting those goals. Indeed, the Corps authority to regulate and protect open waters is clearer within the statutory framework than our authority to regulate wetlands. For instance, as a condition of a Section 404 permit, the Corps can require vegetated buffers adjacent to streams to offset adverse effects of the authorized activity on water quality.

Although certain statements in the July 1, 1998, **Federal Register** notice appear to expand the Administration's goal of no overall net loss of the Nation's remaining wetlands to other waters of the United States, such as streams, it is important to note that wetlands are only one component of the overall aquatic environment. By requiring compensatory mitigation for activities in other aquatic areas, such as streams, we are providing better overall protection for the aquatic environment. For the NWP program, the purpose of compensatory mitigation is to ensure that the authorized activities result in minimal adverse effects on the aquatic environment, individually or cumulatively, not to achieve "no net loss" of wetland acreage. Compensatory mitigation may be required by district engineers for losses of any type of water of the United States, not just wetlands. Such compensatory mitigation requirements do help contribute to the "no net loss" of wetlands goal, but in some cases district engineers may determine that compensatory mitigation is unnecessary because the adverse effects of the authorized work are minimal, without compensatory mitigation. It is important to note that NWP compensatory mitigation requirements are not driven by the "no net loss" goal, but will help support that

goal. For the NWP program, the need for compensatory mitigation is assessed on a case-by-case basis and a watershed basis, not a national basis, to ensure that the NWPs authorize only those activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. The programmatic goal of no net loss of wetlands is embodied in several Corps guidance documents, including former NWP issuance documents. The underlying principle is that the Corps will require compensatory mitigation to offset functions and values of aquatic resources, including wetlands, that are lost as a result of permit actions. Within the NWP program, the Corps will require compensatory mitigation to offset losses of functions and values of aquatic resources, including wetlands, to the extent that the NWPs authorize activities with no more than minimal adverse effects on the aquatic environment. On a watershed basis, this will normally result in no net loss of any important aquatic functions, not just wetlands.

One commenter requested that the Corps regulations should be consolidated as part of the proposed changes to the NWPs, because the Corps and the regulated public must consult multiple **Federal Register** notices for changes that have occurred over the past 12 years since the last consolidated rule was published. Another commenter stated that the Wetland Delineator Certification Program (WDCP) should be finalized to increase efficiency of the Corps regulatory program. Several commenters objected to the proposed NWPs because they authorize activities that are not water dependent.

The proposal to issue new and modified NWPs and general conditions does not constitute rulemaking. The current NWP regulations were issued on November 22, 1991, and the purpose of the proposal published in the **Federal Register** on July 1, 1998, is merely to issue and modify NWPs in accordance with the regulations at 33 CFR Part 330. The public can obtain a copy of the consolidated Corps regulations at 33 CFR Parts 320 to 330 by purchasing a copy of the appropriate Code of Federal Regulations published annually by the U.S. Government Printing Office or obtain a copy through the Internet at <http://www.access.gpo.gov/nara/index.html#cfr>. The Corps has not finalized the WDCP and has not determined when the program will be implemented.

On a case-by-case basis, NWP activities are not subject to the requirements for a Section 404(b)(1) alternatives analysis, including the

water dependency test. General Condition 19 of the NWP requires permittees to avoid impacts to the aquatic environment on-site to the extent practicable. However, no off-site alternatives test is ever conducted for any general permit activity, including NWPs. In addition, the water dependency test in the Section 404(b)(1) Guidelines does not require that all activities in waters of the United States must be water dependent to fulfill its basic project purpose (see 40 CFR Part 230.10(a)(3)). The vast majority of all activities permitted by the Corps are not water dependent. NWPs can authorize activities in special aquatic sites, provided they result in minimal adverse effects on the aquatic environment, individually or cumulatively, and impacts to the aquatic environment have been avoided on-site to the extent practicable.

One commenter stated that the acreage limits and PCN thresholds for the NWPs should be more consistent. Another commenter recommended that the acreage limits for the NWPs should be $\frac{1}{2}$ or 1 acre and 200 linear feet of stream bed. A third commenter suggested an acreage limit of $\frac{1}{4}$ acre for all NWPs. One commenter recommended that the Corps decrease the acreage limits of the new NWPs because permittees will reduce the scope of work to comply with those lower acreage limits, resulting in better protection of the environment and reducing wetland losses.

We disagree that the acreage limits for the NWPs should be the same, but we have made the PCN thresholds more consistent by changing the PCN threshold to $\frac{1}{4}$ acre for most of the new and modified NWPs. For open and flowing waters, the PCN requirements will still vary among these NWPs. We also disagree with imposing an upper limit for linear feet of stream impacts. We have changed the prohibition against filling greater than 500 linear feet of stream under NWP 26 to a PCN requirement. NWP 39 has a PCN requirement for any discharges into open waters, including streams. The PCN requirement for impacts to stream beds will allow district engineers to review those projects to ensure that they result only in minimal adverse effects on the aquatic environment. Division engineers can also regionally condition NWPs to lower the acreage limits and PCN thresholds. Although many project proponents will design their projects to comply with the terms and conditions of the NWPs, there is a lower limit where such incentives no longer work and it would be more cost effective for the regulated public to pursue

individual permits, which may result in even greater adverse effects on the aquatic environment. With the proposed new and modified NWPs, we believe that we have developed NWPs that balance environmental protection with development activities by providing the districts with the ability to use NWPs to authorize most activities with minimal individual or cumulative adverse effects on the aquatic environment while protecting high value areas with regional conditions.

Expiration of Nationwide Permit 26

In the July 1, 1998, **Federal Register** notice, we proposed to change the expiration date of NWP 26 from December 13, 1998, to March 28, 1999. Many commenters objected to the proposed extension of the expiration date for NWP 26. A number of commenters requested that the Corps retain NWP 26 until the proposed new and modified NWPs become effective. Other commenters suggested that the Corps change the expiration date of NWP 26 to February 11, 2002, to continue to authorize projects that will not be authorized by the new and modified NWPs. One commenter expressed concern about confusion resulting from different expiration dates for the NWPs.

Due to changes in the schedule and process for developing and implementing the new and modified NWPs to replace NWP 26, the Corps announced in the October 14, 1998, issue of the **Federal Register** the extension of the expiration date of NWP 26 to September 15, 1999, to allow for additional public comment on the new and modified NWPs, general conditions, and regional conditions. Since the proposed new and modified NWPs and regional conditions will not become effective before September 15, 1999, we have decided to extend the expiration date of NWP 26 to December 30, 1999, or the effective date of the new and modified NWPs, whichever occurs first, to allow the continued use of NWP 26 until the new and modified NWPs become effective. Extending the expiration date of NWP 26 until the effective date of the new and modified NWPs is necessary to ensure fairness to the regulated public by continuing to provide an NWP for activities with minimal adverse effects in headwaters and isolated waters until the new activity-specific NWPs become effective. If the expiration date of NWP 26 is not extended, most project proponents would have to apply for individual permits, although some activities may be authorized by other NWPs or regional general permits. For those activities

with minimal adverse effects on the aquatic environment, it would be unfair and unnecessarily burdensome on the regulated public to require an individual permit.

We will not extend the expiration date of NWP 26 to February 11, 2002, to authorize those activities that do not qualify for the new and modified NWPs. Such action would be contrary to our intent, which is to replace NWP 26 with activity-specific NWPs. However, the Corps does not intend to allow a lapse in time to occur between the effective date of the new and modified NWPs and the expiration date of NWP 26. Activities that were previously authorized by NWP 26, but could not be authorized by the proposed new and modified NWPs may be authorized by individual permits, other NWPs, or regional general permits.

In response to the October 14, 1998, **Federal Register** notice, a large number of commenters supported the extension of the expiration date of NWP 26, but a few commenters objected to the time extension. Several commenters stated that the Corps should not set a specific expiration date for NWP 26, to ensure that it is available until the new and modified NWPs become effective. A number of commenters said that the October 14, 1998, **Federal Register** notice was unclear as to whether the expiration date for NWP 26 is extended to September 15, 1999; it appeared to these commenters that the new expiration date was published for public comment. One of these commenters requested that the Corps clearly state in this **Federal Register** notice the new expiration date for NWP 26. Two commenters expressed concern about the expiration of NWP 26 authorizations for projects which already have been authorized by this NWP.

The expiration date for NWP 26 was changed to September 15, 1999, as announced in the October 14, 1998, **Federal Register** notice. The new expiration date was not subject to public comment in that notice. It is necessary to set a firm expiration date for NWP 26 to minimize confusion for the regulated public during the process of developing and implementing the new and modified NWPs.

In accordance with 33 CFR Part 330.6(b), permittees with a valid NWP 26 authorization have up to one year to complete the authorized work, provided they start the work or are under contract to do the work prior to the expiration of the NWP. This provision of the NWP regulations is not affected by the proposed new and modified NWPs. Any activities authorized by NWP 26 that have not commenced or are not under

contract prior to the expiration of NWP 26 must be reauthorized by another NWP, a regional general permit, or an individual permit. Some of these projects may be authorized by the proposed new and modified NWPs, provided those projects meet the terms and conditions of those NWPs.

State, Tribal, and EPA Section 401 Certification of the NWPs

One commenter stated that the Corps denial of an NWP authorization based on the denial of the Section 401 water quality certification (WQC) by States, Tribes, or EPA prevents applicants from pursuing an individual permit. According to the commenter, applicants are required to obtain an individual, project-specific WQC. A number of commenters objected to the Corps practice of issuing provisional NWP verifications where WQC has been denied by the State, Tribe, or EPA. One commenter stated that NWPs should not be used in states where WQC has been denied or the NWP activity is determined to be inconsistent with the State's Coastal Zone Management Act (CZMA) plan. These commenters believe that individual permits should be required instead.

Denial of WQC for an NWP should not be the sole reason for requiring individual permit review for activities that would otherwise comply with the terms and conditions of the NWP. A denial of WQC by a State, Tribe, or EPA for an NWP does not mean that the activities authorized by that NWP will result in more than minimal adverse effects on the aquatic environment. The WQC denial only indicates that the NWP activity may not meet the water quality standards for that State or Tribal land in all situations. For specific projects that meet the water quality standards, the 401 agency can issue an individual WQC or waive the WQC requirement. If a specific project does not meet the water quality standards and the 401 agency denies WQC for that project, then that particular project cannot be authorized by an NWP or an individual permit unless the WQC is later issued or waived.

Although the Corps makes every effort to work closely with States, Tribes, or EPA to facilitate Section 401 water quality certification for activities authorized by NWPs, we have an obligation to the regulated public to provide timely NWP authorizations for projects that meet the terms and conditions of the NWPs and result in minimal adverse effects on the aquatic environment, individually and cumulatively. Therefore, if a project qualifies for NWP authorization, we

should issue a provisional NWP verification that is not valid until the permittee obtains an individual WQC or CZMA consistency determination or waiver and a copy is sent to the Corps. These provisional NWP verifications indicate that the permittee cannot commence work until the WQC or CZMA determination is obtained or waived.

The final WQC and CZMA determination processes for the new and modified NWPs will begin with the publication of the **Federal Register** notice announcing the issuance of the NWPs. This **Federal Register** notice is scheduled to be published on October 22, 1999. Concurrent with that **Federal Register** notice, Corps districts will publish public notices announcing their final Corps regional conditions for the new and modified NWPs. The 401 and CZMA agencies will have 60 days from the date of that **Federal Register** notice to make their WQC or CZMA consistency determinations for those NWPs.

Regional Conditioning of the Nationwide Permits

For the proposed new and modified NWPs, the Corps is placing greater emphasis on regional conditioning. Regional conditioning is necessary to ensure that the NWPs authorize only those activities with minimal adverse effects on the aquatic environment, individually and cumulatively.

A number of commenters supported the increased emphasis on regional conditioning for the new and modified NWPs. Some of these commenters recognize the importance of evaluating wetland impacts on a regional and watershed basis. One commenter stated that since hydrologic, geologic, and other environmental characteristics vary across the country, regional conditions are necessary because an inflexible regulatory approach to managing waters of the United States is ineffective. This commenter said that regional conditions provide the flexibility to effectively manage waters of the United States, based on their particular environmental characteristics.

Many commenters expressed opposition to the increased emphasis on regional conditions for the proposed new and modified NWPs. Some commenters recommended that the Corps eliminate regional conditioning from the NWP program. Two commenters said that regional conditions are unnecessary because the NWPs can only authorize activities with minimal adverse effects on the aquatic environment. Another commenter stated that regional conditions are unnecessary

because district engineers can place special conditions on NWP authorizations on a case-by-case basis. One commenter stated that regional conditions are unnecessary because Federal regulations require that general permits must be based on activities, not types of waters. A couple of commenters objected to the approach presented in the July 1, 1998, **Federal Register** notice, because it treats regional conditioning as the rule, not the exception. One commenter stated that regional conditioning should not be required of all districts, because some districts may not need them.

Regional conditioning of the proposed new and modified NWPs is necessary to ensure that these NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment, a requirement of Section 404(e) of the Clean Water Act. Regional conditions are necessary because the national terms and conditions of the NWPs are established to authorize most activities that result in no more than minimal adverse effects on the aquatic environment, individually or cumulatively. For particular regions of the country or specific waterbodies where additional safeguards are necessary to ensure that the NWPs satisfy the statutory requirements for general permits, regional conditions are the appropriate mechanism. Case-specific discretionary authority or special conditions cannot act as surrogates for regional conditions in many cases, especially for those NWP activities that do not require notification to the District Engineer. For example, regional conditions can restrict the use of NWPs in high value waters for those activities that do not require submission of a PCN. Although the proposed NWPs are activity-specific, regional conditions are necessary to protect high value waters to ensure that the NWPs do not authorize activities that result in more than minimal adverse effects on the aquatic environment. We believe that all districts have high value waters that should be subject to regional conditioning.

A substantial number of commenters asserted that regional conditioning of the NWPs greatly reduces the flexibility of the NWPs, making them more complicated, less useful, and too restrictive. Many of these commenters stated that regional conditioning of the NWPs undermines the intent of Section 404(e) of the Clean Water Act, by making the NWPs more like individual permits. They also said that regional conditions would unnecessarily and substantially increase burdens on the regulated public. A number of

commenters stated that regional conditioning of the NWP offsets any benefits in regulatory streamlining the NWPs are intended to provide. Several commenters stated that regional conditioning of the NWPs will increase the Corps workload, because there will be more projects that cannot qualify for NWP authorization.

Although regional conditions may increase the complexity of the NWPs and reduce their applicability, it is important to remember that NWPs are optional permits, and if the project proponent does not want to comply with all of the terms and conditions of an NWP, including regional conditions, then he or she can apply for authorization through the individual permit process. Regional conditioning of the NWPs is likely to increase the Corps workload, but we believe that such increases are manageable. Division engineers will review the regional conditions proposed by Corps districts and ensure that any regional conditions that are adopted will ensure that the Corps workload will be prioritized to increase protection of the aquatic environment.

A number of commenters objected to the regional conditioning process and wanted to reserve their comments on the proposed new and modified NWPs until they have had the opportunity to review the proposed regional conditions. Many commenters requested that the Corps provide the regulated community an opportunity to comment on the regional conditions after the new and modified NWPs are issued. Several commenters suggested that the Corps allow an additional 60 days to complete the regional conditions to allow full public participation and comment. Some commenters recommended that the Corps publish the regional conditions in the **Federal Register** and provide the public with an additional opportunity to comment on the regional conditions. A number of commenters stated that the process for developing regional conditions is vague and confusing and that clear guidance is needed to assist districts in developing regional conditions. One commenter stated that the national NWP terms and conditions should be established after regional conditioning is completed.

We agree that the public should have another opportunity to comment on the complete NWP package, including the NWPs, general conditions, definitions, and Corps regional conditions. The process for issuing the proposed new and modified NWPs and Corps regional conditions has been changed from the process announced in the October 14, 1998, **Federal Register** notice.

Concurrent with today's **Federal Register** notice, each Corps district will issue a public notice announcing draft regional conditions for a 45-day comment period. Therefore, the public will have 45 days to provide comments on both the draft new and modified NWPs and the draft Corps regional conditions. We have provided Corps divisions and districts with guidance concerning the regional conditioning process to facilitate the development and implementation of regional conditions. We do not agree that the national terms and limits for the NWPs should be established after the Corps regional conditions are finalized because the terms and limits of the NWPs must be first established nationally, so that division engineers can issue Corps regional conditions that account for regional differences in aquatic resource functions and values and provide additional protection for the aquatic environment. Regional conditions make the NWPs more restrictive where necessary to ensure that those NWPs authorize only activities with minimal adverse effects on the aquatic environment.

Several commenters said that division and district engineers should be able to use regional conditioning to make the NWPs less restrictive, as well as more restrictive. Two commenters asserted that the Corps regulations at 33 CFR Part 330.1(d) specifically state that division and district engineers can condition or further restrict NWPs only when they have concerns for the aquatic environment under the Section 404(b)(1) Guidelines or for any other factor of the public interest. Another commenter recommended that the Corps institute a procedure whereby a permit applicant could request Corps headquarters review of a specific regional condition for consistency with general Corps regulatory policy. This commenter expressed concern that the regional conditioning process would create arbitrary inconsistencies in the implementation of the Corps regulatory program between Corps districts. Two commenters stated that Corps regional conditions for the NWPs should not duplicate the states' authority under Sections 401 and 402 of the Clean Water Act. Another commenter expressed concern that the regional conditions would not completely protect waters that need special protection and recommended that the Corps conduct advanced identification of those high value areas. One commenter opposed the principle that regional conditions can restrict the use of NWPs in areas

covered by Special Area Management Plans (SAMPs).

Division and district engineers cannot use regional conditioning to make the NWPs less restrictive. Only the Chief of Engineers can modify an NWP to make it less restrictive, if it is in the national public interest to do so. Such a modification must go through a public notice and comment process. However, if a Corps district believes that regional general permits are necessary for activities not authorized by NWPs, then that district can develop and implement regional general permits to authorize those activities, as long as those regional general permits comply with Section 404(e) of the Clean Water Act. We do not believe that it is necessary to establish a procedure for headquarters review of regional conditions. Division engineers will review proposed regional conditions and approve only those regional conditions that are necessary to ensure that the NWPs authorize only activities with minimal adverse effects on the aquatic environment. We have provided division and district offices with guidance addressing regional conditioning of NWPs. In general, Corps regional conditions should not duplicate State Clean Water Act Section 401 or 402 authorities, but regional conditions can address concerns for the aquatic environment that may also be related to water quality or non-point sources of pollution. The public notice process for regional conditions, especially the process used for the new and modified NWPs, can help the Corps identify specific waterbodies that should be subject to regional conditions. The public had the opportunity, through district public notices, to recommend specific high value waterbodies that should receive additional protection. In some cases, it is appropriate to restrict or prohibit the use of NWPs in areas subject to SAMPs. In areas where SAMPs are conducted, general permits are often developed and issued to provide Section 404 and Section 10 authorization for activities within the area covered by the SAMP. Restricting or prohibiting the use of NWPs within the SAMP area is often necessary to ensure that the SAMP is properly implemented.

Numerous commenters suggested that regional conditions must be consistent between Corps districts within the same state. Another commenter recommended that regional conditions should be consistent between all Corps districts. One commenter observed that regional conditions being developed by districts in initial public notices for the new and modified NWPs are highly variable and emphasized the need for

stronger national terms and conditions. This commenter believes that inconsistencies between Corps districts with regard to regional conditions will be severe and unacceptable. One commenter requested that for companies operating throughout the country, regional conditions must be consistent between districts.

There may be certain regions within a particular state, such as specific high value waterbodies, that warrant regional conditions that are not necessary in other areas of that state. Consistency in regional conditions across the country is contrary to the purpose of the regional conditioning process, which is to consider local differences in aquatic resource functions and values to ensure that the NWP's do not authorize activities with more than minimal adverse effects on the aquatic environment. Companies that work in more than one district will have to comply with the regional conditions established in each district.

The draft regional conditions are currently available for public review on the Internet at the following home pages:

North Atlantic Division

Baltimore District: <http://www.nab.usace.army.mil/permits/regionalconditions.htm>

New England District: <http://www.nae.usace.army.mil/envirom/regl.htm>

New York District: <http://www.nan.usace.army.mil/business/buslinks/regulat/index.htm#PNotices>

Norfolk District: <http://www.nao.usace.army.mil/Regulatory/PN/PN.html>

Philadelphia District: <http://www.nap.usace.army.mil/cenap-op/regulatory/regulatory.htm>

South Atlantic Division

Charleston District: <http://www.sac.usace.army.mil/permits>

Jacksonville District: <http://www.saj.usace.army.mil/permit/index.html>

Mobile District: <http://www.sam.usace.army.mil/sam/op/reg/almscat.htm>

Savannah District: <http://www.sas.usace.army.mil/regcond.htm>

Wilmington District: <http://www.saw.usace.army.mil/wetlands/regtour.htm>

Great Lakes and Ohio River Division

Buffalo District: <http://www.lrb.usace.army.mil/orgs/offices/form.htm>

Chicago District: <http://www.usace.army.mil/lrc/co-r/index.htm>

Detroit District: <http://huron.lre.usace.army.mil/regu/dtwhome.html>

Huntington District: <http://www.lrh-opr-nt.orh.usace.army.mil/permits/Nationwide/nation.html>

Louisville District: <http://www.lrl.usace.army.mil/orf/nw/nw.html>

Nashville District: <http://www.orn.usace.army.mil/cof/notices.htm>

Pittsburgh District: <http://www.LRP.usace.army.mil/OR-F/permits.html>

Mississippi Valley Division

Memphis District: http://www.mvm.usace.army.mil/regulatory/public-notices/public_notices.htm

New Orleans District: <http://www.mvn.usace.army.mil/ops/regulatory/Rock Island District: http://www.mvr.usace.army.mil/regulatory/nationwidepermits.htm>

St. Louis District: <http://www.mvs.usace.army.mil/permits/pn.htm>

St. Paul District: <http://www.mvp.usace.army.mil/regulatory/regulatory.html>

Vicksburg District: <http://www.mvk.usace.army.mil/odf/regs/nwpcconditions.htm>

Southwestern Division

Fort Worth District: <http://155.84.60.1/current/current.htm>

Galveston District: <http://www.swg.usace.army.mil/news.htm>

Little Rock District: <http://www.swl.usace.army.mil/regulatory/ceal.html>

Tulsa District: <http://www.swt.usace.army.mil/whatishot/whatishot.htm>

Northwestern Division

Kansas City District: <http://www.nwk.usace.army.mil/conops/regulatory.htm>

Omaha District: <http://www.nwo.usace.army.mil/html/op-r/webpg.htm>

Portland District: <http://www.nwp.usace.army.mil/op/g/regulatory.htm>

Seattle District: <http://www.nws.usace.army.mil/reg/reg.htm>

Walla Walla District: <http://www.nww.usace.army.mil/html/offices/op/rf/cond2.htm>

South Pacific Division

Albuquerque District: <http://www.spa.usace.army.mil/reg/localnot.htm>

Los Angeles District: <http://www.spl.usace.army.mil/co/co5.html#reg>

Sacramento District: <http://www.spk.usace.army.mil/cespk-co/regulatory/>

San Francisco District: <http://www.spn.usace.army.mil/regulatory/>

Pacific Ocean Division

Alaska District: <http://www.usace.army.mil/alaska/co/conops1.htm>

Honolulu District: <http://www.pod.usace.army.mil/news/newsrel.html>

Please note that the regional conditions posted on these Internet home pages are the current draft Corps regional conditions, and that there are likely to be changes to the Corps regional conditions based on the comments received in response to district public notices.

Compliance With Section 404(e) of the Clean Water Act

A large number of commenters stated that the proposed NWP's are in violation of Section 404(e) of the Clean Water Act because they believe that the proposed NWP's do not authorize activities that are similar in nature. Section 404(e) stipulates two statutory criteria for general permits, including the NWP's: (1) the activities authorized by a general permit must be similar in nature, and (2) those activities must result in minimal adverse environmental effects, individually or cumulatively. Many of these commenters asserted that the proposed NWP's 39, 42, and 44, as well as additional activities authorized by the proposed modifications of NWP's 12 and 40, violate the provisions of Section 404(e) because they lack precise descriptions of authorized activities and the descriptions for these NWP's included in the July 1, 1998, **Federal Register** notice were too broad to be similar in nature and environmental impact. Many commenters stated that the proposed new and modified NWP's authorize activities with more than minimal adverse effects on the aquatic environment. Some commenters stated that the Corps has not adequately assessed the individual and cumulative adverse environmental effects of the new and modified NWP's in accordance with 33 CFR Part 320 and 40 CFR Part 230.

When considering whether or not an NWP complies with the "similar in nature" criterion of Section 404(e), it is important not to constrain this criterion to a level that makes the NWP program too complex to implement or makes a particular NWP useless because it

would authorize only a small proportion of activities that result in minimal adverse effects on the aquatic environment. Developing NWP's with extremely precise and restrictive language to satisfy the environmental community's definition of the term "similar in nature" would result in a large number of NWP's that would make the NWP program excessively complex and burdensome, without any added protection to the aquatic environment. It appears that most critics of the NWP's believe that activities authorized by an NWP must be identical to each other to satisfy Section 404(e). We believe that the term "similar in nature" is intended to have a more practical definition. The word "similar" does not have the same meaning as the word "identical." We believe that the proposed new and modified NWP's, which are activity-specific, authorize only activities that are similar in nature in the broader, and the more practical, definition of the word "similar." We agree that proposed NWP A may not have satisfied the "similar in nature" requirement of Section 404(e) because of the wide range of authorized activities listed in the text of the proposed NWP. Therefore, we have proposed to modify the description of activities authorized by this NWP (designated as NWP 39) to limit the NWP to the construction of building pads or foundations and attendant features necessary for the operation and use of the building constructed on the pad or foundation. We believe that NWP 39 authorizes only activities that are similar in nature (i.e., the construction of buildings and features necessary for their operation and use) and have minimal adverse effects on the aquatic environment. We believe that each of the other new and modified NWP's proposed in this **Federal Register** notice authorize only activities that are similar in nature.

During the development of these NWP's, the Corps has complied with all applicable laws and regulations, especially 33 CFR Parts 320 through 330 and 40 CFR Part 230. For those new and modified NWP's that are issued, the Corps will prepare Environmental Assessments, Statements of Finding, and, where applicable, Section 404(b)(1) Compliance reviews. These documents will address how these NWP's comply with the public interest review criteria in 33 CFR part 320 and the Section 404(b)(1) impact analysis criteria in 40 CFR part 230. To further ensure that the NWP's authorize only activities with minimal adverse effects on the aquatic environment, the NWP general conditions address specific concerns

relating to the NWP program, such as compliance with the Endangered Species Act and the National Historic Preservation Act. Most NWP's require a Section 401 water quality certification to ensure that the authorized activities meet State or Tribal water quality standards. In coastal areas, most NWP's require a coastal zone consistency determination to comply with Section 307 of the Coastal Zone Management Act. Activities that require a permit pursuant to Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 are not authorized by NWP's.

In accordance with Section 404(e) of the Clean Water Act, the NWP's cannot authorize activities that result in more than minimal adverse effects on the aquatic environment, individually or cumulatively. For those activities that may result in more than minimal adverse effects on the aquatic environment, division or district engineers will assert discretionary authority (see 33 CFR 330.4(e) and 33 CFR 330.5(c) and (d)), and notify the applicant that the proposed activity is not authorized by NWP. Therefore, the NWP's comply with 40 CFR 230.1(c) and 230.7(a)(3). The factual determination requirements of 40 CFR 230.11 will also be addressed in the decision document for each NWP. These decision documents will include estimates of the discharges anticipated to be authorized by the NWP that are required pursuant to 40 CFR 230.7(b)(3).

General Condition 19 of the NWP's satisfies the requirements of 40 CFR 230.10(d). This general condition requires that permittees avoid and minimize adverse effects on the aquatic environment on-site to the maximum extent practicable. If the adverse effects of the proposed work on the aquatic environment are more than minimal, then the District Engineer will exercise discretionary authority and the project cannot be authorized by NWP, unless it is modified to reduce the adverse effects and comply with all of the requirements of the NWP.

One commenter stated that the Corps increased emphasis on regional conditioning of the NWP's is an acknowledgment that activities authorized by NWP have the potential of resulting in more than minimal adverse effects on the aquatic environment. This commenter objected to the Finding of No Significant Impact (FONSI) issued on June 23, 1998, stating that the FONSI is based on regional conditions which have not yet been proposed. Several commenters objected to the position that the adverse effects on the aquatic environment authorized

by the NWP's will be minimal because they authorize only relatively small losses of waters of the United States and in many cases require compensatory mitigation for those losses. These commenters state that small wetlands often have significant values (e.g., prairie potholes provide waterfowl habitat) and that compensatory mitigation is often ineffective in replacing those values. They also stated that there is insufficient qualitative or quantitative analysis concerning environmental consequences of the new and modified NWP's.

The NWP's authorize activities that, under most circumstances, result in minimal adverse effects on the aquatic environment. The Corps has always acknowledged that some activities that could potentially be authorized by NWP's may have more than minimal adverse effects on the aquatic environment. The notification requirements for NWP's allow district engineers the opportunity to review proposed activities that have the potential for exceeding the minimal adverse effect threshold. The provisions in the NWP regulations, specifically 33 CFR 330.4(e) and 33 CFR 330.5(c) and (d), allow district and division engineers to exercise discretionary authority when specific activities result in more than minimal adverse effects on the aquatic environment and require an individual permit for those activities. Discretionary authority also allows division and district engineers to place conditions on NWP's to ensure that the NWP's authorize only those activities that have minimal adverse effects on the aquatic environment. Division engineers can also place regional conditions on the NWP's. In specific high value waterbodies or wetland types, regional conditions can restrict the use of NWP's in those waters by lowering acreage limits or notification thresholds. Regional conditions can also prohibit the use of NWP's in high value waters. District engineers can place case-specific special conditions on NWP authorizations. The FONSI issued on June 23, 1998, merely reiterates the fact that the regional conditioning process helps ensure that the NWP's authorize only those activities that result in minimal adverse effects on the aquatic environment.

We recognize that there has been, and continues to be, substantial interest among the public regarding the potential environmental effects associated with the implementation of the NWP program. With the last reissuance of the NWP's in December 1996, we reemphasized our commitment to improve data collection

and monitoring efforts associated with the NWP program, and NWP 26 in particular. In many instances, these efforts have already provided critical information on the use of the NWPs, overall acreage impacts, affected resource types, the geographic location of the activities, and the type of mitigation provided. This information is critical in our efforts to make well-informed permitting and policy decisions regarding the continued role of the NWP program and to ensure that the program continues to authorize only those activities with minimal individual and cumulative effects.

Compliance With the National Environmental Policy Act

Many commenters believe that the proposed new and modified NWPs do not comply with the National Environmental Policy Act (NEPA). They disagree with the Corps determination that the NWPs do not constitute a major Federal action that significantly affects the quality of the human environment. These commenters assert that the new and modified NWPs will expand the direct, indirect, and cumulative adverse effects of the NWPs, because these NWPs are applicable in a broader geographic range of waters of the United States than NWP 26.

Many commenters addressed the preliminary environmental assessments (EAs) for the new and modified NWPs and the FONSI issued on June 23, 1998. Several commenters believe that the Corps is making a circular argument when it states that the NWPs do not constitute a major Federal action because, by definition, the NWPs authorize only activities with minimal individual or cumulative adverse effects on the aquatic environment. They believe this conclusion is based on the definition of a general permit, not on data from authorized impacts. They suggest that the Corps consider the loss of wetlands over an extended time period to evaluate the actual adverse effects on the aquatic environment in specific terms, not generalities. One commenter concurred with the Corps determination that the NWPs do not require an Environmental Impact Statement (EIS). One commenter stated that an EIS should be required prior to implementing the new and modified NWPs and the EIS must include an economic analysis of the economic effects of the NWPs. Another commenter said that to comply with NEPA, the Corps must evaluate both wetlands and upland impacts for activities authorized by NWPs.

NEPA requires Federal agencies to prepare an EIS only for major Federal

actions that have a significant impact on the quality of the human environment. Even though we have committed to prepare a Programmatic Environmental Impact Statement (PEIS) for the NWP program, we continue to maintain our position that the NWP program does not constitute a major Federal action significantly affecting the human environment. Therefore, the preparation of an EIS is not required by NEPA. The NWPs authorize only those activities that have minimal adverse environmental effects on the aquatic environment, individually or cumulatively, which is a much lower threshold than the threshold for requiring an EIS. This is not a circular argument. To ensure that the NWPs authorize only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively, there are several safeguards in the NWP program: (1) PCN requirements to allow district engineers to review certain proposed NWP activities on a case-by-case basis; (2) compensatory mitigation requirements for most activities that require a PCN; (3) the ability to impose case-specific conditions on an NWP authorization to protect the aquatic environment; (4) the ability to impose regional conditions on an NWP to protect high value waters; (5) the requirement for water quality certification for activities involving a discharge of dredged or fill material into waters of the United States; (6) the requirement for Coastal Zone Management Act consistency determination in coastal areas; and (7) provisions for discretionary authority to require an individual permit review if the proposed impacts are more than minimal.

The FONSI was issued on June 23, 1998. Copies of the FONSI are available at the office of the Chief of Engineers, at each District office, and on the Corps regulatory home page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>. The EAs for each of the new and modified NWPs will be available on the Corps regulatory home page when the issuance of these NWPs is announced in a future **Federal Register** notice. When regional conditions are added to an NWP, a supplemental decision document containing local analyses will be issued by the Division Engineer. The supplemental decision documents for a district's regional conditions will be available at that district.

For the Corps regulatory program, including the NWP program, the procedures for complying with NEPA are contained in 33 CFR Part 325, Appendix B. The scope of analysis for

NEPA compliance is thoroughly discussed in Appendix B, including the factors to be considered when determining the extent of Federal control and responsibility for a particular project. In most cases, upland impacts are not part of Federal control and responsibility, and should not be included in a general analysis of NEPA compliance for the NWP program.

Many commenters stated that, while they support the Corps intent to prepare a PEIS for the NWP program, the PEIS should be completed prior to the issuance of the new and modified NWPs. Several commenters remarked that the PEIS should have been completed prior to this reissuance of the NWPs in 1996. Some commenters stated that the PEIS should include a comprehensive and accurate accounting of the cumulative impacts authorized by the NWPs in the past. One commenter recommended that the Corps allow full public participation in the preparation of the PEIS through regional meetings. This commenter also suggested that the PEIS address the following alternatives: no action, reduction in scope of authorized activities, reduction in acreage impact limits, and alternative programmatic approaches. One commenter agreed that a PEIS is not required and stated that while the Corps is not legally prevented from producing a PEIS, even if it is not required, the PEIS could have significant effects on the Corps workload and the Corps should not devote resources to the preparation of the PEIS at the expense of its other activities.

We have committed to demonstrating that the NWP program authorizes only those activities with minimal individual and cumulative environmental effects. Consistent with this commitment, the Corps will prepare, through the Institute for Water Resources, a PEIS for the entire NWP program. While a PEIS is not required for the same reasons that an EIS is not required, the PEIS will provide the Corps with a comprehensive mechanism to review the effects of the NWP program on the human environment. The PEIS will be conducted with the participation of other Federal agencies, States, Tribes, and the public. The Corps is scheduled to initiate the PEIS by mid-1999 and complete the PEIS by December 2000. Therefore, the PEIS should be completed prior to the next scheduled reissuance of the NWPs in December 2001. Since the PEIS is not required, we will not delay the issuance of the new and modified NWPs. The PEIS will fully comply with NEPA requirements, including alternatives analyses. There have been meetings to provide other

Federal agencies, states, Tribes, and the public with opportunities to participate in the scoping of the PEIS. These scoping meetings were announced in a **Federal Register** notice published on March 22, 1999 (64 FR 13782).

Some commenters said that the preliminary EAs do not comply with NEPA because they do not adequately address alternatives that are necessary to support the final decision. They believe that failure to consider a "no action" alternative is inconsistent with NEPA and that an alternatives analysis in the EA cannot be replaced with a discussion of the case-specific flexibility provided by the NWP program. Another commenter stated that if the EAs are properly prepared, they would not support the FONSI determination.

In compliance with NEPA, environmental documentation will be prepared for each new and modified NWP. Each document will include an EA, a FONSI, and, where relevant, a preliminary Section 404(b)(1) Guidelines compliance review. Each EA will contain an alternatives analysis for the NWP, including a discussion of the "no action" alternative. The alternatives analysis will also consider national modification alternatives, regional modification alternatives, and case-specific on-site alternatives for the NWP. After the issuance of the new and modified NWPs, copies of these documents will be available for inspection at the office of the Chief of Engineers, at each Corps district office, and at the Corps regulatory home page at the Internet address cited at the beginning of this **Federal Register** notice.

Several commenters stated that the preliminary EAs for the proposed new and modified NWPs are inadequate because they fail to provide an ecological rationale for the proposed acreage limits. These commenters believe that the assessment of individual and cumulative adverse effects relies entirely on conditions that address secondary impacts, future regional conditions, and the discretion of the District Engineer in the PCN process. Another commenter recommended that the Corps revise the EAs once the regional conditions are developed and suggested that the Corps place the revised EAs, with the regional conditions, on public notice in the **Federal Register** to provide an opportunity for public comment.

Where appropriate, each EA will generally consider different acreage limits for each NWP. Acreage limits for each NWP are established to allow the NWPs to authorize most activities that result in minimal adverse effects on the

aquatic environment, individually or cumulatively. The minimal adverse effects determination is based on general consideration of the effects of the authorized activities on the physical, chemical, and biological characteristics of the aquatic environment, as well as human use characteristics. Division engineers can regionally condition an NWP to decrease the acreage limit established nationally for that NWP, if such a regional condition is necessary to ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. When division engineers approve regional conditions for an NWP, they will issue a decision document that will supplement the national EA for that NWP. On a case-by-case basis, it is the responsibility of district engineers to assess and monitor the adverse effects on the aquatic environment that result from activities authorized by NWPs. District engineers review PCNs to assess the foreseeable adverse effects caused by the authorized work. The final EAs for the new and modified NWPs will not be subject to public comment, since they are final decision documents.

Scope of the New Nationwide Permits

In the July 1, 1998, **Federal Register** notice, we requested comments on the scope of applicable waters for the new and modified NWPs. In that **Federal Register** notice, we listed five categories of applicable waters for the proposed NWPs. The categories of waters included: (1) all waters of the United States; (2) non-tidal waters; (3) non-tidal waters, excluding non-tidal wetlands contiguous to tidal waters; (4) non-Section 10 waters; and (5) non-Section 10 waters, excluding wetlands contiguous to Section 10 waters.

Most of the commenters objected to the proposed NWPs because they authorize activities in most non-tidal waters of the United States, including non-tidal wetlands adjacent, but not contiguous, to tidal waters. On the other hand, some commenters supported the proposed NWPs because the distinction between non-tidal waters and headwaters and isolated waters was dropped from the NWP program. NWP 26 authorizes activities only in isolated waters and headwaters. A number of commenters expressed concern that the increased scope of applicable waters for the new NWPs provides less protection to the aquatic environment because many of the waters subject to the new NWPs are important for a variety of fish and wildlife and provide important functions and values such as flood control and improvement of water

quality. One of these commenters stated that the increased scope of waters would harm the ecological integrity of watersheds. One commenter remarked that the scope of waters for the new NWPs implies that non-tidal waters are less important than tidal waters.

To increase protection of the aquatic environment, we have modified the applicable waters for the some of the proposed new and modified NWPs (i.e., NWPs 39, 40, 41, 42, and 43) to prohibit the use of these NWPs in non-tidal wetlands adjacent to tidal waters. With the proposed NWPs, the Corps is increasing protection of open and flowing waters, and not focusing only on wetlands, especially low-value wetlands. This approach will enhance protection of the aquatic environment. The proposed NWPs were developed and conditioned to better control and limit adverse effects on the aquatic environment. We are proposing to modify two NWP general conditions to provide greater protection for water quality and maintenance of water flows (General Conditions 9 and 21, respectively). We are also proposing three new NWP general conditions to protect the aquatic environment (General Conditions 25, 26, and 27) by restricting the use of NWPs in designated critical resource waters, impaired waters, and waters of the United States within 100-year floodplains. The proposed general conditions are discussed elsewhere in this **Federal Register** notice. In addition, Corps districts and divisions will regionally condition these NWPs to ensure that they authorize only activities with minimal adverse effects on the aquatic environment.

NWPs 39, 41, 42, and 43 do not authorize activities in non-tidal wetlands adjacent to tidal waters. High value isolated waters identified by districts will be protected through the regional conditioning of the NWPs. Case-specific special conditions and discretionary authority will also be used to protect high value waters when district engineers review PCNs.

Many commenters stated that the five categories of waters of the United States applicable to the new NWPs make the NWP program too complex. One commenter remarked that identifying these waters would not result in a workload savings to the Corps because it will require additional field review. One commenter recommended that the Corps reduce the number of applicable waters from five to three, specifically "all waters," "Section 10 waters," and "non-tidal waters." Another commenter believes that these categories are arbitrary and requested that the Corps

provide justification for these categories of waters. A few commenters asked why "adjacent waters," as used in the context of NWP 26, was dropped from the NWP program. One commenter suggested that NWPs 39, 41, 42, 43, and 44 should be modified to authorize activities only in isolated waters and headwaters.

We recognize that the five categories of waters discussed in the July 1, 1998, **Federal Register** notice can be considered by some members of the regulated public as unnecessarily complex, so we have simplified the applicable waters for the new NWPs. Most of the new NWPs authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. The applicable waters for each proposed new and modified NWP are discussed in detail in the preamble discussions of those NWPs.

One commenter objected to the focus on contiguous waters and stated that subsurface connections between waters of the United States are as important as surface connections. Two commenters requested that the Corps specify that for non-contiguous, isolated waters, an interstate or foreign commerce connection must be established for these areas to be considered waters of the United States. One commenter objected to portions of the July 1, 1998, **Federal Register** notice that stated that district engineers can exercise discretionary authority when areas with "significant social or ecological functions and values" may be adversely affected by the work, because the commenter believes that the Clean Water Act does not provide regulatory authority for areas with significant social values. Another commenter objected to the use of the term "ecological functions," stating that it is not a term used to define the scope of authority.

We recognize that subsurface connections between waters of the United States are important, but the Section 404 program focuses on surface waters. It is not necessary for the Corps to specify that isolated waters require an interstate or foreign commerce connection for these waters to be considered waters of the United States, because that requirement can be found in 33 CFR Part 328. Discretionary authority can be exercised by division and district engineers where there are sufficient concerns for the aquatic environment under the Section 404(b)(1) guidelines or any other factor of the public interest. Public interest factors include consideration of waters

with "significant social or ecological functions and values."

A couple of commenters stated that the classification of perennial, intermittent, and ephemeral streams will establish a ranking system, implying that perennial streams are more valuable than ephemeral streams. These commenters believe that the majority of streams in the northwestern, northeastern, and southern United States will receive more protection than those in the western and southwestern United States.

We are classifying streams as perennial, intermittent, and ephemeral for the purposes of the NWPs to evaluate or restrict adverse effects to flowing waters more effectively. For example, in NWP 43 we are proposing to prohibit the construction of new stormwater management facilities in perennial streams. Damming perennial streams to construct stormwater management ponds often has more than minimal adverse effects on the aquatic environment, particularly for aquatic organisms such as fish and invertebrates. Dams in perennial streams may block fish passage to spawning areas and disrupt food webs in streams, reducing the productivity of streams. In many areas, it is more effective to construct stormwater management ponds in ephemeral and low-value intermittent streams, because these facilities, if properly designed, constructed, and maintained, will substantially reduce adverse effects of nearby development on local water quality and water flows. In areas where ephemeral streams are valuable aquatic resources, division and district engineers can regionally condition the NWPs to restrict their use in ephemeral streams or require PCNs for activities in ephemeral streams.

Indexing of the Nationwide Permits To Determine Acreage Limits

In the July 1, 1998, **Federal Register** notice, we requested comments on the use of indexing to determine acreage limits for NWPs 39 and 40, as well as the proposed NWP B for master planned developments. Most of the commenters who addressed the use of indexing to determine acreage limits for certain NWPs were opposed to the indexing schemes proposed in the July 1, 1998, **Federal Register** notice. A majority of commenters stated that the proposed indexes were too confusing, not scientifically based, burdensome on the regulated public, and would result in a significant workload increase for the Corps. These commenters believe that indexing acreage limits makes the NWPs less efficient and increases the amount

of time spent reviewing activities that have minimal adverse effects on the aquatic environment. Most of these commenters requested that the Corps continue to use simple acreage limits for the NWPs. Some commenters recommended basing the indexed acreage limit on a percentage of parcel size, whereas other commenters suggested basing the indexed acreage limit on a percentage of the total wetland acreage within the parcel, not the total size of the parcel.

Some commenters believe the proposed indexes for these NWPs were too restrictive and that both the maximum acreage loss and PCN thresholds under the NWP should be higher. Other commenters said that the proposed indexes and PCN thresholds would authorize activities with more than minimal adverse effects on the aquatic environment and recommended reducing the acreage limits and PCN thresholds. Several commenters believe that using indexing to determine acreage limits will allow NWPs to authorize activities that result in more than minimal cumulative adverse effects by not addressing avoidance and minimization. A number of commenters were confused as to how the proposed indexes would be interpreted or utilized, particularly where there was overlap between parcel size ranges and acreage limits. For example, the proposed acreage limit index for NWP A had an acreage limit of $\frac{1}{2}$ acre for parcel sizes of 5 to 10 acres and an acreage limit of 1 acre for parcel sizes of 10 to 15 acres. These commenters were uncertain as to whether the acreage limit for a project constructed on a 10-acre parcel would be $\frac{1}{2}$ acre or 1 acre.

We believe that indexing acreage limits based on project size or project area is necessary for certain NWPs (*i.e.*, NWPs 39 and 40) to ensure that those NWPs authorize only activities that have minimal adverse effects on the aquatic environment. Instead of using the indexing schemes proposed in the July 1, 1998, **Federal Register** notice, we are proposing indexes based on simple algebraic formulas, using a percentage of project area or farm tract size. The proposed indexed acreage limit for NWP 39 has a minimum acreage limit of $\frac{1}{4}$ acre for a single and complete project, with the indexed acreage limit increasing by 2% of the project area to a maximum acreage limit of 3 acres. For NWP 40 activities in playas, prairie potholes, and vernal pools, we are proposing a similar indexing formula, with a base acreage limit of $\frac{1}{10}$ acre and a different percentage of farm tract size (*i.e.*, 1% of farm tract size). For NWP 40 activities in other types of non-tidal

wetlands to increase agricultural production, we are proposing a simple acreage limit of 2 acres, since the average farm tract size in the United States is 275 acres, which means that most agricultural producers would qualify for the maximum acreage limit even if an indexed acreage limit would be used.

The algebraic indexing scheme will be easier to use and less confusing than the indexes proposed in July 1, 1998, **Federal Register** notice. Indexing based on the percentage of project size will avoid the confusion resulting from overlap of parcel size ranges. For example, in the indexing scheme proposed for NWP A in the July 1, 1998, **Federal Register** notice (see 63 FR 36067), a 15-acre parcel would be subject to either a 1 or 2 acre limit. The algebraic index avoids this overlap in acreage limits. We believe that the indexes used for NWPs 39 and 40 will allow the authorization of most activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively. Division engineers can regionally condition NWP 39 to make the indexed acreage limit more restrictive, either by reducing the minimum acreage limit, percentage of project area or farm tract size, or maximum acreage limit. For example, NWP 39 can be regionally conditioned to reduce the minimum acreage limit from $\frac{1}{4}$ acre to $\frac{1}{10}$ acre or the percentage of project area from 2% to 1%. However, paragraph (a) of NWP 40 cannot be regionally conditioned by division engineers, to ensure consistent implementation of this part of NWP 40 in cooperation with NRCS throughout the country. An activity that exceeds the indexed acreage limit will require authorization by another NWP, a regional general permit, or an individual permit. The use of an indexed acreage limit does not preclude project proponents from complying with General Condition 19, which requires on-site avoidance and minimization of activities in waters of the United States to the maximum extent practicable. If the District Engineer determines that the proposed work will result in more than minimal adverse effects on the aquatic environment, then discretionary authority will be exercised and the applicant will be notified that another form of Corps authorization, such as an individual permit or regional general permit, is required.

Another source of confusion for NWP applicants cited by commenters was the application of PCN thresholds with an indexed acreage limit. For example, the proposed index for NWP 39 had an acreage limit of $\frac{1}{4}$ acre for activities on

parcels less than five acres in size. The proposed PCN threshold for this NWP was $\frac{1}{3}$ acre. Some commenters thought that this implied that losses of greater than $\frac{1}{4}$ acre of waters of the United States would require notification to the Corps, but this requirement was not specifically stated in the NWP.

For NWP 39, the PCN threshold has been changed to $\frac{1}{4}$ acre. Since this threshold is the same as the minimum acreage limit of $\frac{1}{4}$ acre in the indexed acreage limit, the PCN requirements for these NWPs should not be confusing. District engineers will not receive PCNs for agricultural activities authorized only by paragraph (a) of NWP 40. Instead, they will receive postconstruction reports from landowners that describe the authorized work.

Workload Implications of the New NWPs

A number of commenters stated that the complexity of the proposed NWPs will increase the Corps workload for the NWP program. Some of these commenters said that the current staffing level of the Corps is inadequate to implement the proposed new and modified NWPs. One commenter stated that utilization of the NWPs as a tool to prioritize workload is an abdication of the Corps responsibility. This commenter said that the Corps regulatory program can be made more efficient through other means, such as improved technology, the use of private delineators, permit fees, and increased coordination.

For many years, general permits, including NWPs, have been used by the Corps to manage its workload by authorizing activities with minimal adverse effects on the aquatic environment that would otherwise be subject to the more resource-intensive individual permit process. The Corps does not have the resources to review each activity that requires a Section 404 and/or Section 10 permit through the individual permit process. Requiring individual permits for all these activities would also create unnecessary burdens on the regulated public. Most activities authorized by the Corps regulatory program are authorized by general permits. General permits, including NWPs, authorize activities that would usually be authorized through the individual permit process with little or no change in the scope of work. It is inefficient to require an individual permit for activities that have minimal adverse effects on the aquatic environment that the Corps could authorize more effectively through the general permit process. General permits

also benefit the aquatic environment because they provide incentives for landowners and developers to design their projects to reduce adverse effects on the aquatic environment to qualify for the expedited permit process provided by general permits.

The scope of applicable waters for the proposed NWPs and the proposed new NWP general conditions, especially General Condition 27, will cause substantial increases in the Corps workload by requiring individual permits for many activities in designated critical resource waters, impaired waters, and waters of the United States within the 100-year floodplain. The proposed prohibition against using NWPs to authorize certain activities resulting in permanent, above-grade fills in waters of the United States within the 100-year floodplain is expected to result in two to three thousand more individual permits per year added to the Corps workload.

The increase in the Corps workload caused by the proposed NWP general and regional conditions will require that most Corps districts reprioritize their activities. Corps districts will focus their efforts on those actions that provide the most value added to the environment and the public. Inevitably, the substantial increase in workload will result in an increase in permit evaluation time for most permit reviews. At this point, we cannot quantify these impacts.

Preconstruction Notification

A few commenters recommended that the Corps extend the review period for preconstruction notifications (PCNs) from 30 days to 45 or 60 days, due to the increased complexity of the new and modified NWPs. One commenter expressed support for the 30-day review period for PCNs. Several commenters believe that the PCN thresholds and information requirements are confusing and that the PCN thresholds should be lower for all activities, such as $\frac{1}{4}$ acre of waters or 100 linear feet of stream bed.

We recognize that the proposed NWPs are more complex than NWP 26 and that a longer PCN period is necessary to effectively review notifications. We are proposing to modify the preconstruction notification process for the NWPs to provide more time for district engineers to review PCNs. District engineers will have 30 days from the date of receipt of a PCN to determine if it is complete. If the PCN is not complete, the District Engineer can make only one request for additional information from the applicant. This request must be made during the initial 30-day period. District

engineers cannot make additional requests for more information to evaluate the PCN. If the applicant has not provided all of the requested information to the District Engineer, then the PCN is not considered complete and the PCN review process will not start until the applicant has provided all of the requested information to the District Engineer. Upon receipt of a complete PCN, the District Engineer has 45 days to determine if the proposed work qualifies for NWP authorization, with or without special conditions, or exercise discretionary authority to require an individual permit. If the District Engineer does not notify the applicant of the outcome of the PCN review prior to the end of the 45-day period, then the proposed work is authorized by NWP and the permittee can begin work provided all of the requisite State and local authorizations, such as WQC, have been obtained. We are proposing to modify General Condition 13 in accordance with the proposed changes to the notification process discussed above.

The Corps has limited the amount of information required to be submitted with a PCN to the minimum necessary to effectively evaluate the potential adverse effects of the proposed work on the aquatic environment and determine if the project complies with the terms and conditions of the NWPs. By providing the required information when the PCN is first submitted to the Corps, the applicant will minimize delays in processing. The Corps has also changed the PCN threshold for many of the proposed NWPs from $\frac{1}{3}$ acre to $\frac{1}{4}$ acre to provide more consistency. The proposed PCN thresholds for stream bed impacts are similar to the PCN thresholds proposed in the July 1, 1998, **Federal Register** notice.

Two commenters recommended that PCNs should be required for all activities authorized by the new NWPs. These commenters stated that 15 days is an inadequate length of time for agency technical review of site conditions, mitigation plans, and monitoring plans for activities authorized by these NWPs. These commenters also believe that the lack of agency coordination for PCNs violates the Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and the Fish and Wildlife Coordination Act (FWCA). Another commenter stated that the PCN process is illegal.

Requiring PCNs for all activities authorized by NWPs is unnecessary and would substantially reduce the effectiveness of the NWPs. PCN thresholds are established so that only

activities that could potentially result in more than minimal adverse effects on the aquatic environment require notification to the Corps. In addition, the Corps does not have the resources to review PCNs for every activity authorized by NWPs. We are proposing to modify General Condition 13 to provide more time for Federal and State resource agencies to review PCNs. These agencies will have 10 calendar days to notify the District Engineer that they intend to provide substantive, site-specific comments. If these agencies provide such notification, the District Engineer will wait an additional 15 calendar days before making a decision on the PCN. Twenty-five days is an adequate period of time for the Federal and State resource agencies to review PCNs. The intent of agency coordination is to obtain site-specific, substantive comments from these agencies within their area of expertise. Detailed mitigation and monitoring plans are not required for the PCN. The applicant need only propose compensatory mitigation that will offset losses of waters of the United States. The Federal and State resource agencies can comment on the appropriateness of the proposed compensatory mitigation. The District Engineer will determine if the proposed compensatory mitigation is appropriate and incorporate the requirements for compensatory mitigation, including detailed plans and monitoring requirements, into the NWP authorization as special conditions.

The PCN process does not violate ESA, NEPA, or FWCA. General Condition 11 ensures that activities authorized by NWPs comply with ESA. There is no provision in NEPA requiring the Corps to coordinate activities authorized by general permits with other Federal, State, or local agencies. The NWP issuance process satisfies the coordination requirements of FWCA. The PCN process is not illegal; it is merely a mechanism to ensure that the NWPs do not authorize activities with more than minimal adverse effects on the aquatic environment, individually or cumulatively.

Two commenters suggested that the avoidance and minimization statement required for NWPs 39 and 43 should be required for all NWP activities that require a PCN. Another commenter recommended that the minimization and avoidance statement should be limited to one page.

We disagree that the avoidance and minimization statement is necessary for all NWP activities that require a PCN. General condition 19 requires that permittees avoid and minimize impacts to waters of the United States on-site to

the maximum extent practicable. In addition, many activities authorized by NWP must occur in a certain location. For example, repair and maintenance activities authorized by NWP 3 must be in the same location as the existing structure or fill. Bank stabilization activities authorized by NWP 13 must occur at the location of the bank. The statement required for NWPs 39 and 43 is intended to encourage the applicant to consider ways to avoid and minimize impacts to waters of the United States during project planning. It also provides avoidance and minimization information to Corps personnel with the PCN, instead of requiring the District Engineer to ask the applicant if additional avoidance and minimization can be achieved. The avoidance and minimization statement will allow more expeditious review of the PCN.

One commenter stated that a delineation of special aquatic sites should be required for every activity that requires a PCN. Another commenter recommended establishing a notification process for projects that include development on floodplains, so that State and local floodplain management agencies can review the proposed work.

We disagree that a delineation of special aquatic sites is necessary for every activity requiring a PCN. General condition 13, paragraph (b)(4), lists the NWPs that require submission of a delineation of special aquatic sites with the PCN. It is not practical for the Corps to establish a notification process for projects that occur in floodplains. In many parts of the country, there are floodplains that are not waters of the United States. Development activities in floodplains that do not involve discharges of dredged or fill material into jurisdictional wetlands or other waters of the United States do not require a Section 404 permit, even though a Corps permit may be required to cross waters of the United States to provide access to the upland development. Many State and/or local governments currently have programs that address construction in floodplains. Issuance of an NWP authorization for an activity within a floodplain does not preclude the State or local floodplain management agency from denying its authorization. If the State or local regulatory agency does not authorize the proposed work, then the project proponent cannot do the work even though the Corps may have determined that it qualifies for authorization under the NWP program.

In response to the July 1, 1998, **Federal Register** notice, the National Park Service (NPS) requested that they

receive full opportunity to comment on all proposed NWP activities that may impact NPS resources. NPS also requested that they be able to request elevation of specific projects to require review under the individual permit process. Although the Department of the Interior, through the U.S. Fish and Wildlife Service (FWS), has the opportunity to review PCNs that require agency coordination, NPS believes that the 5 day comment period does not provide enough time to allow FWS to consult with NPS.

We do not agree that it is necessary to consult with NPS on every NWP activity. If NPS has specific concerns, they should be addressed at the district level, either through coordination agreements between the District Engineer and the local NPS office or through the regional conditioning process. The proposed modification of the PCN process would allow district engineers to provide up to 25 calendar days for agency comment on a specific NWP activity that requires agency coordination. We believe that this is ample time for FWS to coordinate with NPS.

One commenter recommended that the Corps post PCNs on district Internet home pages to allow the public to provide comments and better track cumulative adverse effects. Another commenter requested that the Corps coordinate with the appropriate agency prior to issuing NWP authorizations in Tribal trust lands to determine if treaty reserved resources would be adversely affected by the work.

The purpose of the PCN process is to provide the Corps with an opportunity to determine if a proposed activity complies with the terms and conditions of the NWPs and results in minimal adverse effects on the aquatic environment, individually or cumulatively. Posting PCNs on the Internet would add no value to the Corps review of the PCN. Cumulative adverse effects on the aquatic environment will continue to be tracked by Corps districts. Corps districts can regionally condition the NWPs to require coordination for activities that may adversely affect treaty reserved resources in Tribal trust lands.

Compensatory Mitigation

A large number of commenters specifically addressed the compensatory mitigation requirements of the proposed new and modified NWPs. A few commenters stated that the proposed provisions discourage compensatory mitigation, because the requirements are too complex and burdensome. Other commenters assert that the

compensatory mitigation requirements discussed in the July 1, 1998, **Federal Register** notice are not specific enough. Many commenters provided recommendations concerning the size and types of losses authorized by the NWPs for which compensatory mitigation is appropriate. These recommendations included requiring compensatory for: (1) All activities authorized NWPs, (2) activities that require submittal of a PCN, (3) losses of greater than $\frac{1}{3}$ acre of waters of the United States, or (4) losses of greater than 1 acre of waters of the United States. One commenter suggested that compensatory mitigation should also be required for all impacts to non-wetland aquatic resources. Several commenters stated that the Corps should not require compensatory mitigation for wetlands losses because other State and local regulatory agencies already have such requirements.

We acknowledge that the discussions of compensatory mitigation requirements in the July 1, 1998, **Federal Register** notice contained some inconsistencies. Therefore, we will clarify these requirements in general terms, but permittees must recognize that specific compensatory mitigation requirements for particular projects are established by the District Engineer. Compensatory mitigation will normally be required for NWP activities that require submission of a PCN (e.g., losses of greater than $\frac{1}{4}$ acre of waters of the United States), and in all cases where compensatory mitigation is necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment. The District Engineer may determine that compensatory mitigation is not necessary for a particular project because the proposed work will result in only minimal adverse effects on the aquatic environment. Activities that do not require notification are presumed to result in minimal adverse effects and would not require compensatory mitigation to bring the adverse effects to the minimal level. District and division engineers can regionally condition an NWP to lower the notification threshold and determine, on case-by-case basis, if compensatory mitigation is necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment.

Although many State and local agencies may require compensatory mitigation for losses of wetlands, we can require compensatory mitigation for losses of other waters of the United States. If the compensatory mitigation requirements of a State or local agency for a particular project adequately

address the Corps concerns or requirements, then that compensatory mitigation can be used to satisfy the Corps compensatory mitigation requirements. However, some State and local governments may not have adequate compensatory mitigation provisions to ensure that activities authorized by NWPs will result in minimal adverse effects on the aquatic environment. Therefore, the Corps can impose its own compensatory mitigation requirements.

Many commenters expressed opposition to the use of compensatory mitigation to offset losses of waters of the United States that result from activities authorized by NWPs. They believe that compensatory mitigation encourages off-site, out-of-kind compensation for losses of waters of the United States. Another objection raised by these commenters is that some wetland types are not easily created. A number of commenters cited studies that evaluated compensatory mitigation projects and found them to be unsuccessful or only partially successful. One commenter stated that only restoration and creation should be used to calculate net gains in wetlands. One commenter recommended limiting preservation only to exceptional quality or unique wetlands.

Compensatory mitigation is often necessary to offset the loss of waters of the United States and ensure that an activity authorized by NWP will result in minimal adverse effects on the aquatic environment. The NWP regulations at 33 CFR Part 330.1(e)(3) allow permittees to provide compensatory mitigation to reduce the adverse effects of the proposed work to the minimal level. The functions and values provided by waters of the United States that are lost due to authorized activities can be replaced by carefully planned and constructed restoration, enhancement, and creation of aquatic habitats. Compensatory mitigation can also protect and enhance important aquatic resource functions and values through the establishment and maintenance of vegetated buffers adjacent to waters of the United States and, in exceptional circumstances, the preservation of high value aquatic habitats. Without compensatory mitigation, the Corps regulatory program would not be able to satisfy a principal goal of the Clean Water Act, which is the restoration and maintenance of the physical, chemical, and biological integrity of the Nation's waters.

Compensatory mitigation requirements should be based on what is best for the aquatic environment, not

inflexible requirements for in-kind and on-site compensatory mitigation that may not successfully replace lost functions and values of aquatic habitats. The primary goal of compensatory mitigation is to replace the functions and values of waters of the United States that are lost due to activities authorized by NWP. It is essential that compensatory mitigation projects that restore, enhance, or create aquatic habitats have a high probability of success. Much of the failure of past compensatory mitigation projects is due to poor site selection, planning, and implementation. On-site compensatory mitigation projects may fail because site conditions, such as local hydrology, are usually substantially changed by the authorized activity. For example, once a residential subdivision is constructed, the on-site hydrology may be altered to the extent that the site cannot support a restored or created wetland. In such cases, it may be better for the aquatic environment to conduct the compensatory mitigation project off-site, in a location with better chances for success within the watershed of the authorized work.

When reviewing compensatory mitigation proposals, district engineers will consider what is best for the aquatic environment, including requiring vegetated buffers to open waters, streams, and wetlands. Wetland restoration, enhancement, creation, and in exceptional circumstances, preservation are not the only compensatory mitigation activities that can be required for an NWP authorization. Stream restoration and enhancement can also provide compensatory mitigation for losses resulting from activities authorized by NWPs. Upland buffers can be considered as out-of-kind compensatory mitigation because they protect local water quality and aquatic habitat. Vegetated buffers reduce adverse effects to water quality caused by adjacent land use. For example, forested riparian buffers provide shade to streams, supporting cold water fisheries. We cannot require compensatory mitigation for upland impacts, but we can require, as compensatory mitigation, upland vegetated buffers that protect water quality and aquatic habitat. It is important to note that the NWPs are optional permits, and if the project proponent does not want to establish and maintain vegetated buffers adjacent to waters of the United States to qualify for an NWP authorization, then he or she can apply for authorization through the individual permit process. The establishment or maintenance of a

vegetated buffer adjacent to waters of the United States can be an important part of the compensatory mitigation required for a Corps permit. District engineers should adjust the amount of "replacement acreage" required for compensatory mitigation by an amount that recognizes the value of the vegetated buffer to the aquatic environment.

We recognize that certain wetland types are not easily restored or created. Past failures to replace certain types of wetlands are not sufficient justification to stop all efforts to replace wetlands lost through the Section 404 program. Some types of wetlands are easily restored or created, although they may take several years to achieve functional equivalence compared to natural wetlands. Preservation is also an important mechanism to protect remaining high value wetland types, particularly those that cannot be easily restored or created. Careful site selection, planning, and construction are essential to achieve greater success for compensatory mitigation projects.

The ability of the Corps to review and monitor compensatory mitigation projects required for NWP authorizations is dependent upon workload and available resources. Increased use of mitigation banks and appropriate in lieu fee programs may make monitoring efforts more manageable, because those efforts can be focused on a smaller number of large sites instead of a large number of small individual mitigation projects. Mitigation banks and appropriate in lieu fee programs may provide better compensatory mitigation because they are often better planned, constructed, and maintained. The goal of compensatory mitigation is to offset losses of waters of the United States authorized by the Corps regulatory program. Because the Corps program causes the avoidance of most high value wetlands, most permitted impacts are to moderate or low value wetlands.

We also received numerous comments concerning the location and types of compensatory mitigation that should be acceptable for the NWP program. Most commenters expressed a preference for restoration, and some commenters oppose the use of enhancement or preservation of aquatic resources to provide compensatory mitigation. Some commenters oppose the use of out-of-kind compensatory mitigation to offset losses of waters of the United States. Several commenters recommended that the Corps require compensatory mitigation at specific ratios, ranging from 1:1 to 5:1. Many commenters stated that compensatory mitigation

projects should be confined to the watershed where the losses resulting from the authorized activity occurred. Most commenters recommended that the NWPs should not express a sequencing preference for on-site mitigation, mitigation banks, or in lieu fee programs. One commenter stated that the NWPs should have a general condition establishing compensatory mitigation performance criteria, to specify basic requirements.

We recognize that restoration is the type of compensatory mitigation with the greatest probability of success and encourage its use wherever possible. Enhancement of aquatic resources improves the functions and values of low-quality waterbodies, but should not be used in high value waters. As stated in the July 1, 1998, **Federal Register** notice, preservation of aquatic resources is estimated to comprise less than 5% of the compensatory mitigation required by the Corps, but it is an important mechanism for protecting high value wetlands and waterbodies.

Out-of-kind compensatory mitigation should not be prohibited because it can provide substantial benefits for the aquatic environment. An important form of out-of-kind compensatory mitigation is the establishment and maintenance of upland vegetated buffers adjacent to open or flowing waters or wetlands. Upland vegetated buffers help protect and enhance the water quality and aquatic habitat features of waters of the United States.

Specific compensatory mitigation requirements, such as replacement ratios, are determined by district engineers on a case-by-case basis. For the NWPs, district engineers determine what compensatory mitigation is necessary to ensure that the adverse effects of the proposed work on the aquatic environment are minimal. The Corps can require compensatory mitigation in excess of a 1:1 ratio of impact acreage to compensatory mitigation acreage in order to adequately replace the lost aquatic resource functions and values. The Corps can also accept out-of-kind compensatory mitigation, if it provides benefits to the aquatic environment. We believe that it is inappropriate, due to the differences in aquatic resource functions and values across the country, to establish national requirements for compensatory mitigation.

One commenter stated that the compensatory mitigation data cited by the Corps in the July 1, 1998, **Federal Register** notice was misleading because many NWP activities do not require reporting to the Corps. Several commenters requested that the Corps

provide accurate data on losses of waters of the United States to allow the public to consider compensatory mitigation requirements and that this data should specify the proportion of compensatory mitigation that is achieved through enhancement of aquatic resources. A number of commenters requested that the Corps modify its data collection efforts to monitor the amount of compensatory mitigation that is accomplished through restoration, enhancement, creation, and preservation, as well as the effectiveness of these activities. Two commenters recommended that the Corps furnish this data to the States on an annual basis.

The compensatory mitigation data cited in the July 1, 1998, **Federal Register** notice is based on the acreage of reported wetland impacts and wetland compensatory mitigation. This data does not include compensatory mitigation for impacts to streams and other types of non-wetland aquatic habitats. Many of the non-reporting NWP activities do not result in filling of wetlands and would not normally require compensatory mitigation to ensure that the adverse effects to the aquatic environment are minimal. For NWP activities that do not require notification to the Corps, many permittees request a written determination from the Corps to ensure that their projects qualify for NWP authorization. The wetland impact acreage for these activities is included in the data compiled by the Corps. District engineers can require compensatory mitigation for these projects to ensure that they result in only minimal adverse effects on the aquatic environment.

The data collection systems for most Corps districts do not currently differentiate between the amounts of compensatory mitigation provided through restoration, enhancement, creation, or preservation. Instead, most districts track only the total amount of compensatory mitigation required for Corps permits. The effectiveness of compensatory mitigation efforts is monitored by district engineers on a case-by-case basis, to the extent allowed by workload and personnel resources. Therefore, we cannot collect this type of information. The data the Corps collects on impacts to waters of the United States and compensatory mitigation is public information.

Support and opposition for the use of mitigation banks and in lieu fee programs to compensate for NWP impacts was equivocal. Many commenters asserted that mitigation banks cannot replace the functions and

values of smaller, scattered wetlands and that the increased use of mitigation banks and in lieu fee programs will not replace local wetland functions and values. A couple of commenters were concerned that consolidation of wetland habitats in a single place could increase the vulnerability of that single ecological wetland unit, and would not allow for a mosaic of wetlands. Others argued that mitigation banks would better compensate for scattered wetland losses by providing consolidated locations for compensatory mitigation, with greater chances of success. Some commenters expressed concern that mitigation banking would disrupt the mitigation sequence process and one commenter specifically requested that the Corps place stronger emphasis upon avoidance and minimization of impacts. Many commenters recommended streamlining the process for establishing mitigation banks, and some commenters requested modification of the NWP terms and conditions to encourage the use of mitigation banks. These commenters also requested that the Corps more clearly establish the policy that on-site compensatory mitigation may not always be the preferred choice. Several commenters suggested that mitigation banks should be established in each watershed. Some commenters expressed concern that mitigation banks, in some cases, utilize preservation of aquatic resources, which does not replace lost wetland functions and values, and does not comply with the goal of "no net loss" of wetlands.

We cannot require the establishment of mitigation banks in a particular watershed or geographic area. Mitigation banks are usually constructed and maintained by entrepreneurs, who locate mitigation banks in areas where they believe the established credits will sell quickly. In the December 13, 1996, **Federal Register** notice (61 FR 65874-65922), we did not direct Corps districts to require permittees to use mitigation banks for offsetting wetland losses due to NWP 26, but suggested that mitigation banks could be used, in addition to in lieu fee programs, to provide compensatory mitigation for impacts below 1 acre.

Consolidated mitigation methods, including mitigation banks and in lieu fee programs, are often an efficient means of compensating for losses of waters of the United States, particularly for multiple small projects, and may confer benefits to the aquatic environment as well (see 61 FR 65892). We recognize that mitigation banks and in lieu fee programs are often more practicable and successful because of the planning and implementation efforts

typically expended on these projects by their proponents. In contrast, individual efforts to create, restore, or enhance wetlands to replace small wetland losses may be unsuccessful because of poor planning and/or construction. Furthermore, consolidated mitigation efforts are often better monitored and maintained and often result in the establishment of a larger contiguous wetland area that benefits the overall local aquatic environment and many of the species that utilize larger aquatic habitats. Although smaller, scattered wetland areas that exist in the landscape as a mosaic provide essential habitat for certain species, the local changes in land use usually makes it impossible to maintain those mosaics in any ecologically functional capacity. Recreating those wetland mosaics is often impractical and it is better to provide compensatory mitigation through consolidated mitigation methods.

As with all other compensatory mitigation, the use of mitigation banks and in lieu fee programs does not eliminate the need to avoid impacts on-site. General Condition 19 of the NWPs requires that permittees avoid and minimize losses of waters of the United States on-site to the maximum extent practicable. If the District Engineer determines that compensatory mitigation is necessary to ensure that the particular NWP activity results only in minimal adverse effects on the aquatic environment, individually or cumulatively, then the District Engineer can require compensatory mitigation to offset the loss of waters of the United States. Mitigation banks and appropriate in lieu fee programs can be used to provide the required compensatory mitigation. The preferred form of compensatory mitigation should be based on what is best for the aquatic environment, whether the compensatory mitigation is on-site, off-site, in-kind, or out-of-kind.

Many of the commenters that were opposed to in lieu fee programs were strongly in favor of mitigation banks. Several of these commenters stated that mitigation banks have distinct advantages over in lieu fee programs, since mitigation banks have specific processes to establish goals, credits, and monitoring. Some commenters believe that in lieu fee programs compete unfairly with mitigation banks, since they are easier to establish and are often less costly than mitigation banks. One commenter requested that in lieu fee programs be prohibited in areas with established and functional mitigation banks with available credits.

Mitigation banks and in lieu fee programs are not common throughout the country. Therefore, it would be impractical to require their use as a preferred or sole means of providing compensatory mitigation for impacts authorized by NWP. While in lieu fee programs are used in several Corps districts, efforts continue to ensure that in lieu fee programs provide adequate compensatory mitigation. District engineers have the authority to approve or disapprove the use of specific mitigation banks or in lieu fee programs as compensatory mitigation for losses of waters of the United States authorized by NWP. Permittees should have the flexibility to utilize compensatory mitigation methods that are within their means to accomplish and meet the requirements to offset unavoidable losses of waters of the United States. To the extent practicable, permittees should consider use of approved mitigation banks and other forms of consolidated compensatory mitigation. District engineers will evaluate compensatory mitigation proposals for appropriateness and practicability as indicated in the NWP general conditions.

A number of commenters expressed concern about the effectiveness of in lieu fee programs in providing compensatory mitigation. Many commenters requested the establishment of specific requirements for in lieu fee programs. Two commenters suggested that the Corps establish a data collection system for in lieu fee programs, including payments and program credits, and report this data on an annual basis. Several commenters noted that in lieu fee programs typically do not require completion in advance of utilizing credits, as is the case with mitigation banks. Many commenters stated that payments to in lieu fee programs do not result in replacement of lost wetland functions and values. One commenter suggested limiting the use of in lieu fee programs to compensate for losses of small, low value wetlands and farmed wetlands.

In lieu fee mitigation programs have been effective in some parts of the country. Typically these programs are operated by well-established entities such as State and local government organizations or conservation groups. District engineers review in lieu fee programs to determine if they are appropriate for providing compensatory mitigation for losses of waters of the United States that result from activities authorized by the Corps regulatory program. The District Engineer should have a reasonable amount of confidence

in the operator prior to utilizing such areas for compensatory mitigation. Especially with the NWPs, in lieu fee programs should provide applicants with a compensatory mitigation option that is efficient and appropriate for the authorized work. District engineers use their own methods to track the use of in lieu fee programs. We do not agree that in lieu fee areas should be limited to small areas and farmed wetlands. When evaluating a compensatory mitigation proposal, the Corps should consider the action that is best for the aquatic environment. In some cases, on-site compensatory mitigation may not be a practicable option because there may be a low probability of success or adjacent land uses make any type of on-site compensatory mitigation infeasible. In some locations, an appropriate in lieu fee program may be most appropriate, while in another district or watershed, a mitigation bank would be the best option.

Vegetated Buffers

Some commenters supported the Corps increased emphasis on vegetated buffers adjacent to waters of the United States, including the use of vegetated buffers as compensatory mitigation for impacts to waters of the United States. A number of commenters objected to the requirements for vegetated buffers, stating that requirements for vegetated buffers, particularly upland buffers, adjacent to open and flowing waters are illegal because the Corps would be expanding its jurisdiction to upland areas. Two commenters said that the vegetated buffers can be used as a form of compensatory mitigation, but could not be required for an NWP authorization. One commenter stated that vegetated buffers should not be considered compensatory mitigation because they do not replace lost wetland acreage, including functions and values. Many commenters requested that the Corps provide a more specific definition and minimum size standards for vegetated buffers. A couple of commenters recommended specific minimum widths for vegetated buffers. One commenter suggested a buffer width of 1 or 2 kilometers from the edge of the wetland to preserve maximum biodiversity. Another commenter recommended a minimum buffer width of 100 feet from the edge of the wetland.

We disagree with the assertion that requiring a vegetated buffer as a condition of an NWP authorization is illegal and an attempt to expand the Corps jurisdictional authority. The Corps currently has regulatory authority through the Clean Water Act to require vegetated buffers as a condition of an

NWP authorization because vegetated buffers, including upland buffers, help prevent degradation of water quality and aquatic habitat. The establishment and maintenance of wetland or upland vegetated buffers adjacent to open waters, streams, or other waters of the United States can be considered compensatory mitigation for losses of waters of the United States authorized by Corps permits. One of the goals of the Clean Water Act is the maintenance and restoration of the chemical, physical, and biological integrity of the Nation's waters. Regulatory agencies can place any conditions on a permit or authorization as long as those conditions are related to the activities regulated by that agency. The Section 404 activities regulated by the Corps usually cause adverse effects on the aquatic environment. To offset these adverse effects, we can require measures, such as vegetated upland buffers adjacent to streams, that prevent or reduce adverse effects on the aquatic environment. Vegetated buffers, including uplands, adjacent to open waters of the United States provide many of the same functions and values of wetlands, such as flood mitigation, erosion reduction, the removal of pollutants and nutrients from water, and support aquatic habitat values. In summary, since vegetated buffers adjacent to open waters, even if they are uplands, help maintain the physical, biological, and chemical integrity of the aquatic environment, the Corps can require these buffers as a condition of a Clean Water Act Section 404 permit. Permit applicants must recognize that NWPs are optional permits and if the applicant believes that the NWPs are too restrictive, then he or she can apply for authorization through the individual permit process.

For the purposes of the Corps regulatory program, vegetated buffers are areas inhabited by woody or herbaceous plants that are adjacent to streams, lakes, ponds, wetlands, or other waters of the United States. Vegetated buffers can be either wetlands or uplands. Mowed lawns are not considered vegetated buffers, because these areas do not provide the same functions as areas inhabited by fully grown woody or herbaceous vegetation. Upland vegetated buffers are generally as effective at protecting open water quality as wetland buffers, and are often the only choice where there are no wetlands adjacent to a stream. Vegetated buffers, including uplands, adjacent to open waters, streams, and wetlands, should be an integral part of the compensatory mitigation requirements

for a particular project. Vegetated buffers can be used as out-of-kind mitigation to offset part of the wetland loss because they provide substantial benefits for the local aquatic environment. Vegetated buffers provide the following functions and benefits to the aquatic environment: (1) Reducing adverse effects to water quality by trapping and removing sediments, pollutants, and nutrients from surface runoff; (2) enhancing infiltration of water into the soil, which allows plants and microbes to remove nutrients and pollutants from water; (3) decreasing storm flows to streams, thereby reducing downstream flooding and degradation of aquatic habitat; (4) decreasing erosion of stream beds and surrounding land by slowing stormwater runoff velocities and increasing infiltration; (5) reducing soil erosion by keeping the soil in place with plant roots; (6) maintaining fish habitat by reducing water temperature changes; (7) providing detritus from riparian vegetation that contributes to the aquatic food web; (8) providing aquatic habitat features such as snags and shade; (9) providing habitat to a wide variety of aquatic and terrestrial species; and (10) providing corridors for movement of many species of wildlife.

For the purposes of the NWP, vegetated buffers should consist mostly of native trees and shrubs. In drier areas of the United States, vegetated buffers can consist of herbaceous vegetation, provided the vegetation is not mowed or removed. Native trees and shrubs should be planted, where possible, to establish a vegetated buffer where one does not exist. If the buffer area is degraded or inhabited by invasive or exotic plant species, then these species should be removed and the area planted with appropriate native species to the extent practicable.

Districts should normally require vegetated buffers that are between 50 and 125 feet wide. For streams, the width of the buffer is measured out from the bank of the stream, not the width across the stream (*i.e.*, the buffer will be 50 to 125 feet wide on each side of the stream channel). For other open waters, the width of the buffer is measured from the bank; if no bank is present, the ordinary high water mark should be used instead. District engineers will use their discretion and judgement to determine appropriate vegetated buffer widths for particular projects. If adequate State or local buffer width requirements already exist, district engineers should utilize the same requirements. The width of the vegetated buffer required as part of the NWP authorization must balance the benefits provided to the aquatic

environment with the uses of the property resulting from the authorized work. Buffer widths should not be excessive, with little additional benefits for the aquatic environment. Buffer width requirements can also depend on the condition of the local watershed. The Corps will determine what is best for the watershed involved, and what is practicable to the applicant.

Conservation easements, deed restrictions, or similar restrictions should be imposed on the vegetated buffer to ensure that the buffer is maintained. Developers should be encouraged to place vegetated buffers in community open space areas, especially when such areas are required by State or local statutes or regulations. Recreational (*e.g.*, hiking, nature, etc.) trails should generally be constructed outside of the vegetated buffer area, but these trails may be constructed within the buffer, provided the buffer is wide enough to accommodate the trail and the trail is constructed in such a manner so that it does not adversely affect the functions of the buffer.

Assessing Cumulative Impacts on a Watershed Basis

A number of commenters stated that it is difficult to determine when an adverse effect on the aquatic environment is minimal on an individual or cumulative scale. These commenters said that the Corps needs to utilize technological improvements, such as geographic information systems, to make these determinations because they believe the Corps current data collection efforts are inadequate to assess cumulative adverse effects on the aquatic environment. One commenter suggested that permit applicants should be required to identify past and future impacts for projects and that the remaining wetlands on the site should be deed restricted.

In the July 1, 1998, **Federal Register** notice, we discussed our current data collection efforts for NWPs, regional general permits, and standard permits. We are continuously modifying our methods of data collection to improve our ability to assess cumulative adverse effects on the aquatic environment that result from activities authorized by the Corps regulatory program. For each authorized activity, the United States Geological Survey (U.S.G.S.) hydrological unit code is entered in the database to record which watershed the activity is located. This data, along with other data collected for each authorized activity, will be used to assess the cumulative adverse effects on that watershed that result from activities authorized by the Corps.

Since the Corps resources are limited, the amounts and types of data that can be collected must strike a balance between the amount of work required to evaluate permit applications and the usefulness of the data to monitor the cumulative adverse effects of those permitted activities on the aquatic environment. The data collected by the Corps regulatory program is limited to the data necessary to assess cumulative adverse effects so that the Corps can effectively evaluate permit applications and conduct enforcement and compliance activities. The Corps recognizes that there are gaps in the data collection effort because many of the activities authorized by NWPs do not require preconstruction notification to the Corps. However, in many cases where the NWP activity does not require notification to the Corps, permit applicants request that the Corps verify that the proposed work qualifies for authorization under the non-reporting NWP. The impacts from these projects are included in the data collected by the Corps, so the data collection gap is not as great as some critics of the NWP program believe. We do not have the resources to provide field verification of the adverse effects of all activities authorized by NWPs. We also cannot fully monitor all of the compensatory mitigation that is required as special conditions to many NWP authorizations.

For the proposed new and modified NWPs, we will continue to collect data on a watershed basis to ensure that the use of the NWPs does not result in more than minimal adverse effects on the aquatic environment. The Corps will continue to improve its data collection efforts for all types of permits, not just NWPs, to better assess the adverse effects of the Corps regulatory program on the aquatic environment.

When assessing cumulative adverse effects on the aquatic environment, particularly on a watershed basis, it is important to note that we can only assess those adverse effects that result from activities authorized by the Corps pursuant to Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act. The aquatic environment is also adversely affected by activities that do not require a Corps permit. For example, construction of an upland residential development can result in adverse effects on water quality and aquatic habitat due to the removal of woody vegetation in upland riparian zones and surface runoff. Development and landclearing activities in adjacent or nearby uplands can substantially

alter the watershed, adversely affecting the local aquatic environment, but such activities are not regulated under Section 404 of the Clean Water Act.

Compliance With the Endangered Species Act

A number of commenters indicated that the NWP do not satisfy the requirements of the Endangered Species Act (ESA), especially for those activities that do not require submission of a PCN to the Corps. These commenters expressed concern that NWPs do not provide the necessary coordination required by ESA where proposed activities may adversely affect endangered or threatened species. One commenter stated that an individual permit should be required for activities within critical habitat for Federally-listed endangered and threatened species. Several commenters remarked that the Corps should condition the NWPs to prohibit activities that adversely affect State-listed endangered or threatened species. One of these commenters cited the reference to State-listed endangered or threatened species in the regulations for the Section 404(b)(1) guidelines (40 CFR part 230). A few commenters indicated that the NWPs focus too much on wetlands with little consideration of other aquatic habitats, such as streams and rivers inhabited by salmon and trout. Several commenters stated that the Corps is in compliance with the ESA because the NWPs are conditioned so that no activity authorized by NWPs may jeopardize the continued existence of a listed species or its critical habitat. These commenters assert that the Corps should not conduct programmatic formal consultation for activities that have already been determined not to result in adverse effects on endangered or threatened species.

The NWP program contains provisions to ensure that activities authorized by NWPs comply with the ESA. General Condition 11 ensures that the NWPs do not authorize any activity that is likely to jeopardize the continued existence of a Federally-listed threatened or endangered species or a species proposed for designation as a threatened or endangered species or which is likely to modify the critical habitat or such species. In addition, an NWP authorization does not authorize the "take" of any Federally-listed threatened or endangered species. If any listed species or designated critical habitat may be affected by an activity authorized by NWP, the permittee is not authorized to begin work until the requirements of the ESA have been satisfied. The Corps will conduct the

coordination necessary to ensure that activities authorized by NWPs comply with the ESA.

For activities that occur in the vicinity of endangered or threatened species or their designated critical habitat, division and district engineers can regionally condition the NWPs to require notification to the Corps to allow case-by-case review of these activities and ensure compliance with the ESA. It is unnecessary to require an individual permit for NWP activities that may affect endangered or threatened species or designated critical habitat. If the Corps determines that an NWP activity may affect a Federally-listed endangered or threatened species, then the Corps will request formal consultation unless it is not required by 50 CFR Part 402.14(b). After completion of consultation with the U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS), the Corps will determine whether or not the proposed work will be in compliance with Section 7(a) of the ESA. After the Corps makes this determination, the project can be authorized by NWP or the Corps will notify the applicant that no permit can be issued.

In the proposed General Condition 25, entitled Designated Critical Resource Waters, we are proposing to prohibit the use of NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 in NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally-listed threatened or endangered species, coral reefs, State natural heritage sites, or outstanding national resource waters officially designated by the state where those waters area located. General Condition 25 also states that discharges are not authorized by NWPs in designated critical habitat for Federally-listed endangered or threatened species, unless the activity complies with General Condition 11 and the FWS or NMFS has concurred in a determination of compliance with this condition. General Condition 25 is discussed in more detail elsewhere in this **Federal Register** notice.

The Corps does consider the effects of NWP activities on State-listed endangered or threatened species within the overall evaluation of the proposed activity. The provisions relating to endangered or threatened species in the Section 404(b)(1) guidelines apply only to species listed under the Federal Endangered Species Act (see 40 CFR 230.10(b)(3)), although there is some discussion of potential impacts to State-listed endangered and threatened species in 40 CFR Part 230.30. To

address local concerns for the aquatic environment, division engineers can regionally condition the NWPs to restrict their use for activities that may adversely affect State-listed species or their designated critical habitat.

Some commenters questioned the Corps ability to issue any NWPs prior to completion of programmatic consultation with the FWS and NMFS. Another commenter recommended that, instead of programmatic ESA consultation for the NWP, the Corps should conduct consultation at a district or regional level to establish programmatic or categorical mechanisms to comply with the ESA. This commenter believes that programmatic consultation will not adequately address specific ESA concerns. One commenter noted that the request for formal ESA consultation cited in the July 1, 1998, **Federal Register** notice is inconsistent with the Corps finding that the NWP program complies with the ESA. Several commenters requested that the Corps conduct an analysis of the cumulative effects of the NWP program on endangered and threatened species and their critical habitat. A commenter stated that the Standard Local Operating Procedures for Endangered Species (SLOPES) established by some districts are inadequate for complying with ESA. Two commenters requested clarification as to whether or not the incidental take provisions under ESA apply to obligate wetland endangered or threatened species.

We believe that the NWP program complies with the ESA and adequately addresses concerns for endangered and threatened species and their designated critical habitat. In spite of the provisions of General Condition 11 and the ESA Section 7(d) determination issued on June 10, 1997, which states that the NWPs do not adversely affect listed species or critical habitat, formal programmatic ESA consultation for the NWP program was initiated with the FWS and NMFS on June 4, 1999. The programmatic consultation will provide additional assurance that the existing NWPs, as well as the proposed new and modified NWPs, have a formal process to develop any necessary additional procedures at the district level. The programmatic consultation will provide further assurance that the NWP program does not jeopardize the existence of any Federally-listed threatened or endangered species. Both the programmatic ESA consultation and the Programmatic Environmental Impact Statement that will be prepared for the NWP program will address potential cumulative effects on endangered and

threatened species and their designated critical habitat. We believe that the SLOPES help ensure compliance with the ESA at the district level. Districts can meet with local offices of the FWS and NMFS to modify or improve their SLOPES.

In addition to NWP General Condition 11, division and district engineers can impose regional conditions on the NWPs and case-specific conditions to address endangered or threatened species or their critical habitat. For example, Corps regional conditions can prohibit the use of NWPs in designated critical habitat for endangered or threatened species or require notification for activities in areas known to be inhabited by threatened or endangered species. Some Corps districts have conducted programmatic consultation on geographic areas. These efforts usually consider the NWP program in that particular area. In summary, General Condition 11, Corps regional conditions, case-specific special conditions, and SLOPES will ensure that the NWP program complies with the ESA. General Condition 11 states that the NWPs do not authorize the "take" of any Federally-listed endangered or threatened species. It does not matter if the species is an "obligate" wetland endangered or threatened species.

Additional Issues

In response to the July 1, 1998, **Federal Register** notice, some commenters raised several new issues relating to the NWPs. A large number of commenters believe that the Corps is attempting to expand its jurisdictional authority by requiring upland vegetated buffers adjacent to waters of the United States as a condition of the NWPs. Some commenters stated that the Corps is also trying to expand its jurisdictional authority by applying the NWPs to activities that involve excavation of waters of the United States. Several commenters suggested additional restrictions for the NWPs. Other issues include: the use of multiple NWPs to authorize a single and complete project (often referred to as "stacking" of NWPs), the Corps data collection efforts, the use of NWPs on Tribal lands, compliance with Section 106 of the National Historic Preservation Act, enforcement of the NWPs, property rights issues, and State and local authorities.

Expansion of Jurisdictional Authority: Many commenters questioned the Corps authority to require upland vegetated buffers adjacent to open waters, streams, and wetlands, since uplands are not waters of the United States. Some

commenters believe that if vegetated buffers are necessary to protect water quality, then only the appropriate water quality certification agency can require the vegetated buffer. Other commenters stated that the Corps is exceeding its regulatory authority by including excavation activities in the new NWPs.

We have the legal authority to require vegetated buffers adjacent to streams and other waters through the Clean Water Act. The goals of the Clean Water Act include the maintenance of the biological, chemical, and physical integrity of the aquatic environment. The activities regulated by the Corps pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act usually cause adverse effects on the aquatic environment. As compensatory mitigation for losses of waters of the United States, we can require measures, such as vegetated upland buffers adjacent to waters, that offset such adverse effects. Since vegetated buffers adjacent to waters, even if they are uplands, help maintain the physical, biological, and chemical integrity of the aquatic environment, the Corps can require these buffers as a condition of a Clean Water Act Section 404 permit.

Another activity that many commenters believe to be an attempt to expand the Corps regulatory authority is the inclusion of excavation activities in the NWPs, particularly in the definition of "loss of waters of the United States." These commenters cited the recent decision by the United States Court of Appeals for the District of Columbia which upheld the United States District Court for the District of Columbia's decision in the *American Mining Congress v. Corps of Engineers* lawsuit. This lawsuit challenged the Corps and EPA's revised definition of "discharge of dredged material" that was promulgated on August 25, 1993 (58 FR 45008). The revised definition of "discharge of dredged material" was overturned because the District Court held that the rule was outside of the agencies' statutory authority and contrary to the intent of Congress by asserting Clean Water Act jurisdiction over activities where the only discharge associated with the activity is "incidental fallback." These commenters requested that the Corps remove all references to excavation activities from the new and modified NWPs.

Although the revised definition of "discharge of dredged material" published on August 25, 1993, was overturned by these recent court decisions, certain excavation activities are still regulated under Section 404 of

the Clean Water Act and require a Corps permit. Excavation activities that result in redeposits of dredged material into waters of the United States other than incidental fallback require a Section 404 permit. All other excavation activities, if they result in the replacement of an aquatic area with dry land or changing the bottom elevation of a waterbody require a Section 404 permit, and may be authorized by NWPs if they comply with the terms and limits of the NWPs. Excavation activities that result only in discharges classified as "incidental fallback" do not require a Section 404 permit. We have retained the excavation language in the proposed new and modified NWPs and the definition of "loss of waters of the United States" to make it clear that some excavation activities still require a Section 404 permit, and if so, may be authorized by NWPs. A final rule was published in the May 10, 1999, issue of the **Federal Register** (64 FR 25119-25123) with revisions to the Clean Water Act regulatory definition of "discharge of dredged material." The revision clarifies the definition of "discharge of dredged material" by deleting language from the regulatory definition at 33 CFR Part 323.2(d) that was held by the Court to exceed the Clean Water Act statutory authority.

Proposed Additional Restrictions for NWPs: In spite of the increased emphasis on regional conditioning for the new and modified NWPs proposed in the July 1, 1998, **Federal Register** notice, many commenters recommended additional restrictions that they believe should be applied to all NWPs. Several commenters recommended prohibiting the use of NWPs to authorize activities in wetlands that cannot be replaced through wetland restoration or creation, such as bogs, fens, forested wetlands, and vernal pools. One commenter advocated prohibiting the use of NWPs to authorize activities in endangered ecosystems, as identified by the National Biological Service. Two commenters recommended excluding NWPs from areas subject to watershed restoration plans, since many of these projects are funded by Federal agencies. One commenter recommended allowing the NWPs to be used only in states that have developed conservation plans that protect water quality, with no net loss of wetland function and acreage as a goal. This commenter described the State conservation plan as requiring a fee system to achieve the no net loss goal through restoration, preservation, and management of wetlands, with the funds from fees being spent only on projects, not overhead. Several

commenters recommended prohibiting the use of NWP in watersheds that have lost more than 50% of their wetlands. A number of commenters recommended excluding NWP in watersheds upstream or within Outstanding National Resources Waters and within critical resource waters. One of these commenters suggested that the Corps solicit public comments to identify critical resource waters. Regional conditions can be used to prohibit or restrict the use of NWP from high value waters, especially if those waters are difficult to restore or create. We do not agree that NWP should be excluded from use in areas under watershed restoration plans. Some activities authorized by NWP may comply with the watershed restoration plan, and some compensatory mitigation required by NWP authorizations for work within that watershed may provide net benefits for the watershed. Prohibiting the use of NWP in watersheds that have lost greater than 50% of their wetlands would be impossible to implement, because we cannot identify with a defensible degree of certainty the extent of jurisdictional wetlands that existed in that watershed. These commenters did not provide any suggestions to determine the historic extent of wetlands in a watershed or recommend a date to determine the historic baseline for wetlands. In the October 14, 1998, **Federal Register** notice, we proposed to exclude the NWP from critical resource waters and requested comments on how to identify those waters for a national NWP general condition. This proposal is discussed elsewhere in this **Federal Register** notice.

Many commenters, notably the Federal Emergency Management Agency (FEMA), recommended restricting the use of NWP within floodplains. FEMA stated that the use of NWP in the 100-year floodplain is contrary to the Administration's goal of reducing natural hazard impacts on citizens because the NWP provide Federal authorization for activities in floodplains. FEMA believes that the Corps should only authorize activities within designated Special Flood Hazard Areas through the individual permit process and that the NWP should contain a provision stating that the NWP program does not usurp State and local floodplain management programs and regulations governing activities within floodplains. A few commenters stated that the NWP should not authorize activities that result in a net loss of flood storage capacity within the 100-year floodplain. Several commenters

recommended excluding the NWP from watersheds or areas upstream of communities that have been designated as flood disaster areas in the past 10 years.

In the October 14, 1998, **Federal Register** notice, we proposed to prohibit the new NWP from authorizing permanent above-grade wetland fills in waters of the United States within the 100-year floodplain, as mapped by FEMA on their Flood Insurance Rate Maps. This proposal is discussed elsewhere in this **Federal Register** notice.

A number of commenters recommended excluding the use of NWP in tributaries identified as impaired through Section 303(d) of the Clean Water Act due to the loss of wetlands. Several commenters suggested restricting the use of NWP in impaired waters and requested that the Corps solicit public comments on how to identify impaired waters. Other commenters recommended suspending the use of NWP in areas designated as source water zones under the Safe Drinking Water Act or prohibiting the use of NWP in drinking supply watersheds.

In the October 14, 1998, **Federal Register** notice, we proposed to limit the use of NWP in waterbodies and aquifers identified by States as impaired due to the loss of wetlands. This proposal is discussed elsewhere in this **Federal Register** notice. Division and district engineers can regionally condition any of the NWP to prohibit or restrict their use in designated source water zones under the Safe Drinking Water Act or drinking water supply watersheds. District engineers can also exercise discretionary authority for activities that may result in more than minimal adverse effects on these areas.

Some commenters requested that the Corps prohibit the use of NWP in waters or watersheds with designated critical habitat for Federally-listed endangered or threatened species. One commenter recommended excluding the use of NWP in habitats designated by the FWS or NMFS as crucial for endangered or threatened species, unless the work is for habitat restoration.

General Condition 11 and SLOPES that are developed by Corps districts adequately address the use of NWP in designated critical habitat for Federally-listed endangered or threatened species. Please also see the discussion of General Condition 25 elsewhere in this **Federal Register** notice.

Use of Multiple Nationwide Permits:

A number of commenters objected to the use of more than one NWP for a single

and complete project, believing that this practice results in more than minimal adverse effects on the aquatic environment. Several commenters objected to adding any restrictions against the use of more than one NWP to authorize a single and complete project, stating that it does not necessarily result in more than minimal adverse effects on the aquatic environment. One of these commenters believes that the notification process is sufficient to determine when specific projects requiring the use of more than one NWP will result in more than minimal adverse effects on the aquatic environment.

We are proposing to modify General Condition 15 to address concerns for the use of multiple NWP to authorize a single and complete project. The proposed modification of this general condition does not allow more than one NWP to authorize a single and complete project if the acreage loss of waters of the United States exceeds the highest specified acreage limit of the NWP used to authorize that project. In the proposed NWP we have removed the conditions that address the use of specific NWP with those NWP. The proposed modification of General Condition 15 is discussed in further detail below.

Data Collection: Several commenters believe that the Corps current data collection efforts fail to effectively monitor both the individual and cumulative adverse effects on the aquatic environment resulting from the use of the NWP. These commenters stated that the Corps does not know how many NWP activities that do not require submission of a PCN occur, the acreage of impact authorized by these non-reporting NWP, and what types of compensatory mitigation, if any, are provided to offset losses of waters of the United States authorized by these NWP. A number of commenters requested that the Corps track losses of waters of the United States authorized by non-reporting NWP. One commenter stated that the Corps should not limit the use of NWP until it knows for certain how many wetlands are lost each year.

For those activities that are reported to the Corps, including activities authorized by NWP, regional general permits, and individual permits, the Corps monitors the individual and cumulative adverse effects on the aquatic environment. The individual adverse effects are evaluated on a case-by-case basis when the Corps reviews the PCN or conducts the public interest review. It should also be noted that many NWP permittees request that the

Corps provide written confirmation that the proposed work is authorized by NWP, even though submission of a PCN to the Corps is not required. This allows the Corps to track many of the activities that are authorized by non-reporting NWPs and include the adverse effects of those activities in its analysis of individual and cumulative adverse effects, plus any compensatory mitigation provided to offset those impacts.

Cumulative adverse effects on the aquatic environment that result from activities authorized by the Corps regulatory program are assessed by district engineers on a watershed or regional basis. District engineers utilize data collected on authorized activities for which the Corps issues general permit authorizations or standard permits, as well as estimates of the number of activities authorized by non-reporting general permits. Based on the actual and estimated impacts to aquatic resources, district engineers determine if the cumulative adverse effects on the aquatic environment resulting from the use of general permits, including NWPs, are more than minimal. Activities authorized by individual permits are not required to result in minimal adverse effects on the aquatic environment because that statutory requirement applies only to general permits. To prohibit the use of general permits in a watershed or other geographic area, the District Engineer must demonstrate that more than minimal cumulative adverse effects on the aquatic environment are caused by the Corps permit decisions. This demonstration must include clear, extensive, and unequivocal evidence that activities regulated pursuant to Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act are causing the cumulative adverse effects on the aquatic environment, not unregulated activities. Activities that are not regulated by the Corps program are not factored into this analysis because they are outside of the purview of the Corps.

Other commenters stated that inconsistencies in data collection efforts exist between Corps districts and that the data collected by the Corps is inaccurate. They said that some districts do not collect the same types of data that other districts collect. These commenters assert that these inconsistencies result in inaccurate data reported at a national level. One commenter stated that the Corps should make all NWP information, such as the number of PCNs, NWP verifications, authorized losses, mitigation, and enforcement actions available on the Internet.

There are standard data collection requirements for the Corps regulatory program. The data collected by each district for both general and individual permits was discussed in the July 1, 1998, **Federal Register** notice. As stated in the July 1, 1998, **Federal Register** notice, data collection requires a balance between the amount of work required to evaluate applications for Corps permits and the usefulness of the collected data to assess adverse effects of those activities on the aquatic environment. The specific types of data collected are limited to data that is necessary to evaluate the cumulative adverse effects on the aquatic environment that result from activities authorized by the Corps, while allowing the district the time and personnel to effectively evaluate permit applications and conduct enforcement activities. There are minimum standards for data collection for the Corps regulatory program, but some districts may collect additional data for their own use, if it is needed to satisfy other requirements. In the future, the Corps may modify its data collection standards to improve its assessment of the adverse effects of regulated activities on the aquatic environment and to provide more information to the public concerning the regulatory program. To make NWP program data, such as the number of PCNs, NWP verifications, authorized losses, mitigation, and enforcement actions, available for public access on the Internet is impractical, since each district maintains its own regulatory database.

Tribal Issues: Several comments were received from Native American organizations regarding tribal issues relating to the NWPs. Some of these commenters expressed concern that use of the NWPs would result in adverse effects on water quality and fish habitat, and that the tribes would not receive notification for projects on tribal land. One commenter requested that the Corps add the following sentence at the end of General Condition 8, Tribal Rights: "Nothing in this permit shall be construed to be authority or permission to conduct development, construction, or any other activity in waters of the United States with the exterior boundaries of a Federally-recognized Indian tribe in the absence of prior authority or permission being granted by such Tribal government." According to this commenter, some people believe that an NWP authorization constitutes permission to do work on Tribal lands without prior permission of the Tribe. Another commenter opposes issuance of NWP authorizations for activities within

the boundaries of Tribal lands without the opportunity for public notice and comment. One commenter stated that reservation watersheds should be considered high value waters and receive additional protection and that the Corps should consult with the appropriate Tribal governing authority prior to issuing NWP authorizations for activities in a reservation watershed. One commenter said that the procedures of the Corps Native American Policy must be followed prior to the issuance of the NWPs.

Division engineers can regionally condition the NWPs to prohibit or limit their use in high value waters, including high value waters on Tribal lands. We have provided opportunities to discuss potential regional conditions with Tribes, through district public notices for the new and modified NWPs. Tribes with Section 401 authority can deny water quality certification for the NWPs and require individual 401 certifications, which would allow those Tribes to review all proposed NWP activities and determine if those activities meet their water quality standards.

As with all Corps permits, the NWPs do not convey any property rights or any exclusive privileges (see 33 CFR Part 320.4(g) and the "Further Information" section of the NWPs). Issuance of an NWP authorization does not preclude the permittee from obtaining permission from the appropriate Tribal government, if such permission is necessary. Therefore, it is unnecessary to add the requested language to General Condition 8. Concerns for high value waters that occur on Tribal lands are more appropriately addressed through the regional conditioning process, but we disagree with the assertion that all reservation watersheds are high value waters.

Compliance with Section 106 of the National Historic Preservation Act: Several commenters expressed concern regarding how the new and modified NWPs will comply with Section 106 of the National Historic Preservation Act (NHPA) and how the permittee will know if the proposed work will affect a historic resource. Another commenter stated that the NWP program is not in compliance with the NHPA and its implementing regulations at 36 CFR Part 800, because the 5-day agency coordination period for PCNs is too short, since a 30-day comment period is required by 36 CFR Part 800.2.

NWP General Condition 12 addresses compliance with Section 106 of the NHPA. This general condition states that any activity which may affect

historic properties listed, or eligible for listing, in the National Register of Historic Places is not authorized, unless the District Engineer has complied with the provisions of 33 CFR Part 325, Appendix C. For activities authorized by non-reporting NWP, permittees concerned about compliance with General Condition 12 should contact the State Historic Preservation Officer (SHPO) to determine if the proposed work will affect historic properties. For NWP activities that require submission of a PCN to the Corps, the Corps will evaluate the PCN to determine if coordination with the SHPO is necessary to ensure compliance with the NHPA. In areas such as designated historic districts, division engineers can regionally condition the NWPs to require coordination with the SHPO to ensure compliance with the NHPA. The Corps regulations for ensuring compliance with the NHPA are found at 33 CFR Part 325, Appendix C, not 36 CFR Part 800.

Enforcement: Several commenters stated that the proposed new and modified NWPs did not mention enforcement. These commenters are concerned that the terms and limits of the NWPs may be largely ignored unless enforcement is specifically addressed in the text of the NWPs. Another commenter said that the discussion of the Corps data collection procedures did not address how many enforcement actions were taken on projects that violated NWP terms and conditions. A number of commenters expressed concern that the requirements for on-site avoidance and minimization are not enforced. Several commenters believe there is a lack of monitoring and enforcement of general permits, including NWPs.

Enforcement of Corps permits, including NWPs, is addressed in 33 CFR Part 326. District engineers use discretion to enforce non-compliance with the terms and conditions of the NWPs, including any regional conditions or case-specific conditions. Although the discussion of the Corps data collection procedures did not specifically address enforcement activities, these activities are included in our data collection systems. We conduct compliance reviews to determine if permittees do the work in accordance with NWP authorizations, including any requirements for avoidance and minimization. Although Corps districts cannot conduct compliance reviews for every activity authorized by NWPs, they will conduct compliance reviews to the extent that their district resources allow. Enforcement activities will be

prioritized by first investigating suspected violations that are reported by citizens and then performing compliance checks on other projects.

Other Issues: Two commenters believe that the proposed new and modified NWPs infringe upon individual property rights and that the Corps does not have the authority to require compensatory mitigation that is not directly proportional to the adverse effects of the authorized work. Several other commenters requested that the Corps adopt a separate appeals process for the NWP program, similar to the process currently being developed for individual permits. Several commenters requested that the Corps implement an appeals process for jurisdictional determinations. One commenter requested that all of the NWPs include a condition requiring deed restrictions for all remaining wetlands on the property. One commenter stated that the proposed NWPs are contrary to the Fair Housing Act because the NWPs make it more difficult to build affordable housing.

For certain types of activities, the proposed new and modified NWPs provide property owners and project proponents with an efficient means of obtaining the authorizations necessary to comply with Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, provided those activities result in minimal adverse effects on the aquatic environment, individually or cumulatively. The NWPs allow property owners to use their land in compliance with these Federal laws. District engineers can require compensatory mitigation that is necessary to offset the losses of waters of the United States and ensure that the authorized work, with compensatory mitigation, results in minimal adverse effects on the aquatic environment.

We believe that it is unnecessary to develop a separate appeals process for the NWP program. It is important to recognize that the NWPs are optional permits. If a permittee does not want to comply with the terms and conditions of the NWP authorization, he or she can request authorization through the individual permit process. If the prospective permittee objects to the terms and conditions of the individual permit or is denied an individual permit, then he or she could use the regulatory appeals process, once it is implemented. We are not certain when an appeals process for jurisdictional determinations will become effective.

We cannot condition the NWPs to require deed restrictions on all remaining wetlands on the property for a particular project, unless the deed

restriction is for a compensatory mitigation requirement that is fulfilled through the preservation of wetlands on the property. If there are remaining wetlands on the property after the completion of the authorized work, the landowner must obtain another Section 404 permit to do any further work on the property that involves discharges of dredged material into waters of the United States. Requiring a deed restriction for all remaining waters of the United States on the property may be considered as a taking of private property, unless the waters to be protected by the deed restriction are used to satisfy a compensatory mitigation requirement.

We do not agree that the proposed new and modified NWPs violate the Fair Housing Act. The proposed NWPs will provide developers with an expedited permit process that authorizes activities in waters of the United States that have minimal adverse effects on the aquatic environment. Although the proposed new and modified NWPs contain conditions that provide additional protection for the aquatic environment, which may increase costs for some builders, we still believe that the NWPs are a cost-effective means of complying with the Clean Water Act. It is important to remember that NWPs and other general permits are optional permits, and if the project proponent does not want to comply with all terms and conditions of the NWP, then he or she can apply for an individual permit.

One commenter requested that the new NWPs authorize water impoundments and other water development activities that have minimal adverse effects. Another commenter stated that the NWPs should authorize the construction of water diversion, storage, and reuse facilities. Another commenter suggested that NWP 16 requires revision because the quality of return water from the contained upland disposal site should be addressed through Section 402, not Section 401, of the Clean Water Act.

During the development of the new NWPs to replace NWP 26, we found that the use of NWP 26 to authorize discharges of dredged material into waters of the United States for the construction of water impoundments and water diversion, storage, and reuse facilities was not widespread across the country. We believe that it is more appropriate for Corps districts to develop regional general permits for these activities, where the construction of impoundments occurs regularly with minimal adverse effects on the aquatic environment. The citation in NWP 16 to

Section 401 of the Clean Water Act is correct, because the runoff or overflow from a contained land or water disposal area has been defined as a "discharge of dredged material," which requires a Section 401 water quality certification (see 33 CFR Part 323.2(d)).

General Comments on October 14, 1998, Federal Register Notice

Many commenters were generally in favor of the proposed restrictions on NWP activities within the 100-year floodplain, designated critical resource waters, and impaired waters published in the October 14, 1998, **Federal Register** notice, but stated that the proposed changes still do not provide enough environmental protection and further restrictions on the NWPs are needed. A large number of commenters objected to the proposed additional restrictions, stating that the proposal contained little factual basis, the proposal was too vague to allow meaningful comment, or the proposal was unsupported because it did not contain an analysis of the potential effects it would have on the regulated public. Several commenters said that this proposal was based on an inadequate administrative record and that there is little or no documentation supporting the need for these additional restrictions. These commenters requested that the Corps demonstrate that the relevant factors have been considered when it makes its final decision concerning these restrictions and supplement its record to justify the need for these limitations if they are adopted. A few commenters requested that the Corps conduct an analysis of the effects of the proposed additional restrictions including: (1) The land area affected by the proposal; (2) the environmental benefits; (3) the costs to the regulated public, including the cost of compliance and potential delays; and (4) the workload implications to the Corps and other agencies. Many of these commenters stated that the proposed restrictions would be too burdensome to the regulated public, with few tangible added environmental benefits. Other objections expressed by many commenters are that the proposed restrictions would result in more activities requiring individual permits, they would remove any streamlining from the permit process provided by the NWPs, and they would result in increased costs and delays to the regulated public.

The NWP restrictions proposed in the October 14, 1998, **Federal Register** notice were intended to solicit comments from the public to provide the Corps with information regarding

their effects on the regulated public, problems with implementation of the proposed restrictions, how to identify the areas that should be subject to the restrictions, and to which NWPs the restrictions should apply. As discussed below, we have thoroughly evaluated all of the comments received in response to the October 14, 1998, **Federal Register** notice and have made some changes to the proposed restrictions based on those comments. These additional NWP restrictions could create substantial burdens for the regulated public, because many project proponents will be required to apply for an individual permit or provide additional information to demonstrate compliance with these new NWP conditions. We believe that the proposed new restrictions will result in better protection of the aquatic environment and are necessary to address certain public interest factors, such as flood hazards, floodplain values, and high value waters.

A couple of commenters requested that the Corps provide the public with another opportunity to comment on the proposed restrictions, based on information provided by comments received in response to the October 14, 1998, **Federal Register** notice. One commenter stated that the proposal violates the Unfunded Mandates Reform Act by not conducting a regulatory assessment for each proposed restriction. Another commenter believes that the proposal is contrary to Section 404(e)(2) of the Clean Water Act, which requires a public hearing before revoking or modifying general permits.

Because of the modified public participation process the public has, with this **Federal Register** notice, another opportunity to comment on the proposed restrictions, with more complete information to evaluate those restrictions. Since the proposed restrictions may be implemented as NWP general conditions and are not new regulations, we are not required to conduct a regulatory assessment pursuant to the Unfunded Mandates Reform Act. The proposed restrictions do not substantially change the NWPs themselves, so we are not required to conduct a public hearing in accordance with Section 404(e)(2) of the Clean Water Act.

A number of commenters stated that the goals of the proposed additional NWP restrictions can be achieved through other means, instead of establishing national conditions for the NWP program. These commenters believe that the use of existing NWP general conditions, regional conditions, revocation of NWPs in certain

geographic regions, preconstruction notifications, avoidance and minimization requirements, and discretionary authority are adequate to ensure that the NWPs do not authorize activities with more than minimal adverse effects to designated critical resource waters and impaired waters. Examples of general NWP requirements cited by some of these commenters include the establishment and maintenance of vegetated buffers adjacent to open waters and streams, water quality management plans, stormwater management, maintenance of water flows, and compensatory mitigation. Some commenters said that the proposed restrictions are more appropriately handled by State and/or local governments. Several commenters stated that the proposed limitations should be done through regional conditions instead of the NWP general conditions.

We agree that some of the goals of proposed restrictions can also be achieved through some of these means, but to ensure that concerns for floodplains, impaired waters, and designated critical resource waters are addressed consistently across the country, we believe that these restrictions should be implemented as NWP general conditions.

Many commenters objected to the proposal because terms such as "critical resource waters" and "impaired waters" were not defined. Other commenters based their objections on estimates that the proposed restrictions would exclude the use of NWPs from the approximately 40% of the Nation's waters that are considered impaired and the 8% of the land area of the continental United States that is within the 100-year floodplain. One commenter believes that the proposed restrictions are unlikely to result in a net increase in wetlands or improve water quality.

One of the objectives of the October 14, 1998, **Federal Register** notice was to solicit public comment on definitions for these terms and criteria to identify critical resource waters and impaired waters. We received many recommendations to help us identify those waters nationally. Each of the proposed restrictions on the NWP program are discussed below in separate sections. The intent of the proposed restrictions is to better protect the aquatic environment, not to produce a net increase in wetlands.

A large number of commenters supported the Corps decision to allow public comment on the final NWPs and final Corps regional conditions. A couple of commenters requested a 60-day comment period instead of a 45-day

comment period. Two commenters asked if the Section 401 agency will have another opportunity to evaluate any changes to the NWP that may occur as a result of comments received in response to that **Federal Register** notice. These commenters stated that the 401 agency should have another period of review to make new Section 401 determinations. Another commenter stated that 60 days is insufficient for Tribes to make Section 401 or CZM determinations on the new NWPs because EPA must approve the Tribes' application to administer Section 401 water quality standards and approve those standards.

We believe that 45 days is an adequate amount of time for the public to comment on the draft new and modified NWPs and Corps regional conditions because of the previous opportunities for public comment. Because of the changes to the issuance process for the proposed new and modified NWPs, the 401 and CZMA agencies will make their determinations based on final NWPs and Corps regional conditions, since those NWPs and regional conditions will be issued before the final 60-day WQC/CZMA determination period begins. If a Tribal agency does not currently have EPA approval to administer Section 401 water quality standards or EPA has not yet approved their water quality standards, then the agency that currently has Section 401 authority must make the determination.

Withdrawal of NWP B

In response to the October 14, 1998, **Federal Register** notice announcing the Corps withdrawal of the proposed NWP B for master planned development activities, a large number of commenters expressed their support for the withdrawal of that proposed NWP. On the other hand, many commenters objected to the withdrawal of NWP B. A number of commenters believe that the Corps did not consider all comments received in response to the July 1, 1998, **Federal Register** notice and that the decision to withdraw NWP B was premature. These commenters stated that the Corps should have announced its decision to withdraw NWP B when the other proposed NWPs are issued. Several of these commenters requested that the Corps provide documentation explaining this decision. Several commenters recommended that the Corps repropose NWP B.

We fully considered all comments received in response to the proposal to issue NWP B for master planned development activities. The decision to withdraw NWP B from the proposed

new and modified NWPs was discussed in the October 14, 1998, **Federal Register** notice, but we will provide further detail below.

One of the most important factors in the decision to withdraw NWP B is the difficulty in providing a clear, easy to understand, definition for the term "Master Planned Development," to be used in the context of the NWP. Without a clear definition of this term, there will be much confusion for the Corps and the regulated public concerning which developments could be authorized by this NWP. The comments received in response to the July 1, 1998, **Federal Register** notice provide ample evidence of the potential problems with implementing this NWP, because of the difficulty in producing a definition that is easily understood. Many commenters believe that any type of master planned development, particularly those approved by State or local agencies, would qualify for NWP B. This is simply an incorrect assumption which emphasized the difficulties in implementing this NWP. The intent of NWP B was to authorize developments that are designed, constructed, and managed to conserve the functions and values of waters of the United States on the project site. For these developments, the aquatic environment receives equal consideration to the development, and the development is designed to protect the local aquatic environment. We may repropose NWP B when we have formulated a definition that better supports the intent of the NWP and have resolved other concerns associated with the proposed NWP.

Limiting the Use of NWPs Within the 100-Year Floodplain

In the October 14, 1998, **Federal Register**, we proposed to prohibit the use of the new and modified NWPs to authorize permanent, above-grade wetland fills in the 100-year floodplain as mapped by the Federal Emergency Management Agency (FEMA) on its Flood Insurance Rate Maps. We also requested comments regarding the applicability of this restriction to existing NWPs, as well as the proposed new and modified NWPs.

Nearly all of the correspondence received in response to the October 14, 1998, **Federal Register** notice commented on this proposed restriction. Most of the proponents stated that the restriction should be expanded to apply to all 100-year floodplains, not just the 100-year floodplains mapped by FEMA, because further restriction is necessary to safeguard wetlands for protection against floods. One commenter said that the condition should be expanded to

include riparian buffers of 300 feet from all rivers and streams and should address any uses of NWPs in these areas, not merely above-grade fills in waters of the United States. A few of the commenters recommended specific NWPs to be included in this condition. Collectively, every NWP was recommended for inclusion. Many commenters objecting to the proposed restriction included State and local flood control agencies that voiced their concern that essential public facilities may need to be sited within the floodplain in order to properly function. They stated that all municipalities need the ability to build and maintain their urban drainage infrastructure without undue delay and expense so that it operates as originally designed for flood control and/or water quality enhancement purposes. Specifically, they said that the use of NWPs 3 and 31 to maintain these facilities should be exempt from this condition.

We are proposing to add General Condition 27 to the NWPs to restrict or prohibit the use of NWPs 12, 14, 21, 29, 39, 40, 42, 43, and 44 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain. For these NWPs, prospective permittees must notify the District Engineer in accordance with General Condition 13. For NWPs 21, 29, 39, 40, 42, 43, and 44, the notification must include documentation that the proposed project will not involve discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills in waters of the United States within the FEMA-mapped 100-year floodplain. If the FEMA map is out of date or the 100-year floodplain is not mapped, the documentation should be from the local floodplain authority. This general condition is not restricted to 100-year floodplains mapped by FEMA on its Flood Insurance Rate Maps. Instead, this general condition would apply to all 100-year floodplains, except in 100-year floodplains at the point in the watershed where the drainage area is less than 1 square mile. In those areas where no FEMA maps exist, or the FEMA maps are out-of-date, the prospective permittee must submit documentation to the District Engineer from the local official with authority to issue development permits for activities in the 100-year floodplain that the proposed work is outside of the 100-year floodplain.

Proposed General Condition 27 also contains a presumption that NWP 12 and 14 activities resulting in permanent, above-grade fills in waters of the United States within the 100-year floodplain

will cause more than minimal adverse effects. However, this presumption is rebuttable and the proposed work can be authorized by NWP 12 or 14 if the prospective permittee clearly demonstrates to the District Engineer that the proposed work and associated mitigation will not decrease the flood-holding capacity of the waterbody and will not cause more than minimal changes to the hydrology, flow regime, or volume of waters associated with the 100-year floodplain. The documentation rebutting this presumption must include proof that FEMA, or a state or local floodplain authority through a licensed professional engineer, has approved the proposed project and provided a statement that the project does not increase flooding or more than minimally alter floodplain hydrology or flow regimes.

Expanding proposed General Condition 27 to prohibit the use of all NWPs within the 100-year floodplain, regardless of whether or not the authorized activity would result in above-grade wetland fills, would unnecessarily prohibit NWP activities that have little or no effect on floodplain functions or values. While a 300-foot buffer may be within the 100-year floodplain of some waterbodies, this would be an excessive requirement for waterbodies with narrow floodplains. We believe that certain NWP activities which result in permanent, above-grade fills in waters of the United States within the 100-year floodplain have the potential to impact water quality, especially during flood events, and therefore should be subject to the restrictions of this condition. We concur with the flood control agencies contentions that municipalities need the ability to build and maintain their urban drainage infrastructure without undue delay and expense so that those facilities operate as originally designed for flood control and/or water quality enhancement purposes. Lacking general support for including the existing NWPs in this proposed condition, and acknowledging that not all activities authorized by the existing NWPs will result in more than minimal adverse effects to 100-year floodplains, we are proposing to include NWPs 12, 14, 21, 29, and 40 in General Condition 27, as well as NWPs 39, 42, 43, and 44. Furthermore, we have determined that the proposed NWP 41, which authorizes reshaping existing drainage ditches, would not result in any appreciable adverse impacts to the floodplain and are proposing to exclude this NWP from General Condition 27.

Many commenters stated that FEMA maps are inaccurate and incomplete,

mapping mostly urban areas and leaving rural areas unprotected. Others were concerned about what information will be used to determine whether a project is within the 100-year floodplain. Many commenters also stated that the condition will result in greatly increased numbers of individual permits and that the area of land encompassed by the 100-year floodplain prohibition is so extensive as to make use of NWPs with this condition extremely prohibitive. Additionally, the Corps has provided no evidence to support their notion that use of any particular NWP to authorize fills in floodplains has contributed to, or threatens to contribute to, the frequency or severity of flood events. They state the burden is on the Corps to develop a factual record to justify its proposed regulatory actions.

FEMA maps are available for review at local FEMA or Corps offices for determining the applicability of this condition to the applicant's proposed project. We agree that applying General Condition 27 to NWPs 12, 14, 21, 29, 39, 40, 42, 43, and 44, will significantly increase the number of individual permit applications processed by the Corps. Additionally, we have determined that this condition covers approximately 55 million acres of wetlands which fall within the 100-year floodplain, a large amount of wetlands regulated under Section 404 of the Clean Water Act.

In response to the July 1, 1998, **Federal Register** notice, FEMA provided the following comments: (1) the replacement NWPs cover a much greater geographical area than the existing NWP 26 and therefore need to consider project impacts within the 100-year floodplain; (2) when flood capacity within the floodplain is diminished due to authorized or unauthorized construction in wetland areas, flooding in other areas is likely to increase; and (3) it is the responsibility of the Corps under Executive Order 11988, entitled Floodplain Management, to evaluate all activities in or affecting floodplains. Based upon these premises, the Corps feels it is necessary to impose this condition on those specific NWPs, which could potentially impact the flood capacity of the floodplains.

Most of those opposed to the proposed general condition stated that it does not fulfill the congressional intent to implement a streamlined permitting process for activities resulting in minimal adverse environmental effects on the aquatic environment. They also state that the Corps is not authorized by Congress to become a regulatory authority with regards to controlling

floodplain activities. A large number of commenters stated that the condition provides for dual regulation of the 100-year floodplains, through the Corps and FEMA. These commenters said that floodplain management, which FEMA administers, and water quality management, administered by the Corps under Section 404 of the Clean Water Act, should be regulated separately. A couple of commenters stated that if FEMA wants to restrict construction in floodplains to reduce flood damage then they should do so under their own authority.

We believe that the proposed condition does fulfill the congressional intent inasmuch as the NWP process provides for a less rigorous review of proposed projects with decisions being rendered in a much more timely manner than the individual permit process. Also, conditioning the NWP fulfills the requirement to minimize adverse impacts to the aquatic environment. Additionally, in accordance with Executive Order 11988, the district engineers are directed to avoid authorizing floodplain developments whenever practicable alternatives exist outside of the floodplain. We believe that we are authorized to regulate waters of the United States for water quality management and many wetlands within the 100-year floodplain fall within the "adjacency clause." Therefore, wetlands in the 100-year floodplain are within the Corps regulatory jurisdiction. To reiterate, the Corps recognizes that it does not regulate any activity in the 100-year floodplain that does not occur within a water of the United States; these upland areas would be regulated by FEMA. It is not the intent of the Corps to duplicate FEMA and State and local flood control agencies, but rather to rely on these agencies to assert their jurisdiction to minimize impacts to aquatic resources within the 100-year floodplain.

Most of the commenters indicated that the proposed condition is overly restrictive, unnecessary, and causes the process to be burdensome to both Corps regulators and the taxpayers. These commenters also indicated that it is both expensive and time-consuming without providing commensurate benefits for wetlands. Many said the proposal is not warranted and obviated by the many environmentally protective conditions already in place, including State and local regulations. Many of the opponents included state and local transportation departments who indicated that this condition would prevent them from fulfilling their mandate of ensuring public safety and that widening roadways, some within

wetlands within the 100-year floodplain, is often required and the condition would put an unnecessary burden on their departments while delaying their projects. They recommended exempting NWP 14 from this condition. Few of the objectors recommended which specific NWPs, existing or proposed replacements, should be excluded from this condition. Collectively, every NWP was recommended for exclusion.

To reiterate, in accordance with Executive Order 11988, district engineers should avoid authorizing floodplain developments whenever practicable alternatives exist outside of the floodplain. The proposed General Condition 27 prohibits the use of certain NWP activities that could result in more than minimal adverse impacts to the aquatic environment, as well as the 100-year floodplain. We believe that, with proper planning, transportation departments will have ample time to attain a permit through the individual permit process without undue delays and excessive risks to public safety. In the event of a "wash-out" due to a storm event, NWP 3 can be used to repair public and private roadways.

Limiting the Use of the NWPs in Designated Critical Resource Waters

We proposed in the October 14, 1998, **Federal Register** notice, to limit the use of NWPs in critical resource waters designated by State or Federal agencies. Many of the comments we received addressed proposed restrictions on the applicability of the NWPs in critical resource waters. Most of those comments generally supported the adoption of such restrictions, and they focused on suggestions for defining critical resource waters. These suggestions advocated the inclusion of the following waters as critical resource waters: waters that have any kind of special value designation by Federal, State, or local governments; sensitive and specially valuable waters; habitat of endangered, threatened, or sensitive species; source waters for drinking water; groundwater recharge zones; rare and irreplaceable wetlands that cannot be mitigated with current technologies; and waters declared as impaired under Section 303(d) of the Clean Water Act. We have considered each of these recommendations, as discussed below.

Waters that have any kind of special value designation by Federal, State, or local governments: For waters that have received a Federal designation of special value, we agree that the use of NWPs should be restricted to the extent that their applicability is reasonably certain to jeopardize any essential functions

which confer the recognized special value to these waters. We are proposing to add a new NWP general condition (General Condition 25) to address the use of NWPs in designated critical resource waters. Proposed General Condition 25, entitled Designated Critical Resource Waters, prohibits the use of NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity in the following critical resource waters including wetlands adjacent to these waters: NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally-listed threatened and endangered species, coral reefs, State natural heritage areas, or outstanding national resource waters officially designated by the State where those waters are located. Outstanding national resource waters and other waters having particular environmental or ecological significance must be officially designated through an official State process (e.g., adopted through regulatory or statutory processes, approved through State legislation, or designated by the Governor). In those circumstances where a waterbody has been designated by the State, the District Engineer will publish a public notice advising the public that such waters will be added to the list of designated critical resource waters. The District Engineer may, on his own, designate critical resource waters after notice and opportunity for public comment. For activities authorized by NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, proposed General Condition 25 requires the prospective permittee to notify the District Engineer in accordance with General Condition 13 for any activity proposed in these designated critical resource waters, including adjacent wetlands. This general condition also prohibits discharges in designated critical habitat for Federally-listed endangered or threatened species unless the activity complies with General Condition 11 and the U.S. FWS or the NMFS has concurred in a determination of compliance with this condition.

We believe that special value designations promulgated solely by State or local agencies without the approval of the governor or State legislature are not appropriate bases for the imposition of restrictions on the use of these Federal permits. We believe that restrictions which are necessary to support the other State and local special value designations should be effected through relevant State and local processes.

Several commenters suggested that Wild and Scenic Rivers, blue-ribbon trout fisheries, and American Heritage Rivers were all examples of waters that have been designated as having special value, and that these particular categories of waters should be categorically excluded from NWP eligibility. Since there is no official Federal designation of any waters as blue-ribbon trout fisheries, we do not agree that these waters should be excluded from this Federal program. The NWP general conditions already impose restrictions on NWP eligibility in waters that are components of Wild and Scenic River Systems, and on any river officially designated by Congress as a "study river" for possible inclusion in such systems. Since this general condition imposes restrictions that achieve the goals of adequately protecting special values, and of maximizing NWP utility, we do not believe that further restriction is appropriate or necessary. American Heritage Rivers may be likely candidates for inclusion as critical resource waters but it is difficult to identify any possible adverse effect that would result from NWP eligibility in these waters. It is particularly difficult to identify such effects from a national perspective.

We believe that the imposition of any restriction imposed to protect Critical Resource Waters must be precise in its scope, in order to provide all reasonable and necessary protection of the factors conferring special value, without unnecessarily limiting the utility of the NWPs. Since we believe that these two goals are equally important, we have concluded that it would be too broad a restriction to eliminate the applicability of any NWP in special value waters without a prior Corps determination that the NWP in question posed some reasonable likelihood of adverse effect on the recognized special value. Our consideration of the comments received and our concern about undue restrictions on the NWPs, lead us to conclude that we are unable to make additional determinations from a national perspective. As a result, we believe that any such determination of other types of waters would most appropriately be made at the district or, in some cases, at the division level, and that as a practical matter, the necessity of further restriction to protect waters that have a Federal special value designation must be determined by the Corps district or division and implemented as regional conditions on the NWPs, as necessary.

Sensitive and specially valuable waters: There is no official Federal designation of any waters as sensitive or

specially valuable waters, therefore there is no Federal definition of such waters. We believe that the inclusion of such arbitrary terms in the definition of Critical Resource Waters would be counterproductive, and we do not agree that introduction of additional ambiguity is appropriate. We further believe that the use of any NWP in waters identified by the Corps, on a case-by-case basis, as having some particular sensitivity or special value that is susceptible to degradation by the activity authorized by the NWP, can be adequately protected by the Corps use of its discretionary authority to require an individual permit review, as necessary.

Habitat of endangered, threatened, or sensitive species: Federal protection for the critical habitat of Federally-listed threatened and endangered species is provided in all Corps permit actions through compliance with the requirements of the Endangered Species Act, with the regulations promulgated pursuant to that Act, and through NWP General Condition 11. General Condition 25 contains a provision stating that discharges are not authorized in designated critical habitat for Federally listed threatened or endangered species unless the activity complies with General Condition 11 and the U.S. Fish and Wildlife Service or the National Marine Fisheries Service has concurred in a determination of compliance with this condition. Since "sensitive species" is a term that is not defined in the Endangered Species Act or in any other applicable Federal law, we believe that including the habitat of such "sensitive species" would promote confusion rather than provide clarity in the definition of critical resource waters, and we do not believe that such inclusion is appropriate.

Source waters for drinking water: We do not believe that any of the activities authorized by the NWPs pose any inherent threat to drinking water or to the source waters for drinking water, but it may be possible for such adverse effects to occur in certain circumstances. However, we believe that the specification of all such source waters as critical resource waters would impose a restriction on the utility of the NWPs that is not warranted by the limited extent of potential adverse effects. In light of this, we believe it is more appropriate to rely on the Corps use of its discretionary authority, on a case-by-case basis, to ensure against adverse effects on drinking water.

Groundwater recharge zones: We agree that any activity that significantly impairs groundwater recharge functions of wetlands must be avoided. However, such significant impairment does not

inherently result from the kinds of activities authorized by the NWPs. As such, we believe that any restriction on the authorization of an activity should be based on the effects that are expected to occur as a result of a specifically proposed activity. Since we do not expect the majority of activities authorized by the NWPs to adversely affect groundwater recharge, we believe that our ability to assert discretionary authority to require an individual permit in lieu of any NWP, for cause, provides ample protection for groundwater recharge zones.

Rare and irreplaceable wetlands that cannot be mitigated with current technologies.

As with many of the other types of wetlands suggested for inclusion as critical resource waters, the term "rare and irreplaceable wetlands that cannot be mitigated with current technologies" is undefined, and the general nationwide specification of such wetlands as critical resource waters would be a continuing source of debate and, therefore, impractical. However, we acknowledge that many wetlands systems may qualify as "rare and irreplaceable" because of their location in the landscape of a particular region. We believe that such locally rare and irreplaceable wetlands are critical resource waters because of their local importance. We believe that as such wetlands are recognized by Corps district and division offices, the revocation of any NWP that poses a threat to these systems, or the imposition of regional conditions to avert such threats, should be considered.

Waters declared as impaired under Section 303(d) of the Clean Water Act: "Impaired waters," as defined in Section 303(d) of the Clean Water Act, are addressed as a separate issue in the next section of this **Federal Register** notice, and as such, we do not believe it is appropriate to include these waters in the definition of critical resource waters.

Proposed General Condition 25 prohibits the use of NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity in certain Federally- and State-designated critical resource waters, including wetlands adjacent to those waters, with the exceptions discussed above. For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required for activities in designated critical resource waters and adjacent wetlands, to allow the district engineer to determine if the proposed work will result in more than minimal adverse effects on those waters. Activities

authorized by the NWPs not listed in General Condition 25 would not be subject to these requirements. Corps districts may also consider the use of regional general permits for those activities prohibited by General Condition 25, if the District Engineer determines after public notice and opportunity for public comment that on a regional basis, such activities will not result in more than minimal adverse effects on the aquatic environment, individually or cumulatively.

Limiting the Use of the NWPs in Impaired Waters

In the **Federal Register** notice published on October 14, 1998, we requested comments on restricting or prohibiting the use of the NWPs in impaired waters, including how to identify impaired waters for the purposes of the NWPs, and which NWPs should be subject to this limitation. We received a large number of comments supporting the proposed limitation and a large number of comments objecting to the proposed limitation.

Some commenters stated that the proposed exclusion should apply to the use of NWPs in all wetlands and other waters within the watersheds of impaired waters. Other commenters recommended that the use of NWPs should be excluded from wetlands or waters upstream or adjacent to impaired waters. Two commenters stated that NWPs should be excluded from use in wetlands in impaired waters, even if the historic loss of wetlands within the watershed is not the cause of impairment, because those wetlands are of high value in that watershed. In contrast, several other commenters agreed with the Corps proposal to restrict the use of NWPs only in those watersheds that are considered impaired as a result of historic wetland losses. These commenters recommended that the exclusion apply only to "State-designated impaired waters which are determined to be impaired as a result of the historic loss of wetlands." Several commenters supported the proposed exclusion, provided the restriction applies only to those projects that will result in further degradation of the waterbody based on the applicable 303(d) parameter; if the proposed work will have no effect on the 303(d) parameter, then the project could be authorized by NWP.

In the October 14, 1998, **Federal Register** notice, we stated that the impairment of certain open waters such as lakes, rivers, and streams is directly related to the historic loss of wetlands in the watershed. Although not

explicitly stated in the October 14, 1998, **Federal Register** notice, the intent of the proposal was to restrict the use of NWP in waterbodies that are impaired due to the loss of wetlands. This remains our intent, but we are also proposing to add several other causes of impairment that will be considered as part of the restriction. The additional causes of impairment include: nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, and turbidity. These additional sources of impairment may be related to activities regulated under Section 404 of the Clean Water Act. We are proposing to incorporate this restriction into the NWP program as General Condition 26, entitled Impaired Waters.

We believe that discharges of dredged or fill material into impaired waters of the United States and adjacent wetlands may cause further impairment of those waters. Proposed General Condition 26 prohibits the use of NWPs to authorize discharges resulting in the loss of greater than 1 acre of impaired waters of the United States, including wetlands adjacent to those waters, except for activities authorized by NWP 3. Activities authorized by NWP 3 that occur in impaired waters and adjacent wetlands require notification to the District Engineer in accordance with General Condition 13, who will determine if the proposed work will result in further impairment of the waterbody. For activities resulting in the loss of 1 acre or less of impaired waters of the United States, including adjacent wetlands, the prospective permittee must notify the District Engineer in accordance with General Condition 13 and the work authorized by NWP must not result in further impairment of the waterbody. The notification must include a statement from the permittee that clearly explains how the proposed work, excluding mitigation, will not further impair the waterbody. The District Engineer will determine if the prospective permittee has clearly demonstrated that the proposed work will not result in further impairment of the waterbody. For discharges resulting in the loss of greater than 1/4 acre of impaired waters, including adjacent wetlands, the District Engineer will coordinate with the State 401 agency in accordance with the procedures in paragraph (e) of General Condition 13. The District Engineer will consider any comments received from the State 401 agency to determine if the proposed work will not result in further

impairment of the listed waterbody. If the District Engineer determines that the proposed activity will not result in further impairment of the waterbody by providing additional inputs of the listed pollutant (i.e., nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and loss of wetlands), then the project can be authorized by NWP if it meets all of the other terms and conditions of the NWPs. If the District Engineer determines that the proposed activity will result in further impairment of the waterbody by contributing more of the listed pollutant to the impaired waterbody, then the project cannot be authorized by NWP and the project proponent must apply for authorization either through the individual permit process or obtain authorization through an appropriate regional general permit, if available.

For the purposes of this proposed general condition, impaired waters are those waters of the United States that have been identified by States or Tribes through the Clean Water Act Section 303(d) process as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and the historic losses of wetlands. The Corps will defer to states to identify these waters under the Section 303(d) process, because states are responsible for implementing Section 303 of the Clean Water Act, specifically the Total Maximum Daily Load (TMDL) program overseen by EPA. TMDL standards must be approved by EPA after a formal public notice and comment period. States must submit lists of impaired waters to EPA every two years. The authorized activity itself can result in net improvement of the aquatic ecosystem. For example, NWP 13 can be used to authorize bank stabilization activities in a waterbody that has been identified as impaired due to sedimentation, because the bank stabilization activity reduces the amount of sediment entering the waterbody, thereby improving water quality. Compensatory mitigation can be used to offset losses of waters of the United States authorized by NWPs and reduce the sources of pollution causing impairment of the local aquatic environment. The establishment and maintenance of vegetated buffers adjacent to open and flowing waters is a type of compensatory mitigation than can help improve the impaired

waterbody by restoring aquatic habitat, removing nutrients from surface runoff and groundwater flowing into waterbodies, trapping sediments, and moderating changes in water temperatures.

Several commenters believe that the use of NWPs in impaired waters is a violation of the Clean Water Act and that individual permits must be used instead to authorize Section 404 activities. A number of commenters objected to the proposed exclusion because they believe that concerns for impaired waters should be addressed by states or Tribes under Sections 101(b) and 401 of the Clean Water Act. Several of these commenters stated that the proposed exclusion duplicates State efforts and is unnecessary for the NWP program, because states currently consider the effects of development projects on impaired rivers. A number of commenters expressed concern that excluding the use of NWPs from impaired waters will result in additional pressures on average quality waters.

The use of NWPs in impaired waters is not a violation of the Clean Water Act, particularly when a State, Tribe, or EPA issues a Section 401 water quality certification either for the NWP itself or for a case-specific NWP authorization. If the 401 agency determines that a project does not meet the water quality standards of the State or Tribe, resulting in further impairment of the waterbody, they can deny water quality certification for that particular activity. The requirements of proposed General Condition 26 will not place additional pressures on impaired waters, because most project proponents are unlikely to relocate their projects to areas adjacent to or in unimpaired waters. It is important to remember that NWPs are optional permits, and the project proponent can apply for authorization through the individual permit process if he or she cannot meet the terms and conditions of an NWP. They are much more likely to request an individual permit for a project rather than relocating the project to try to obtain an NWP authorization.

Many commenters objected to restricting or eliminating the use of NWPs in impaired waters. Reasons for their objections include: (1) Eliminating the use of NWPs in impaired waters is illogical and will not provide any environmental benefits; (2) the Corps does not explain how eliminating the use of NWPs in impaired waters will repair or fix the impairment; (3) no information is provided in the October 14, 1998, **Federal Register** notice to support that impairment is due to historic losses of wetlands in the

watershed, since few states have identified waters where the impairment is due to loss of wetlands; (4) historic wetland loss is an insignificant source of impairment for most waterbodies; (5) no clear definition of "impaired waters" was provided in the October 14, 1998, **Federal Register** notice; (6) many State Section 303(d) lists have not been approved by EPA; and (7) the Corps provided no justification for making this a Federal exclusion.

Restricting the use of NWP in waters that are impaired because of nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and historic losses of wetlands in the watershed will benefit the local aquatic environment by preventing additional impairment of the waterbody and improving the waterbody through compensatory mitigation and best management practices. It is important to note that impaired waters are identified by evaluating open waters and segments of streams and rivers, not the entire watershed. Proposed General Condition 26 will apply only to those waterbodies, or segments of waterbodies, that have been assessed by states under the TMDL program. In addition, proposed General Condition 26 will apply only to wetlands adjacent to those waterbodies or segments of waterbodies. The Corps will not identify impaired waterbodies. As more waterbodies are surveyed by states under the TMDL program, there may be additional waters subject to General Condition 26. In the October 14, 1998, **Federal Register** notice, we requested suggestions for identifying impaired waters, and cited the Section 303(d) process as an example. Based on the comments received in response to the October 14, 1998, **Federal Register** notice, we have determined that the Section 303(d) program is the most appropriate way to identify impaired waters. We can add the requirements of proposed General Condition 26 to the NWP program because those requirements are directly related to the goals of the Clean Water Act.

A couple of commenters questioned how the Corps will define the phrase "identified with waters and aquifers that have been identified by states as impaired," and asked if stream flow data, hydrologic data, or geographic proximity will be used as criteria.

Some commenters said there is no indication as to the number of waters that are impaired due to activities authorized by NWPs. Many commenters objected to the proposed exclusion, stating that it would substantially

reduce the amount of geographic area where NWPs could be used. Several of these commenters stated that the proposed exclusion would prohibit the use of NWPs in 36% of the rivers and 39% of the lakes in the United States. Because of the large amount of waters that are considered impaired through the Section 303(d) process, a number of commenters stated that prohibiting the use of NWPs in impaired waters will result in a substantial increase in the number of individual permits processed by the Corps, increasing its workload.

Since proposed General Condition 26 will apply only to activities in waterbodies (and wetlands adjacent to those waterbodies) that are identified by State Section 303(d) programs as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and historic losses of wetlands in the watershed, and the proposed general condition requires that the NWP activity cannot further impair the waterbody, the number of activities for which the NWPs cannot be used is not likely to be substantial. Therefore, we anticipate only a relatively minor increase in the number of activities requiring individual permits as a result of proposed General Condition 26. According to EPA's "National Summary of Water Quality Conditions" for 1996, only 19% of the river and stream miles in the United States have been surveyed for TMDLs. For other waterbodies, 40% of the lakes, ponds and reservoirs and 72% of the square miles of estuaries have been surveyed for TMDLs. Of the river miles surveyed, 18% are impaired due to siltation, 14% are impaired due to nutrients, 10% are impaired due to oxygen depleting substances, 7% are impaired due to habitat alteration, and 7% are impaired due to suspended solids. Of the pond, lake, and reservoir acres surveyed, 20% are impaired due to nutrients, 10% are impaired due to siltation, 8% are impaired due to oxygen-depleting substances, and 5% are impaired due to suspended solids. For ponds, lakes, and reservoirs, habitat alteration was not listed as a source of impairment in the 1996 EPA report cited above. Of the square miles of estuaries surveyed, 22% are impaired due to nutrients, 12% are impaired due to oxygen-depleting substances, and 6% are impaired due to habitat alterations. There may be some overlap in these percentages, because more than one pollutant may impair a particular waterbody or river segment. If, in the

future, states identify, through the Section 303(d) process, additional waters as impaired due to the causes listed in proposed General Condition 26, then those waters and any adjacent wetlands will be subject to this general condition.

A few commenters objected to the reference to aquifers in the October 14, 1998, **Federal Register** notice. Some of these commenters stated that Section 404 of the Clean Water Act does not provide the Corps with the authority to regulate groundwater. They said that regulation of groundwater should be left to the states, who have the legal authority. Other commenters requested guidance or definitions to identify impaired aquifers.

We agree that Section 404 of the Clean Water Act does not provide us with the authority to directly regulate activities that affect groundwater, but since the quality of groundwater is often affected by activities in surface waters, we can consider the adverse effects of work authorized under Section 404 on water supplies.

Many commenters discussed potential problems with the proposed limitation, especially if the Section 303(d) process is used to identify impaired waters for the purposes of the proposed exclusion. A large number of commenters stated that waters included on the Section 303(d) lists for specific water quality criteria are not necessarily affected by activities regulated under Section 404 of the Clean Water Act. Many commenters recommended that the proposed exclusion should not apply to waters that are considered impaired due to toxic discharges, nutrient runoff, organic pollutants, fecal coliform, and sediment loads. Another commenter objected to the proposed exclusion because impairment of waters may be due to activities outside of the watershed and not directly in the impaired waterbody. A couple of commenters objected to using the Section 303(d) process to identify impaired waters because EPA is currently attempting to refine the entire Section 303(d) program and is planning to issue proposed rules and guidance with specific requirements for developing Section 303(d) lists. Another objection is that the Section 303(d) lists are subject to review every two years, which may result in uncertainty for the regulated public. Some commenters oppose the use of Section 303(d) lists because a state often uses only one data point to make a Section 303(d) determination and the criteria are often applied inconsistently between states. Some State lists are better developed

than others, resulting in inconsistent standards between states.

The impairment of waterbodies due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and the historic loss of wetlands, may be related to activities regulated under Section 404 of the Clean Water Act. The requirements of General Condition 26 will ensure that the activities authorized by NWP will not result in further impairment of the waterbody, so that the NWPs will authorize only activities with minimal adverse effects on the aquatic environment. Impairment due to other causes, such as metals, toxic discharges, organic pollutants, and fecal coliform, will not be subject to this general condition. We recognize that the Section 303(d) lists are subject to change every 2 years and that many waters have not been surveyed to determine if they comply with State TMDL criteria. If additional waters are identified as impaired due to the causes listed in General Condition 26, then they will be subject to that general condition. We also recognize that there may be some inconsistencies between states, but these inconsistencies should be resolved by EPA, which provides Federal oversight for the Section 303(d) program and its implementation by states.

A number of commenters proposed alternatives to prohibiting the use of NWPs in impaired waters. Several commenters stated that concerns for impaired waters should be addressed through either regional conditions, case-specific discretionary authority, or revocation of certain NWPs in specific geographic areas. Other commenters suggested addressing concerns for impaired waters in the same way that the Corps addresses endangered species and historic property issues, by adding a general condition to the NWPs requiring notification to the District Engineer for activities that affect impaired waters and allowing the District Engineer to determine if the proposed activity will result in further impairment of the waterbody. If the proposed work would result in no further impairment of the waterbody, then the activity could be authorized by NWP. Another commenter suggested that compensatory mitigation could be required for NWP activities to replace lost wetlands and increase the acreage of wetlands in the vicinity of the impaired waterbody. A few commenters recommended allowing the use of NWPs in impaired waters where the authorized activity does not result in a permanent loss of pollution control

features or does not cause permanent adverse effects to water quality, citing as examples stream restoration projects, utility line backfills, and temporary impacts to waters of the United States. Another commenter stated that the use of NWPs in impaired waters should not be restricted or prohibited when the objective of the proposed work is to restore wetlands, aquatic habitat, or water quality, or to conduct activities that will remove the waterbody from the Section 303(d) list.

We agree that an NWP general condition addressing the use of NWPs in waterbodies designated, through the Section 303(d) process, as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and the historic loss of wetlands is appropriate. Proposed General Condition 26 requires that activities authorized by NWPs in impaired waterbodies and adjacent wetlands will not result in further impairment of the waterbody. Compensatory mitigation, if required to ensure that the authorized work results in minimal adverse effects on the aquatic environment, should also help reduce inputs of the pollutants that are causing the impairment. Such compensatory mitigation may include: offsetting the authorized loss of wetlands, establishing and maintaining a vegetated buffer that reduces the input of nutrients, organic matter, and sediments into the waterbody, and reestablishing aquatic habitat adjacent to the waterbody. NWP activities that restore or enhance impaired waters are not prohibited by proposed General Condition 26.

In response to the October 14, 1998, **Federal Register** notice, we received many suggestions for NWPs that should not be subject to the proposed exclusion. Some commenters cited specific types of activities that should not be prohibited from NWP authorization in impaired waters. One commenter suggested that the exclusion should not apply to the maintenance of transportation projects. Other commenters suggested that flood control activities and the maintenance of flood control projects should be exempt from this exclusion. Some commenters said that the exclusion should apply only to those NWP activities that have a direct effect on a Section 303(d) parameter.

We believe that proposed General Condition 26 should apply to all NWPs that authorize discharges of dredged or fill material into waters of the United States identified as impaired due to the

causes listed in the general condition. Proposed activities that result in further impairment of the listed waterbody or result in the loss of greater than 1 acre of impaired waters and adjacent wetlands (except for activities authorized by NWP 3 as discussed above) are not authorized by NWPs. Prospective permittees are required to notify the District Engineer in accordance with General Condition 13, and the District Engineer will determine whether or not proposed work will result in further impairment of the waterbody. For proposed activities resulting in the loss of greater than 1/4 acre of impaired waters and adjacent wetlands, the District Engineer will coordinate with the State 401 agency in accordance with paragraph (e) of General Condition 13. Proposed General Condition 26 does not apply to activities in impaired waters that are subject only to Section 10 of the Rivers and Harbors Act, if there is no related Section 404 activity. Maintenance activities for transportation projects and flood control projects that do not result in discharges of dredged or fill material are not subject to the requirements of proposed General Condition 26.

III. Comments and Responses on Specific Nationwide Permits

3. Maintenance

In the July 1, 1998, **Federal Register** notice, the Corps proposed to modify this NWP to authorize the removal of accumulated sediments in the vicinity of existing structures. We also proposed to authorize activities in waters of the United States associated with the restoration of uplands lost as a result of a storm, flood, or other specific event. These additional activities are authorized by paragraphs (ii) and (iii) of the NWP.

General Comments on this NWP: The original terms and conditions of NWP 3 are in paragraph (i) of this NWP. In the July 1, 1998, **Federal Register** notice, we proposed minor changes to the original text of NWP 3. In the July 1, 1998, **Federal Register** notice, we proposed to add a notification requirement for all work authorized by paragraph (i) of the proposed modification of NWP 3 except for the replacement of the structure. We also inserted the phrase "or damaged" after the word "destroyed." We also received some comments concerning the provisions of NWP 3 as published in the December 13, 1996, issue of the **Federal Register** (61 FR 65874-65922).

Some commenters recommended removing the PCN requirement from paragraph (i) whereas other commenters suggested modifying the NWP to require

PCNs for all activities authorized by NWP 3. Many commenters stated that a replacement project generally results in greater impacts than repair and rehabilitation activities, but notification should be required only if the repair and rehabilitation activity exceeds the "minor deviations in the structure's configuration or filled area" provision of the NWP. One commenter stated that it was unclear whether repair and rehabilitation activities require notification. We have removed the PCN requirement from paragraph (i) of this NWP, since we do not believe it is necessary to require notification for the repair, replacement, or rehabilitation of a previously authorized structure or fill.

Two commenters suggested that the definition of the phrase "minor deviations in the structure's configuration" should be made more compatible with modern design standards and another suggested that the definition of "currently serviceable" should be expanded to cover all structures which have been destroyed in a catastrophic event, such as a hurricane.

This NWP authorizes repair, rehabilitation, and replacement activities with minor deviations necessary to comply with modern design standards. Previously authorized structures or fills that have been damaged by catastrophic events can also be repaired, rehabilitated, or replaced under this NWP. We do not need to change the definition of the term "currently serviceable."

General comments addressing this NWP include: (1) Prohibiting its use in watersheds with substantial historic aquatic resource losses; (2) prohibiting its use in regionally identified tidal waters to ensure effective protection of their unique and difficult to replace functions; (3) prohibiting its use in certain stream segments to ensure minimal cumulative adverse effects; (4) prohibiting its use in watersheds identified as having water quality problems; and (5) requiring the permittee to perform the work during low flow conditions.

We believe that these restrictions are unnecessary since NWP 3 authorizes maintenance activities, which are unlikely to result in more than minimal adverse effects on the aquatic environment. However, division engineers can regionally condition NWP 3 to restrict or prohibit its use in high value waters. Division engineers can also regionally condition NWP 3 to reduce the distance from the existing structure that accumulated sediment can be removed or reduce the amount of fill that can be discharged into waters of

the United States for activities associated with the repair of uplands damaged as a result of storms or other discrete events.

Many commenters suggested additional conditions, which would allow minor deviations necessary to incorporate best management practices. Again, this is the intent of the phrase "minor deviations in the structure's configuration or filled area" in paragraph (i). It was also suggested that the repair and installation of scour and bank protection should be included in the NWP, as long as the applicant provides documentation of the original construction, including but not limited to, "as-built" plans. Another suggested activity to be added to NWP 3 was the removal of beaver dams and associated debris to restore the "natural" hydrology or functions of an area.

Paragraph (ii) of the proposed modification of NWP 3 authorizes the installation of scour protection necessary to protect or ensure the safety of the structure. If bank protection is necessary, it may be authorized by NWP 13, a regional general permit, or an individual permit. The removal of a beaver dam may or may not require a Section 404 permit, depending on whether the removal of the beaver dam results in a discharge of dredged or fill material into waters of the United States. If the beaver dam can be removed without any discharges into waters of the United States or the discharge consists only of incidental fallback, no Section 404 permit is required. If the removal of the beaver dam involves discharges into waters of the United States, then a Section 404 permit is required. If a Section 404 permit is required, the removal of a beaver dam may be authorized by another NWP such as NWP 18, a regional general permit, or an individual permit.

Removal of Accumulated Sediments in the Vicinity of Existing Structures: A large number of commenters recommended limits for paragraph (ii) of NWP 3. Recommended limits ranged from 20 to 300 cubic yards of excavated material and 25 to 500 linear feet of direct impacts upstream and/or downstream of the structure. The commenters recommending lower limits believe that higher limits for this NWP would cause more than minimal adverse effects on the aquatic environment. The commenters suggesting higher limits contend that higher limits are necessary to authorize sediment removal when accumulation of sediments occurs for greater distances (e.g., in flat terrain or alluvial out-wash areas). Another commenter recommended imposing 1/3-

acre and 200 linear foot limits in paragraph (ii) if the project is in woodlands or special aquatic sites. Several commenters believe that there should be no restrictions because review of the PCN allows the District Engineer to limit the work to the minimum necessary to maintain the function of the structure. One commenter stated that the NWP should be conditioned to prohibit stream bed "clean-outs." Another commenter requested a narrower definition of the term "vicinity."

We believe that the 200 linear foot limit authorizes removal of accumulated sediments from the vicinity of an existing structure that, under most circumstances, results only in minimal adverse effects on the aquatic environment, individually or cumulatively. Division engineers can regionally condition this NWP to decrease the 200-foot limit or impose limits on the quantity of excavated material that can be removed. Since paragraph (ii) of the proposed modification of NWP 3 requires notification to the District Engineer for every activity, district engineers can exercise discretionary authority and require an individual permit for those activities that result in more than minimal adverse effects on the aquatic environment. Paragraph (ii) of the proposed modification does not authorize stream "clean out" activities, unless sediments have accumulated in the vicinity of an existing structure, such as a bridge or culvert. Sediment removal to deepen a stream channel is not authorized by this NWP. District engineers will determine what constitutes the "vicinity" for the purposes of paragraph (ii) of this NWP.

One commenter recommended that the NWP prohibit the removal of accumulated sediments in special aquatic sites. Another commenter stated that compensatory mitigation should be required if aquatic habitat is removed. Some commenters suggested modifying paragraph (ii) to authorize the removal of sediment deposits and associated vegetation from the structures themselves and require testing of sediments in areas of suspected contamination to ensure that the adverse effects of the work are minimal.

We do not believe that it is necessary to exclude special aquatic sites from paragraph (ii) of the proposed modification of NWP 3. Sediment accumulation can occur in riffle and pool complexes and can also result in vegetated bars which may be considered wetlands. However, these areas are constantly changing due to sediment transport within the waterbody. Under

these circumstances, the removal of accumulated sediments, even if they are vegetated, typically results in minimal adverse effects on the aquatic environment. District engineers can require compensatory mitigation, if they believe it is necessary to ensure that the authorized work results only in minimal adverse effects, but in most situations compensatory mitigation is unnecessary due to the dynamic nature of the affected area and the minor impacts to the aquatic environment. In fact, removal of accumulated sediments in the vicinity of structures may improve the aquatic environment by removing barriers to fish passage. It is likely that sediments will repeatedly accumulate in the area and will have to be removed on a regular basis. The phrase "in the vicinity of existing structures" includes removal of accumulated sediments, including any vegetation that may be growing on those accumulated sediments, in and near the structures. However, we will clarify the phrase to read "* * * in the vicinity of, and within, existing structures * * *" In areas where accumulated sediments may be contaminated, district engineers can exercise discretionary authority to require an individual permit and require testing to determine if special techniques are required for the excavation and disposal of the accumulated sediment.

Some commenters objected to modifying this NWP to authorize sediment removal in the vicinity of existing structures, especially in docking areas. One commenter requested that the NWP include a definition of the term "structure" to clarify whether or not maintenance dredging of marina basins and boat slips is authorized by this NWP. One commenter suggested that the provision for removing accumulated sediment in front of existing structures appears to conflict with the prohibition against maintenance dredging in paragraph (i) of the proposed modification to this NWP. Several commenters also recommended that the Corps limit the number of times this permit could be used to prevent the cumulative impacts of multiple sediment removal projects. One commenter stated that removal of sediment from a drainage ditch in the vicinity of an existing structure would be considered maintenance of an existing drainage ditch and would be exempt from Section 404 permit requirements in accordance with 33 CFR Part 323.4(a)(3).

We have changed the text of the proposed modification of NWP 3 to clarify that maintenance dredging for the primary purpose of navigation is not

authorized by this NWP, unless it is specifically authorized by paragraphs (ii) and (iii) of the NWP for other purposes. For example, this NWP can authorize the removal of accumulated sediment from a water intake structure in a marina basin. Maintenance dredging of existing marina basins or boat slips may be authorized by NWP 35, NWP 19, regional general permits, or individual permits. We believe that it is unnecessary to limit the number of times this NWP can be used to remove accumulated sediments in the vicinity of existing structures. The removal of accumulated sediments in the vicinity of existing structures is unlikely to result in more than minimal cumulative adverse effects on the aquatic environment. District engineers can determine, through their review of notifications, if repeated removal of accumulated sediments at a particular site results in more than minimal cumulative adverse effects on the aquatic environment. For the purposes of this NWP, the term "structure" does not include unconfined waterways and channelized streams, except where the channelized stream consists of a concrete-lined channel. Although the maintenance of existing drainage ditches is exempt under Section 404(f), paragraph (ii) of NWP 3 authorizes the removal of accumulated sediments in the vicinity of existing structures that does not qualify for a Section 404(f) exemption. Maintenance activities that are eligible for Section 404(f) exemptions do not require the use of this NWP.

Some commenters stated that the placement of rip rap to protect the structure should be removed from this NWP because this activity can be authorized by other NWPs. One commenter believes that the placement of rip rap should not be authorized by this NWP except in areas where it is clearly necessary to protect public structures. Other commenters recommended prohibiting the placement of rip rap in areas inhabited by submerged aquatic vegetation.

It is our intent to authorize under paragraph (ii) all related activities for a single and complete project that have minimal adverse effects on the aquatic environment, rather than require the use of multiple NWPs to authorize those activities. The placement of rip rap at the foot of the structure is often necessary to protect the structure from scour. If sediments are accumulating in the vicinity of the structure, it is likely that the structure is subject to scouring by the sediment load of the waterbody. In areas with substantial movement of sediment, it is unlikely that large

populations of submerged aquatic vegetation will become established, because the movement of sediments in the bed of the waterbody often will not allow submerged aquatic vegetation to take root and grow in the waterbody. Furthermore, the PCN requirement in paragraph (ii) allows district engineers to review all proposed removal of accumulated sediments to ensure that the adverse effects on the aquatic environment are minimal. If a substantial population of submerged aquatic vegetation inhabits the vicinity of the structure, district engineers can exercise discretionary authority if the adverse effects of sediment removal and the placement of rip rap will be more than minimal.

Some commenters stated that the removal of accumulated sediments from publicly-owned transportation facilities should be exempt from notification requirements, and no PCN should be required for sediment removal after heavy storms or floods, because it is too time consuming to obtain the required cultural and biological clearances.

We believe that the adverse effects on the aquatic environment are the same, regardless of whether or not a transportation crossing is privately or publicly owned. The PCN requirement is necessary to allow district engineers to determine if the adverse effects of the proposed work on the aquatic environment will be minimal and ensure that prospective permittees will not remove more sediment than necessary. In the event of a heavy storm, flood, or other natural disaster, the Corps has emergency procedures in place for expediting permit issuance for activities related to repairing storm or disaster damage.

Some commenters recommended authorizing the use of minor cofferdam systems in the NWP, without a PCN requirement, when removing accumulated sediments and debris in accordance with paragraph (ii) and for activities in waters of the United States associated with restoring damaged uplands in paragraph (iii).

We disagree that this NWP should include the use of cofferdams, because NWP 33 can be used to authorize temporary construction, access, and dewatering activities that may be associated with the activities authorized by this NWP. Combining NWP 3 with NWP 33 for a single and complete project is not contrary to General Condition 15, provided the adverse effects on the aquatic environment are minimal.

Activities Associated with Restoration of Uplands: Paragraph (iii) of the proposed modification of NWP 3

authorizes discharges of dredged or fill material into all waters of the United States for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event. Many commenters stated that the restoration of uplands should be removed entirely from this NWP because it has nothing to do with the maintenance of currently serviceable structures and the Corps does not have jurisdiction over any activity in uplands. Many of these commenters believe that the Corps is asserting jurisdiction over uplands and requested the removal of paragraph (iii) from NWP 3. One commenter suggested that instead of authorizing the project proponent to rebuild an upland area to "pre-event" conditions, the permittee should only be authorized to stabilize the remaining uplands. Another commenter objected to modifying NWP 3 to authorize the restoration of eroded banks because bank erosion is a natural process and there are no limits in the NWP. This commenter believes that an individual permit should be required, with conditions requiring the use of coarse woody debris or other bioengineering methods to prevent further erosion of the bank.

The purpose of paragraph (iii) of this NWP is to authorize those activities in waters of the United States that are associated with the restoration of uplands damaged by a storm or other discrete event. The restoration of uplands lost as a result of a discrete natural event does not require a Section 404 permit, because that activity is subject to the Clean Water Act Section 404(f) exemptions. However, some work in waters of the United States may be necessary to complete the restoration work. It is this associated work in waters of the United States that is authorized by this NWP. For example, the permittee may want to install structures to protect the restored uplands or remove obstructions in waters of the United States in the vicinity of the affected uplands. Through paragraph (iii) of this NWP, we are not attempting to regulate activities in uplands. We agree that paragraph (iii) requires clarification as to the extent of the Corps jurisdiction for upland restoration activities and we have rewritten paragraph (iii) to state that NWP 3 authorizes discharges " * * * into all waters of the United States for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event * * * ". Paragraph (iii) of the proposed modification does not authorize activities in waters of the United States

associated with the replacement of uplands lost through gradual erosion processes; the loss of uplands must be due to a specific event, such as a hurricane or flood. Permittees are encouraged, but not required, to utilize bioengineering methods to stabilize the restored bank.

One commenter objected to the proposed paragraph (iii) of the NWP, stating that previous conditions of the site are too difficult to document. Some commenters recommended that the Corps require the use of field evidence to estimate the prior extent of uplands, such as contours adjacent to the damaged areas, or as-built plans for the waterway to determine the extent of activities authorized by this NWP. Two commenters suggested that paragraph (iii) of NWP 3 should be applicable for smaller events over a specific time period (e.g., one year) rather than one catastrophic event.

We have made the requirement for the prospective permittee to provide evidence to the District Engineer to justify the extent of the proposed restoration less stringent, to allow the District Engineer more flexibility to determine if a proposed activity can be authorized by paragraph (iii) of this NWP. Evidence of the pre-event extent of uplands can be provided by a recent topographic survey or photographic evidence. District engineers may also assess the surrounding landscape, including field evidence, to evaluate the extent of the proposed restoration and determine if it complies with the NWP. The location of the ordinary high water mark that existed prior to the storm event may be obvious when visiting the site. We realize that most property owners will not have a recent topographic survey showing the extent of the uplands on their property.

Paragraph (iii) of the proposed modification of NWP 3 specifically does not authorize the reclamation of lands lost over an extended period of time due to normal erosion processes. If the land is subject to normal erosion processes, the landowner can prevent or reduce further erosion through bank stabilization measures, many of which are authorized by NWP 13. If the proposed bank stabilization measure does not qualify for authorization under NWP 13, then the landowner can apply for authorization by another NWP, a regional general permit, or an individual permit. We will retain the provision of the NWP to authorize only activities in waters of the United States for restoration of uplands lost due to specific events, such as storms and floods, and specifically exclude lands lost through normal erosion processes.

For paragraph (iii) of the NWP, PCN thresholds of 1/4 acre, 10 cubic yards, and up to 200 linear feet of stream bed were suggested by commenters and some commenters recommended requiring notification only for activities in special aquatic sites. One commenter recommended notification and agency coordination for all activities authorized under paragraph (iii).

In the July 1, 1998, proposal to modify NWP 3, there was an inconsistency in the notification requirements. In subparagraph (c) of the proposed modification, notification was required for activities affecting greater than 1/3 acre of waters of the United States. Subparagraph (e) of the proposed modification stated that notification is required for all activities associated with the restoration of uplands. We have determined that notification should be required for all activities authorized under paragraph (iii) of this NWP, and have modified the NWP to state that notification is required for all activities authorized by paragraph (iii) of NWP 3.

One commenter suggested that the Corps reduce the amount of time required to submit a PCN from one year after the date of the damage to two or three months. They believe that two or three months is sufficient time for the landowner to realize that damage to uplands has occurred due to a discrete event and determine if restoration of the uplands will be done by the property owner. Another commenter suggested that while a 12-month time limit after the damage event may be enough time to plan restoration, it does not provide enough time to obtain financing for the restoration effort. Some commenters recommended requiring compensatory mitigation at a 1:1 ratio for activities authorized by paragraph (iii) of this NWP.

Although landowners are usually immediately aware that they have lost uplands due to a storm, flood, or other discrete event, we believe that they should be allowed one year to determine if they want to restore the lost uplands and submit a notification to the District Engineer. After a catastrophic event, many landowners require time to recover from the event and conduct repairs to their homes and other structures. Restoration of their land is often less urgent and the landowners should be allowed adequate time to carefully plan their upland restoration efforts. It should also be noted that the one year deadline in paragraph (iii) of the NWP applies only to the notification requirement and that the permittee has two years to start the restoration work or execute a construction contract. Two

years should be an adequate amount of time to conduct the upland restoration activity.

Since the purpose of paragraph (iii) is to authorize activities in waters of the United States associated with the restoration of uplands lost due to a storm event, in most cases compensatory mitigation should not be required because the purpose of the work is to return the area to approximately the same conditions that existed prior to the storm event. Activities in waters of the United States associated with the restoration of uplands typically do not result in more than minimal adverse effects on the aquatic environment and should not require compensatory mitigation. Carefully planned and implemented restoration efforts may benefit the overall aquatic environment by repairing the damaged areas and reducing sediment loads to the waterbody, thereby improving water quality. As with all NWP, district engineers may require compensatory mitigation to ensure that the adverse effects of the work on the aquatic environment are minimal, but we believe that compensatory mitigation should not be required in most cases.

To make NWP 3 easier to understand, we are proposing to combine all of the conditions in subparagraphs (a) through (e) and subparagraph (h) of paragraph (iii) to form a single paragraph. We have also added a note at the end of this NWP to clarify that NWP 3 authorizes repair, rehabilitation, or replacement activities that do not qualify for the Section 404(f) exemption for maintenance.

This NWP is subject to the requirements of proposed General Conditions 25 and 26. General Condition 25 requires the prospective permittee to notify the District Engineer in accordance with General Condition 13 for activities in designated critical resource waters, including wetlands adjacent to those waters. The District Engineer may authorize NWP 3 activities in designated critical resource waters and adjacent wetlands if the adverse effects on the aquatic environment are no more than minimal. General Condition 26 does not prohibit the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. However, NWP 3 activities in impaired waters and adjacent wetlands require notification to the District Engineer in accordance with General Condition 13. The proposed work can be authorized by NWP 3 if the permittee demonstrates to the District Engineer that the work will not result in further impairment of the waterbody.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. This NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

7. Outfall Structures and Maintenance

In the July 1, 1998, **Federal Register** notice, the Corps proposed to modify this NWP to authorize the removal of accumulated sediments from outfall and intake structures and associated canals. All of the original terms and limitations of NWP 7 have been retained. Numerous commenters expressed their support for the proposed modifications to NWP 7. A number of commenters objected to the inclusion of excavation activities in associated canals and impoundments and questioned whether such activities are related and similar in nature. A couple of commenters questioned the need for the proposed modification. Some commenters requested acreage and cubic yardage limits for the additional activities authorized by the proposed modification of NWP 7. Several commenters recommended restricting excavation in wetlands.

Outfalls, intakes, and associated canals accumulate sediment and require periodic excavation or maintenance dredging to restore flow capacities to the facility. Most of the dredging is required in the vicinity of intake structures and their canals because circulation patterns result in the deposition of sediment in these areas. This sediment must be removed to ensure that the facility has an adequate supply of water for its operations. Water discharged from outfall structures usually has little or no sediment load and maintenance dredging is not often required in these areas. In situations where a utility company's intake or outfall canal is also used by barges to travel to the utility facility, part (ii) of the proposed modification of NWP 7 will allow continued access by those barges because the removal of accumulated sediments will return the intake or outfall canal to its originally designed dimensions and restore its navigable capacity.

We believe that authorizing some dredging or excavation to maintain the effectiveness of the outfall or intake structure is necessary and an integral part of this NWP. This NWP is conditioned to authorize only the minimum work necessary to maintain the facility, and requires the prospective

permittee to provide the District Engineer with information on the design capacities and configuration of the intake or outfall structure, impoundment, or canal. The prospective permittee will also be required to submit a delineation of affected special aquatic sites with the PCN to allow district engineers to better assess potential adverse effects on the aquatic environment, especially in vegetated shallows that may occur in the canal or in the vicinity of the intake or outfall structure. No acreage limits have been placed upon this NWP. Most activities authorized by this NWP will take place in existing canals, which have been repeatedly dredged and maintained and often support some kind of industrial or commercial activity for public benefit. Furthermore, existing deposit areas for the dredged or excavated sediment will typically be present and available for use. Where maintenance dredging or excavation is proposed, notification is required and the District Engineer can exercise discretionary authority if the adverse effects on the aquatic environment will be more than minimal. Compensatory mitigation will also be required where appropriate, but in most cases we believe that compensatory mitigation should not be required for activities authorized by part (ii), since it is a maintenance activity. Division engineers can also impose regional conditions on this NWP to add limits to the NWP or restrict or prohibit its use in certain waterbodies.

Several commenters supported the proposed notification requirements. Several commenters recommended requiring notification for all activities whereas other commenters suggested specific distance and acreage thresholds for notification.

We are proposing to retain the notification requirement to allow district engineers to review all activities authorized by this NWP. Evidence of the original design capacity and configuration of the facility must be submitted with the notification. This information allows district engineers to review the proposed work to ensure that the removal of sediment is for maintenance, not new dredging or excavation.

Two commenters stated that irrigation and farm ponds should be removed from the proposal as they are not related to outfalls, while many commenters objected to the inclusion of excavation in small impoundments under this NWP. Another commenter stated that the maintenance of water treatment facilities, irrigation ponds, and farm

ponds, is exempt from Section 404 permit requirements.

In the July 1, 1998, **Federal Register** notice, we stated that the proposed modifications to NWP 7 could be used to authorize the removal of accumulated sediments from intake and outfall structures in small impoundments, such as irrigation ponds and farm ponds. This statement is in error, since the construction and maintenance of farm, stock, and irrigation ponds does not require a Section 404 permit (see 33 CFR Part 323.4(a)(3)), provided the work does not trigger the recapture provision of Section 404(f)(2) of the Clean Water Act (see 33 CFR Part 323.4(c)). The removal of sediments from small impoundments is limited to the excavation of sediment around the intake or outfall structure, if that activity is not exempt under Section 404(f). Water treatment facilities may be constructed in waters of the United States, and possibly Section 10 waters. The proposed modification of NWP 7 authorizes removal of accumulated sediments in the vicinity of intake and outfall structures constructed in waters of the United States for water treatment facilities.

One commenter opposed modifying NWP 7 to authorize activities in non-tidal waters, believing that this would open up thousands of acres of wetlands and streams to destruction. One commenter stated that since the proposed modification had no quantitative limits for impacts, this NWP could cause significant and unmitigated individual and cumulative adverse impacts. Two commenters stated that no activities in tidal areas or areas adjacent to, or contiguous with, tidal waters should be authorized by this NWP. Two commenters further requested that outfall structures associated with large facilities, such as aquaculture facilities or power plants, should be reviewed under an individual permit.

NWP 7 is applicable in all waters of the United States, including navigable waters. The proposed modification of NWP 7 authorizes only the construction of outfall structures and associated intake structures and maintenance dredging or excavation of accumulated sediments in the vicinity of outfall and intake structures and associated canals. These activities will not result in the destruction of thousands of acres of wetlands and streams, because most outfall structures are fairly small and the authorized excavation or dredging activities are only for maintenance. The removal of accumulated sediments from an existing intake or outfall structure or canal will not open up thousands of

wetlands and streams to destruction. Furthermore, since the authorized removal of accumulated sediment will be limited to the minimum necessary to restore the facility to its original design capacity, the adverse effects on the aquatic environment will usually be minimal. The District Engineer will have the opportunity to review all proposed NWP 7 activities on a case-by-case basis and will be able to add any necessary conditions, including compensatory mitigation requirements, to ensure that this NWP authorizes only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively. For those activities that may result in more than minimal adverse effects on the aquatic environment, district engineers will exercise discretionary authority. This NWP can be utilized for outfalls associated with aquaculture or power plants. All outfalls proposed under this NWP must be authorized, exempted, or otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program.

Several commenters suggested adding restrictions during fish spawning and nesting periods. One commenter recommended adding two additional conditions because of potential impacts to manatees. Another commenter recommended that this permit contain a condition requiring that shorelines affected by activities authorized under this permit should be revegetated.

General Condition 20 states that activities including structures and work in navigable waters of the United States or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. This condition further states that activities that physically destroy important spawning areas are not authorized. In addition, limitations in specific waters for certain species are more appropriately addressed as regional conditions or case-specific special conditions. Activities that may affect Federally-listed endangered or threatened species or designated critical habitat must comply with General Condition 11. Districts are encouraged to establish local operating procedures to provide better protection for these species and their critical habitat.

General Condition 3, Soil Erosion and Sediment Control, requires the permittee to utilize appropriate soil erosion and sediment controls during construction and permanently stabilize the site at the earliest practicable date. This requirement may be fulfilled through vegetative stabilization

methods. In addition, following project completion, some areas may naturally revegetate. We do not believe that it is necessary to incorporate an additional requirement into the NWP. Where necessary, revegetation can be required by district engineers on a case-by-case basis through special conditions or regional conditions. In some cases, mitigation requirements may also address this issue, particularly where the permittee is required to establish and maintain a vegetated buffer.

One commenter stated that NWP 7 should clearly state that it authorizes removal of accumulated sediment in and around intake pipes and not just around intake pipes. Several commenters requested that this NWP authorize removal of accumulated sediment in the vicinity of intake and outfall structures for engineered flood control facilities, including dams, flood control facilities, and large reservoirs. One commenter asked why NWP 7 does not authorize the construction of intake structures only, because they result in similar adverse effects on the aquatic environment as outfalls.

The proposed modification of this NWP authorizes the removal of sediments blocking or restricting outfall or intake structures. This includes sediment removal from inside of the intake structure. This NWP does not authorize the construction of new canals or the removal of sediment from the head works of large dams, flood control facilities, or large reservoirs. Individual permits, regional general permits, or other NWPs such as NWPs 19 or 31, may authorize these activities. NWP 7 does not authorize the construction of intake structures without associated outfall structures because of the potential for more than minimal adverse effects on the aquatic environment where an intake structure may be constructed in a waterbody to withdraw water. If the water is not returned to the waterbody through an outfall structure, there may be more than minimal adverse effects to aquatic organisms and local water supplies, especially in arid regions of the country.

This NWP is subject to proposed General Conditions 25 and 26, which will reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 7 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent

wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

12. Utility Line Activities

In the July 1, 1998, **Federal Register** notice, we proposed to modify this NWP to authorize activities commonly associated with utility lines, such as the construction of electric or pumping substations, foundations for overhead utility line towers, poles, and anchors, and access roads. Many of these activities may have been authorized by NWP 26.

General comments: We received many comments addressing the proposed changes to NWP 12. Some commenters suggested leaving NWP 12 unchanged. Other comments ranged from supporting the issuance of the proposed modifications of NWP 12 to recommending the revocation of NWP 12. Many commenters concurred with the proposed acreage limits and PCN thresholds for the additional activities included in this NWP. Some commenters proposed higher acreage limits and PCN thresholds. Other commenters recommended lower acreage limits and PCN thresholds for the additional activities. Many commenters stated that the proposed changes would improve the efficiency of the NWP program and prevent the increase of regulatory burdens, without causing more than minimal adverse effects on the aquatic environment.

Many commenters expressed opposition to the expansion of NWP 12 to authorize utility line substations, foundations for utility towers, and permanent access roads. These commenters stated that this proposal would be a major expansion of the limits of NWP 12, resulting in significant losses of wetlands and other waters of the United States. Several commenters stated that there would no longer be any incentive to locate these facilities in uplands because the proposed modification would authorize their construction in wetlands. Some commenters believe that concerns regarding individual and cumulative

adverse effects on the aquatic environment resulting from the modification of NWP 12 could be addressed through the regional conditioning process.

We believe the NWP terms, limits, and notification requirements, will help to ensure that the proposed modification of NWP 12 authorizes only those utility activities with minimal adverse effects on the aquatic environment. The review of PCNs by district engineers and the regional conditioning process will ensure that the NWP authorizes only those activities with minimal adverse effects on the aquatic environment and will address regional and watershed concerns. The notification provisions of NWP 12 will allow district engineers to exercise discretionary authority for those utility line activities that may result in more than minimal adverse effects on the aquatic environment.

One commenter recommended combining utility lines with roads and other linear projects into one NWP permit and authorizing other utility line activities that are not linear in nature, such as substations and foundations for overhead utility lines, by another NWP because they are more similar in nature.

We believe that utility line substations, foundations for utility line towers, and permanent access roads for utility line maintenance are more appropriately authorized by NWP 12, instead of a separate NWP for these activities, because these activities are integral to single and complete utility line projects and the adverse effects for these activities should be considered under one NWP. All of the activities identified in NWP 12 are associated with typical utility projects and are similar in nature to other utility projects. We have changed the title of this NWP from "Utility Activities" to "Utility Line Activities" to better reflect the related nature of these activities for utility line construction, maintenance, and operation. We also believe that most of these projects, when conducted within the specified limits of the NWP, will have no more than minimal adverse impact on the aquatic environment. Finally, in those cases where proposed activities may have more than minimal adverse effects on the aquatic environment, we believe that the notification and regional conditioning processes will serve to ensure that the NWP authorizes only utility line activities with minimal adverse effects on the aquatic environment.

One commenter made the following recommendations concerning NWP 12: (1) The NWP should apply only to previously developed areas and well-

established utility corridors; (2) the clearing of forested wetlands should be excluded from this NWP; (3) the NWP should be excluded from wetlands in migratory corridors or near wetlands heavily used by migratory birds; and (4) the NWP should contain a provision requiring the planting of native species in disturbed areas and the removal of noxious and invasive plant species. Another commenter recommended excluding the use of NWP 12 in special aquatic sites and endangered species habitat.

We do not agree with the recommendations in the previous paragraph. NWP 12 authorizes only those utility activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively. It is unnecessary and impractical to limit NWP 12 only to activities in existing utility corridors. If the proposed utility line will result in more than minimal adverse effects on the aquatic environment, district engineers can exercise discretionary authority and require an individual permit. Regional conditioning or case-by-case discretionary authority is the best mechanism to address potential adverse effects to wetland habitat. Regional conditions can also address concerns for revegetating areas temporarily affected by the authorized work. District engineers can add special conditions to NWP 12 authorizations to specify certain plant species to be planted in disturbed areas. General Condition 11 adequately addresses potential effects of the use of NWP 12 on Federally-listed endangered or threatened species or designated critical habitat.

Utility lines: One commenter recommended limiting NWP 12 to utility lines that are less than 10 miles in length and six inches in diameter, with an acreage limit of 2 acres. Other recommended acreage limits included 1 acre and $\frac{1}{3}$ acre. One commenter expressed concern about allowing sidecast material to remain in waters of the United States for up to six months, particularly in tidally influenced waters. To minimize adverse effects to marine fisheries, this commenter recommended conditioning NWP 12 to require the permittee to leave gaps in sidecast material at minimum intervals of 500 feet and prohibiting the placement of sidecast material in a manner that blocks natural surface water flows. Another commenter recommended prohibiting sidecasting of material during utility line maintenance activities to protect unique wetland functions. Some commenters questioned the requirement that excess material

must be removed to upland areas immediately upon completion of construction and one recommended that, in light of the recent Fifth Circuit Court of Appeals ruling in *American Mining Congress, et al. v. Corps of Engineers*, the Corps move the sentence concerning excess material to paragraph (i) of NWP 12. This commenter also stated that they assume that this requirement is intended to apply only to soil or other material that is dredged or excavated in significant quantities and redeposited at another location within a water of the United States, and not to clearing vegetation above ground.

Regional conditioning is the best mechanism for placing acreage limits on utility line construction, if division engineers believe that the cumulative adverse effects of utility line construction may result in more than minimal adverse effects on the aquatic environment within a particular region. Regional conditions are also the best way to address concerns regarding the maximum amount of time sidecast material should remain in waters of the United States and whether or not gaps or culverts should be placed in the temporary piles of excavated material to maintain surface water flows. In addition, General Condition 21, Management of Water Flows, requires that the permittee conduct the work so that preconstruction water flow patterns are maintained to the maximum extent practicable after completion of the authorized work.

The requirement for removing excess fill materials upon completion of construction will be retained in this NWP. This NWP authorizes temporary fills to install the utility line, such as sidecasting into waters of the United States during installation, provided the permittee backfills the trench. Any excavated material placed in waters of the United States that is not used to backfill the trench must be removed upon completion of the work or it will be considered a permanent fill requiring a separate Section 404 permit. An important requirement to ensure that activities authorized by NWP 12 will have no more than minimal adverse effects on the aquatic environment is the requirement to maintain preconstruction contours and elevations as close as possible after completion of the authorized work. Clearing vegetation by cutting it above the soil surface does not require a Section 404 permit, as long as there is no discharge of dredged or fill material into waters of the United States. In addition, if the proposed work is in a forested wetland, any mechanized landclearing which results in a discharge of dredged or fill material

will require a PCN. The Corps believes it is necessary to retain this provision to ensure that this NWP authorizes activities with only minimal adverse effects on the aquatic environment.

One commenter recommended that the NWP contain a requirement that all wastewater lines have no-seam pipes beneath perennial or intermittent streams to reduce the potential for untreated wastewater leaking into these streams. Another commenter recommended conditioning NWP 12 to require the installation of anti-seep collars at the downstream wetland boundary and every 150 feet up the gradient until the utility line exits the wetland at the upstream or up-slope end to prevent the lateral draining of the wetland caused by the gravel bed beneath the utility line. One commenter recommended requiring perpendicular (between 75 and 105 degrees) stream crossings.

General Condition 2, Proper Maintenance, requires that permittees maintain all authorized structures or fills to ensure public safety. Permittees must also comply with Section 402 of the Clean Water Act, which requires a permit for the discharge of effluent into waters of the United States. Wastewater lines must be designed and maintained so that they do not leak untreated wastewater into waters of the United States. NWP 12 also includes a requirement that a utility line may not be constructed in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, which may create a french drain effect, and failing to take appropriate measures to prevent the lateral draining of a wetland).

We believe that perpendicular stream crossings are environmentally preferable in many situations. However, these types of crossings are not always feasible and we have determined that it is better to require notification where a utility line is proposed to be placed within a water of the United States and runs parallel to a stream bed within that jurisdictional area. These projects will be reviewed on a case-by-case basis to determine if the activities would have more than minimal adverse effects on the aquatic environment. In addition, regional conditions can address concerns about certain activities and/or impacts to certain waters of the United States.

Many commenters concurred with the statement in the preamble that the installation of subaqueous utility lines in waters of the United States should not be considered as resulting in a loss of waters of the United States if the area impacted by installation of the utility

line is the minimum necessary and preconstruction contours and elevations are restored after construction. A number of commenters expressed concern about adverse effects associated with utility projects and believe that compensatory mitigation should be required to offset those adverse effects. Some commenters also questioned why the term "loss" only applies to permanently affected waters of the United States. One commenter stated that the term "loss" should apply to the clearing of forested wetlands for the construction of overhead power transmission lines where the forest will not be allowed to grow back.

We believe that the installation of utility lines that results only in temporary adverse effects on waters of the United States should not be considered a loss if preconstruction contours and elevations are restored after construction and there are no permanent adverse effects to the aquatic environment resulting from the activity. While temporary adverse effects to water quality, fish and wildlife habitat, and other components of the aquatic environment may result, the areas typically return to preconstruction conditions if the terms and conditions of the NWP are met. In these cases, compensatory mitigation should not be required. However, should the installation of a utility line result in the permanent conversion of a forested wetland to another wetland type in a permanently maintained right-of-way, compensatory mitigation may be required by the District Engineer if it is necessary to ensure that the authorized work will result in minimal adverse effects on the aquatic environment. Finally, in those cases where the proposed work may result in more than minimal adverse impact on the aquatic environment, we believe the notification and regional conditioning processes will ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. In addition, compensatory mitigation can be required for any NWP 12 activity requiring a PCN to ensure that the adverse effects of the authorized work on the aquatic environment are minimal, individually or cumulatively. The NWP already contains provisions addressing the clearing of forested wetlands. District engineers will determine if compensatory mitigation should be required for the conversion of a forested wetland to an emergent or scrub-shrub wetland in a maintained utility line corridor.

In the first sentence of paragraph (i), we have stated that NWP 12 authorizes the maintenance and repair of utility

lines in addition to their construction. Since NWP 12 can be used to authorize the construction of utility lines in both Section 10 and Section 404 waters, we have added the phrase "in all waters of the United States" to the text of paragraph (i).

Utility line substations: Some commenters recommended that the Corps withdraw this part of the proposed modification of NWP 12. Many commenters recommended higher acreage limits, ranging from 2 to 3 acres. A number of commenters recommended lower acreage limits. One commenter requested that the Corps clarify what is meant by the term "pumping substations" and suggested using the term "compressor station" instead.

We believe that the 1 acre limit for the construction of utility line substations is appropriate to authorize the construction of most utility line substations with minimal adverse effects on the aquatic environment. However, we have lowered the PCN threshold for the construction of utility line substations to $\frac{1}{4}$ acre, to make it more consistent with the other proposed new and modified NWPs. We also agree that some clarification is appropriate to specify the types of utility line substations are authorized by paragraph (ii). The term "utility line substations" includes power line substations, lift stations, pumping stations, meter stations, compressor stations, valve stations, small pipeline platforms, and other facilities integral to the operation of a utility line.

For the proposed modification of NWP 12, the construction or expansion of utility line substations in waters of the United States is limited to non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters. We have added this language to paragraph (ii) to clarify the applicable waters for utility line substations authorized by NWP 12, and to make those applicable waters consistent with most of the other proposed NWPs.

Foundations for overhead utility line towers, poles, and anchors: One commenter recommended eliminating the requirement to use separate footings for utility line towers where feasible. Another commenter noted that in certain situations where hurricanes, high winds, and lightning occasionally cause damage to power line structures and conductors, it is better to construct a single pad beneath the footings. The commenter requested modification of the NWP to allow single pad fills as long as they result in the loss of less than $\frac{1}{3}$ acre of waters of the United States.

We have decided to retain the proposed language because it provides

flexibility. The phrase "where feasible" does not prohibit the construction of a single pad to support the utility line tower; it merely encourages the construction of separate footings. This phrase provides district engineers with the flexibility to use NWP 12 to authorize the construction of single pads where there are concerns due to hurricanes, high winds, and other dangerous conditions. District engineers can require the permittee to provide justification as to why a single pad should be constructed instead of separate footings. The only requirement is that the pads result in minimal adverse effects on the aquatic environment. District engineers can require compensatory mitigation for the losses of waters of the United States resulting from the construction of single pads for overhead utility line towers.

Since the proposed modification of NWP 12 can be used to authorize the construction of foundations for overhead utility line towers, poles, and anchors in both Section 10 and Section 404 waters, we have added the phrase "in all waters of the United States" to the text of paragraph (iii).

Access roads: Many commenters recommended increasing the acreage limit for permanent access roads to 2 or 5 acres. One commenter recommended limiting permanent access roads to $\frac{1}{3}$ acre of loss of waters of the United States and a maximum width of 15 feet. Several commenters recommended excluding permanent access roads from this NWP. One of these commenters objected to the inclusion of permanent utility access roads because access roads fragment the landscape, which can adversely affect fish and wildlife habitat and the water quality functions of many wetland ecosystems. Another commenter requested that the NWP contain a provision requiring the permittee to submit justification explaining why permanent access roads are needed. One commenter suggested that the PCN contain a requirement for the submission of an engineering analysis demonstrating that the culvert size for the permanent access road is adequate, based on watershed acreage and the appropriate rainfall coefficient. One commenter expressed concern about inconsistent statements in paragraph (iv) and the preamble discussion relating to the effects of the access roads on subsurface flows. This commenter questioned whether the Corps had the authority to regulate subsurface waters. A commenter asked the Corps to clarify the meaning of "minimum width necessary" as well as the acceptable length of road, and questioned who would make such

determinations. Further, this commenter asked who decides whether preconstruction contours are maintained as near as possible. One commenter recommended adding a term to the NWP requiring that access roads be constructed with pervious surfaces.

We believe that the 1 acre limit for permanent access roads is appropriate to ensure that the NWP authorizes only those permanent access roads that result in minimal adverse effects on the aquatic environment. The PCN threshold remains the same as proposed in the July 1, 1998, **Federal Register** notice. The construction of permanent access roads for utility line maintenance has the same effects on landscapes as the construction of utility line right-of-ways because the access roads are usually constructed within the right-of-way. We do not believe that it is necessary for the applicant to provide justification for the construction of permanent access roads or an engineering analysis demonstrating the appropriateness of the culvert size. For those activities that require notification, district engineers will review the PCN and determine if the construction of permanent access roads will result in more than minimal adverse effects on the aquatic environment. Division engineers can also regionally condition NWP 12 to ensure that the construction of permanent access roads will result in minimal adverse effects.

We agree that we do not have the authority under Section 404 of the Clean Water Act to regulate groundwater flows. Therefore, we have deleted the reference to subsurface flows in paragraph (iv). The District Engineer determines if the access road is the minimum width necessary, as well as the appropriate length of access road, and if the access road will result in minimal adverse effects on the aquatic environment. Division engineers can regionally condition NWP 12 to specify maximum widths and lengths of permanent access roads that can be authorized by this NWP. In cases where a PCN is required, the Corps will review the proposed work for compliance with the terms and conditions of the NWP. If a certain activity does not meet the terms and conditions of the NWP, another form of authorization must be obtained.

For the proposed modification of NWP 12, the construction of permanent access roads for the construction or maintenance of utility lines in waters of the United States is limited to non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. We have added this language to paragraph (iv) to clarify the applicable

waters for utility line access roads authorized by NWP 12. We have also added a provision stating that permanent access roads must be constructed with pervious surfaces.

Notification Requirements: Many commenters recommended eliminating the PCN requirement for mechanized landclearing in forested wetlands. One commenter questioned the requirement for notification in forested wetlands and requested an explanation for that requirement. Several commenters said that the PCN requirements for access roads should be consistent with the PCN requirements for roads under NWP 14. One commenter recommended decreasing the PCN threshold for utility lines installed in waters of the United States from 500 linear feet to 300 linear feet. Several commenters supported a minimum notification threshold of $\frac{1}{3}$ acre. Several commenters requested reduced thresholds for notification to ensure minimal impacts.

The PCN requirement for mechanized landclearing in a forested wetland has not been changed. This requirement was originally incorporated into NWP 12 for the December 13, 1996, reissuance of this NWP. The purpose of this notification requirement is to ensure that only minimal adverse effects on the aquatic environment will occur when the installation of a utility line occurs in forested wetlands. In the proposed modification of NWP 12 published in the July 1, 1998, **Federal Register**, we proposed to modify this notification requirement by limiting the circumstances requiring notification only to the establishment of the utility line right of way in a forested wetland, so that PCNs would not be required for any utility activity that involves mechanized landclearing of a forested wetland, such as the construction of a utility line substation. We are proposing to retain this requirement.

We disagree that the notification requirements for permanent access roads authorized by NWP 12 and linear transportation crossings authorized by NWP 14 should be the same. NWP 12 and NWP 14 authorize different types of roads utilized for different purposes. Permanent access roads authorized by NWP 12 must be constructed as close to preconstruction contours as possible and at the minimum width necessary. We expect most permanent access roads for utility lines to be a maximum of 15 feet wide. Because of construction and safety standards, many roads authorized by NWP 14 are likely to be wider than 15 feet, resulting in greater impacts to waters of the United States. We are proposing to retain the PCN thresholds for the construction of utility lines in

waters of the United States and the construction of access roads as proposed in the July 1, 1998, **Federal Register** notice.

Two commenters requested that the District Engineer, instead of the prospective permittee, notify the National Ocean Service (NOS) in cases where the utility line is to be constructed or installed in navigable waters of the United States.

We agree that it is more appropriate for the District Engineer to provide NOS with a copy of the PCN and NWP authorization, since the requirement at 33 CFR Part 325.2(a)(9)(iii) is to provide NOS with a copy of the permit for utility lines in navigable waters of the United States. We are proposing to add a note (Note 3) to the end of the text of NWP 12, reminding the District Engineer to send copies of the PCN and the NWP 12 authorization to NOS if the utility line is constructed in navigable waters of the United States.

Some commenters stated that the Corps should not require a delineation of special aquatic sites, including wetlands, as part of the NWP 12 PCN, or at least apply that requirement only to those projects that are subject to an acreage limitation. Some commenters recommended using simpler methods to delineate special aquatic sites. Other commenters suggested that the Corps adopt a procedure requiring Corps approval of a delineation of special aquatic sites within a reasonable period of time.

We disagree with the first comment in the previous paragraph because it is important to identify the limits and amounts of special aquatic sites that might be lost as a result of the proposed work to determine if additional on-site avoidance and minimization is possible and if the proposed project would have more than minimal adverse effects on the aquatic environment. The only approved method of determining the extent of wetlands is by the procedures in the 1987 *Corps of Engineers Wetlands Delineation Manual* (Technical Report Y-87-1). Other special aquatic sites are identified through other methods. For activities requiring notification, district engineers have 45 days from the date of receipt of a complete PCN to determine if the proposed work qualifies for NWP authorization. During the 45-day period, the District Engineer must determine if the delineation is accurate. District engineers cannot consider a PCN incomplete solely because they have not verified the delineation of special aquatic sites.

Other issues: One commenter recommended that the Corps add language to NWP 12 to waive the PCN

requirement for cases where a prospective permittee is working under a valid NPDES stormwater management permit.

We disagree, since the NPDES permit does not satisfy the permit requirements of Section 404 of the Clean Water Act. Review by the District Engineer is necessary to ensure that the authorized work complies with the terms and conditions of NWP 12 and results in minimal adverse effects on the aquatic environment.

Some commenters objected to compensatory mitigation requirements for public utility projects and others suggested that mitigation should only be required to the extent necessary to ensure that an activity has minimal adverse effects on the aquatic environment. Other commenters recommended requiring complete or partial restoration of areas altered by mechanized landclearing.

Public projects may have more adverse effects on the aquatic environment than private projects since they may be larger in size. Project proponents will be required to provide compensatory mitigation, if necessary, to ensure that the authorized work results in minimal adverse effects on the aquatic environment regardless of whether the project is for public or private purposes. For activities that require notification, compensatory mitigation may be required by district engineers to ensure that the net adverse effects to the aquatic environment are minimal, individually and cumulatively. Utility line right-of-ways in waters of the United States can be cleared for the construction, maintenance, or repair of utility lines, but the cleared area must be the minimum necessary and preconstruction contours must be maintained as close as possible. Wetland vegetation will grow back if the right-of-way is constructed in wetlands and preconstruction contours and elevations are restored after construction. However, the plant community may be maintained as shrubs or herbaceous plants, to prevent damage to the utility line and facilitate repairs. We believe that the conditions of NWP 12 adequately address temporary impacts to waters of the United States and that additional restoration requirements are not necessary.

Some commenters emphasized the importance of the regional conditioning process to address regionally significant resources such as vernal pools, headwater springs, prairie potholes, certain coastal wetlands to ensure protection of unique wetland functions.

Many commenters made recommendations for regional conditions.

We recognize that the regional conditioning process is a very important element in the implementation of the new and modified NWP but that specific recommendations for regional conditions must be addressed by division and district engineers.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 12 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. General Condition 27 prohibits the use of NWP 12 to authorize permanent, above-grade wetland fills in waters of the United States within the 100-year floodplain, unless the prospective permittee clearly demonstrates that the project and associated mitigation will not decrease the flood-holding capacity and no more than minimally alter the hydrology, flow regime, or volume of waters associated with the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

14. Linear Transportation Crossings

In the July 1, 1998, **Federal Register** notice, we proposed several changes to this NWP. We proposed to modify this NWP to have a larger acreage limit for public transportation crossings, such as roads, railroads, and airport runways, in non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters. We also requested comments on whether the acreage limit for public transportation crossings in non-tidal waters should be 1 or 2 acres. For private crossings and public linear transportation crossings in tidal waters, or non-tidal wetlands

contiguous to tidal waters, we did not propose to change the original acreage limits of NWP 14.

One commenter stated that the NWP should not authorize public transportation crossings. A number of commenters said that the distinction between public and private transportation crossings is unnecessary. Many commenters requested that the Corps clarify what is meant by private and public transportation crossings. Several commenters asked whether roads to residential developments would be considered public or private.

NWP 14 previously authorized both public and private road crossings. Due to public interest factors, we proposed to increase the acreage limit for public transportation crossings for this NWP, with acreage limits based on the types of waters affected by the work. For the purposes of this NWP, a private crossing is restricted to the use of a particular person or group, and is not freely available to the public. An example is a driveway crossing a stream to provide access to a single family residence. A public crossing is a crossing which is intended to serve all citizens, rather than a specific limited group. As further clarification, if the responsibility for the highway or road maintenance and repair is a county, state, or government entity, the road will be considered public. To increase protection of the aquatic environment, we are proposing to change the applicable waters for linear transportation crossings as follows: (1) Public linear transportation crossings constructed in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, (2) public linear transportation crossings constructed in tidal waters and non-tidal wetlands adjacent to tidal waters, and (3) private linear transportation crossings constructed in all waters of the United States.

Many commenters requested that NWP 14 remain unchanged. Several commenters suggested that the acreage limit for public projects should be limited to 1 acre and the length of the crossing to no more than 200 feet. Other commenters stated that the proposed 2 acre limit for public transportation crossings is too low and would prefer the original 10 acre limit that NWP 26 had prior to December 1996. Many commenters said that 2 acres is sufficient for public highways, which often have 2 to 4 lanes. Several commenters stated that public linear transportation crossings should have no acreage limit while others said the limit is too high and that the proposed modification should be withdrawn. Another commenter recommended

removing the 200 linear foot limit for private crossings and replacing it with a 500 linear foot limit.

We have carefully considered all comments on the proposed acreage limits. The existing limit for private crossings is retained at $\frac{1}{3}$ acre and 200 linear feet. For public projects in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, we have decided the proposed 1 acre limit for public linear transportation crossings is appropriate to authorize most public linear transportation crossings that have minimal adverse effects on the aquatic environment in non-tidal waters. It is important to note that each crossing of a separate waterbody is a single and complete project (see 33 CFR Part 330.2(i)). The $\frac{1}{3}$ acre and 200 linear foot limits will be retained for private linear transportation crossings and public linear transportation crossings in tidal waters and non-tidal wetlands adjacent to tidal waters.

Some commenters asked why the acreage limit for public projects was higher than the acreage limit for private projects. Many objected to the differences in acreage limits. Several commenters were concerned that the proposed modification establishes different thresholds based upon whether a project is private or public.

During our review of transportation projects authorized by NWP 26, we found that there were a substantial number of public linear transportation crossings with minimal adverse effects on the aquatic environment. Approximately 90% of the transportation projects authorized by NWP 26 during 1997 resulted in the loss of less than 1 acre of non-tidal waters. The proposed modification of NWP 14 is intended to authorize these types of projects, since NWP 26 will be replaced by the proposed new and modified NWPs announced in this **Federal Register** notice. Public linear transportation crossings need to be larger, because they must have larger capacities. Private crossings, on the other hand, are typically small. Public linear transportation crossings also fulfill a greater proportion of public interest factors, and the government entities that typically sponsor or build these projects have the resources and experience necessary to design these projects and provide necessary compensatory mitigation to ensure that these projects have minimal adverse effects on the aquatic environment. Consequently, these projects are less likely to be contrary to the public interest. Public transportation projects often require detailed planning

processes to document compliance with NEPA, Section 404 of the Clean Water Act, and many other applicable laws. As a result, we have decided that it is appropriate to impose a higher acreage limit for public linear transportation projects in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters.

Public roads serve the general public and allow access for entire communities. Other transportation facilities, such as municipal airport runways or railroads are constructed for public transportation needs, and are considered public if they are accessible to the public as a whole. Railroad crossings may be constructed by private entities, but may be used by public transportation agencies for mass transit, such as commuter rail services. As long as these transportation facilities are used by the general public, providing a means of transportation for an entire community, these linear transportation crossings will be considered public for the purposes of this NWP.

Many comments were received regarding PCN thresholds. Several commenters suggested that notification should be required for all projects authorized by this NWP. Some commenters stated that the proposed notification requirements were too stringent and some wetland impacts should be authorized without any PCN requirements. These commenters stated that the PCN requirement should be consistent with the notification requirements of NWP 12, and recommended that notification should be required if the activity results in the loss of more than $\frac{1}{3}$ acre of non-tidal wetlands or the impact exceeds 500 linear feet in waters of the United States. Another commenter said that the PCN threshold should be raised to $\frac{1}{2}$ acre. One commenter stated the notification requirements for public and private linear transportation projects should be the same. Another commenter wanted to know how Corps Districts would identify areas of high value that could trigger lower PCN thresholds.

To make the PCN thresholds of NWP 14 more consistent with the new NWPs, the proposed notification threshold has been modified. The proposed PCN thresholds for public and private linear transportation crossings are the same. Notification will be required for activities that result in the loss of greater than $\frac{1}{4}$ acre of waters of the United States. Notification will also be required for all activities that result in a discharge into special aquatic sites, including wetlands. We do not agree that the PCN thresholds of NWP 14 should be the same as the PCN

thresholds of NWP 12 because the activities authorized by these NWPs have different adverse effects on the aquatic environment. High value waters will be identified through the regional conditioning process. Division engineers can regionally condition this NWP to lower the PCN threshold or require notification for all activities in specific high value waters.

Numerous commenters requested clarification concerning what constitutes a single and complete linear project. Several commenters recommended that the Corps eliminate the practice of piecemealing road projects so that NWP 14 authorizes each separate wetland or stream impact along the construction corridor. Another commenter suggested that the Corps consider allowing the use of this NWP for multiple crossings provided the "no net loss" goal is met.

Our NWP regulations already address linear projects and what constitutes a single and complete linear project (see 33 CFR Part 320.2(i)). In paragraph (h) of the proposed modification of this NWP, we have provided additional clarification concerning when discretionary authority may be exercised for road segments with multiple crossings of streams.

Many commenters believe that airports and runways should not be authorized by this NWP. Several commenters suggested that the secondary impacts of airport runway construction, such as chemicals and pollutants, are a serious concern. Several commenters questioned whether railroads are considered public entities.

The construction, improvement, and expansion of airport runways can be authorized by this proposed modification of this NWP, provided the adverse effects on the aquatic environment are minimal. These facilities are often subject to additional rigorous regulation by other State and Federal agencies. Airports will have existing stormwater and water quality management plans, and are likely to be closely regulated with regard to air quality, noise pollution, point and non-point source pollution, and hazardous and toxic substances. Since this NWP requires a PCN for most projects, district engineers will have the opportunity to review the impacts of the proposed activity. If a project will have more than minimal adverse effects on the aquatic environment, the District Engineer will assert discretionary authority and require an individual permit. Railroads will typically be considered public transportation because, as previously discussed, a railroad may be constructed by a private entity, but the tracks are

often utilized by the general public for public transportation. As long as these facilities are generally accessible to the public, by providing a means of mass transit or services for a community, railway crossings will be considered public.

One commenter stated that regional conditions should prohibit the disruption of water flows by requiring culverts, bridges, etc. Another commenter asked for clarification of the terms in paragraph (g) of the proposed NWP 14 modification. Another commenter requested that applicants provide detailed engineering information on the crossings to ensure that they are designed properly.

General Condition 21, Management of Water Flows, requires NWP activities to be designed and constructed to maintain preconstruction downstream flow conditions, to the maximum extent practicable. Activities authorized by this NWP should not result in more than minor changes to the hydraulic flow of a stream and should not result in an increase in flooding upstream or downstream of the crossing. Proposed General Condition 27 also applies to activities authorized by this NWP. To construct the crossing, some work in the stream channel is necessary. Examples include bank stabilization, the placement of fill and culverts, depressing the culvert into the stream bed, etc. All of this work should take place only in the immediate vicinity of the crossing. The construction of the crossing should result in only minor impacts to the hydraulic characteristics of the stream. General Condition 9, Water Quality, requires the permittee to implement a water quality management plan to ensure the work does not cause more than minimal adverse effects to the downstream aquatic system. In general, where a state or tribal entity requires such a plan, this requirement will be considered fulfilled. If a water quality management plan is not required by the state, the District Engineer must decide if one is needed for the proposed activity. We do not agree that applicants should be required to provide detailed engineering information concerning the crossing. It is incumbent upon the permittee to ensure that the crossing is designed so that it complies with all of the conditions of the NWP, especially General Condition 21.

One commenter questioned why a mitigation plan was required for public linear transportation projects but not for private crossings. Several commenters asked whether compensatory mitigation would be required for all crossings.

We have modified this provision of NWP to require a mitigation proposal

for both public and private linear transportation crossings. Paragraph (c) of the proposed modification of NWP 14 requires the prospective permittee to submit a mitigation proposal to offset permanent losses of waters of the United States and a statement describing how temporary losses will be minimized to the extent practicable.

Many commenters objected to the inclusion of attendant features to the linear transportation project, such as interchanges, stormwater detention basins, rail spurs, or water quality enhancement measures in the NWP. Many commenters approved the inclusion of such features, and a couple of commenters requested that the NWP authorize non-linear features such as vehicle maintenance or storage buildings, parking lots, train stations, and hangars. One commenter said that this NWP should not authorize new transportation facilities, which typically result in significant indirect and cumulative impacts.

Features integral to the crossing, such as interchanges, rail spurs, stormwater detention basins, and water quality enhancement measures are authorized by this NWP. This requirement will help ensure that the adverse effects of the entire single and complete project are considered. The attendant features must be integral to the crossing, however, and the combined loss of waters of the United States for a single and complete project cannot exceed the acreage limit of this NWP. We are not proposing to modify NWP 14 to authorize non-linear transportation activities, because these activities have greater potential to result in more than minimal adverse effects on the aquatic environment.

The proposed modification of this NWP can authorize the construction of new linear transportation crossings, provided the proposed work results in minimal adverse effects on the aquatic environment. The notification requirements, the District Engineer's ability to impose special conditions on a particular activity, and the District Engineer's ability to exercise discretionary authority and require an individual permit will ensure that the activities authorized by this NWP result in minimal adverse effects on the aquatic environment.

Several commenters recommended adding conditions that appear to apply to specific regions. One commenter requested that: this NWP should be prohibited in watersheds with substantial aquatic resource losses and in watersheds which have impervious surfaces over a substantial percentage of the landscape; the acreage limits be

modified to protect regionally significant resources; linear foot limitations should be imposed on activities in streams with regionally important resources; kick-out provisions should be provided for Federal agencies; and compensatory mitigation should be required to fully offset all impacts to ensure no net loss of aquatic resources. Another commenter requested that this NWP: prohibit activities below the existing water level of the stream, limit work affecting water quality between March 15 and June 15, prohibit the use of stream bed material for erosion control, limit the use of rip rap, limit clearing of forested stream corridors to the minimum necessary, require revegetation of disturbed areas to reduce erosion, require culverts for temporary rock stream crossings higher than 18 inches, maintain stream bed gradient during construction, and size and place culverts to avoid creating a drop between the downstream end of the culvert and the downstream water surface elevation.

All of the recommendations cited in the previous paragraph are best addressed as regional conditions and case-specific special conditions for an NWP authorization.

A couple of commenters requested that this NWP authorize some stream channelization. Several commenters requested that this NWP prohibit stream channelization.

Paragraph (f) of the proposed modification of NWP 14 states that this NWP cannot be used to channelize a stream, but some channel modification in the immediate vicinity of the crossing can be conducted to ensure that water flow through the crossing does not result in additional flooding, erosion, or other adverse impacts that may compromise public safety.

One commenter was confused about the manner in which the authorized activities and applicable waters were described. We have clarified this section, with the acreage limits for each category of activities and applicable waters.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. Due to the requirements of General Condition 26, NWP 14 activities resulting in the loss of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of

the waterbody. General Condition 27 prohibits the use of NWP 14 to authorize permanent, above-grade wetland fills in waters of the United States within the 100-year floodplain, unless the prospective permittee clearly demonstrates that the project and associated mitigation will not decrease the flood-holding capacity and no more than minimally alter the hydrology, flow regime, or volume of waters associated with the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

27. Stream and Wetland Restoration Activities

In the July 1, 1998, **Federal Register** notice, we proposed to modify NWP 27 to authorize the restoration of non-Section 10 streams, in addition to the wetland and riparian restoration and enhancement activities already authorized by this NWP.

Some commenters supported the proposed modifications. Other commenters said that no restrictions should be placed on the NWP. Several commenters stated that the NWP meets the criteria for minimal effects. One commenter supported modification of NWP 27 to authorize activities on private property. Several commenters opposed the proposed modifications to NWP 27 because they believe that wetlands and streams would be adversely affected by the proposed changes.

The purpose of the proposed modification of NWP 27 is to authorize the restoration of non-tidal streams. NWP 27 previously authorized only the restoration former non-tidal wetlands and riparian areas, the enhancement of degraded wetlands and riparian areas, and the creation of wetlands and riparian areas. We are also proposing to modify NWP 27 to authorize the restoration of tidal waters. Currently, NWP 27 only authorizes the restoration of non-tidal wetlands and riparian areas. The enhancement of degraded wetlands and riparian areas and the creation of wetlands and riparian areas is authorized in all waters of the United States, including tidal waters. We believe, that by adding stream and tidal wetland restoration activities to this NWP, that the overall aquatic

environment will benefit by providing an efficient means of authorizing the restoration and enhancement of these areas.

One commenter recommended eliminating wetland restoration activities from this NWP and limiting it only to enhancement activities. This commenter believes that restoration activities do not require a Section 404 permit because the project area is not currently a wetland. Another commenter asked if NWP 27 applies to the restoration of riparian zones outside of wetlands and other waters of the United States.

Many wetland restoration activities require a Section 404 permit because there are discharges into waters of the United States that are necessary to conduct the restoration activity, such as connecting the restored wetland to other waters of the United States. The same principle applies to wetland creation activities. NWP 27 authorizes the restoration of riparian zones that are waters of the United States (e.g., wetlands adjacent to a stream) and activities in waters of the United States associated with the restoration of upland riparian zones. For example, to establish a vegetated upland riparian zone, some bank stabilization activities in waters of the United States may be necessary, such as the planting of willows along the bank. If the proposed riparian zone restoration activity is conducted entirely outside of waters of the United States, then no Corps permit is required.

One commenter requested the inclusion of more examples of stream restoration and enhancement activities, such as the addition of spawning gravel and the removal of accumulated sediment from ponds to prevent sediments from being washed downstream. Another commenter stated that the list of examples of authorized activities in the NWP is too inclusive and vague. Other commenters expressed concern that activities not directly related to the restoration of ecological values or aquatic functions could be authorized by this NWP. Several commenters recommended excluding the placement rip rap from NWP 27 and that the appropriate use of biological materials should be encouraged.

The list of activities in the paragraph following paragraph (c) of the proposed modification of NWP 27 is intended only to provide examples and is not a complete list of activities authorized by this NWP. The next paragraph in NWP 27 lists activities that are not authorized by the NWP. If the prospective permittee has questions about a particular stream and wetland

restoration or enhancement activity, then he or she should contact the District Engineer to determine if the proposed work can be authorized by NWP 27. For those projects requiring notification, the District Engineer will determine if the proposed work satisfies the terms and conditions of NWP 27 and will exercise discretionary authority if the proposed work will result in more than minimal adverse effects on the aquatic environment. Division engineers can also regionally condition this NWP to exclude certain activities or prohibit its use in specific waterbodies or geographic regions. We do not agree that the use of rip rap should be excluded from this NWP, because rip rap provides habitat for many aquatic organisms and can help reduce adverse effects to water quality resulting from soil erosion on the project site.

A number of commenters were confused about the scope of this NWP and asked which types of waters are subject to this NWP. Several commenters recommended expanding the applicable waters for this NWP to include Section 10 waters. Other commenters suggested excluding tidal wetlands from this NWP. One commenter stated that the NWP should be used only in small lengths of streams or small wetland areas.

We have modified the first paragraph of the proposed modification of this NWP to clarify the scope of applicable waters for this NWP. Since its issuance in 1991, NWP 27 has authorized wetland and riparian restoration, enhancement, and creation activities in Section 10 waters, although certain activities were restricted to non-tidal Section 10 waters. This NWP authorizes activities that restore former waters, including tidal and non-tidal wetlands, enhance degraded tidal and non-tidal wetlands and riparian areas, create tidal and non-tidal wetlands and riparian areas, and restore and enhance non-tidal streams and non-tidal open waters. This NWP can be used to restore and enhance Section 10 streams and open waters, as long as they are non-tidal. Other Section 10 activities authorized by this NWP include the restoration of former non-tidal wetlands in Section 10 waters, the enhancement of degraded wetlands in navigable waters, and the creation of wetlands in navigable waters.

Restricting the use of this NWP to small segments of streams and small wetlands is unnecessary because this NWP authorizes only those activities that improve the aquatic environment. Adding such a restriction is also likely to discourage larger stream and wetland restoration and enhancement projects by

requiring prospective permittees to go through a more complicated and expensive permit process.

Many commenters recommended conditioning this NWP to prohibit conversion and alteration of habitat. One of these commenters recommended prohibiting the conversion of one aquatic habitat type to another type unless the intent of the conversion is to restore the area to an aquatic habitat type that historically existed on that site. One commenter recommended including a provision in the NWP to allow the construction of small impoundments in ephemeral and/or intermittent reaches of streams to benefit water quality and waterfowl.

The proposed modification of this NWP prohibits the conversion of natural streams or wetlands to another aquatic use, unless the permittee recreates similar aquatic habitat types in a different location on the project site and the project results in aquatic resource functional gains. However, only non-tidal waters can be converted to other types of aquatic habitat. We are proposing to modify the text of the NWP to specify that any relocated non-tidal aquatic habitat type must be created on the project site, so that the relocation is not limited to creating the aquatic habitat type in adjacent uplands. We have added a prohibition against converting tidal waters, including tidal wetlands, to other aquatic uses or relocating tidal waters. We do not believe that is necessary to limit the conversion to aquatic habitat types that historically existed on the project site, because the permittee may want to conduct activities that provide more benefits to the aquatic environment than the historic aquatic habitat type provided. This NWP can authorize small impoundments in ephemeral and/or intermittent streams, provided those aquatic habitat types are recreated on the project site, the adverse effects on the aquatic environment are minimal, and there are net functional gains.

Several commenters expressed concern with the use of this NWP with other permits. Other commenters were uncertain as to whether General Condition 15 applies to NWP 27.

NWP 27 may be used with other NWPs to authorize a single and complete project, provided the authorized work results in minimal adverse effects on the aquatic environment, individually or cumulatively. For example, NWP 33 may be used to provide temporary access to the construction site for activities authorized by NWP 27. The proposed modification of General

Condition 15 applies to NWP 27 and all other NWPs.

We have also been made aware of situations where participants in wetland restoration programs, such as the U.S. Department of Agriculture's Wetlands Reserve Program, want to revert their land back to its prior condition. If the land was prior converted cropland before the implementation of the wetland restoration activity, and no associated discharge of dredged or fill material into waters of the United States was required to conduct the wetland restoration activity, the landowner did not require a Section 404 permit. If the landowner wants to revert the land back to its prior condition, he or she could not utilize the reversion provision of NWP 27, because NWP 27 was not needed to restore wetlands on the prior converted wetland. To address this issue, we are proposing to add a provision to NWP 27 that allows the landowner to revert the land back to its prior condition using NWP 27, even though no Section 404 permit was needed to conduct the wetland restoration activity, provided the prior-converted cropland has not been abandoned. We believe this provision is necessary to provide equity for landowners. This provision may encourage more landowners to restore wetlands on prior converted cropland because they will not have to apply for an individual permit at a later date to revert the land back to its prior condition.

Several commenters stated that notification to the resource agencies should be required for all activities authorized by this NWP. One commenter recommended requiring agency coordination for all activities authorized under part (iv) of this NWP. This commenter also recommended that project proponents for stream restoration activities should be required to coordinate with the Corps and Federal and State fish and wildlife agencies prior to submitting a PCN under part (iv). Many commenters suggested PCN thresholds, ranging from $\frac{1}{10}$ acre to 1 acre. One commenter stated that downstream landowners should be notified of proposed stream restoration projects.

To clarify the notification requirements of this NWP, we are proposing to restructure NWP 27 to make it easier to understand which activities require notification to the District Engineer. Notification is not required for: (1) activities on public or private land where the landowner has an agreement with the FWS or NRCS, (2) activities on Federal land, or (3) activities on reclaimed surface coal

mined land in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining or the applicable state agency. Notification is also required if a permittee wants to use NWP 27 to authorize the construction of a compensatory mitigation site (see the Note at the end of NWP 27). We disagree that agency coordination should be conducted for all activities authorized by this NWP, because this NWP authorizes activities that benefit the aquatic environment. Corps district personnel possess the knowledge and experience to assess the environmental effects, both beneficial and adverse, of those activities requiring notification. If the proposed work will result in more than minimal adverse effects on the aquatic environment, the District Engineer will exercise discretionary authority and require an individual permit. Requiring project proponents to coordinate with the Corps and fish and wildlife agencies prior to submitting a PCN is unlikely to provide any benefits for the aquatic environment, and will serve only to discourage stream restoration projects because the authorization process will become too burdensome for many landowners. For many of the reasons cited above, we do not believe it is necessary to place a PCN threshold based on acreage on this NWP, or to notify downstream landowners of proposed stream restoration projects.

Several commenters stated that the NWP is too vague and is vulnerable to abuse. A number of commenters requested the inclusion of narrow definitions of authorized activities in the NWP. Two commenters asked how the Corps will assess functional gains. One commenter stated that NWP 27 should authorize only ecological-based stream restoration. One commenter asked if NWP 27 was intended to apply to the compensatory mitigation requirements of other Corps permits. Another commenter recommended that the NWP require the planting of native species at the site.

No activities or discharges not directly related to the restoration of ecological values or aquatic functions are authorized by this NWP. This NWP can be used to authorize wetland and stream restoration activities required by other Corps permits. The intent of the proposed modification of this permit is to facilitate the restoration of degraded or altered streams and wetlands. The goals of the proposed activities must be based upon the enhancement, restoration, or creation of the ecological conditions that existed, or may have existed, in the stream or wetland prior

to disturbance, or to otherwise improve the aquatic functions and values of such areas. The activities may include, but are not limited to, the modification of the hydrology, vegetation, or physical structure of the altered or degraded stream or wetland. If additional protection is necessary, division engineers can add regional conditions to this NWP. We have added a provision to the proposed modification of NWP 27 that requires the permittee to utilize native plant species if he or she is vegetating the project site. We are limiting this requirement to plant species installed by the permittee, because non-native plant species may naturally colonize the project site and we cannot require the permittee to remove those plants.

Some commenters recommended requiring binding agreements for activities authorized by this NWP. One commenter stated that management plans were needed in all cases. One commenter recommended requiring detailed restoration plans. One commenter recommended prohibiting future fills in areas that have reverted to prior condition under parts (ii) and (iii). Another commenter stated that wetland and stream restoration and enhancement activities by State resource management agencies should be included in NWP.

We do not believe that binding agreements or detailed restoration plans are necessary in all cases. Where the NWP authorizes reversion of the created or restored wetlands to its non-wetland state (*i.e.*, in those cases involving private parties entering into contracts or agreements with, or documentation of prior condition by, the NRCS or FWS under special wetland programs or an Office of Surface Mining (OSM) or applicable state program permit), then a binding agreement, documentation, or permit by NRCS, FWS, or OSM or applicable state agency which clearly documents the prior condition is required. This reversion can only occur when these instruments clearly document the prior condition. In all other cases where the reversion opportunity is not included, a Corps permit would be required for alteration of the site. Therefore, no binding agreement, detailed restoration plan, or documentation of the prior conditions will be required. Because the permit is limited to restoration, enhancement, and creation activities and because authorizations for those projects do not provide the opportunity for reversion, except as noted above, without a permit from the Corps, we believe that a management plan would be unnecessarily burdensome without

additional environmental benefits. Activities by State natural resource management agencies are already authorized by this NWP, but may require notification to the Corps unless those activities are in the categories described by paragraphs (a)(1), (a)(2), or (a)(3).

One commenter stated that evaluation of upstream and downstream impacts should be conducted. Another commenter stated that NWP 27 should not authorize activities that impede fish passage. A couple of commenters requested that the NWP should not be allowed in exceptional use waters and wild and scenic rivers.

All activities authorized by this NWP must comply with General Condition 21, Management of Water Flows. Compliance with this condition will ensure that the authorized activity results in minimal adverse effects on hydrology upstream and downstream of the project site. Similarly, all activities authorized by this NWP must comply with General Condition 4, Aquatic Life Movements, to ensure that the authorized work results in no more than minimal adverse effects on aquatic life movements. The requirement to comply with General Condition 7 will ensure the proper coordination to prevent adverse impacts to Federally-designated wild and scenic rivers. In addition, districts have coordinated with Federal and State natural resource agencies to discuss appropriate regional conditioning for the NWPs. Proposed General Condition 25 requires notification to the District Engineer if the proposed activity will occur in NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally-listed threatened or endangered species, coral reefs, State natural heritage sites, and outstanding national resource waters or other waters officially designated by a State. Restricting the use of NWP 27 in exceptional use waters will also be considered at the district level.

This NWP is subject to the requirements of proposed General Conditions 25 and 26. General Condition 25 requires the prospective permittee to notify the District Engineer in accordance with General Condition 13 for activities in designated critical resource waters, including wetlands adjacent to those waters. The District Engineer may authorize NWP 27 activities in these waters if the adverse effects are no more than minimal. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including

adjacent wetlands. NWP 27 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody.

In the proposed modification of NWP 27, we are proposing to add a note to the NWP to clarify the compensatory mitigation is not required for activities authorized by this NWP, provided the work results in a net increase in aquatic resource functions and values in the area. The note also states that NWP 27 can be used to authorize compensatory mitigation projects, including mitigation banks, as long as the project includes compensatory mitigation for any losses of waters of the United States that may occur as a result of constructing the compensatory mitigation project. The proposed note also states that NWP 27 does not authorize reversion of sites used as compensatory mitigation projects to prior conditions.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

39. Residential, Commercial, and Institutional Developments

This NWP was proposed as NWP A in the July 1, 1998, **Federal Register** notice. NWP 26 has been used extensively to authorize discharges of dredged or fill material into waters of the United States for residential, commercial, industrial, and institutional development activities. Based on the comments received in response to the July 1, 1998, **Federal Register** notice, we have made changes to the proposed NWP, which are discussed in further detail below. We are proposing to use an index to determine the acreage limit for this NWP. The index will be based on a percentage of the project area, with a $\frac{1}{4}$ acre base limit. The maximum acreage loss that can be authorized by this NWP is 3 acres. We are also proposing to restrict the list of activities authorized by this NWP to building pads, building foundations, and attendant features for residential, commercial, and institutional development activities. We have reduced the PCN threshold from $\frac{1}{3}$ acre to $\frac{1}{4}$ acre. A PCN will be required for

all activities that involve discharges of dredged or fill material into open waters. We believe that these changes will ensure that this NWP authorizes only those development activities that are similar in nature and have minimal adverse effects on the aquatic environment, individually or cumulatively. In addition, to further ensure that the NWP authorizes activities with only minimal adverse effects on the aquatic environment, most, if not all, Corps districts will impose regional conditions on this NWP.

General: Nearly 350 comments were received that specifically addressed this NWP. Many commenters opposed the issuance of this NWP, but a few favored its issuance. Many of the commenters who objected to the issuance of this NWP believe that it authorizes activities with more than minimal impacts, resulting in excessive cumulative adverse effects on the aquatic environment. Several commenters stated that the types of activities authorized by this NWP should be subject to the individual permit process and public comment. Another commenter stated that this NWP is essentially the same as NWP 26, with an expanded scope of waters where it can be used.

NWPs can only authorize activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. We have established PCN thresholds to allow district engineers to review all activities authorized by this NWP that could potentially result in more than minimal adverse effects on the aquatic environment. We believe that, in most cases, residential, commercial, and institutional development activities that result in the loss of less than $\frac{1}{4}$ acre of wetlands have minimal adverse effects on the aquatic environment. In watersheds or waterbodies where losses of less than $\frac{1}{4}$ acre of waters of the United States may result in more than minimal adverse effects, division engineers can regionally condition this NWP to lower the notification threshold or require notification for all activities. This NWP can also be revoked by division engineers in those watersheds or geographic regions where use of the NWP will cause more than minimal cumulative adverse effects on the aquatic environment. By restricting the proposed NWP to the construction of building pads, building foundations, and attendant features, we are limiting the use of this NWP to the development activity, which is much narrower than the scope of activities that could be authorized by NWP 26.

Types of Waters Affected: Several commenters objected to this NWP because it authorizes residential, commercial, and institutional development activities in all non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters. They believe that the scope of applicable waters for this NWP will increase wetland destruction. In contrast, two commenters stated that this NWP should be applicable in all non-tidal waters, including non-tidal wetlands contiguous to tidal waters. Another commenter recommended that wetlands and waters adjacent to tidal waters should be excluded from the use of this NWP as are contiguous wetlands. Two commenters stated that this NWP should authorize only activities in isolated wetlands less than 1 acre in size.

To increase protection of the aquatic environment, we are proposing to change the applicable waters of this NWP to: non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters. This change in applicable waters will reduce the geographic extent in which NWP 39 can be used. High value isolated waters can receive additional protection through regional conditions to restrict or prohibit the use of this NWP in those waters.

Another commenter stated that the expansion of applicable waters from headwaters and isolated wetlands will result in degradation of water quality by destroying wetlands which trap sediments and take up pollutants. This commenter also stated that the NWP does not specify stormwater management requirements needed to prevent water quality degradation.

We are proposing to modify General Condition 9, Water Quality, to require a water quality management plan for activities authorized by this NWP. The purpose of the water quality management plan is to ensure that the activities authorized by this NWP result in only minimal degradation of downstream water quality. The permittee must utilize stormwater management techniques and vegetated buffers to ensure that the project complies with this condition and does not result in substantial degradation of downstream water quality. The requirements of proposed General Condition 26 will also prevent further degradation of impaired waters by limiting the use of this NWP to authorize discharges in impaired waterbodies and adjacent wetlands.

Types of Activities Authorized: Many commenters stated that this NWP does not comply with Section 404(e) of the Clean Water Act, which requires

activities authorized by general permits to be "similar in nature." They believe that this NWP authorizes a wide variety of activities and does not comply with this requirement. One commenter recommended that the Corps develop a more limited list of activities authorized by this NWP. Another commenter suggested that a separate NWP should be developed for each category of activities. Several other commenters objected to this NWP because they believe that it authorizes activities that are not water dependent and that these activities should not be authorized in wetlands. One commenter suggested that the NWP should authorize only the construction of buildings and attendant features and should not authorize ball fields and golf courses.

In response to these comments, we have restricted the list of activities authorized by the proposed NWP to building pads, foundations, and attendant features constructed for residential, commercial, and institutional purposes. A structure must be built on the building pad or foundation to qualify for authorization under this NWP. Attendant features, as defined for the purposes of this NWP, are those features necessary for the use, operation, and maintenance of the residential, commercial, or institutional building. District engineers will determine whether or not a particular attendant feature can be authorized by this NWP. Attendant features can include, but are not limited to: roads constructed within the development project area, parking lots, storage buildings, garages, physical plant, sidewalks, stormwater management facilities, utilities, lawns and landscaped features, and recreational facilities such as playgrounds for schools and day care centers. We do not believe that it is necessary to develop a separate NWP for each category of activity because limiting the proposed NWP to building pads and attendant features necessary for the operation and use of those buildings complies with the similar in nature requirement of Section 404(e) of the Clean Water Act. The purpose of the building and attendant features (i.e., whether it is for residential, commercial, industrial, or institutional purposes) is usually irrelevant in terms of adverse effects on the aquatic environment. The construction of a building pad or foundation for a residential, commercial, or institutional building has the same effects on aquatic habitat because it replaces an aquatic area with a building. Issuing a separate NWP for each type of development activity

would also result in a much more complex NWP program with a substantially larger number of NWPs. Authorization of the necessary attendant features with the building pad or foundation will help ensure that the NWP authorizes all activities associated with a single and complete project and avoid piecemealing of projects. In addition, by authorizing the entire development project with one NWP, we will be better able to assess the adverse effects of the entire development on the aquatic environment.

Residential developments include single and multiple unit developments. A residential subdivision may be authorized by this NWP as a single and complete project. This NWP also authorizes the construction of apartment complexes. Developers and speculative builders can use this NWP to construct single family residences. We have removed the language from the proposed NWP A published in the July 1, 1998, **Federal Register** notice that prohibited the use of this NWP to authorize the construction of a single family residence and attendant features for personal residence for the permittee. Although this change results in some overlap between this NWP and NWP 29 because they both can authorize single family residences, we believe that this overlap does not result in less protection of the aquatic environment. The construction of a single family residence, whether it is constructed by the property owner who will live in the residence or by a contractor or speculative builder who will later sell the completed residence, has the same adverse effects on the aquatic environment. Although NWP 39 may have a higher indexed acreage limit than NWP 29, the geographic scope of applicable waters for NWP 39 is much less than the scope of applicable waters for NWP 29. NWP 39 cannot be used to authorize discharges into non-tidal wetlands adjacent to tidal waters, but NWP 29 can authorize discharges in those non-tidal wetlands. NWP 39 has a more stringent avoidance and minimization requirement than NWP 29 because it requires the permittee explain, in the notification submitted to the District Engineer, how avoidance and minimization was achieved on the project site. District engineers will receive PCNs for activities that result in the loss of greater than 1/4 acre of waters of the United States or involve discharges into open waters, such as streams. Based on the review of the PCN, the District Engineer will determine if the proposed work results in minimal adverse effects on the

aquatic environment and qualifies for authorization under NWP 39. We also believe that prohibiting the use of NWP 39 to authorize the construction of a single family home for the property owner, but allowing a contractor or speculative builder to use NWP 39 to construct a single family residence, is unfair to the regulated public because it places different restrictions based solely on who the applicant is (i.e., whether the applicant will be the resident of the home or if the applicant is a contractor or a speculative builder will sell the completed home at a later time to a future occupant). Such inequities are likely to lead to selective use of these two NWPs. A property owner can ask a contractor to apply for NWP 39 authorization for a higher acreage limit, instead of applying for an NWP 29 authorization. Since NWPs can authorize only those activities that result in more than minimal adverse effects on the aquatic environment, individually or cumulatively, we believe this overlap between NWPs 29 and 39 is not contrary to Section 404(e) of the Clean Water Act.

Commercial developments authorized by this NWP include, but are not limited to, retail and wholesale stores, shopping centers, industrial facilities, malls, restaurants, hotels, business parks, and other buildings for the production, distribution, and selling of goods and services, as well as attendant features for those buildings. Institutional developments include, but are not limited to, schools, police stations, fire stations, government office buildings, libraries, courthouses, public works buildings, college or university buildings, hospitals, and places of worship. This NWP does not authorize the construction of new ski areas or the installation of oil or gas wells.

One commenter stated that the term "infrastructure" is poorly defined in the NWP. Another commenter suggested that infrastructure should be authorized by a separate NWP. Three commenters recommended that this NWP authorize the roads constructed by State or local governments to the development, not just the roads within the development.

For the purposes of the proposed NWP, infrastructure includes attendant features necessary for the operation of the residential, commercial, or institutional development or building, such as utilities, roads, and stormwater management facilities. Utilities that are not an integral part of the development, but are shared with other developments, may be authorized by other NWPs, such as NWP 12, regional general permits, or individual permits. The proposed NWP authorizes only those roads within the

project area (e.g., the subdivision). Roads leading to the project area, including those roads constructed by State or local governments, may be authorized by NWP 14, another NWP, regional general permit, or individual permit. These roads typically serve other areas and may be considered as separate single and complete projects.

The proposed NWP does not authorize discharges of dredged or fill material into waters of the United States for the construction or expansion of golf courses unless the golf course is an integral part of a residential subdivision. However, this NWP may be used to authorize the clubhouse, storage buildings, or garage for a golf course. A golf course that is not an integral part of a residential subdivision may be authorized by proposed NWP 42, Recreational Facilities, provided the golf course is designed and constructed in a manner that complies with the terms of that NWP. Golf courses as primary projects are not authorized by this NWP because they do not require building pads or foundations to fulfill their primary purpose. Rather, the clubhouse, storage building, or garage is an attendant feature of the golf course, not vice versa. Golf courses can also be authorized by other NWPs, regional general permits, or individual permits.

One commenter requested that the Corps develop a separate NWP for shopping centers because shopping centers differ from residential, commercial, and institutional developments. Another commenter stated that institutional facilities should include reuse plants, wastewater treatment facilities, and water treatment plants. One commenter stated that community recreation activities should not be authorized by this NWP.

We do not believe it is necessary to issue a separate NWP for shopping centers because shopping centers are a specific type of commercial development. The adverse effects on the aquatic environment resulting from the construction and use of shopping centers are similar to the impacts of other types of commercial developments. Reuse plants, wastewater treatment facilities, and water treatment plants may be authorized by this NWP, at the discretion of the District Engineer. We cannot list every type of residential, commercial, or institutional development that is authorized by the proposed NWP because such a list would be impractical and unnecessarily restrict the use of this NWP for other development activities that have minimal adverse effects on the aquatic environment. For those discharges that require notification the District Engineer

will determine if the proposed activity qualifies for authorization under this NWP. For discharges that do not require notification, a permittee can contact the appropriate Corps district office to determine if his or her development activity is eligible for this NWP.

A commenter requested that the NWP explicitly authorize all commercial and industrial activities because this NWP could be interpreted as not authorizing general industry construction. This commenter stated that there is no difference between commercial developments and general industrial developments. Another commenter requested clarification as to whether the term "institutional developments" includes government facilities.

We agree with these commenters and have stated in the text of the proposed NWP that industrial facilities and government office building pads, foundations, and attendant features may be authorized by this NWP.

We do not agree that community recreation activities should not be authorized by this NWP, because NWP 39 authorizes attendant features associated with a residential, commercial, or institutional development. These attendant features may include playgrounds and playing fields, provided those facilities are constructed in conjunction with a residential subdivision or school building. Excluding these features would be contrary to the purpose of the proposed NWP, which is to authorize all necessary attendant features associated with the buildings as part of a single and complete project. This NWP does not authorize discharges of dredged or fill material into waters of the United States for the construction of recreational facilities unless those recreational facilities are attendant features for residential, commercial, or institutional buildings. However, the building need not be constructed in waters of the United States for the attendant features to be authorized by NWP 39. Recreational facilities not constructed with residential, commercial, or institutional buildings may be authorized by proposed NWP 42, other NWPs, regional general permits, or individual permits.

Several commenters stated that rechannelization of streams should not be authorized by this NWP. One commenter said that stream rechannelization would not comply with the proposed modifications to General Conditions 21 and 9 because rechannelization causes more than minor changes in flow characteristics and could measurably degrade water quality. Another commenter stated that

the list of authorized activities should include drainage facilities, culverts, and drainage ditches.

To address concerns regarding stream channelization associated with residential, commercial, and institutional development projects, we have added paragraph (j) to proposed NWP 39. Paragraph (j) prohibits the channelization or relocation of stream beds downstream of the point on the stream where the average annual flow is 1 cubic foot per second. Therefore, only small streams can be channelized or relocated by this NWP. We believe that this restriction will help ensure that residential, commercial, and institutional development activities will result in minimal adverse effects on the aquatic environment. It should also be noted that notification is required for all discharges resulting in the loss of open waters, which allows district engineers to review all proposed activities in streams and other open waters. Division engineers can also regionally condition this NWP to prohibit the channelization or relocation of high value streams with average annual flows of 1 cubic foot per second or less. Channelization or relocation of stream segments with average annual discharges of greater than 1 cubic foot per second may be authorized by regional general permits or individual permits. The construction or maintenance of drainage facilities, culverts, and drainage ditches may be authorized by this NWP only if they are attendant features necessary for the residential, commercial, or institutional building. Drainage facilities and ditches may be part of a stormwater management facility or road. Culverts may be used to construct road crossings in the residential, commercial, or institutional development.

Acreage Limit: In the July 1, 1998, **Federal Register** notice, we requested comments on whether a simple acreage limit should be used for this NWP or whether the acreage limit should be indexed or based on a sliding scale. We proposed options for a simple limit of 3 acres and an indexed acreage limit based on parcel size. Many commenters said that a simple acreage limit should be used instead of indexing or a sliding scale. A few commenters stated that the 3 acre limit is adequate. Many commenters believe that the proposed acreage limit is too high. A number of commenters recommended an acreage limit of 1 acre. Other commenters proposed limits of $\frac{1}{2}$ acre and 2 acres. One commenter recommended acreage limits of 2 acres of isolated wetlands and $\frac{1}{3}$ acre of headwater wetlands. Numerous commenters said that the 3 acre limit is too low and that the acreage

limit should be 5 acres. They believe that the NWPs should be more flexible and should authorize all activities that result in minimal adverse effects. They recommended that PCNs should be used to determine whether or not a particular project would result in more than minimal adverse effects. Two commenters recommended a 10-acre limit and another commenter suggested a 25-acre limit for this NWP. Some commenters remarked that the acreage limit should be higher because the Corps has not demonstrated that higher acreage limits will result in significant direct or cumulative adverse effects.

Many of the commenters who stated that the 3 acre limit is too high referred to the recent United States District Court decision in the District of Alaska on NWP 29. They cited this court decision as evidence that the acreage limit for NWP 39 is too high because the Corps was enjoined from accepting NWP 29 preconstruction notifications after June 30, 1998. Two commenters stated that the acreage limits and PCN thresholds of this NWP and NWPs 29 and 40 should be similar.

In its decision, the District Court did not rule that the acreage limit for NWP 29 (i.e., $\frac{1}{2}$ acre of non-tidal waters) was too high. The District Court merely required the Corps to consider lower acreage limits and the exclusion of high value waters in its environmental assessment.

For activities in non-tidal wetlands, NWPs 39 and 40 have different acreage limits. NWP 39 utilizes an indexed acreage limit, as does NWP 40 for discharges into playas, prairie potholes, and vernal pools. NWP 40 utilizes a simple acreage limit of 2 acres for discharges into other types of non-tidal wetlands. We are not proposing an indexed acreage limit for discharges authorized by NWP 40 into non-tidal wetlands because the national average for farm tract size is approximately 275 acres, which means that most agricultural producers would qualify for the maximum acreage limit of 2 acres. However, we are proposing to utilize an indexed acreage limit for discharges into playas, prairie potholes, and vernal pools. Most residential, commercial, and institutional developments, on the other hand, would be subject to the indexed acreage limit since most of these developments occur on relatively small parcels of land and the indexed acreage limit would encourage avoidance and minimization of impacts to waters of the United States. It would be impractical for this NWP to have the same acreage limit as NWP 29 because these NWPs fulfill different purposes. NWP 29 applies solely to the

construction of a single family residence whereas NWP 39 may be used to authorize the construction of a large residential subdivision, a commercial development, or an institutional development. The PCN requirements of NWPs 29 and 39 are different. NWP 29 requires notification for all activities authorized by that NWP. NWP 39 requires notification for activities resulting in the loss of greater than $\frac{1}{4}$ acre of non-tidal waters and any discharges resulting in the loss of open waters.

Several commenters favored the use of a sliding scale or indexing to determine the acreage limit for this NWP. A few commenters noted that the sliding scale is too complex to implement. Some of the commenters endorsing the use of a sliding scale recommend basing the indexing on a percentage of the development size. One commenter suggested that the acreage limit should be based on 10% of the parcel size, another commenter suggested that the maximum acreage should be 5% of the parcel size, several commenters recommended an acreage limit 2% of the parcel size, and two commenters recommended using 1% of the parcel size as the acreage limit. Another commenter recommended a minimum acreage limit of $\frac{1}{3}$ acre plus 10% of the wetlands on the parcel for this NWP.

One commenter stated that a percentage of parcel size should be used as the basis for the index because if the indexing scheme proposed in the July 1, 1998, **Federal Register** is used, a small increase in parcel size could allow a much larger loss of wetlands. For example, a parcel size of 14.4 acres would have an acreage limit of 1 acre whereas a 15.1 acre parcel would have an acreage limit of 2 acres. In contrast, an index based on the percentage of parcel size or project area would result in a small increase in the acreage limit with a small increase in parcel size or project area.

Other commenters remarked that the indexing scheme proposed in the July 1, 1998, **Federal Register** notice has acreage limits so low for each size category that it is useless. If indexing is used to determine the acreage limit, these commenters requested that the Corps base the index on higher acreage limits. In contrast, some commenters stated that the indexing should be based on lower acreage limits. One commenter recommended an indexed acreage limit of $\frac{1}{4}$ acre for every 5 acres of parcel size.

In response to these comments, we have decided to utilize an indexed acreage limit for this NWP. The

proposed index begins with a base acreage limit of $\frac{1}{4}$ acre and increases as 2% of the project area, in acres. The maximum acreage limit for this NWP is 3 acres of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. The acreage limit for this NWP is calculated as follows:

Acreage limit = $\frac{1}{4}$ acre + 2% of the project area (in acres) For example if the project area is 5 acres, the acreage limit would be 0.35 acres. If the project area is 80 acres, the acreage limit would be 1.85 acres. With this indexed acreage limit, the maximum limit of 3 acres is reached at a project area of 137.5 acres. If the project area is greater than 137.5 acres, the acreage limit is 3 acres.

Two commenters said that indexing should be based on the quality or values of the aquatic resource lost due to the authorized work. They stated that such a basis for indexing would ensure that only projects with minimal adverse effects are authorized.

We believe that using functions and values of aquatic resources to determine the maximum acreage limit for an NWP is impractical because we do not currently have a standard method for measuring or assessing aquatic resource functions and values.

One commenter stated that indexing duplicates requirements for avoidance and minimization, including the statement required in paragraph (f) of the proposed NWP A. Two commenters believe that indexing is counter to the requirements for avoidance and minimization and provides incentives for developers to build larger projects.

We disagree with these comments, because the purpose of using an indexed acreage limit for this NWP is to have a proportionally smaller acreage limit for smaller projects, which reduces the potential for losses of waters of the United States. An indexed acreage limit encourages avoidance and minimization because it imposes smaller acreage limits on smaller projects rather than a single larger acreage limit. With an indexed acreage limit, NWP applicants are still required to avoid and minimize impacts to waters of the United States on-site to the maximum extent practicable (see General Condition 19).

Another commenter asserted that project proponents will attempt to get around indexing requirements by artificially defining the parcel as larger than it really is to avoid going through the individual permit process. Two commenters remarked that developers may phase projects so that they can build projects with higher impact acreage limits using the indexing scheme proposed in the July 1, 1998,

Federal Register notice. In this case, the Corps would have to determine if phasing meets the criteria for a single and complete project. They believe that the use of a sliding scale will encourage piecemealing of projects. One commenter recommended that the term "parcel size" used in the proposed indexing scheme should be replaced with the term "single and complete project," as defined by subdivision criteria.

We are proposing to base the indexed acreage limit on a percentage of project area, not parcel size, to ensure that the NWP authorizes only single and complete projects. Basing the indexed acreage limit on project area will result in an acreage limit that reflects the actual size of the proposed activity, which cannot be artificially inflated in an attempt to get a higher acreage limit. Using the project area to determine the acreage limit, a particular parcel could have separate projects built upon it, with acreage limits based on the size of each project, as long as each separate project has independent utility. If the separate projects do not have independent utility, then the acreage limit would be determined by the sum of the project areas for each dependent component of the entire single and complete project.

Two commenters said that the proposed acreage limit will allow long segments of streams to be impacted. Some commenters recommended limits for the amount of linear feet of stream bed that may be filled or excavated under this NWP. Commenters recommended limits of 50, 100, or 150 linear feet of stream bed.

It should be noted that the proposed NWP has a PCN requirement for any loss of open waters, including streams. By reviewing the PCN, district engineers will be able to determine if the loss of stream bed will result in more than minimal adverse effects. If the stream bed impacts are more than minimal, discretionary authority will be exercised by the District Engineer, and the applicant will have to apply for authorization through another permit process or modify the project to comply with the NWP. Therefore, we do not believe that it is necessary to impose a limit on the quantity of stream bed that can be filled or excavated under this NWP.

Preconstruction Notification: We received a variety of comments concerning the notification requirements for this NWP. A couple of commenters supported the proposed PCN threshold of $\frac{1}{3}$ acre. Several commenters stated that the PCN threshold should be $\frac{1}{4}$ acre. Two

commenters recommended a $\frac{1}{2}$ acre PCN threshold. Two commenters believe that the PCN threshold should be 1 acre and a few commenters stated that a PCN should be required for all activities authorized by this NWP.

We believe that the PCN threshold should be $\frac{1}{4}$ acre, to be consistent with the other new NWPs.

For this NWP, we also proposed to require notification for all activities that involve filling or excavating open waters, such as perennial or intermittent streams and lakes. One commenter stated that this PCN requirement is excessive and would mean that a PCN will be required for virtually all projects. This commenter also stated that this PCN requirement implies that open waters are more important than special aquatic sites and is contrary to the Section 404(b)(1) guidelines. The commenter recommended that the Corps establish other PCN thresholds for open water impacts instead, such as a 500 linear foot PCN threshold for intermittent stream impacts, and require a PCN for all perennial stream impacts. Another commenter recommended using the size of the drainage area to determine when a PCN is required for open water impacts. This commenter recommended requiring a PCN when the drainage area is 1 square mile or greater. Another commenter believes that the PCN requirement for open waters demonstrates a lack of understanding that not all significant wetlands have open waters and that this PCN requirement redefines wetlands.

We disagree with the assertion that this PCN requirement is excessive and would result in PCNs for nearly all projects authorized by this NWP. Many development projects authorized by this NWP would only impact wetlands and would require notification only for those activities that result in the loss of greater than $\frac{1}{4}$ acre of wetlands. In addition, most residential, commercial, or institutional development projects can be designed to avoid impacts to open waters. Road crossings of streams that are constructed with culverts would require submittal of a PCN. The purpose of this PCN requirement is to allow district engineers to review residential, commercial, and institutional development activities that result in a loss of open waters, such as streams, and ensure that activities in these waters will result only in minimal adverse effects on the aquatic environment. We are proposing to add Note 2 to the text of this NWP to help the regulated public identify those areas that require submission of a PCN for discharges into open waters.

We are proposing to add the PCN requirement for discharges into open waters to provide district engineers with the opportunity to review activities in open waters and ensure that the authorized work results in minimal adverse effects on the aquatic environment. One intent of the proposed new and modified NWP is to provide equal consideration for open and flowing waters and wetlands. The proposed NWP focuses on the aquatic environment as a whole, not just wetlands. Streams and other open waters are extremely important components of the overall aquatic environment. The proposed PCN requirement does not redefine wetlands; it merely places additional emphasis on other types of waters of the United States, such as lakes and streams. High value wetlands and other waters will receive additional protection through regional conditions and the use of discretionary authority where discharges into high value waters may result in more than minimal adverse effects on the aquatic environment.

Several commenters stated that the PCN process for this NWP does not provide the Federal and State resource agencies the opportunity to comment on projects that adversely affect less than 1 acre of waters of the United States. These commenters believe that these agencies should be allowed the opportunity to comment on these projects. One commenter supported Corps-only review of projects that adversely affect between $\frac{1}{3}$ acre and 1 acre of waters of the United States. One commenter recommended agency coordination for activities resulting in the loss of greater than $\frac{1}{2}$ acre of waters of the United States.

We are proposing to modify General Condition 13 to require agency coordination for NWP 39 activities that result in the loss of greater than 1 acre of waters of the United States. PCNs for activities that result in the loss of $\frac{1}{4}$ acre to 1 acre of waters of the United States will be reviewed solely by the Corps. Agency coordination for smaller projects is costly to the Corps and provides little value added in determining whether or not the work will result in minimal adverse effects on the aquatic environment. Corps district personnel are highly experienced in reviewing PCNs to assess the environmental effects of the proposed work and recommending special conditions or requiring compensatory mitigation to ensure that the adverse effects on the aquatic environment are minimal. If the District Engineer determines that the adverse effects are more than minimal, discretionary

authority will be exercised and the applicant will be notified that another form of Corps authorization, such as an individual permit, is required for the proposed work.

A few commenters stated that the PCN should include detailed plans and schedules for compensatory mitigation. Another commenter recommended that the PCN should include baseline data for stream flows and a detailed analysis of stormwater standards to ensure compliance with paragraph (g) (formerly paragraph (i) of NWP A) of the proposed NWP.

We believe that it is unnecessary to require detailed plans and schedules for compensatory mitigation with the PCN to ensure that the adverse effects of the authorized work on the aquatic environment are minimal. Requiring the submission of detailed compensatory mitigation plans with the PCN will increase the amount of time required to review the PCN. For the PCN, the applicant need only provide a conceptual proposal for compensatory mitigation that will offset the loss of aquatic resource functions and values. However, a detailed mitigation plan may be submitted with the PCN if the applicant chooses to submit such a plan. The District Engineer will evaluate the compensatory mitigation proposal to determine if it is adequate to ensure that the adverse environmental effects of the proposed work are minimal. Detailed plans for project-specific compensatory mitigation projects are usually required as special conditions of the NWP authorization. If the proposed compensatory mitigation is provided through payment to an approved mitigation bank or in lieu fee program, detailed plans are not required because the Corps may have previously reviewed the plans for the mitigation bank or in lieu fee site. It should be noted that Corps must finish its review of the PCN within 45 days of receipt of a complete PCN; such a time limit makes it difficult to thoroughly review and approve detailed compensatory mitigation plans and schedules.

District engineers will determine compliance with paragraph (g) of NWP 39 through qualitative methods or defer to State or local regulatory agencies, who may require quantitative analyses to ensure that the project does not result in more than minimal adverse effects to water quality or surface water flows.

Statement of Avoidance: Paragraph (f) of the proposed NWP requires the applicant to submit a statement with the PCN which demonstrates that discharges into waters of the United States were avoided and minimized to the maximum extent practicable and

that additional avoidance and minimization cannot be achieved. One commenter favored this requirement, but a few commenters remarked that the requirement is unnecessary and recommended that it be removed. One commenter stated that the NWP regulations already require on-site avoidance and minimization and that this requirement increases the burden on the landowner and provides no environmental benefit. This commenter went on to say that the **Federal Register** notice does not provide any guidance as to what information is necessary to fulfill this requirement. Another commenter stated that this requirement will be impossible to implement. Several commenters stated that this requirement is insufficient, and that projects should be subject to more comprehensive alternatives analysis.

This requirement (now in paragraph (e) of NWP 39) is similar to the requirements of General Condition 19, Mitigation. It merely requires that the applicant provide a statement explaining how he or she is complying with this general condition. We disagree that it will create an additional burden on the project proponent because it will provide the Corps with the relevant avoidance and minimization details early in the PCN review process. In fact, submission of such a statement with the PCN is likely to benefit project proponents because the Corps personnel evaluating the PCN will not have to ask during the PCN review period if additional avoidance and minimization can be achieved. We believe that this requirement will save time and make the PCN process more effective. This requirement will also encourage project proponents to think more carefully about how to further avoid and minimize adverse effects to waters of the United States on the project site.

To require a more comprehensive alternatives analysis is contrary to the NWPs. NWPs authorize activities with minimal adverse effects on the aquatic environment, and if the proposed work meets the terms and limits of the NWP, the applicant cannot be required to consider off-site alternatives. If the adverse effects of a particular project are more than minimal the District Engineer will exercise discretionary authority and require an individual permit for the proposed work. The individual permit process requires a full alternatives analysis, including the consideration of off-site alternatives.

Since the avoidance and minimization requirement and the compensatory mitigation requirement of the NWP are related, we have combined paragraphs (f) and (g) of proposed NWP

A into paragraph (e) of NWP 39. Compensatory mitigation requirements for this NWP are discussed below.

Compensatory Mitigation: Paragraph (g) of the proposed NWP A stated that the permittee must submit a mitigation proposal to offset the loss of waters of the United States for activities that require notification. One commenter recommended changing this requirement to specify that the losses of wetland functions and values should be offset, not just the acreage loss. This commenter stated that the proposed wording is unclear and subject to various interpretations and should be consistent with the mitigation memorandum of agreement (MOA) signed in 1990.

This requirement has been incorporated into paragraph (e) of NWP 39. The purpose of compensatory mitigation is to offset losses of functions and values of waters of the United States and ensure that the net adverse effects on the aquatic environment are minimal. However, it is important to allow district engineers the flexibility to require compensatory mitigation that provides more benefits to the aquatic environment. Out-of-kind compensatory mitigation, such as the establishment and maintenance of vegetated buffers adjacent to streams, may provide more benefits to the local aquatic environment than replacing the wetland filled by the authorized work. It is also important to note that compensatory mitigation may be required for losses of other types of waters of the United States, not only wetlands. District engineers can require a greater acreage of compensatory mitigation to replace the aquatic resource functions and values lost due the authorized work if the compensatory mitigation cannot readily replace the lost functions and values. On the other hand, if the waters of the United States lost as a result of the authorized work are low value, providing few functions and values, a smaller acreage of compensatory mitigation may be appropriate to offset the lost functions and values of that area.

The mitigation process, as defined in the Council on Environmental Quality's regulations at 40 CFR Part 1508.20, includes avoidance, minimization, and compensation. Therefore, we are providing further clarification for this requirement by inserting the word "compensatory" in front of the word "mitigation" to state that the type of mitigation required by the District Engineer is compensation to replace losses of functions and values of waters of the United States.

Two commenters support the requirement for compensatory mitigation for losses that require a PCN. Several commenters objected to this NWP because this condition does not specifically require compensatory mitigation for losses of less than $\frac{1}{3}$ acre, which they believe will result in substantial cumulative adverse effects on the aquatic environment. Another commenter suggested that compensatory mitigation should be required for impacts to perennial streams. One commenter stated that mitigation proposals should be subject to agency review. A commenter recommended modifying this paragraph to allow the permittee the opportunity to justify why compensatory mitigation should not be required for a particular project.

It should be noted that paragraph (e) only requires the submission of a compensatory mitigation proposal to the District Engineer with the notification, and is not a requirement for compensatory mitigation. The prospective permittee may submit either a conceptual or detailed compensatory mitigation proposal. District engineers will determine on a case-by-case basis if compensatory mitigation is necessary to ensure that the proposed activity will result in minimal adverse effects on the aquatic environment, individually or cumulatively. However, in most cases, compensatory mitigation will be required for activities that require notification to ensure that those activities result only in minimal adverse effects on the aquatic environment. In paragraph (e), we have stated that compensatory mitigation will normally be required to offset losses of waters of the United States, but if the applicant believes that the adverse effects of the project on the aquatic environment are minimal without compensatory mitigation, then the applicant can provide justification with the PCN for the District Engineer's consideration.

Compensatory mitigation is not required for activities that do not require preconstruction notification, because the adverse effects on the aquatic environment caused by those activities are minimal. In watersheds where small losses of waters of the United States have greater potential for more than minimal adverse effects, division engineers can regionally condition the NWP to lower the notification threshold, which will allow district engineers to require compensatory mitigation for losses of less than $\frac{1}{4}$ acre of waters of the United States. For activities that require Corps-only review of the PCN, agency review is not required to review the compensatory mitigation proposal

because the District Engineer will determine whether or not the proposed mitigation is appropriate. For PCNs subject to agency coordination, Federal and State resource agencies will have the opportunity to review the compensatory mitigation proposal submitted with the notification.

One commenter stated that buffers adjacent to any waters of the United States, not just open water, should be part of any required compensatory mitigation.

We concur with this comment and have stated elsewhere in this notice that district engineers can consider the establishment and maintenance of vegetated buffers adjacent to waters of the United States, including wetlands, as compensatory mitigation for losses of waters of the United States. Vegetated buffers adjacent to waters of the United States, including open waters and wetlands, can be considered as out-of-kind compensatory mitigation because vegetated buffers are important components of the aquatic environment due to the functions they provide, especially for maintaining water quality and habitat for aquatic organisms. Vegetated buffers reduce adverse effects to local water quality caused by adjacent land use. Forested riparian buffers provide shade to streams, supporting cool water fisheries. When determining the appropriate amount of compensatory mitigation required for particular projects, district engineers should reduce the amount of "replacement acreage" required as compensatory mitigation by an amount that recognizes the value of the vegetated buffer to the aquatic environment.

One commenter recommended that on-site mitigation should be considered before off-site mitigation and that off-site mitigation should be accepted only if on-site mitigation is not environmentally beneficial. Two commenters oppose the use of mitigation banks and in lieu fee programs to provide compensatory mitigation for activities authorized by this NWP. Another commenter recommended that where compensatory mitigation is required, it should be done in a State-sponsored mitigation bank within the same drainage basin.

The sequencing requirements for compensatory mitigation recommended in the previous paragraph have limitations. Compensatory mitigation projects, whether they are individual projects that restore, enhance, or create aquatic areas or are payments to mitigation banks or in lieu fee programs, should be selected on the basis of their chance for success and their

effectiveness at offsetting authorized losses of waters of the United States. In-kind and on-site requirements for compensatory mitigation should be considered, but not to the exclusion of what is best for the aquatic environment. If off-site compensatory mitigation will provide more benefits to the local aquatic environment, then that form of compensatory mitigation should be selected. On-site wetland creation projects are often unsuccessful because of changes to local hydrology caused by the authorized activity, which may prevent the development of a functional replacement wetland. On-site restoration may have a better chance of success, but success may not be achieved because of changes in land use in the vicinity of the authorized work. It is often better to utilize off-site wetland creation, restoration, and enhancement projects, including mitigation banks and in lieu fee programs, if they are appropriate and available. The use of mitigation banks to provide compensatory mitigation for losses of waters of the United States authorized by NWP should not be limited to State-sponsored mitigation banks. Permittees should be allowed to use any mitigation bank in the area that replaces functions and values of waters of the United States, including wetlands, lost due to the authorized work. When reviewing compensatory mitigation proposals, district engineers will consider what is best for the aquatic environment, including requiring vegetated buffers to open and flowing waters and wetlands.

One commenter recommended that the NWP contain a provision requiring all remaining wetlands on the parcel to be protected by a conservation easement to prohibit any future development on the property.

We disagree, because such a requirement can be considered a taking of private property, unless the applicant agrees to preserve the remaining wetlands on the property as compensatory mitigation for authorized losses of waters of the United States. If there are any streams or other open waters on the project site, the District Engineer can require the permittee to establish and maintain vegetated buffers adjacent to those waters as compensatory mitigation. The vegetated buffers should be protected by a conservation easement, deed restriction, or other legal means.

Use of This NWP With Other NWPs: Paragraph (h) of the proposed NWP A addressed the use of this NWP with other NWPs. This paragraph has been changed to paragraph (f), and only addresses the PCN threshold when this

NWP is used with other NWPs. The use of NWP 39 with other NWPs is addressed in the proposed modification of General Condition 15. Paragraph (f) has been modified to reflect the changes in the PCN threshold discussed above.

One commenter supported this requirement of paragraph (h) of the proposed NWP A. Another commenter stated that this NWP should not be stacked with other NWPs because this NWP authorizes all activities associated with the single and complete project. One commenter said that this NWP should not be combined with other NWPs to authorize permanent, above-grade fills. One commenter stated that this NWP should not be combined with other NWPs.

Although the proposed NWP 39 authorizes the construction of building pads, foundations, and attendant features for a single and complete residential, commercial, or institutional development, there may be circumstances where other NWPs are necessary to authorize discharges of dredged or fill material into waters of the United States for related activities that occur in types of waters not covered by this NWP. It is important to consider these additional activities as part of the single and complete project. For example, a community boat ramp that can be authorized by NWP 36 may be constructed in tidal waters for a new residential subdivision that is authorized by NWP 39. In this situation, when NWP 39 is combined with NWP 36, the total loss of waters of the United States cannot exceed the indexed acreage limit for NWP 39. The use of more than one NWP to authorize a single and complete project is addressed in the proposed modification of General Condition 15.

One commenter stated that the stacking limitation assumes that projects with greater than 3 acres of impact to waters of the United States exceed the minimal adverse effects threshold and that it is illogical for the Corps to assume that each NWP, if used alone, will result in minimal impacts, but if used with other NWPs will result in more than minimal adverse effects. This commenter asserted that the Corps has no evidence to support its contention that NWP stacking in excess of 3 acres will result in more than minimal impacts and recommended that the Corps eliminate this condition of the NWP because the PCN requirement is sufficient to ensure that the NWP authorizes only those activities with minimal adverse effects. This commenter also stated that the stacking restriction is contrary to 33 CFR Part 330.6(c).

For the NWPs, we establish acreage limits that will ensure that the authorized activities will not result in more than minimal adverse effects on the aquatic environment, individually or cumulatively. There may be some circumstances (e.g., projects in low value waters of the United States) where larger impacts result in minimal adverse effects. If a particular district has a large number of these types of projects, then that district can develop a regional general permit to authorize those activities. When more than one NWP is used to authorize a single and complete project, the District Engineer must consider the additive adverse effects on the aquatic environment. Each NWP has an acreage limit based on a minimal adverse effects determination made only for that NWP. By combining NWPs, the sum of the acreage losses and the sum of the adverse effects of those losses on the aquatic environment increases the probability that the minimal adverse effects threshold will be exceeded. Since the NWPs can authorize only those activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively, a prohibition against stacking NWPs to exceed a specified acreage limit is necessary. General Condition 15 is not contrary to 33 CFR Part 330.6(c) because this regulation does not eliminate the need to comply with Section 404(e) of the Clean Water Act and 33 CFR Part 323.2(h).

Two commenters stated that any stacking that occurs with this NWP should have an acreage limit equal to the lower acreage limit for any of the NWPs involved. Another commenter suggested that any stacking that occurs with this NWP should have an acreage limit equal to the higher acreage limit for any of the NWPs involved. Two other commenters stated that paragraph (h) of the proposed NWP A should be revised to specify that total acreage cannot exceed 3 acres or the indexed acreage limit of the NWP, whichever is less. One commenter recommended that this NWP should not be stacked with NWP 29.

We disagree with the first comment in the previous paragraph because it would render this NWP useless in most situations. For example, NWP 36 limits the construction of boat ramps to a maximum width of 20 feet and a maximum discharge of 50 cubic yards. By requiring a combination of this NWP and NWP 36 to be subject to the lesser acreage limit of NWP 36, NWP 39 would essentially authorize no residential, commercial, or institutional development activities when combined with NWP 36. We are proposing to

modify General Condition 15 to allow the use of more than one NWP to authorize a single and complete project, as long as the acreage loss does not exceed the highest specified acreage limit of the NWPs used to authorize that activity. The statement in paragraph (f) regarding the PCN threshold has been changed to include the PCN threshold of $\frac{1}{4}$ acre.

We believe that prohibiting the use of NWP 29 with NWP 39 is unnecessary and have not added it to the NWP. NWPs 29 and 39 are used by different groups of landowners. NWP 29 can be used only by the present or future occupants of the single family residence. NWP 39, on the other hand, can be used by others, such as contract builders and developers, to construct single family residences. Paragraph (d) states that only single and complete projects can be authorized by NWP 39. If the District Engineer establishes an exemption to the subdivision provision of this NWP, NWP 29 may be used by an owner of a subdivided parcel to construct a single family residence. If the construction of another single family residence on the property has independent utility and is not part of the previously authorized single and complete project, then either NWP 29 or NWP 39 may be used to authorize that single family residence, provided the authorized work results in minimal adverse effects on the aquatic environment.

Other comments: A few commenters recommended that the Corps add a definition of the term "single and complete project" to the NWP.

The Corps has defined the term "single and complete project" in the regulations governing the NWP program (see 33 CFR 330.2(i)). This definition applies to all of the NWPs, including the new NWPs proposed today. This definition is repeated in the "Definitions" section of the NWPs. For NWP 39, the acreage limit is based on the size of the single and complete project (i.e., the footprint or areal extent of the project). For the purposes of this NWP, a definition of "project area" is included in the "Definitions" section. The concepts of "single and complete project" and "project area" must also be considered in the context of the subdivision provision of this NWP. In the July 1, 1998, **Federal Register** notice, we proposed General Condition 16, entitled "Subdivisions." The purpose of proposed General Condition 16 was to define, for proposed NWPs A and B, the single and complete project in terms of land parcels. Since proposed NWP B was withdrawn, we have determined that a separate general

condition addressing subdivision of land is unnecessary since it would only apply to NWP 39. Therefore, we have incorporated the text of proposed General Condition 16 into the text of NWP 39, with some minor changes. The term "parcel" is used in the subdivision provision of NWP 39 to determine the aggregate total loss authorized by the NWP and the appropriate NWP acreage limit. The project area may be the same as the size of the parcel, but more than one single and complete project may be built on a single parcel.

Multi-phase projects may be considered as separate single and complete projects depending on whether or not one phase has independent utility from another phase. If a phase of a multi-phase project has independent utility from the other phases, then that independent phase can be considered as a separate single and complete project and may be eligible for the maximum acreage limit as determined by the project area. Each phase of a project can be authorized with the maximum acreage, provided each phase has independent utility from the other phases and the work results only in minimal adverse effects on the aquatic environment. Multiple parcels can also be combined for a larger single project. The acreage limit for a combined larger project is based on the indexed acreage limit for the project area.

Two commenters suggested that authorizing the expansion of projects with this NWP is contradictory since this NWP is applicable only for single and complete projects.

We disagree, since a project proponent can expand an existing single and complete project provided the terms and limits of the NWP are not exceeded and the adverse effects on the aquatic environment are minimal. When evaluating such requests for NWP authorization, we add the previously authorized impacts to the proposed impacts to determine if the proposed expansion exceeds the acreage limit. If the PCN threshold is exceeded, the applicant is required to notify the District Engineer. The District Engineer reviews the PCN and determines if the proposed work is authorized by NWP.

One commenter expressed concern that a subdivision developer could construct the project, sell the lots, and the new owners would be eligible for NWP authorization to do further work on their lots. Another commenter stated that after a project is authorized by this NWP, further development on the property should be prohibited.

We are proposing to add a subdivision provision to this NWP to prevent

piecemealing of projects that exceed the acreage limit. For real estate subdivisions created or subdivided after October 5, 1984, the aggregate loss of waters of the United States authorized by this NWP cannot exceed the acreage limit based on the index in paragraph (a). If the owners of the property want to do additional work that would exceed the indexed acreage limit under paragraph (a), then they must obtain another type of Corps permit, such as an individual permit or a regional general permit, unless the additional work has independent utility. We cannot prohibit additional activities on the project site unless it is in the public interest to do so.

Three commenters believe that this NWP would authorize considerable impacts to floodplains and riparian zones and should not authorize activities in these areas, or should be limited to those activities with unavoidable impacts that provide essential public services. One commenter stated that a net gain in wetlands cannot be achieved if residential, commercial, and institutional development activities are authorized in wetlands.

In the October 14, 1998, **Federal Register** notice we requested comments on limiting the use of the NWPs to authorize activities in the 100-year floodplain as mapped by the Federal Emergency Management Agency (FEMA) on its Flood Insurance Rate Maps. In response to the October 14, 1998, **Federal Register** notice, proposed General Condition 27 has been added to the NWPs. General Condition 27 prohibits the use of NWP 39 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

Property owners are entitled to reasonable use of their property, the Corps cannot prohibit all of these activities in wetlands. However, NWP applicants are required to avoid and minimize adverse effects to waters of the United States on-site to the maximum extent practicable (see General Condition 19). For those unavoidable impacts, we can require compensatory mitigation to ensure that the adverse effects on the aquatic environment are minimal. In the July 1, 1998, **Federal Register** notice, we cited data from the past use of NWP 26, which demonstrates that during the period of May 1, 1997, through December 31, 1997, more than 3 acres of compensatory mitigation was required for every acre of wetland lost as a result of residential, commercial, and institutional development activities.

One commenter stated that the term "measurably degrade" in paragraph (i) of the proposed NWP A needs to be defined. Another commenter said that this term is unnecessary because any measurable degradation of water quality would occur after the work is completed. This commenter went on to say that this condition implies that if the degradation is not measurable, then it is authorized by the NWP.

We have rewritten this condition (now in paragraph (g)) to replace the term "measurably degrade" with language that is more consistent with General Condition 9. The intent of this condition is to ensure that the authorized work does not result in more than minimal degradation of local water quality. Vegetated buffers adjacent to open or flowing waters and wetlands and adequate stormwater management facilities can minimize the adverse effects of the development on local water quality.

One commenter stated that the preamble for this NWP in the July 1, 1998, **Federal Register** notice contains several conditions that are not included in the text of the NWP and that these conditions should be consistent with the final NWP.

In the preamble discussion of the proposed NWP, we did not include conditions that were not incorporated into the text of the NWP itself. In the preamble for the NWP, we reiterated some of the terms and conditions of this NWP, with discussions of the intent and meaning of those conditions.

A commenter stated that the eight months of data presented by the Corps in the July 1, 1998, **Federal Register** notice is inadequate to assess the adverse effects that may result from the use of this NWP. The commenter recommended that at least one and a half years of data should be used.

We have collected additional data since the July 1, 1998, **Federal Register** notice for the use of NWP 26 for activities that could be authorized by this NWP. We have collected this data for over a year and will consider this data in our Environmental Assessment for NWP 39. This data will be used to estimate the potential losses of waters of the United States that will result from the use of this NWP. This data will include the losses of waters of the United States authorized by NWP 26, as well as the gains provided by compensatory mitigation.

One commenter requested that this NWP require the establishment and maintenance of vegetated buffers adjacent to open waters and streams, and that these vegetated buffers should be protected by deed restrictions,

conservation easements, or other legal means.

We concur with this comment, and have added a new paragraph (i) to NWP 39 to require, to the maximum extent practicable, the establishment and maintenance of vegetated buffers adjacent to open waters and streams, if those types of waters of the United States are present on the project site. Paragraph (i) also requires the protection of these vegetated buffers by deed restrictions, conservation easements, or other legal methods. For activities requiring notification, the composition of the vegetated buffer, in terms of plant species, and the appropriate width of the vegetated buffer, are determined by the District Engineer. For activities authorized by this NWP that do not require notification, the permittee should establish and maintain vegetated buffers that are wide enough to protect water quality and are comprised of native plant species. Division engineers can also regionally condition this NWP to prescribe vegetated buffer requirements for activities that do not require notification.

One commenter stated that this NWP would be overly burdensome to builders. Another commenter believes that authorizing residential, commercial, and institutional development activities in all non-tidal waters of the United States will result in too much workload for Corps districts.

The purpose of the proposed NWP is to efficiently authorize residential, commercial, and institutional development activities that result in minimal adverse effects on the aquatic environment. NWP 26 authorized many of these same activities in isolated waters and headwaters. The proposed NWP authorizes these activities in all non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. Proposed General Condition 27 prohibits the use of NWP 39 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain, which will further limit the use of NWP 39 in non-tidal waters. It is our experience that many builders design their projects to comply with the NWPs, rather than construct larger projects that require individual permits. Although the proposed NWP has additional conditions that were not previously included with NWP 26, these conditions are intended to reduce adverse effects on the aquatic environment. Developers should be able to design their projects to comply with these conditions and qualify for NWP authorization. Another important point to consider is that

NWPs are optional permits. If the permittee does not want to comply with all of the terms and conditions of an NWP, then he or she may request authorization through the individual permit process or apply for authorization by a regional general permit, if such a general permit is available.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 39 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. Notification to the District Engineer is required for all discharges into impaired waters and their adjacent wetlands. General Condition 27 prohibits the use of NWP 39 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

We believe that the terms and conditions of the proposed new and modified NWPs, especially the requirements of the three new NWP general conditions, will result in a substantial increase in the number of individual permits processed by our district offices. Districts will use the proposed new and modified NWPs, with regional conditions, to prioritize their workload in non-tidal waters. In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. Proposed NWP A is designated as NWP 39, with the modifications discussed above.

40. Agricultural Activities

In the July 1, 1998, **Federal Register** notice, we proposed to modify this NWP, which originally authorized only the construction of foundations or building pads for farm buildings in farmed wetlands, to authorize discharges into non-tidal wetlands for the purposes of increasing agricultural

production. As a result of the comments we received concerning this NWP, we have substantially changed the proposed modification of NWP 40 to authorize the following activities: (1) Discharges into non-tidal wetlands, excluding other waters of the United States (e.g., open or flowing waters) and non-tidal wetlands adjacent to tidal waters, conducted by participants in U.S. Department of Agriculture (USDA) programs to increase agricultural production, (2) discharges into non-tidal wetlands, excluding other waters of the United States (e.g., open or flowing waters) and non-tidal wetlands adjacent to tidal waters, conducted by agricultural producers that are not participants in USDA programs to increase agricultural production; (3) discharges into farmed wetlands for the construction of building pads for farm buildings, and (4) the relocation of existing serviceable drainage ditches constructed in non-tidal streams. For activities authorized by paragraph (a) of this NWP, the Natural Resources Conservation Service (NRCS) will determine if the proposed work meets the terms and conditions of NWP 40, unless the permittee also proposes to construct building pads for farm buildings or relocate greater than 500 linear feet of existing serviceable drainage ditches constructed in non-tidal streams. For discharges resulting in the loss of greater than $\frac{1}{4}$ acre of non-tidal wetlands by non-participants in USDA programs to increase agricultural production, the construction of building pads for farm buildings, and/or the relocation of greater than 500 linear feet of existing serviceable drainage ditches constructed in non-tidal streams, the Corps will determine if the proposed work is authorized by NWP 40. Division engineers will not regionally condition paragraph (a) of this NWP, to ensure that this NWP is consistently applied by NRCS and agricultural producers across the country. These proposed changes are discussed in more detail below.

General Comments: Many commenters objected to the proposed modification and only a few supported the proposed modification of NWP 40. Of those who objected to the proposed modification, the reasons for their objections include: (1) The NWP would authorize substantial cumulative losses of wetlands, especially in the prairie pothole region; (2) the use of the NWP would result in substantial degradation of water quality; (3) the NWP does not comply with Section 404(e) of the Clean Water Act; (4) the NWP delegates some of the Corps responsibilities to NRCS, which lacks the resources to implement

the statutory requirements of the Clean Water Act; (5) the NWP is contrary to Swampbuster; and (6) the proposed modification is contrary to the goals of programs that restore and enhance wetlands, such as the Conservation Reserve Program (CRP) and the Wetlands Reserve Program (WRP).

This NWP complies with the requirements of Section 404(e) of the Clean Water Act because it authorizes activities that are similar in nature and will result in minimal adverse effects on the aquatic environment. As with all other NWPs, district engineers will monitor the use of NWP 40 on a watershed basis to determine if the use of NWP 40 and other NWPs results in more than minimal cumulative adverse effects on the aquatic environment, including degradation of local water quality. States, Tribes, and EPA will also make local determinations for compliance with Section 401 of the Clean Water Act and determine if activities authorized by NWP 40 will violate local or State water quality standards. If the cumulative adverse effects within a particular watershed are more than minimal, then the District Engineer will suspend or revoke the use of the NWPs in accordance with 33 CFR Part 330.5. For activities in non-tidal wetlands by USDA program participants to increase agricultural production, NRCS will review the proposed work and determine if it is authorized by NWP 40. In these cases, each landowner must submit a report to the District Engineer so that the use of NWP 40, the losses of waters of the United States, and compensatory mitigation can be monitored. For activities that require notification to the District Engineer (i.e., discharges resulting in the loss of greater than $\frac{1}{4}$ acre of non-tidal wetlands by non-participants in USDA programs to increase agricultural production, discharges into farmed wetlands for the construction of pads for farm buildings, or the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams), the District Engineer will review the PCN and determine if the adverse effects on the aquatic environment resulting from the proposed work will be minimal. If the proposed work involves both activities in non-tidal wetlands to increase agricultural production and either the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams or the construction of pads for farm buildings, the landowner must submit a PCN to the Corps, and the District Engineer will determine if the proposed work is authorized by NWP

40. For those activities that require notification, the District Engineer will determine if the proposed work will result in minimal adverse effects on the aquatic environment. If the proposed work will result in more than minimal adverse effects on the aquatic environment, discretionary authority will be exercised and an individual permit will be required.

One of the goals of the proposed modification of this NWP is to reduce duplication between the Corps and NRCS, reduce confusion, and provide some regulatory relief to agricultural producers. This is one of the goals of the Administration's wetlands plan, which is to make the wetlands regulatory program fair, flexible, and effective. This NWP does not delegate the Corps responsibilities under Section 404 of the Clean Water Act to NRCS, but allows activities with minimal adverse effects on the aquatic environment to proceed without duplicate review by two Federal agencies. This NWP does not require NRCS to implement the Clean Water Act. It merely addresses certain situations where the Clean Water Act and Swampbuster have duplicate requirements. District engineers will monitor the use of NWP 40 to assess the cumulative adverse effects on the aquatic environment, through reports submitted by landowners and those activities reviewed by the Corps on a case-by-case basis.

This proposed modification of NWP 40 is not contrary to the CRP and the WRP, which are voluntary programs. Participation in these programs by agricultural producers is not mandatory. Although the CRP and WRP are important conservation programs, it is important to note that agricultural producers may need to alter their land to increase production and remain competitive with other agricultural producers. NWP 40 authorizes activities in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to allow agricultural producers to increase production, as long as those activities have minimal adverse effects on the aquatic environment, individually or cumulatively. Both the Corps and NRCS can require compensatory mitigation to offset losses of waters of the United States authorized by this NWP to ensure that the adverse effects on the aquatic environment are minimal. It is important to note that draining and filling wetlands to increase agricultural production is often reversible. Agricultural lands that were previously wetlands are often the easiest to restore because they require less effort and expense to restore than wetlands that

were filled to create residential subdivisions or commercial facilities. Although this NWP may be used to fill a particular area to increase agricultural production, that area may be restored at a later time.

A commenter stated that the proposed modification is too restrictive and should be equitable with other NWPs, because agricultural activities and other more potentially destructive activities, such as the construction of residential, commercial, and institutional developments, should be held to the same standard. One commenter requested that the preamble to the NWP state that the use of the NWP will help achieve the goal of the Clean Water Action Plan of "no net loss" and ensure consistency with the Federal Agriculture Improvement and Reform Act of 1996, which exempts wetland conversions from the Swampbuster provisions of the Food Security Act as long as wetland functions, values, and acreage are fully offset. One commenter recommended modifying the NWP to be consistent with the limits associated with the minimal effects criteria regionally established under the Farm Bill. A number of commenters believe that the proposed modification of NWP 40 is unnecessary because ongoing farm operations in farmed wetlands are exempt under Section 404(f) of the Clean Water Act.

We agree that the modifications to NWP 40 proposed in the July 1, 1998, **Federal Register** notice placed greater restrictions on agricultural producers than proposed NWP A (now designated as NWP 39) did on residential, commercial, and institutional developers. We have attempted to make NWPs 39 and 40 more equitable in terms of applicable waters and determining what constitutes a single and complete project for these NWPs. Both NWPs 39 and 40 authorize activities in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. We have retained the separate provisions for playas, prairie potholes, and vernal pools from NWP 40, with an indexed acreage limit and a maximum limit of 1 acre, which is achieved for farm tracts 90 acres or greater in size. For proposed NWP 39, the single and complete project will be based on project area. For the proposed modification of NWP 40, a single and complete project will be based on farm tract size. Farm tracts will be identified by the Farm Service Agency. The definition of the term "farm" based on reporting to the Internal Revenue Service has been removed. In the "Definitions" section of the NWPs, the term "farm" has been

replaced with "farm tract." The definition of the term "farm tract" has been taken from the Farm Service Agency regulations at 7 CFR Part 718.2.

In accordance with the provisions of the Food Security Act, compensatory mitigation will be required for activities authorized by paragraph (a) of this NWP to fully offset losses of non-tidal wetlands. District engineers will determine on a case-by-case basis if compensatory mitigation is necessary to offset losses of waters of the United States resulting from activities authorized by paragraphs (b), (c), and (d) of this NWP to ensure that those activities result in minimal adverse effects on the aquatic environment. NRCS and the Corps, in cooperation with EPA, FWS, and NMFS, will develop joint compensatory mitigation guidance to provide consistency in compensatory mitigation requirements necessary for the implementation of NWP 40. Since the proposed modification of NWP 40 is intended to have national applicability, it is impractical to modify the NWP to be consistent with local minimal effects criteria established regionally under the Farm Bill. This NWP is applicable in all non-tidal wetlands, not just farmed wetlands. The conversion of waters of the United States to another use is not exempt under Section 404(f) of the Clean Water Act, which makes these modifications to NWP 40 necessary to satisfy the requirements of Section 404.

Activities Authorized by NWP 40: One commenter supported the intent of the proposed modification, but stated that the additional activities should be authorized by another NWP, not by modifying the existing NWP 40. Another commenter stated that a separate NWP should be issued to authorize the installation of drainage tiles and drainage ditches, and that the structure of this new NWP should be more like the proposed NWP for residential, commercial, and institutional activities. A commenter suggested that NWP 39 should be used instead of NWP 40 to authorize discharges in waters of the United States to increase agricultural production. One commenter recommended limiting the NWP to maintaining farm acreage, not expanding productive farm area. Two commenters requested the removal of mechanized landclearing from the list of activities authorized by the NWP, stating that only activities in cropland should be authorized by the NWP. Two commenters stated that mechanized landclearing should be considered exempt under Section 404(f)(1) of the Clean Water Act and not included in the NWP. One commenter stated that the

proposed modification to NWP 40 illegally brings two Farm Bill exemptions into the Federal wetlands program, namely "categorical minimal effects" and "minimal effects mitigation."

We disagree that there should be a separate NWP for activities that increase agricultural production. We believe that it is more appropriate to modify NWP 40, which previously authorized only the construction of building pads and foundations for farm buildings in farmed wetlands. The purpose of the proposed modification of NWP 40 is to authorize all activities for increasing agricultural production and constructing farm buildings. By including all of these activities in a single NWP, there will be less confusion for the regulated public and district engineers will be better able to assess the adverse effects on the aquatic environment for single and complete projects. We are proposing to make the modifications to NWP 40 similar to the proposed NWP 39 by utilizing indexed acreage limits and by making both NWPs applicable to non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters. The indexed acreage limit for NWP is applicable only for discharges resulting in the loss of playas, prairie potholes, and vernal pools, with a maximum acreage limit of 1 acre. We are proposing to utilize a simple 2 acre limit for discharges into other types of non-tidal wetlands to increase agricultural production. The proposed modification of NWP 40 has a smaller maximum acreage limit (*i.e.*, 2 acres) than NWP 39 (*i.e.*, 3 acres). The lower maximum acreage limit for NWP 40 is necessary to ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment, because district engineers will not receive notifications for many activities authorized by this NWP. Division and district engineers cannot impose regional or case-specific conditions on paragraph (a) of this NWP, so that NRCS can implement this part of NWP 40 consistently throughout the country. In addition, district engineers cannot revoke authorizations for activities authorized by paragraph (a) of NWP 40 on a case-by-case basis, but division engineers can revoke the provisions of paragraph (a) of NWP 40 within a state, geographic region, or a particular waterbody. However, regional conditions can be added to paragraphs (b), (c), and (d) of NWP 40, since the Corps is responsible for reviewing these activities. We have changed the applicable waters for the proposed modification of NWP 40 to be consistent

with most of the new NWP. Proposed NWP 39 cannot be used to increase agricultural production instead of NWP 40, because NWP 39 specifically authorizes only building pads and attendant features for residential, commercial, and institutional developments. Activities that increase agricultural production are not included in NWP 39, although the construction of a farm house used as a residence on a farm may be authorized by NWP 39.

Mechanized landclearing may result in a discharge of dredged or fill material into waters of the United States and require a Section 404 permit. We disagree that the NWP should be limited to areas currently used as cropland. It would be inequitable to agricultural producers to limit use of the NWP only to those areas currently used for agricultural production. Mechanized landclearing is not exempt under Section 404(f)(1) if it converts a water of the United States into a use to which it was not previously subject, such as the mechanized landclearing of a forested wetland to convert it into cropland (see Section 404(f)(2) of the Clean Water Act).

Categorical minimal effect determinations and minimal effects mitigation are provisions of the 1996 Farm Bill and 1985 Food Security Act. The categorical minimal effects determination is not an exemption from the permit requirements of Section 404 of the Clean Water Act. It merely allows the landowner to maintain USDA farm program eligibility for activities that convert a wetland to increase agricultural production, provided the activity has minimal effects on the hydrological and biological functions of the wetlands in the vicinity.

One commenter requested clarification of the NWP to state that it authorizes activities for the purposes of improving production on existing agricultural land, because the commenter believes that the proposed wording of the NWP allows conversion of land not previously used for agricultural purposes. Another commenter recommended that, in addition to activities regulated under the National Food Security Act Manual (NFSAM), those activities considered exempt under NFSAM (*i.e.*, where the land is not currently in agricultural production) such as the construction of grassed waterways, storage facilities, and impoundments should be authorized by the NWP. One commenter recommended that the NWP authorize the construction of farm ponds, when they are subject to the recapture provision of Section 404(f)(2) and are not exempt from the Clean Water Act.

The proposed modification of NWP 40 authorizes discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the purpose of increasing agricultural production, including areas not currently used for agricultural production. This NWP authorizes the construction of grassed waterways, storage facilities, and impoundments in non-tidal wetlands, provided their purpose is to increase agricultural production. In certain circumstances, the construction of farm ponds is exempt from Section 404 permit requirements. The proposed modification of this NWP authorizes the construction or expansion of farm ponds used for agricultural purposes (*e.g.*, irrigation ponds) that are not eligible for the Section 404(f) exemption, if the farm ponds are constructed in non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters, and do not involve discharges of dredged or fill material into stream beds or other open waters. The only activity authorized by this NWP in open waters is the relocation of non-tidal streams that have been channelized as drainage ditches. The construction of farm ponds in stream beds or the construction of ponds for purposes other than increasing agricultural production may be authorized by other NWPs, a regional general permit, or an individual permit.

Scope of the NWP: A number of commenters recommended limiting the NWP only to wetlands that are currently frequently cropped. Two commenters suggested that the NWP should authorize discharges only in isolated wetlands and should not authorize draining of wetlands. Several commenters stated that agricultural activities in naturally vegetated playas, prairie potholes, and vernal pools should not be included in the NWP.

Limiting the scope of applicable waters of the proposed modification of this NWP only to frequently cropped or farmed wetlands would be inequitable to farmers, when compared to the applicable waters for NWP 39. District engineers will monitor the use of this NWP to ensure that it authorizes only those agricultural activities in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, that result in minimal cumulative adverse effects on the aquatic environment. District engineers will receive notification for discharges into non-tidal wetlands by non-participants in USDA programs if the discharge results in the loss of greater than 1/4 acre of non-tidal wetlands, the construction of building pads for farm

buildings, and/or the relocation of greater than 500 linear feet of existing serviceable drainage ditches constructed in non-tidal streams. These notifications will be reviewed by District Engineers to ensure that the proposed work will result in minimal adverse effects on the aquatic environment. We have not removed the specific provisions relating to playas, prairie potholes, and vernal pools to ensure that discharges into those types of non-tidal wetlands do not result in more than minimal adverse effects on the aquatic environment. To ensure that the provisions for playas, prairie potholes, and vernal pools are implemented accurately for those wetland types, we are proposing definitions for these terms in the "Definitions" section of the NWPs. The proposed definitions are based on geographic, hydrological, and vegetation characteristics. The proposed definitions were derived from information from technical sources on identifying and delineating wetlands. We are proposing to modify the applicable scope of waters for NWP 40 from all non-tidal waters of the United States, as proposed in the July 1, 1998, **Federal Register** notice, to non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, to make it consistent with most of the new NWPs.

Acreage limits: Comments on acreage limits for the proposed modification of this NWP are divided into two categories. One category addresses the basis for determining acreage limits for a single and complete project (*i.e.*, whether NWP 40 should apply to one entire farm or to a single farm tract). The other category of comments addresses the maximum acreage loss authorized by this NWP.

Two commenters favored the use of the term "farm" to define the single and complete project for the NWP. One commenter objected to the use of "farm" in the NWP, stating that a person who owns more than one farm could use the NWP at each farm for the maximum acreage limit. One commenter stated that the proposed definition of "farm" is confusing and would unfairly restrict the use of NWP 40. A few commenters stated that acreage limits should not be linked to farm size. One of these commenters objected to basing the acreage limit on the Internal Revenue Service's definition of a "farm" because NRCS personnel would have to review copies of the landowner's tax returns to verify the number of tracts with the farm. This commenter recommended that the Corps determine single and complete projects for NWP 40 based on "farm tracts" as identified by the Farm Service Agency. Other commenters

suggested applying the acreage limit to the individual USDA field number or the individual parcel. One commenter requested that the aggregate acreage limit apply only to the property, not the farmer. One commenter advocated the use of "farm tracts" for this NWP because the farm tract, not the farm, is the basic unit of land ownership. This commenter stated that many farms consist of different tracts geographically separated from each other. Farm tracts remain constant in size and configuration, but may be sold, leased, or traded between farms. A couple of commenters opposed the use of "farm tracts" to determine the acreage limit of NWP 40. One of these commenters reasoned that the use of farm tracts would result in substantial losses of wetlands because of multiple use of the NWP by a large farm operation that owns many farm tracts. One commenter stated that impacts to waters of the United States are not dependent on farm size.

One of the objectives of the Administration is to make the Federal wetlands programs fair, flexible, and effective. Basing the single and complete project on Internal Revenue Service reporting of farms for the proposed modification of NWP 40 results in unfair restrictions on agricultural producers compared to residential, commercial, and institutional developers. Developers often own more than one parcel of land and may have several development projects occurring at the same time. The Corps considers each development a single and complete project, as long as each development has independent utility. Each development can qualify for separate NWP authorization even though the land may be owned by the same developer, if the proposed work meets the terms and conditions of the NWP and if the individual or cumulative adverse effects on the aquatic environment are minimal. We are proposing to base the single and complete project and indexed acreage limit of NWP 40 on farm tract size, instead of farms. The use of farm tracts for NWP 40 provides equitable treatment to agricultural producers, and each farm tract would be considered a single and complete project for the purposes of the NWPs.

Several commenters stated that the proposed acreage limits are too high. Suggested acreage limits were 1, $\frac{1}{3}$, $\frac{1}{4}$, and $\frac{1}{10}$ acre. A few commenters suggested higher acreage limits. Several commenters stated that the proposed 3 acre limit is adequate. In the July 1, 1998, **Federal Register** notice, we requested comments on the use of a

simple acreage limit versus a sliding scale for this NWP. Most commenters opposed the use of a sliding scale or indexing to determine the acreage limit for this NWP. One of these commenters stated that the indexing scheme proposed in the July 1, 1998, **Federal Register** notice is too burdensome, confusing, and without ecological justification. Two commenters favored the use of a sliding scale, but recommended basing the sliding scale on a percentage, either as 5% of the wetlands on a farm regardless of farm size or 2% of the project size, if the project is greater than 5 acres in size.

A number of commenters stated that the acreage limit for NWP 40 should be the same as for the NWP for residential, commercial, and institutional development activities (*i.e.*, NWP 39). One of these commenters stated that the acreage limits proposed in the July 1, 1998, **Federal Register** notice are inequitable compared to the acreage limits developers are subject to in NWP 39, particularly to farmers who own smaller farms. This commenter also said that using acreage limits and farm size as a substitute to determine minimal adverse effects has not been applied in a consistent manner between similar activities, such as development or agricultural projects.

Based on our review of comments received in response to the July 1, 1998, **Federal Register** notice, and to provide agricultural producers and residential, commercial, and institutional developers with equitable NWPs, we are proposing to utilize a simple 2-acre limit for discharges into non-tidal wetlands and an indexed acreage limit for discharges into playas, prairie potholes, and vernal pools that are authorized by paragraphs (a) (for USDA program participants) or (b) (for non-participants in USDA programs) of NWP 40. The indexed acreage limit for playas, prairie potholes, and vernal pools has a maximum limit of 1 acre per farm tract. A lower maximum acreage limit (*i.e.*, 2 acres per farm tract) was selected to ensure that the NWP authorizes activities only with minimal adverse effects on the aquatic environment because preconstruction notification to the District Engineer is not required for activities authorized by paragraph (a) of this NWP (unless the project proponent is also requesting authorization for the construction of foundations for farm buildings or the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams). We are proposing a 2-acre limit for discharges into non-tidal wetlands (except for playas, prairie potholes, and vernal pools) to increase production.

For the proposed modification of NWP 40, the indexed acreage limit for discharges into playas, prairie potholes, and vernal pools is based upon 1% percent of the farm tract size, with a base limit of $\frac{1}{10}$ acre. The maximum acreage limit of 1 acre is achieved for farm tracts 90 acres or greater in size. We believe that the formula for the indexed acreage limit will be easy to use. An indexed acreage limit helps encourage avoidance and minimization of losses of waters of the United States.

One commenter opposed the use of an aggregate acreage limit for NWP 40, stating that the requirement for mitigation replaces the need for an acreage limit for activities authorized by the NWP. A couple of commenters said that the Corps cannot enforce the acreage limits of this NWP because land is reapportioned among farm tracts on an annual basis and the Corps does not have access to the farm tract history necessary to ensure compliance with the acreage limits.

The acreage limit for NWP 40, as for all other NWPs, is based on a national determination that the NWP will authorize most activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. For certain activities, preconstruction notification is required to allow district engineers to review these activities on a case-by-case basis and determine if they will result in minimal adverse effects on the aquatic environment, individually or cumulatively. Compensatory mitigation cannot be used to increase the acreage limit for an NWP, but discharges of dredged or fill material into waters of the United States to construct compensatory mitigation are not included in the calculation of acreage loss of waters of the United States to determine if the single and complete project exceeds the acreage limit of NWP 40. It is our understanding that farm tract designations change only when the land is subject to a real estate transaction, such as when a farmer subdivides a farm tract to sell a part of that farm tract to another person.

Paragraph (a) of the proposed NWP 40 modification published in the July 1, 1998, **Federal Register** notice authorized activities that qualify for a minimal effects exemption under the Food Security Act and National Food Security Act Manual, provided the discharge does not cause the loss of greater than 1 acre of non-tidal wetlands or greater than $\frac{1}{3}$ acre of playas, prairie potholes, and vernal pools. One commenter supported the inclusion of minimal effects determinations in NWP 40. Two commenters opposed this

provision of the NWP. One commenter stated that the farm owner should not have to obtain an authorization from both the Corps and NRCS for work in wetlands. This commenter believes that the Corps should make the minimal effects determination and that USDA program participants should get an NWP authorization before they can get a minimal effects determination. Another commenter requested that the minimal effects determination should include non-participants in USDA programs. One commenter stated that it is inappropriate for the Corps to apply acreage limits under this part of the NWP to activities that receive minimal effects determinations. Another commenter recommended that this portion of the NWP should be removed and replaced with regional conditions. One commenter believes that NRCS does not currently monitor the indirect or cumulative adverse effects of projects that are eligible for minimal effects determinations, and that this is contrary to the Clean Water Act's general permit criteria. This commenter stated that the minimal effects determination does not assess the value for a watershed. Three commenters recommended that NRCS should receive concurrence from the FWS and/or NMFS prior to issuing a minimal effects determination.

We are proposing to modify this NWP to authorize discharges in non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters, by USDA program participants and non-participants in USDA programs to increase agricultural production on a farm tract. For USDA program participants, the permittee must obtain an exemption or minimal effects with mitigation determination from NRCS and implement an NRCS-approved compensatory mitigation plan that fully offsets wetland losses. For non-participants in USDA programs, notification to the District Engineer is required for discharges resulting in the loss of greater than 1/4 acre of non-tidal wetlands to increase agricultural production. The District Engineer will determine on a case-by-case basis if the activities authorized by paragraph (b) will result in minimal adverse effects on the aquatic environment. Compensatory mitigation will normally be required for activities that require notification to ensure that they result in minimal adverse effects on the aquatic environment. The 2 acre limit for discharges into non-tidal wetlands and the indexed acreage limit for discharges into playas, prairie potholes, and vernal pools will ensure that the NWP authorizes only activities with minimal

adverse effects on the aquatic environment. District engineers will monitor the use of this NWP through postconstruction reports and preconstruction notifications submitted to the District Engineer. If the activities authorized by NWP 40 result in more than minimal cumulative adverse effects on the aquatic environment, division engineers can suspend the use of this NWP in the watershed or Corps district.

Paragraph (b) of the proposed modification of NWP 40 published in the July 1, 1998, **Federal Register** authorized activities in non-tidal wetlands, except for naturally vegetated playas, prairie potholes, and vernal pools for the purposes of increasing agricultural production. Two commenters recommended using a simple acreage limit, but two other commenters favored using a sliding scale. Two commenters opposed the proposed 3 acre limit, because they believe it is too high. One commenter stated that the proposed indexed acreage limit was too low, especially if mitigation is required. One commenter recommended a 1 acre limit and another commenter recommended a 1/3 acre limit. One commenter recommended basing the acreage limit on a sliding scale of 2% of the entire property, with a maximum of 3 acres. One commenter stated that this part of the NWP should apply to all non-tidal wetlands, with no exclusions for playas, prairie potholes, and vernal pools.

We are proposing to modify NWP 40 to authorize agricultural activities in all non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters. For discharges into non-tidal wetlands to increase production, we are proposing a simple acreage limit of 2 acres and an indexed acreage limit for discharges into playas, prairie potholes, and vernal pools. The indexed acreage limit for discharges into playas, prairie potholes, and vernal pools will have a maximum acreage limit of 1 acre. The acreage limit for the proposed modification of this NWP will be based on farm tracts.

Paragraph (c) of the proposed modification of NWP 40 published in the July 1, 1998, **Federal Register** authorized activities in naturally vegetated playas, prairie potholes, and vernal pools for the purposes of increasing agricultural production. Two commenters concurred with the proposed acreage limit of 1 acre. One commenter objected to the lower acreage limit for activities in playas, prairie potholes, and vernal pools. One commenter stated that this portion of the NWP should apply only to frequently cropped playas, prairie potholes, and vernal pools and that

naturally-vegetated wetlands should not be included in the NWP. Another commenter recommended including pocosins in this paragraph of the NWP. A commenter stated that the proposed 1 acre limit is too high. One commenter believes that a higher acreage limit should be used because the permittee is required to provide mitigation. Two commenters recommended using a simple acreage limit instead of a sliding scale acreage limit.

As previously discussed, we are proposing to modify NWP 40 to include playas, prairie potholes, and vernal pools with an indexed acreage limit.

Construction of Farm Buildings:

Paragraph (d) of the proposed modification of NWP 40 contained the original provisions of NWP 40 and authorized discharges into wetlands, excluding playas, prairie potholes, and vernal pools, that were in agricultural production prior to December 23, 1985, for the construction of building pads for farm buildings, with an acreage limit of 1 acre.

One commenter recommended increasing the acreage limit to 2 acres. Another commenter recommended an acreage limit of 1/4 acre, to be consistent with the acreage limit proposed for NWP 29 in the July 1, 1998, **Federal Register** notice. One commenter stated that non-agricultural buildings such as houses should not be authorized by this NWP. Three commenters stated that the December 23, 1985, date should be removed from this part of the NWP, based on the rationale that any area under agricultural production prior to that date should not be considered a jurisdictional wetland and subject to the limitations of the NWP.

We are proposing to remove the exclusion for playas, prairie potholes, and vernal pools from this part of NWP 40. This provision is now in paragraph (c) of the proposed modification of this NWP, with a requirement that the permittee notify the District Engineer in accordance with General Condition 13. We are proposing to maintain the 1 acre limit for this activity. One acre is adequate for the construction of most farm buildings. This acreage limit need not be consistent with the acreage limit of NWP 29, since farm buildings are constructed for the operation of the farm, not for residences. Farm buildings, such as barns, usually must be larger than houses to fulfill their purposes. In addition, this paragraph of NWP 40 encompasses a much smaller geographic scope than the other provisions of NWP 40, since it is limited to farmed wetlands. Paragraph (c) of NWP 40 authorizes discharges only in farmed

wetlands for the construction of building pads for farm buildings, whereas NWP 29 authorizes discharges of dredged or fill material into all non-tidal wetlands. This NWP does not authorize the construction of non-agricultural buildings, such as residences. We do not agree that the December 23, 1985, date should be removed from the NWP because there are jurisdictional wetlands that have been used for agricultural production since that date. Although they are considered farmed wetlands, they are still waters of the United States and subject to Clean Water Act Section 404 permit requirements.

Drainage Ditch Relocations:

Paragraph (e) of the proposed NWP 40 modification published in the July 1, 1998, **Federal Register** notice authorized the relocation of existing serviceable drainage ditches and previously substantially manipulated intermittent and small perennial streams. Two commenters supported the proposed provision of the NWP. Several commenters opposed this provision. Two commenters stated that the relocation of streams or drainage ditches may result in substantial adverse effects on the aquatic environment. One commenter recommended modification of this provision to limit the work only to the relocation of currently serviceable drainage ditches or manipulated streams that are not so degraded as to require reconstruction. Another commenter stated that it is unclear which other waters of the United States are included in this paragraph of the NWP. Two commenters suggested that this condition should not apply to perennial streams. Two commenters requested that the Corps define the term "substantially manipulated stream."

The purpose of this provision of the proposed modification of NWP 40 is to authorize relocation of drainage ditches constructed in waters of the United States to increase agricultural production. Based on comments received in response to our proposed definition of the term "drainage ditch," and in an effort to clarify this provision of NWP 40, we are changing the language of this paragraph and designating it paragraph (d). Paragraph (d) of the proposed modification of NWP 40 authorizes discharges of dredged or fill material to relocate existing serviceable drainage ditches constructed in non-tidal streams. The relocation of existing serviceable drainage ditches constructed in non-tidal wetlands can be authorized by paragraphs (a) or (b) of this NWP. Notification to the District Engineer is required for the relocation of greater

than 500 linear feet of drainage ditches constructed in non-tidal streams. Since drainage ditches can be constructed in wetlands or by channelizing perennial, intermittent, or ephemeral stream beds to improve drainage, we have removed the phrase "* * *" and previously substantially manipulated intermittent and perennial streams" and replaced it with "* * *" constructed in non-tidal streams" to reflect the fact that drainage ditches may have been constructed in streams. As a result of this change, it is unnecessary to provide a definition for the term "substantially manipulated stream." Relocation of drainage ditches constructed in uplands does not require a Section 404 permit because these ditches are not waters of the United States, except in certain circumstances.

We do not believe that the relocation of existing serviceable drainage ditches constructed in waters of the United States will result in more than minimal adverse effects on the aquatic environment. The term "existing serviceable drainage ditches" adequately describes the limitation of paragraph (d) to only those drainage ditches that do not require reconstruction due to abandonment and neglect.

One commenter asked why this provision was included in the NWP, since ditch maintenance is exempt under Section 404(f) of the Clean Water Act. One commenter stated that other NWPs should be used to authorize work in rivers and streams on agricultural lands. One commenter said that a provision should be added to this paragraph requiring the land to remain in agricultural use if the ditches are maintained. Another commenter recommended adding a 500 linear foot limit to this part of the NWP.

The Section 404(f) exemption for drainage ditch maintenance does not apply to the relocation of drainage ditches. To qualify for the exemption, the landowner cannot change the location of the drainage ditch or modify it beyond the original design dimensions and configuration. Since the relocation of drainage ditches constructed in non-tidal streams can increase agricultural production, it would be inappropriate to require the use of other NWPs to authorize this activity. Other activities in waters of the United States on agricultural lands, such as bank stabilization, may be authorized by other NWPs, regional general permits, or individual permits. We cannot add a provision to paragraph (d) requiring the landowner to keep the land in agricultural use if the ditches are relocated because such a provision is beyond the Corps regulatory authority

and unenforceable. We do not believe that is necessary to impose a 500 linear foot limit on relocating drainage ditches constructed in waters of the United States because district engineers will receive a PCN for the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams to determine if the proposed work will result in minimal adverse effects on the aquatic environment and can qualify for authorization under this NWP.

Notification: We proposed requiring notification for activities that cause the loss of greater than $\frac{1}{3}$ acre of non-tidal wetlands or the relocation of greater than 500 linear feet of drainage ditches and previously substantially manipulated intermittent and small perennial streams. One commenter recommended a 1 acre PCN threshold. Another commenter recommended a $\frac{1}{4}$ acre PCN threshold, with agency coordination. One commenter requested that PCNs should be required for all activities authorized by this NWP. Another commenter stated that the PCN requirements for NWP 40 should be the same as for NWP 39. For ditch and stream relocations, recommended PCN thresholds included 150, 200, and 3,000 linear feet. One commenter requested agency coordination for all wetland losses of greater than $\frac{1}{3}$ acre and all ditch and stream relocations.

Notification to the District Engineer is required for discharges by non-participants in USDA programs to increase agricultural production that result in the loss of greater than $\frac{1}{4}$ acre of non-tidal wetlands, the construction of building pads for farm buildings, and for the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams. For USDA program participants, notification to the District Engineer is required if the proposed work involves activities in non-tidal wetlands and the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams or the construction of building pads for farm buildings, agency coordination will be conducted for activities requiring notification to the District Engineer if the proposed work results in the loss of greater than 1 acre of waters of the United States.

Mitigation: Paragraphs (b) and (c) of the proposed modification of NWP 40 published in the July 1, 1998, **Federal Register** notice required submission of a mitigation plan to fully offset wetland losses. One commenter stated that the Corps should not require avoidance and minimization for potential losses of frequently cropped, previously altered farmed wetlands, because mitigation sequencing is not required under the

Farm Bill. In other words, the 404(b)(1) guidelines are not applicable to farmed wetland conversions and compensatory mitigation will be required by NRCS. A few commenters recommended that both the Corps and NRCS approve the required compensatory mitigation. Two commenters stated that the required compensatory mitigation should be reviewed by all agencies, not just NRCS. One commenter requested that any compensatory mitigation requirements for this NWP be the same as for all Corps permits.

Although mitigation sequencing may not be required under the 1996 Farm Bill, discharges of dredged or fill material into waters of the United States, including farmed wetlands, require a Section 404 permit, which may be authorized by NWPs. General Condition 19 of the NWPs requires the permittee to avoid and minimize impacts to waters of the United States on-site to the maximum extent practicable. Compensatory mitigation is required for all activities authorized by paragraph (a) of this NWP. For activities requiring notification to the District Engineer, compensatory mitigation may be required to ensure that activities authorized by this NWP result in minimal adverse effects on the aquatic environment. For the purposes of this NWP, compensatory mitigation used to satisfy the requirements of NRCS will be accepted by the Corps. To provide consistency for compensatory mitigation requirements and reduce confusion, NRCS and the Corps will develop, in cooperation with EPA, FWS and NMFS, joint mitigation guidance for this NWP.

One commenter expressed concern that compensatory mitigation requirements will decrease the available amount of farm land and requested that the Corps annually report the amount of farm land used as compensatory mitigation. Two commenters supported the requirement to fully offset losses of waters, but stated that the NWP should require a minimum 1:1 replacement ratio. Another commenter said that compensatory mitigation should be limited to the enhancement, restoration, and creation of aquatic resources and exclude preservation, because the Farm Bill does not authorize preservation and NRCS policy does not allow preservation for Swampbuster purposes.

We do not believe that the compensatory mitigation requirements of this NWP will substantially decrease the amount of available farm land because landowners have the option of avoiding impacts to waters of the United States, which would decrease the amount of land needed for wetland restoration and creation. In addition,

compensatory mitigation is often conducted on farm land with marginal productivity, due to soil characteristics or wetness, that has the highest potential for wetland restoration. We disagree that preservation should be prohibited as a means of providing compensatory mitigation for activities that require notification to the Corps. Preservation is an extremely important method for protecting rare and high value waters of the United States from future losses.

Use of NWP 40 with Other NWPs: One commenter stated that the portion of the preamble to the proposed modification of NWP 40 published in the July 1, 1998, **Federal Register** that prohibits the future use of NWP A (i.e., NWP 39) if the farm is developed by the farmer or sold, should be included in the text of NWP 40. However, this commenter questions the Corps ability to monitor compliance with this provision. Another commenter suggested that NWP 40 should not be used with NWPs 39 or 44. One commenter recommended a 3 acre stacking limit. Another commenter suggested that any use of this NWP with other NWPs should be subject to the lowest acreage limit allowed for any of the NWPs.

We have incorporated into NWPs 39 and 40 the provision addressing the future use of NWP 39 on the farm if that farm or portions of the farm are converted to residential, commercial, or institutional developments by the farmer or sold to a developer. The indexed acreage limit of paragraph (a) of NWP 39 cannot be exceeded, based on the project area and the subdivision provision of NWP 39. The Corps will rely on its records to track the use of NWPs 39 and 40 for a particular parcel of land. The use of more than one NWP for a single and complete project is addressed in the proposed modification of General Condition 15.

Other Comments: A number of commenters objected to allowing the use of NWP 40 on a farm every 5 years, because it would result in substantial cumulative losses of waters. One commenter recommended that the NWP should be used only once per project and if the land is no longer used for agricultural production the fill should be removed and the new use re-permitted. Several commenters believe that NWP 40 should be subject to the same conditions as the NWP for residential, commercial, and institutional development activities and the NWP for mining activities. One commenter recommended including a reference to the Memorandum of Agreement between the Corps and NRCS concerning wetland delineations.

One commenter objected to this NWP, stating that it does not address indirect impacts to waters caused by converting wetlands to agricultural use and cited water quality problems that can be caused by ditching activities. Another commenter recommended that the NWP include a requirement for vegetated buffers around streams on farm land, to filter out pollutants and nutrients and prevent erosion.

We have removed the provision allowing the use of NWP 40 on a farm every five years, to make it more consistent with other NWPs. Restricting the use of NWP 40 to a single and complete farm operation will avoid substantial losses that could occur due to repeated use of this NWP every 5 years. We disagree with the recommendation that land no longer in agricultural use should be restored and any new uses re-permitted. Such a requirement is impractical, places unnecessary burdens on the regulated public and the Corps, and provides no benefits to the aquatic environment. Former wetlands on agricultural lands may be used for aquatic habitat restoration, including mitigation banks and in lieu fee programs.

We have attempted to provide consistency between proposed NWPs 39, 40, and 44, but due to the differences in the types of activities authorized by these NWPs and their potential adverse effects on the aquatic environment, it is impractical to make the conditions for these NWPs identical. We do not believe that it is necessary to cite the Memorandum of Agreement between the Corps and NRCS concerning wetland delineations in this NWP, partly because it is currently undergoing revisions and it is not essential to the implementation of NWP 40. In accordance with the proposed modification of General Condition 9, district engineers can require a water quality management plan for activities authorized by this NWP, if the 401 certification does not require such a plan or address potential adverse effects to water quality. Both the water quality management plan and General Condition 19 allow the District Engineer to require, as compensatory mitigation, the establishment and maintenance of vegetated buffers adjacent to streams.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1

acre of impaired waters, including adjacent wetlands. NWP 40 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates that the activity will not result in further impairment of the waterbody. General Condition 27 prohibits the use of NWP 40 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. To allow NRCS to implement paragraph (a) of this NWP consistently throughout the country, division engineers cannot add regional conditions to paragraph (a) of NWP 40. However, division engineers can add regional conditions to paragraphs (b), (c), and (d) of NWP 40, since the Corps is responsible for reviewing these activities.

41. Reshaping Existing Drainage Ditches

In the July 1, 1998, **Federal Register** notice, we proposed a new NWP (designated as NWP F) to authorize discharges of dredged or fill material into non-Section 10 waters of the United States for reshaping existing drainage ditches constructed in waters of the United States by altering the cross-section of the ditch to benefit the aquatic environment.

Comments both in support and in opposition of this NWP were received, but most commenters recommended conditions to minimize potential impacts. Those in support of the NWP believe that it would be acceptable with regional conditions or Section 401 water quality certification conditions and that it will provide oversight or enforcement in order to reduce abuse in rural areas. Comments opposing the NWP ranged from no permit should be required at all, as this is an activity which is exempt from Section 404 regulation, to all activities in all ditch types should be prohibited in order to prevent degradation of aquatic resources. One commenter stated that Corps regulation of wet weather conveyances would be a huge paperwork burden contributing little to environmental quality. Several commenters stated that it is not always in the overall best interest of the aquatic resource to attempt to achieve improvements in water quality by simply reshaping the banks of the drainage ditch. Many commenters who expressed opposition to the proposed new and modified NWPs in general

stated that this NWP was an exception because it would meet the minimal effect requirement.

Many comments regarding jurisdiction were received. One commenter requested a discussion on jurisdiction as some Corps personnel take jurisdiction over upland ditches based on wetland parameters. Some commenters requested the Corps further clarify the distinction between maintenance work and work that would be authorized by this permit. Some commenters recommending modifying the text of the NWP to exclude ditch maintenance projects while others recommended the new NWP include all ditches that are man-made, regardless of whether or not maintenance has been performed. One commenter suggested that permits should never be required for minor drainage activities on agricultural land and for the maintenance of drainage ditches. Several commenters stated that roadside ditches are not waters of the United States even if they contain wetland vegetation. Many believe this permit authorizes work that is actually exempt from regulation. Other commenters proposed that the NWP should be applicable in Section 10, including tidal waters, as well. One commenter suggested that all natural perennial streams, channelized perennial streams, and/or rechannelized perennial streams should be excluded from this permit. Some commenters said that the permit should authorize the reconversion of abandoned ditches, while others stated that the Corps should stress that abandoned ditches may not be reconverted. Several commenters stated that this permit should provide authorization for reshaping obstructed channels. One commenter said that the permit should be rewritten to clarify that open drainage ditches, including channelized streams, cannot be considered abandoned as long as the maintenance authority exists and as long as all cropland draining to the ditch has not been abandoned. Another stated that this permit should not be used for streams that are called "ditches" or in channelized portions of streams that convey surface runoff and/or groundwater.

Several commenters believe the NWP should be more inclusive and should allow some realignment of the waterway if it is beneficial to the aquatic environment. One group recommended that ditch relocation should be allowed because when shopping centers are renovated or expanded, because the relocation of ditches is often the only activity regulated by the Corps. Several commenters recommended the permit

should allow for a change in centerline location when the activity pertains to roadside ditches where transportation agencies are flattening the side slopes for safety purposes. Additionally, minor relocation of the ditch could have as much or more of a benefit on improving water quality and should be allowed under this permit. Some commenters requested that deepening of ditches should be included because some ditches were originally dug without enough grade to keep them from accumulating excess sediment. Other commenters stated that deepening of drainage ditches should not be allowed beyond the original configurations due to the resultant additional wetland drainage. One commenter suggested that this permit should not be used to authorize diversion or drainage of wetlands or the expansion of the drainage ditch size. And lastly, one commenter recommended that this permit be broadened to include all reshaping that might not be exempt as maintenance.

Discharges associated with the maintenance of drainage ditches constructed in waters of the United States are exempt from regulation under Section 404, provided the drainage ditch is returned to its original dimensions and configuration (see 33 CFR Part 323.4(a)(3)). However, the modification or new construction of drainage ditches in waters of the United States requires a Section 404 permit. Since the maintenance of drainage ditches to their original dimensions and configurations is exempt from Section 404 permit requirements, the purpose of the proposed NWP is to encourage reshaping of ditches in a manner that provides benefits to the aquatic environment. This NWP is limited to reshaping currently serviceable drainage ditches constructed in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the activity does not change the capacity or location of the drainage ditch. We have changed the applicable waters for this NWP to make it more consistent with most of the proposed NWPs. The centerline of the reshaped drainage ditch must be in essentially the same location as the centerline of the existing ditch. The proposed NWP does not authorize reconstruction of drainage ditches that have become ineffective through abandonment or lack of regular maintenance. This NWP authorizes discharges to grade the banks of ditches at a gentler slope than they were originally constructed for the purpose of reducing erosion and decreasing sediment transport down the ditch by

trapping sediments. Shallower slopes may increase the amount of vegetation along the bank of the ditch, which can decrease erosion, increase nutrient and pollutant uptake by plants, and increase the amount of habitat for wildlife. We believe that the deepening and/or widening of a ditch, allowing the centerline to be relocated, and allowing abandoned ditches to be reconverted could result in more than minimal adverse effects on the aquatic environment.

Several commenters suggested this permit should be removed from consideration until questions concerning the Tulloch Rule are resolved, because a landowner does not know if he or she is required to obtain a permit for excavation activities or reshaping existing ditches in wetlands that involve only "incidental fallback." The intent of this NWP is to authorize a certain activity that does not qualify for the maintenance exemption and is not for the purpose of increasing drainage capacity. We believe that this NWP should not be made more inclusive. The intent of this NWP is to authorize those ditch reshaping activities that involve more than "incidental fallback."

The proposed NWP may not be used to relocate drainage ditches or to modify drainage ditches to increase the area drained by the ditch (e.g., by widening or deepening the ditch beyond its original design dimensions or configuration) or to construct new drainage ditches if the previous drainage ditches have been neglected long enough to require reconstruction. This NWP does not authorize the channelization or relocation of streams to improve capacity of the streams to convey water. An individual permit, another NWP, or a regional general permit may authorize the construction of new drainage ditches or the reconstruction of drainage ditches. The proposed NWP does not authorize the maintenance or reshaping of drainage ditches constructed in navigable waters of the United States (non-tidal wetlands that are adjacent to tidal waters are also excluded). A Section 10 permit is required for the maintenance or modification of drainage ditches constructed in navigable waters of the United States. We believe that modifying this permit to authorize work in Section 10 waters could result in the authorization of activities that have more than minimal adverse effects on the aquatic environment.

One commenter recommended that NWP 27 should be expanded to include this activity while another suggested that it should be authorized under NWP

3. We do not agree that this activity is similar enough to the activities authorized by NWP 27 to warrant its inclusion in NWP 27. The purpose of NWP 27 is to restore, enhance, and create wetland and riparian areas and restore and enhance non-tidal streams and open waters. The purpose of proposed NWP 41 is to improve water quality. NWP 3 does not currently authorize reshaping of drainage ditches constructed in waters of the United States because this activity is not maintenance or repair. NWP 3 authorizes only maintenance activities with minor deviations from the previously authorized configuration; reshaping drainage ditches typically involves more than minor deviations in ditch cross sectional shape.

Many commenters believe that this NWP will result in the destruction of riparian habitat, specifically adjacent plant communities, and degrade water quality through the sidecasting of excavated material into wetlands. One commenter stated that the permit would prevent the natural process that increases wetland acreage through natural deposition of detritus and sediment in natural cycles that create wetlands. Other commenters believe that this NWP would cause the degradation of salmon and other fisheries habitat through the removal of woody debris and that this permit would authorize activities that reduce the geomorphic "complexity" of a stream causing it to become more uniform and adversely affect some fisheries. One commenter said that activities authorized by this NWP will have a detrimental effect on water quality due to a decrease in the velocity of the stream and it is possible that the stability of the stream could be compromised due to an unbalanced width/depth ratio. Several commenters stated that the permit would result in more rapidly draining farm files in the Midwest, which would increase scouring of banks and waterways and degrade water quality. One commenter said that the permit should be modified to state that channel reshaping cannot change the discharge rate or volume of the ditch.

To address concerns for vegetation adjacent to drainage ditches that may be removed as a result of the authorized activity, we have added a second notification requirement to the proposed NWP. The prospective permittee must notify the District Engineer if more than 500 linear feet of drainage ditch is to be reshaped. District engineers can review the proposed work and determine if the clearing of adjacent vegetation will result in more than minimal adverse

effects on the aquatic environment. We do not agree that the activities authorized by this NWP will disrupt the natural creation of wetlands or result in substantial degradation of aquatic habitat in streams. It is important to note that drainage ditch maintenance is exempt under Section 404(f). If a stream was channelized to improve drainage, the maintenance of the drainage ditch constructed in the stream is an exempt activity. The purpose of this NWP is to encourage landowners to maintain the drainage ditches constructed in waters of the United States in a manner that benefits the aquatic environment in most cases. Reshaping the drainage ditch with flatter side slopes will improve water quality and decrease the velocity of water flowing through the ditch. This NWP does not authorize modifications to the configuration of the drainage ditch to increase the area drained by the ditch. We believe that the proposed NWP adequately states this requirement. For those activities that require notification, district engineers can impose special conditions on the NWP authorization to ensure that the work results in minimal adverse effects or exercise discretionary authority and require an individual permit.

Some commenters noted that over time, through natural processes, the side slopes of ditches often become flatter than they were originally. In those cases, they say, it would not make sense to require a permit to maintain existing slopes, even if they are not the original slopes. This NWP does not require the landowner to maintain existing slopes, if they have eroded naturally.

Many commenters stated that this NWP contains vague language and that many terms require clear definition in the context of this permit, especially "maintenance," "modification," "reconstruction," "regular maintenance," "abandonment," and "loss of serviceability." One commenter stated the phrase "reshaping to benefit the aquatic environment" means significantly different things in different parts of the country.

We do not agree that definitions of the terms "maintenance," "modification," "reconstruction," and "regular maintenance," need to be provided with the proposed NWP. For the purposes of this NWP, the definitions of these terms are the same as the definitions in common usage today. District engineers will determine which ditch reshaping activities constitute maintenance and which activities constitute reconstruction. District engineers will determine when a particular drainage ditch is considered abandoned. Loss of

serviceability is considered to be the point at which a ditch no longer functions as a drainage ditch, and reconstruction is needed.

Several commenters asked how the original ditch conditions would be determined and how the Corps would distinguish between "reconstruction" and "maintenance to original dimensions." Some asked on what basis it would be determined that the proposed project would improve water quality and how the area of wetland drained by the original ditch would be determined. Also, some commenters questioned how one would determine that the proposed channel shape would not change discharge rate or volume. These commenters also asked who would be responsible for making these determinations.

District engineers will determine which activities constitute maintenance, reshaping, or reconstruction. They will use any available information to make these determinations, including field evidence. In general, changing the configuration of the drainage ditch to slow water flow and increase vegetation in the ditch will help improve water quality because the plants and microbes in the ditch will have more contact with the water and remove more nutrients and other compounds from the water. Slower water flow rates will also decrease the sediment load of the water. The area drained by the ditch can be determined by using available models, which consider factors such as soil type, ditch depth, ditch width, etc. The permittee may be required by the District Engineer to demonstrate that the proposed ditch reshaping activity will not increase the area drained by the ditch.

Another subject that generated many comments is the definition of a drainage ditch. One commenter stated that while some drainage ditches were clearly excavated, either through uplands or wetlands, for the purpose of creating a drainage channel where one did not exist previously, in many other cases, natural streams or drainageways were excavated to increase drainage capacity. In many instances, this took place decades ago and the waterway has been considered a "ditch" by adjacent landowners since that time. Some commenters believe that channelized streams should not be considered ditches and that this NWP should apply only to ditches constructed in uplands and wetlands. Others, however, noted that in some parts of the country, most functioning ditches were once natural waterways.

Understanding the differences in definitions of a ditch across the county,

we have included a definition of the term "drainage ditch" in the "Definitions" section of the NWP. This definition recognizes that drainage ditches may be constructed in uplands or waters of the United States, including wetlands and streams. A stream which has been channelized to improve surface drainage is considered a drainage ditch, for the purposes of the NWP program. District engineers will use judgement to determine whether a stream is a drainage ditch and eligible for the Section 404(f) exemption.

Some commenters stated that, to meet minimal adverse effect criteria, this NWP should have acreage and/or stream length limits. The recommended acreage limits ranged from $\frac{1}{10}$ to 1 acre. Stream length limits ranged from zero to one mile. There were recommendations for compensatory mitigation requirements, such as requiring compensatory mitigation for impacts greater than 1 acre. Some commenters suggested PCN thresholds. Some commenters cautioned that when a PCN is not required, conditions are often ignored and that a PCN should always be required for work in drainage ditches. Other commenters stated that the NWP should not authorize discharges of excavated material into waters of the United States. One commenter believes the NWP should be conditioned to allow its use only once per watershed and should not be used in any area identified as having water quality problems or in any outstanding resource waters. At least one commenter stated that public review should be required for all work on public storm drain systems because they directly affect the public and are paid for with public funds.

We have determined that no acreage limit is necessary for the proposed NWP, because the authorized work is intended to benefit the aquatic environment, by changing the shape of the drainage ditch to improve water quality and other aspects of the aquatic environment. Notification will be required when excavated material is sidecast into waters of the United States or greater than 500 linear feet of drainage ditch is reshaped. The latter PCN requirement was added to address concerns for adverse effects to riparian areas adjacent to ditches constructed in waters of the United States. District engineers will review the PCNs to determine if the proposed work will result in minimal adverse effects on the aquatic environment. Prohibiting the sidecasting of excavated material into waters of the United States would discourage ditch reshaping activities because the Section 404(f) exemption for ditch maintenance allows

sidecasting. Such a prohibition would cause many landowners to maintain the ditch at its originally designed configuration to qualify for the exemption. Since the purpose of the proposed NWP is to encourage ditch maintenance activities that improve the aquatic environment, it would be counterproductive to limit its use to only once per watershed or require public review.

Some commenters recommended that compensatory mitigation be required for all activities authorized by this NWP. Other commenters asked for clarification that compensatory mitigation is not required. One commenter believes that the applicants should be required to provide documentation regarding the scope and effect of the existing drainage ditch before and after the reshaping activity. Another commenter stated that the applicant should be required to obtain a minimal effect determination and certification from NRCS stating that best management practices have been employed. One commenter suggested that the Corps should require the submittal and review of an erosion and sediment control plan prior to authorizing use of this NWP because these conditions are generally ignored when placed on the permit itself. Another commenter suggested that a minimum riparian buffer should be established or maintained as part of the authorization. Several commenters believe that revegetation of ditch banks with tree or shrub species should be required after construction to minimize loss of riparian habitat and reduce the potential for increasing water temperatures within the ditch. Another commenter recommended: (1) Conditioning the NWP to prohibit alteration or replacement of one type of stream substrate with another type; (2) the NWP should not authorize more than minimal adverse effects to riparian corridors during construction activities; (3) the NWP should require the replacement of riparian corridors when they are destroyed during construction; and (4) the NWP should not authorize the sidecasting of material in such a manner that the material would block or impede overland surface flows into any jurisdiction water of the United States, including wetlands.

We have determined that compensatory mitigation will normally not be required for the work authorized by this NWP because the purpose of the proposed NWP is to authorize ditch reshaping activities that improve water quality and aquatic habitat. If the project proponent did the work to qualify for the Section 404(f) exemption,

compensatory mitigation would not be required since the activity is exempt. Requiring compensatory mitigation for modifying the cross-sectional configuration of the ditch may encourage maintenance to the original dimensions and configuration and discourage reshaping the ditch to benefit the aquatic environment. We do not agree that permittees should be required to provide a statement discussing the effects of ditch reshaping or that they should be required to obtain a certification from NRCS. Compliance with any required sediment and erosion control plan is the responsibility of the permittee. Permittees are encouraged to maintain a vegetated buffer along one side of the ditch, but regular maintenance activities will prevent the development of a woody vegetated buffer along the side of the ditch used by equipment to perform the excavation.

Several commenters presented a variety of potential problems and concerns about this NWP. Some commenters believe that this permit will be very difficult to implement and will require substantial coordination with the Corps that previously was not required and will delay implementation of projects. Many commenters requested assurance that it would be used strictly and successfully for water quality improvement. They believe the existing drainage ditch exemption is often abused, resulting in the reditching of long-abandoned ditches, the excavation of natural streams, and the expansion of ditches beyond their original dimensions. They envision abuse of this NWP by applicants stating a water quality improvement purpose, but really intending to remove woody vegetation from the stream bank or increase channel capacity to drain a new area. This group of commenters was concerned that adverse effects on the aquatic environment resulting from activities authorized by this NWP would be more than minimal and could result in loss of important riparian habitat bordering naturalized drainage ditches. They were also concerned about filling and permanent loss of wetlands as a result of sidecasting. Several of these commenters pointed out that many of the conditions of this NWP are very difficult to measure, such as determining if the drainage area has been increased and determining the changes in ditch configuration without altering capacity. They caution that some channel reshaping projects might not be beneficial or would involve a complex trade-off between various environmental values including habitat, flood control, and water quality. One

commenter said the permit should have language which encourages retaining the structure and functions of the wetland and stream habitats.

In response to the comments in the previous paragraph, we must reiterate that the proposed NWP is intended to encourage ditch maintenance activities that benefit the aquatic environment. This NWP authorizes activities that are exempt from Section 404 permit requirements if those activities were done strictly as maintenance to the original ditch design configuration. Although the ditch may be a channelized stream, excavation activities to maintain the drainage ditch do not require a Section 404 permit. We believe that a drainage ditch can be reconfigured to provide water quality benefits without increasing the area drained by the ditch. The removal of riparian vegetation from uplands adjacent to a channelized stream is not regulated by the Corps under Section 404. Sidecasting of excavated material into waters of the United States is exempt from Section 404 permit requirements if the activity is associated with ditch maintenance. We believe that conditioning this NWP to prohibit the sidecasting of excavated material into waters of the United States would severely limit the use of this NWP and encourage exempt maintenance activities. Likewise, conditioning this NWP to require the permittee to maintain the wetlands and stream habitat in the project area would encourage exempt maintenance activities that have more adverse effects on the aquatic environment.

This NWP is subject to proposed General Condition 26, which will reduce its applicability. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 41 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. Notification to the District Engineer is required for all activities authorized by this NWP in impaired waters and wetlands adjacent to those impaired waters.

Division engineers can regionally condition this NWP to exclude certain waterbodies or require notification when waters or unique areas that provide significant social or ecological functions and values may be adversely affected by the work. Activities authorized by this NWP will have

minimal adverse effects on the aquatic environment, since it is limited to existing drainage ditches and activities that improve water quality. District engineers can exercise discretionary authority when very sensitive or unique areas, such as salmonid habitat mentioned by several commenters, may be adversely affected by these activities. The PCN requirement allows Corps districts, on a case-by-case basis, to add appropriate special conditions to ensure that the adverse effects are minimal. The District Engineer can also assert discretionary authority to require an individual permit for any activity that may have more than minimal adverse effects. Proposed NWP F is designated as NWP 41, with the proposed modifications discussed above.

42. Recreational Facilities

In the July 1, 1998, **Federal Register** notice, we proposed an NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters, for the construction or expansion of passive recreational facilities.

Several commenters were concerned about the title of this NWP. Some commenters expressed confusion at the definition of passive recreational facilities. Other commenters were interested in exactly what activities were authorized. One commenter suggested that the Corps clarify what is meant by the term "open space" and when a recreational facility is considered to have a substantial amount of buildings and other impervious surfaces. Several commenters suggested defining the wording "substantially" when considering the amount of grading necessary for a particular activity.

To help reduce confusion, we have eliminated the word "passive" from this NWP and changed the title of the proposed NWP to "Recreational Facilities." The definition of the term "recreational facilities," as used for this NWP, and the types of activities authorized by this NWP have not been modified. For the purposes of this NWP, recreational facilities are defined as low-impact recreational facilities that are constructed so that they do not substantially change preconstruction grades or deviate from natural landscape contours. Low-impact recreational facilities include, but are not limited to, bike paths, hiking trails, campgrounds, and running paths. The construction of golf courses or the expansion of golf courses and ski areas, can be authorized by this NWP, provided these facilities are integrated into the existing landscape, do not require substantial

amounts of grading or filling, and adverse effects to wetlands and riparian areas are minimized to the extent practicable.

The term "open space" refers to areas not disturbed by the construction or expansion of the recreational facility, such as forests, fields, riparian areas, etc. Open spaces do not contain any buildings. District engineers will determine when a proposed activity involves a substantial amount of buildings, concrete, asphalt, or other impervious surfaces. The land area for the recreational facility authorized by the proposed NWP should consist only of a small proportion of impervious surface. District engineers will also determine when the amount of grading is substantial.

One commenter stated that facilities for walking, biking, and running require substantial filling and grading if they are located in hydric soils. One commenter suggested that gravel paths are pervious and should qualify for authorization under this NWP. A couple of commenters suggested that roads are not pervious features and should be excluded from authorization by this permit. Several commenters recommended expanding this permit to include other activities that are beneficial to the community, such as playgrounds, pools, and ball fields, suggesting that these activities are no more harmful to the environment than ski areas or golf courses. Many commenters objected to the inclusion of golf courses, campgrounds, and ski areas in this NWP, stating that these activities are not consistent with the concept of passive recreational facilities and do not have low impacts on aquatic resources.

Walking, running, and biking trails do not necessarily require substantial grading or filling of hydric soils. These trails can be constructed by placing a layer of gravel or crushed stone on the trail or placing a thin layer of asphalt on the soil surface. In some situations, a footer may be excavated to construct a base for the gravel or asphalt trail. District engineers will determine when the construction of a trail involves substantial grading or filling. Timber decks and walkways should be used where possible to minimize losses of waters of the United States. Gravel paths and roads are considered pervious. The proposed NWP can authorize the construction of roads to provide access to the recreational facility, including support buildings. However, the roads must be constructed at grade with pervious materials. Other types of roads to provide access to the recreational facility can be authorized by other

NWPs, such as NWP 14, as long as the permittee complies with General Condition 15. The construction of substantial amounts of roads within the recreational facility is not authorized, since this NWP does not authorize recreational facilities for use by motor vehicles.

Pools, playing fields, and arenas are not authorized by this NWP. These activities typically involve substantial grading and filling and the use of impervious materials for construction. Recreational facilities can be either public or private and will not have a substantial amount of buildings and other impervious surfaces, such as concrete or asphalt. The proposed NWP also authorizes the construction or expansion of small support facilities such as office buildings, maintenance buildings, storage sheds, and stables, but does not authorize the construction of associated hotels or restaurants. The construction or expansion of campgrounds can be authorized by this NWP, provided they are integrated into the existing landscape. These campgrounds should have few impervious surfaces (e.g., concrete or asphalt) and should consist of small cleared areas for tents and picnic tables connected by dirt or gravel trails or roads.

The proposed NWP does not authorize the construction or expansion of campgrounds for mobile homes, trailers, or recreational vehicles. This NWP does not authorize the construction of playing fields, basketball or tennis courts, racetracks, stadiums, or arenas. Recreational facilities not authorized by this NWP may be authorized by another NWP, a regional general permit, or an individual permit. Playing fields, playgrounds, and other golf courses may be authorized by NWP 39 if they are attendant features of residential, commercial, or institutional developments. For example, NWP 39 can authorize the construction of a golf course, provided the golf course is an attendant feature of a residential subdivision. The construction of hotels and conference centers that are sometimes associated with recreational facilities are not authorized by this NWP, but may be authorized by NWP 39, a regional general permit, or an individual permit.

Many commenters objected to the inclusion of support facilities or buildings in this permit. Several commenters wanted clarification on how much and what type of support buildings are authorized.

This NWP authorizes only small support facilities that are essential to the operation of the recreational facility.

District engineers will determine what constitutes a "small" support facility. Support facilities typically include maintenance buildings, storage buildings, and stables, but may also include buildings that store equipment (e.g., bicycles and canoes) that can be rented by users of the recreational facilities, and small offices. We anticipate that these structures will be small and typically have minimal adverse effects on the aquatic environment. Therefore, it is appropriate to include these structures in the NWP. We have modified the text of this NWP to specify that the NWP only authorizes small support facilities. The fact that these buildings must be directly related to the recreational activity, along with the acreage limit and PCN thresholds, will ensure that such support facilities are carefully considered and will have only minimal adverse effects on the aquatic environment.

A couple of commenters objected to the inclusion of golf courses and ski areas in this NWP because these facilities also require intensive maintenance activities, including the application of fertilizers and pesticides, as well as utility and road maintenance. Additionally, some ski areas may hydrologically alter certain areas as artificial snow is created, affecting water flow and adversely impacting trout streams. One commenter suggested that this permit should only allow limited size play throughs, and filling of only small isolated wetlands. This commenter and others further stated that this permit should focus on preserving natural systems and landscape features, and incorporating them into the design for the course. Several commenters objected to the authorization of these types of activities due to their impacts on the environment, suggesting that such activities do not have to be located in wetlands.

The proposed NWP authorizes the construction and expansion of golf courses and the expansion of ski areas, provided they are integrated into the existing landscape. The construction of new ski areas is not authorized by this NWP. These facilities may also require some support buildings with some minor grading and filling for building pads and foundations. Golf courses may require the placement of crushed stone or gravel for cart paths or some minor fill for greens and associated construction activities. We believe it is appropriate to include these activities in this NWP.

Golf courses and expanded ski areas authorized by this NWP should be

subject to careful environmental design and planning. For example, features to control surface runoff, buffers established and maintained adjacent to open waters, integrated pest management, and careful fertilizer and pesticide application, are examples of maintenance and operation activities which reduce the impacts of these facilities on the aquatic environment. These types of features and practices may be part of the water quality management plan required by the proposed modification of General Condition 9. A well-designed golf course authorized by this NWP will have avoided most of the wetlands on the site, incorporated stormwater management facilities into the course to protect local water quality, and established and maintained vegetated buffers adjacent to open or flowing waters.

One commenter asked why a project proponent would request authorization under this NWP when a larger golf course could be authorized by NWP 39. Another commenter questioned the statement in the proposed NWP suggesting that commercial recreational facilities may be authorized by NWP 39. Several commenters stated that the Corps will subject golf courses to more restrictions and that those restrictions should be stated in the NWP.

Proposed NWP 39 authorizes the construction of building pads, foundations, and attendant features for residential, commercial, and institutional developments. NWP 39 does not authorize the construction of golf courses on its own, unless those golf courses are attendant features of developments. However, NWP 39 can be used to authorize support buildings for a golf course, such as equipment storage buildings and clubhouses. Other recreational facilities can be authorized by NWP 39, such as playgrounds or playing fields associated with schools, provided those recreational facilities are attendant features of the school buildings. We have adequately discussed the restrictions on golf courses in the text of NWP 42. Division engineers can regionally condition this NWP to impose additional restrictions on this NWP and ensure that it authorizes only activities with minimal adverse effects on the aquatic environment. District engineers can exercise discretionary authority if the proposed work may result in more than minimal adverse effects or place case-specific special conditions on an NWP authorization to ensure that the authorized work results in minimal adverse effects on the aquatic environment.

Several commenters supported the proposed 1 acre limit for this NWP. One commenter suggested that the NWP should authorize the loss of no more than $\frac{1}{4}$ acre of waters of the United States or 20 linear feet of stream. Another commenter suggested that the NWP should have an acreage limit of 1 acre or 20 percent of the total wetland area on the site, with a prohibition against filling fens, seeps, springs, sand ponds, or bogs. One commenter suggested that this permit should not authorize activities within 200 feet of streams or rivers that contain habitat for salmon. One commenter requested that this permit authorize only up to $\frac{1}{3}$ of an acre of impacts for linear impact recreational facilities such as hiking, and biking trails. One commenter recommended that stream bed impacts should not be authorized by this permit since a passive recreational facility "does not substantially change preconstruction grades or deviate from natural landscape contours."

We believe that a 1 acre limit for recreational facilities is appropriate. This limit, with the notification requirements, will ensure that only activities with minimal adverse effects on the aquatic environment are authorized by this NWP. With regard to limiting the use of the proposed NWP in certain aquatic habitat types, we believe that these issues are more appropriately addressed at the regional level where division engineers can impose regional conditions to restrict the use of this NWP in high value waters, or prohibit its use in certain waterbodies. To make this NWP consistent with most of the other proposed NWPs, we are proposing to change the applicable waters for this NWP to "non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters." We disagree that the NWP should not include impacts to stream beds. The recreational facility may require crossings over streams or bank stabilization activities.

One commenter suggested significantly reducing the proposed PCN thresholds of $\frac{1}{3}$ acre and 500 linear feet of stream bed. A couple of commenters suggested that a PCN should be required for all activities authorized by this NWP, because passive recreational facilities are usually built in areas that are recognized as environmentally sensitive. One commenter requested that Federal agencies should be provided the authority to reject an activity for consideration under this permit.

To make the PCN thresholds of the proposed NWP consistent with the PCN thresholds of the other new NWPs, we have reduced the PCN threshold to $\frac{1}{4}$

acre. The PCN requirement for activities causing the loss of greater than 500 linear feet of perennial and intermittent stream bed will be retained. These PCN requirements will help ensure that the activities authorized by this NWP result in minimal adverse effects on the aquatic environment. Since this NWP has a 1 acre limit, there will be no agency coordination for PCNs. In addition, we do not believe that agency coordination is necessary, since this NWP authorizes only those recreational facilities that are integrated into the natural landscape and consist primarily of open space.

A commenter suggested that trails resulting in the loss of less than one acre of non-tidal waters of the United States should be exempt from the requirements of General Condition 9, especially the requirement for a water quality management plan.

The District Engineer will determine if the proposed recreational facility requires a water quality management plan to comply with General Condition 9. Small trails may not require such a plan. However, where there are water quality concerns due to the construction and use of the facility, vegetated buffers may be required. Stormwater management facilities may also be required.

One commenter said that features such as roads, buildings, and golf courses result in significant indirect and cumulative impacts in watersheds by inducing growth in surrounding areas and increasing runoff and hydrologic modifications. This commenter further suggested that regionally significant resources should be excluded from this NWP or impacts to such resources limited. Many commenters focused on the requirement that this permit should preserve natural systems and that the authorized facilities must be integrated into the natural landscape. One commenter stated that this permit is not consistent with sound watershed management. One commenter stated that the NWP encourages the removal of trees and other vegetation adjacent to waters of the United States, which would increase stream bank erosion, and that the Corps should establish explicit general conditions which prohibit activities that result in removal of stream bank vegetation within riparian areas.

The potential for activities authorized by this NWP to induce growth in surrounding areas is outside of the Corps scope of analysis, unless the induced growth involves activities regulated by the Corps. These low-impact recreational facilities may also be constructed in areas already subject

to increasing populations. The recreational facilities authorized by the proposed NWP are low-impact, and will not cause significant hydrological modifications because the facilities authorized by this NWP consist mostly of open space, with a small proportion of impervious surface. The requirements of General Conditions 9 and 21 will also ensure that the authorized activities do not cause substantial hydrological modifications. The recreational facilities authorized by this NWP will help preserve open space if they are constructed in the vicinity of urbanizing areas. The construction of low-impact recreational facilities is consistent with sound watershed management practices. The NWP does not encourage the removal of riparian vegetation. This NWP, like the other new NWPs, require the establishment and maintenance of vegetated buffers adjacent to waters of the United States to the maximum extent practicable (see General Condition 9).

Many commenters requested that mitigation should be required for activities authorized by this NWP. One commenter opposed the use of in lieu fee or mitigation banking programs to serve as mitigation for losses of waters of the United States authorized by this permit. Another commenter recommended that mitigation should be required for losses of less than $\frac{1}{3}$ acre, either through mitigation banks or in lieu fee programs. One commenter stated that preservation of adjacent green space is not acceptable as mitigation. This commenter further stated that the NWP indicates that buffer zones may be required, but there is not an explicit requirement for vegetated buffers and the benefit of such buffers is questionable. One commenter said that the remaining wetlands on the site should be protected from further development through deed restrictions. Another commenter requested that the Corps require monitoring and evaluation standards for mitigation plans.

District engineers may require compensatory mitigation for activities authorized by this NWP to ensure that the net adverse effects to the aquatic environment are minimal. Mitigation banks and in lieu fee programs can be appropriate methods to provide compensatory mitigation for activities authorized by this NWP. The preservation of wetlands or vegetated buffers on the site can satisfy compensatory mitigation requirements, especially if there are high value waters on the project site that should be protected. The establishment and maintenance of vegetated buffers

adjacent to waters of the United States can be an important part of the compensatory mitigation required by district engineers. We cannot require the permittee to preserve the remaining waters on the site, unless the preservation satisfies a compensatory mitigation requirement. Otherwise, such a preservation requirement could be considered a taking of private property. Through special conditions, district engineers can require compensatory mitigation, including monitoring plans and evaluation standards.

Several commenters were concerned with the use of this NWP with other NWPs to authorize activities with larger impacts to the aquatic environment.

We are proposing to modify General Condition 15 to address the use of more than one NWP to authorize a single and complete project. In accordance with the proposed modification of General Condition 15, this NWP can be used with other NWPs to authorize a single and complete project, as long as the activity does not cause the loss of waters of the United States in excess of the highest specified acreage limit of the NWPs used to authorize that project. Although this NWP is intended to authorize all activities associated with a single and complete recreational facility, there may be some related activities, such as bank stabilization in tidal waters, that cannot be authorized by NWP 42 but can be authorized by other NWPs.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. In accordance with General Condition 26, recreational activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, cannot be authorized by NWP 42 unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. General Condition 27 prohibits the use of NWP 42 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these

activities. Proposed NWP D is designated as NWP 42, with the proposed modifications discussed above.

43. Stormwater Management Facilities

This NWP was proposed in the July 1, 1998, **Federal Register** as NWP C to authorize the discharges of dredged or fill material into non-Section 10 waters of the United States, including wetlands, for the construction and maintenance of stormwater management (SWM) facilities.

A large number of comments were received in response to the proposed NWP, many commenters supporting the NWP and other commenters opposing the issuance of this NWP. Those commenters supporting the NWP stated that it would greatly enhance low-value wetland areas and attenuate the effects of flood waters. Some commenters requested the withdrawal of this NWP. Commenters opposing the issuance of this NWP stated that its use will result in more than minimal adverse effects on the aquatic environment. A number of commenters stated that the NWP would be difficult for the Corps to implement. One commenter said that there is no need for this NWP, because SWM facilities can be authorized by NWP 39 as a part of the residential, commercial, and institutional development. Several commenters were concerned about the possible use of this NWP with other NWPs, if SWM facilities are required as part of the development. One commenter stated that the NWP will reduce incentives to locate SWM facilities in uplands. Many of those opposing this NWP believe that the permit only benefits developers who want to develop the entire upland parcel and locate the SWM facility in wetlands and that mitigation sequencing (*i.e.*, avoidance, minimization, and compensatory mitigation) would not take place.

The proposed NWP and the NWP general conditions contain provisions to help ensure that the NWP does not authorize activities in waters of the United States with more than minimal adverse effects on the aquatic environment, individually or cumulatively. The notification requirements will allow district engineers to review certain stormwater management activities on a case-by-case basis and exercise discretionary authority in those cases where the adverse effects on the aquatic environment are more than minimal. Division and district engineers can add regional or case-specific conditions to this NWP to ensure that the NWP authorizes only activities with minimal

adverse effects on the aquatic environment. An important provision of the proposed NWP is that it does not authorize the construction of new SWM facilities in perennial streams, which will protect habitat for fish and other aquatic organisms.

Although an SWM facility can be authorized by NWP 39 as an attendant feature of a single and complete development project, there are circumstances that warrant a separate NWP for SWM facilities. For example, some SWM facilities may be constructed by a local government as part of a watershed plan, not for a particular development. SWM facilities may also be required for transportation projects or upland development activities. This NWP will not reduce incentives to locate SWM facilities in uplands, because the permittee is still required to comply with General Condition 19 and provide with the notification, a written statement to the District Engineer explaining why the SWM facility must be constructed in waters of the United States and why additional minimization cannot be achieved (see paragraph (d) of the proposed NWP). General condition 19 requires that the permittee avoid and minimize work in waters of the United States on-site to the maximum extent practicable.

A number of commenters stated that SWM facilities should not be constructed in waters of the United States. One commenter said that SWM facilities should not be constructed in waters of the United States adjacent to perennial streams. Many commenters indicated that stormwater should be treated in uplands before it is discharged into waters of the United States. One commenter stated that SWM facilities can only increase wetland functions and values when they are constructed in non-wetland areas. A commenter recommended modifying the NWP to allow the use of wetland systems for passive treatment of stormwater runoff. Many state agencies said that they do not allow the treatment of stormwater in wetlands. One commenter stated that the use of the NWP in waters of the United States should be limited only to receiving stormwater runoff, which will not permanently change the waters of the United States, and proposed a 1/3-acre limit for structures, such as outfalls. Another commenter stated that the NWP should not authorize SWM facilities in waters of the United States, unless the project results in enlargement and enhancement of existing wetlands. One commenter stated that an NWP authorizing SWM facilities in wetlands is contrary to EPA's 1990 guidance on

wetlands and non-point source pollution control programs and requested clarification regarding what constitutes "in certain circumstances," as cited in the preamble discussion concerning the placement of SWM facilities in waters of the United States in the July 1, 1998, **Federal Register** notice. This commenter also objected to the proposed NWP because it authorizes SWM facilities in streams and said that these activities will result in the destruction of stream morphology and destabilize the stream bed, reducing water and habitat quality. One commenter stated that stormwater management ponds constructed in wetlands actually encourage a slower decomposition of toxins, and locating an SWM facility in wetlands creates greater potential for toxic pollution if the pond containment structure or fill fails or the pond is overfilled. A commenter recommended prohibiting the construction of stormwater detention facilities in waters of the United States within 150 feet of the ordinary high water mark.

The construction of SWM facilities in waters of the United States is often necessary, and may provide more protection to the aquatic environment. SWM facilities located in waters of the United States are often more effective than SWM facilities constructed in uplands, because storm runoff flows to streams and wetlands, making these areas better able to trap sediments and pollutants than upland areas. The local aquatic environment benefits from more efficient SWM facilities. Low value wetlands and low value ephemeral and intermittent streams may be the best places to locate SWM facilities, to reduce adverse effects to higher value waters by attenuating storm flows and preventing pollutants from further degrading those areas. The proposed NWP authorizes the construction of SWM facilities in waters of the United States, particularly low value waters, provided that adverse effects on the aquatic environment are minimal. Division engineers can regionally condition this NWP to prohibit its use in high value waters. For those activities that require notification, discretionary authority will be exercised by district engineers on a case-by-case basis where the adverse effects on the aquatic environment are more than minimal. We do not agree that the NWP should be limited only to those projects that enlarge or enhance existing wetlands. In addition, we do not agree that the construction of stormwater management facilities should be prohibited in waters of the United States within 150 feet of

the ordinary high water mark because this requirement would prevent district engineers from using this NWP to authorize many effective SWM facilities with minimal adverse effects on the aquatic environment.

Through the notification process, district engineers will determine which SWM facilities can be authorized by this NWP. Locating SWM facilities in ephemeral and intermittent streams will help reduce degradation of perennial stream morphology by reducing the velocity of surface water flows during storm events. Adequately designed stormwater detention and retention ponds, particularly those ponds constructed in locations where they most effectively capture runoff (*i.e.*, in ephemeral and intermittent stream beds), will help prevent stormwater flows from entering perennial streams with velocities high enough to erode the stream banks and downcut the stream bed. These ponds will also trap sediments, which will help maintain the substrate of the stream bed and reduce water quality degradation. Permittees are required to maintain authorized SWM facilities to prevent the entry of pollutants in the waterway if the pond fills with sediment or the pond containment structure deteriorates. Paragraph (c)(1) of the proposed NWP requires prospective permittees to submit a maintenance plan, if required, with the PCN. The maintenance plan will ensure that the SWM facility will retain its effectiveness at trapping sediments and pollutants and attenuating flood waters.

Many commenters expressed concern for adverse effects to wetlands that may result from changing from one wetland type to another or from adverse effects caused by secondary impacts due to flooding, excavation, or drainage. One commenter stated that this NWP allows the replacement of a natural SWM facility with a concrete facility, thereby increasing the possibility of downstream flooding. A commenter advocated the preservation of natural landscapes for flood control purposes by promoting the use of non-structural alternatives for SWM. Some commenters said that this NWP should not authorize stream relocation or the construction of ponds in wetlands and that the Corps should not encourage other changes to natural drainage systems or diversions of watercourses.

The proposed NWP authorizes the construction of SWM facilities, which may result in wetland conversion and the flooding, excavation, or draining of wetlands. Some relocation of intermittent or ephemeral streams may be necessary to construct the SWM

facility. For those activities that require notification, district engineers will review the proposed work to determine if the proposed work will result in more than minimal adverse effects on the aquatic environment. Division engineers can regionally condition this NWP lower the notification thresholds or restrict the use of the NWP to ensure that it authorizes only those SWM activities with minimal adverse effects on the aquatic environment. Although we encourage the use of non-structural methods for SWM, structural practices are often the only practicable methods, and should be authorized by NWP if they result only in minimal adverse effects on the aquatic environment.

Many of the commenters supporting the proposed NWP requested that the Corps expand the scope of the NWP to include perennial streams and Section 10 waters, including tidal waters. One commenter requested that the NWP authorize sediment basins in perennial streams if sedimentation is a problem in the area. One commenter stated that outfall structures may need to be constructed in Section 10 waters, especially rivers. Another commenter requested that the Corps clarify whether the NWP authorizes discharges into wetlands adjacent to perennial streams. One commenter stated that design criteria should be included in the NWP.

In the July 1, 1998, **Federal Register** notice, we proposed to limit this NWP to non-Section 10 waters, including wetlands. To simplify the scope of applicable waters for the proposed NWPs, we are proposing to limit this NWP to activities in non-tidal wetlands, excluding non-tidal wetlands adjacent to tidal waters. However, this NWP is still limited to Section 404 waters and does not authorize SWM activities in non-tidal Section 10 waters. The construction of new SWM facilities in perennial streams is not authorized by this NWP. We believe that expanding the scope of applicable waters for this NWP to tidal waters and perennial streams would be contrary to the minimal adverse effects requirement of the NWPs, because such an expansion of scope would substantially increase the potential for more than minimal adverse effects on the aquatic environment, individually or cumulatively. Project proponents who need to construct SWM facilities in perennial streams, tidal waters, or Section 10 waters can request authorization through the individual permit process or utilize regional general permits, if available. This NWP authorizes discharges into wetlands adjacent to perennial streams, but does not authorize discharges into the

perennial stream bed. Outfall structures associated with an SWM facility that must be constructed in Section 10 waters may be authorized by NWP 7, provided the single and complete project complies with General Condition 15. We do not agree that design criteria should be included in the NWP. Specific design criteria vary across the country and are more appropriately evaluated by district engineers on a case-by-case basis. Regional conditions can prohibit certain stormwater management activities from authorization by this NWP.

Several commenters addressed jurisdictional issues related to this NWP. One commenter said that no permit is required for these activities. Several commenters stated that all references to excavation and other activities that do not result in a discharge of material into waters of the United States in accordance with the Tulloch Rule decision should be deleted from the NWP. A few commenters emphasized the need to clearly identify the Corps jurisdiction as it relates to stormwater retention and detention facilities. Other commenters questioned the need for a permit to maintain SWM facilities which were constructed entirely in uplands.

The construction and maintenance of SWM facilities require a Section 404 permit if the activity results in a discharge of dredged or fill material into waters of the United States. SWM facilities require a Section 10 permit if they involve any work in navigable waters of the United States. Excavation activities in waters of the United States require a Section 404 permit, if those excavation activities result in more than incidental fallback of excavated material. District engineers will determine, on a case-by-case basis, if a specific SWM facility contains waters of the United States. If the SWM facility was constructed entirely in uplands, and does not expand the reach of waters of the United States, then that SWM facility is not a water of the United States (see 33 CFR Part 328.5). Maintenance of SWM facilities constructed entirely in uplands does not require a Section 404 permit, provided the construction of that SWM facility did not expand the reach of waters of the United States.

Proposed NWP C had a 2 acre limit for the construction of new SWM facilities, but no acreage limit for maintenance activities. In response to the July 1, 1998, **Federal Register** notice, commenters recommended acreage limits for the construction of new SWM facilities, which ranged from 1 to 5 acres. Several commenters

supported no acreage limit for the maintenance of existing SWM facilities. Commenters recommended acreage limits of $\frac{1}{3}$ acre and 1 acre for maintenance activities. One commenter stated that the proposed 2 acre limit for construction was too high. One commenter asked the Corps to clarify whether the 2 acre limit applies to each individual facility, or whether it applies to the watershed. A number of commenters recommended limits for impacts to stream beds, ranging from no impacts to stream beds to a 500 linear foot limit. One commenter supported the PCN threshold for stream bed impacts, rather than a linear foot limitation. A couple of commenters stated that the 2 acre limit is too low and the acreage limit should be based site-specific criteria, such as the quality of affected waters. Another commenter recommended basing the acreage limit on regional conditions, with a national PCN threshold of $\frac{1}{3}$ acre. One commenter suggested that temporary impacts could result in adverse effects, depending on the duration of flooding, and that impacts due to flooding should be considered in the acreage limit of the NWP.

Based on our review of these comments, we are proposing to retain the 2 acre limit for the construction of new SWM facilities, with no limit on maintenance activities provided the maintenance activity is conducted in accordance with an approved maintenance plan. The 2 acre limit applies to each single and complete project, not the watershed. We believe that the proposed NWP should not have a limit for activities resulting in the loss of intermittent stream bed; the PCN threshold of 500 linear feet is adequate to allow district engineers to determine if the proposed work will result in more than minimal adverse effects on the aquatic environment. For activities resulting in the loss of ephemeral stream bed, there is no PCN threshold. Division engineers can regionally condition this NWP to establish limits for stream bed impacts or lower PCN thresholds. Division engineers can also regionally condition this NWP to add PCN thresholds for activities resulting in the loss of ephemeral stream bed.

A simple 2 acre limit is much easier to implement than an acreage limit based on the quality of affected waters. A simple acreage limit is less confusing to the regulated public, because there are no standard, widely accepted methods available to establish acreage limits for stormwater management facilities based on the quality of affected waters. In areas where the 2 acre limit is too low, the Corps district can

develop regional general permits to authorize these activities. District engineers will determine when adverse effects due to flooding result in permanent, not temporary, losses of waters of the United States and should be counted toward the 2 acre limit for this NWP.

Numerous comments were received regarding the PCN thresholds for the proposed NWP. Some commenters believe that PCNs should not be required for any activity authorized by this NWP. Other commenters recommended requiring PCNs for all activities authorized by this NWP because SWM facilities are public facilities built with public funds. Suggested PCN thresholds included $\frac{1}{4}$, $\frac{1}{3}$, and $\frac{1}{2}$ acre. One commenter recommended requiring agency coordination for all activities authorized by this NWP to provide an opportunity to assist in the planning of the facility. Recommended PCN thresholds for stream bed impacts ranged from 150 to 1,000 linear feet.

The notification process is necessary to ensure that the proposed NWP authorizes only those activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively. It is unnecessary to require PCNs for all activities authorized by this NWP, unless the division engineer has specific concerns for the aquatic environment in a particular geographic area and regionally conditions the NWP to lower the notification thresholds. Stormwater management activities resulting in the loss of less than $\frac{1}{4}$ acre of non-tidal waters of the United States, the loss of less than 500 linear feet of intermittent stream bed, or the loss of ephemeral stream bed are unlikely to result in more than minimal adverse effects on the aquatic environment. To be consistent in the PCN thresholds for the other proposed NWPs, we have lowered the PCN threshold from $\frac{1}{3}$ acre to $\frac{1}{4}$ acre. Agency notification will be conducted for activities that result in the loss of greater than 1 acre of waters of the United States.

We received many comments regarding maintenance requirements and maintenance limits for the proposed NWP. Some commenters stated that a permit should not be required for maintenance as long as there are no impacts beyond the originally approved facility. Other commenters said that this NWP is unnecessary because the maintenance can be authorized by NWP 3. Some commenters stated that maintenance is poorly defined and should not be authorized by this NWP. They state that maintenance activities

can be just as destructive of wetlands as the initial construction of the facility. Several commenters requested a limit on the maintenance of SWM facilities, while some commenters recommended no limit to ensure that the design capacity is maintained. One commenter stated that a second review for maintenance of the facility is unnecessary because wetland impacts at the time of the original construction have already been considered.

Some commenters were concerned with the requirement for submitting a maintenance plan as part of the notification package. A number of commenters asked how a prospective permittee would comply with this requirement for the maintenance of an SWM facility that does not have a maintenance plan. Other commenters asked who would approve the maintenance plan if State and local entities did not require such a plan. Many commenters requested guidance as to what information would be required for the maintenance plan.

We are proposing to adopt a tiered approach when assessing the need for, and the amount of, maintenance at the facility. First, if a State or locally approved plan currently exists, that plan must be submitted as part of the notification package. If a plan does not exist, drawings of the original design capacities and design configurations should be submitted. Finally, if no plan and/or drawings exist, the best professional judgment of the Corps, with input from the manager of the facility, will be used to determine if the maintenance activity is authorized by this NWP. As for the content of the maintenance plan, if existing State or local requirements are in place regarding the development of such a plan, their standards will normally be accepted. If there are no such requirements, the plan should generally discuss the frequency and amount of maintenance which is required to ensure the facility functions as designed. If no plan currently exists, a new plan should be submitted for any requests for maintenance under this NWP.

A number of commenters requested that the Corps add a condition to this NWP requiring a statement from the applicant that explains how losses of waters of the United States were avoided and minimized on-site and why additional minimization cannot be achieved. Some commenters stated that compensatory mitigation should be required for all SWM facilities and some suggested that the mitigation proposal should be part of the PCN. One commenter said that compensatory

mitigation should not be allowed in designated facility maintenance areas. Several commenters urged the Corps to reiterate that no compensatory mitigation is required for losses resulting only from maintenance excavation. Other commenters stated that compensatory mitigation should not be required for SWM facilities in areas that may provide more environmentally sensitive planning and benefits to the aquatic environment than placing those facilities in uplands. Other commenters asked whether mitigation credits can be gained through the use of bioengineering techniques and aquatic benches.

We have added a provision to the proposed NWP (paragraph (d)), requiring the prospective permittee to submit a written statement explaining how avoidance and minimization, to the maximum extent practicable, was achieved on the project site. Paragraph (c)(3) requires the prospective permittee to submit, with the notification, a compensatory mitigation proposal to offset losses of waters of the United States resulting from activities authorized by this NWP. Maintenance activities typically do not result in losses of waters of the United States if they are conducted in designated maintenance areas. Therefore, compensatory mitigation for maintenance activities within a currently serviceable SWM facility will not be required in most circumstances. Compensatory mitigation areas within an SWM facility should be designated as non-maintenance areas. If maintenance is required in a designated non-maintenance area used for compensatory mitigation, then the permittee may be required to provide compensatory mitigation for that maintenance activity. District engineers will determine if compensatory mitigation is necessary to ensure that the authorized work results only in minimal adverse effects on the aquatic environment. If the SWM facility is not currently serviceable and requires reconstruction, compensatory mitigation may be required if the District Engineer determines that it is necessary to ensure that the adverse effects on the aquatic environment are minimal.

Compensatory mitigation can be located within an SWM facility, provided it is not located in designated maintenance areas. It is at the discretion of the District Engineer to determine if it is appropriate to include compensatory mitigation (*i.e.*, wetland restoration, creation, or enhancement) within a particular SWM facility. Designated maintenance areas include sediment forebays designed to capture

the sediment in a specific area of the SWM facility. Where the SWM facility provides substantial environmental benefits and/or improves the aquatic environment, compensatory mitigation may not be required. Any future maintenance of the SWM facility conducted in designated maintenance areas identified in the maintenance plan will not require additional compensatory mitigation. It is at the discretion of district engineers whether to allow mitigation credits to become established at a SWM facility constructed with bioengineering techniques and aquatic benches. However, since SWM facilities must be regularly maintained to retain their effectiveness, they should not be used to establish mitigation credits for permanent losses of waters of the United States.

Many commenters recommended conditions to be added to the proposed NWP. One commenter suggested prohibiting discharges into fish habitat and requiring riparian buffers. Another commenter recommended prohibiting use of the NWP within 200 feet of streams or rivers that contain habitat for salmon. One commenter stated that intermittent streams provide valuable salmon habitat and should receive the same protection as perennial streams. One commenter requested that the NWP contain a condition prohibiting construction and maintenance during the spring and summer nesting periods of birds protected under the Migratory Bird Treaty Act and prohibiting work in streams during anadromous fish migration periods. A commenter requested a condition to require maintenance of base flows of streams during low flow periods to protect aquatic species. One commenter recommended adding a condition requiring the project proponent to demonstrate that environmental enhancement throughout the life of the project will result from the SWM project.

Conditions for specific fisheries and migratory bird concerns are best addressed through the regional and case-specific special conditions. This NWP can be regionally conditioned to prohibit the construction of SWM facilities in intermittent streams that support important fisheries. General Condition 21 requires the permittee to maintain, to the maximum extent practicable, preconstruction downstream flow rates, including stream base flows. It is unnecessary to require the permittee to demonstrate that the SWM facility will enhance the aquatic environment throughout the life of the project. The purpose of SWM is

to prevent or reduce further degradation of the aquatic environment, especially water quality. District engineers will review PCNs for certain SWM activities to determine if the proposed work will result in minimal adverse effects on the aquatic environment. If the adverse effects are more than minimal, discretionary authority will be exercised and an individual permit will be required.

One commenter stated that the NWP should specifically authorize sediment control structures. Another commenter requested clarification as to whether or not this NWP authorizes in-stream sediment retention and detention basins. One commenter suggested prohibiting construction of concrete or rip rap-lined channels. A commenter asked for a definition for water control structures and emergency spillways and to delete the word "emergency" in the introductory paragraph of the NWP. One commenter recommended requiring best management practices to prevent downstream impacts of stormwater ponds, including retention facilities, such as holding and treating "first flush" from impervious surfaces.

The proposed NWP does not authorize sediment control structures (e.g., silt fences and check dams) unless they are a part of an SWM facility. The intent of the opening paragraph of this NWP is to provide examples of authorized activities, not an inclusive list. For activities that require notification, district engineers will determine which SWM facilities are authorized under this NWP. Water control structures control the flow of water and may impound a certain volume of water. It is unnecessary to delete the word "emergency" as a modifier of the word "spillways," because the purpose of emergency spillways is to provide an outlet for larger volumes of water and prevent an emergency situation from developing due to a large amount of water placing pressure on the dam, which may cause the dam to fail. Best management practices to prevent downstream adverse water quality effects of SWM ponds are best addressed through the 401 water quality certification.

A few commenters requested that the Corps expand the NWP to authorize the construction of flood control facilities. One commenter requested that the NWP authorize the construction of drainage conveyances such as culverts, canals, and ditches, as well as dam and/or weir construction. One commenter stated that the Corps needs to distinguish between SWM facilities authorized by this NWP and the flood control facilities authorized by NWP 31.

SWM facilities are constructed to control stormwater quantity and quality. SWM facilities provide some flood control for certain storm events. NWP 43 can authorize the construction of certain SWM facilities that also control flooding during small storm events, but larger flood control facilities constructed in waters of the United States must be authorized by other NWPs, regional general permits, or individual permits. Drainage facilities are not authorized by this NWP, unless they are part of an SWM facility. NWP 31 authorizes the maintenance of flood control facilities, not the construction of new flood control facilities.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 43 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. Notification to the District Engineer is required for all discharges into impaired waters and their adjacent wetlands. General Condition 27 prohibits the use of NWP 43 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. This NWP, proposed as NWP C in the July 1, 1998, **Federal Register** notice, is designated as NWP 43, with the proposed modifications discussed above.

44. Mining Activities

During the 1996 NWP reissuance process, we proposed an NWP for Mining Operations. Based upon comments and information gathered during this process, we decided to encourage the development of regional general permits, rather than develop specific limits to meet the minimal

adverse effects requirement of Section 404(e). As a part of the initiative to replace NWP 26, the aggregate and hard rock/mineral mining industries provided information and proposed draft NWPs that they believed would satisfy the minimal adverse effect criterion. We evaluated that information and in the July 1, 1998, **Federal Register** notice, proposed NWP E for aggregate and hard rock/mineral mining activities. As a result of the comments we received in response to the July 1, 1998, **Federal Register** notice, this NWP has been substantially modified. Many commenters stated that the proposed NWP E was too complex, difficult to understand, and too confusing. A number of commenters expressed uncertainty about the applicable waters for the NWP, the limits of work, and which activities could be conducted under the NWP.

General Comments: Many commenters expressed opposition to the proposed NWP. Numerous commenters objected to the proposed NWP because they believe that it authorizes activities with more than minimal adverse effects on the aquatic environment, especially water quality, aquatic habitat, fish and shellfish populations, and hydrology, as well as adjacent landowners. A large number of commenters stated that aggregate and hard rock/mineral mining activities should be subject to the individual permit process and public interest review. Other commenters said that the NWP should not be issued because it authorizes activities that are not similar in nature. Two commenters recommended that regional general permits should be developed in each state instead of an NWP. Several commenters objected to the proposed NWP because they believe it is too complex. A commenter objected to the proposed NWP because the commenter believes that the preamble fails to explain why a mining NWP is needed. A number of commenters recommended that the Corps issue a separate NWP for aggregate mining activities. One commenter suggested that the Corps issue a separate NWP for crushed stone operations.

We believe that certain aggregate and hard rock/mineral mining activities can be authorized by NWP if that NWP is properly conditioned to protect the aquatic environment. The scope of this NWP has been reduced from the proposed NWP E published in the July 1, 1998, **Federal Register**. We have also substantially restructured the proposed NWP to make it easier to understand. The activities authorized by this NWP are similar in nature, and focus on the mining activity and support activities.

This NWP may be suspended or revoked in certain areas, particularly those areas inhabited by economically important fish, such as salmonids. Division engineers can regionally condition this NWP to protect locally important aquatic resources. It is unnecessary and impractical to withdraw this NWP and direct our districts to develop regional general permits. A large number of regional general permits for mining activities would create confusion for the regulated public, especially for those companies that have mining operations across the country. This NWP is necessary because aggregate mining and hard rock/mineral mining have been authorized by NWP 26 in the past. We do not believe it is necessary to develop separate NWPs for aggregate mining and crushed stone mining activities.

Scope of waters: In the July 1, 1998, **Federal Register** notice, we structured the proposed NWP E based on the types of waters impacted by either aggregate or hard rock/mineral mining activities. There were several categories of waters in the proposed NWP. Those categories of waters included: lower perennial riverine systems, intermittent and ephemeral streams, intermittent and small perennial stream relocations, isolated wetlands, wetlands above the ordinary high water mark in non-Section 10 waters, and dry washes and arroyos. Many commenters supported the expanded scope of waters, compared to the applicable waters for NWP 26. Two commenters objected to this NWP because it was applicable to all non-tidal waters, instead of only headwaters and isolated waters. One commenter stated that the July 1, 1998, **Federal Register** notice did not clearly explain why sand and gravel mining, crushed and broken stone mining, and hard rock/mineral mining were authorized in different types of waters. One commenter recommended that this NWP authorize mining activities only in large river systems to protect small streams and creeks. One commenter suggested that all of the types of applicable waters for NWP E should be based on a standard classification system, such as the Cowardin classification system, so that there will be more consistent implementation of the NWP. One commenter stated that this NWP should not authorize work in streams, especially those streams that support fish spawning areas.

As a result of our review of the comments received in response to the July 1, 1998, **Federal Register** notice, we have reduced the applicable waters for the proposed NWP by excluding certain waters from this NWP. The reduced scope of waters will help ensure that the

authorized activities will result in minimal adverse effects on the aquatic environment and simplify the NWP to make it easier to understand. We have limited the types of waters where mining activities can occur under this NWP to: lower perennial streams (*i.e.*, lower perennial riverine subsystems as defined by the Cowardin classification system for wetlands and deep water habitats), isolated waters, streams where the average annual flow is 1 cubic foot per second or less, and non-tidal wetlands adjacent to headwater streams. Aggregate mining is not authorized in waters of the United States within 100 feet of the ordinary high water mark of streams where the average annual flow is greater than 1 cubic foot per second. This NWP does not authorize hard rock/mineral mining activities in streams, or in waters of the United States within 100 feet of the ordinary high water mark of headwater streams. Aggregate and hard rock/mineral mining are not authorized in non-tidal wetlands adjacent to streams where the average annual flow is greater than 5 cubic feet per second.

There are different applicable waters for different types of mining activities because not all types of materials are found in the same waters. For example, the substrate of lower perennial riverine subsystems, by definition, contains mostly mud and sand. To obtain larger aggregates, the mining operation must go upstream to upper perennial streams, as well as intermittent and ephemeral streams. We do not believe that it is practical or necessary to restrict the proposed NWP only to large riverine systems. We have reduced the applicability of this NWP in smaller streams to ensure that the adverse effects of these mining activities will be minimal. Notification is required for all activities authorized by this NWP. If a district engineer reviews a PCN and determines that the proposed work will result in more than minimal adverse effects on the aquatic environment, then discretionary authority will be exercised and an individual permit will be required. We are not aware of a classification system that will allow district engineers to better control adverse effects on the aquatic environment and make the NWP easier to implement. For example, the Cowardin classification system is based on a scale that is too large for the purposes of this NWP. The scale of the upper perennial riverine subsystem is too broad to provide district engineers with the type of control that is necessary for this NWP. We believe that our approach is better because the smaller

scale allows us to better control impacts to the aquatic environment.

We have reduced the applicability of the proposed NWP in streams, to better protect those streams that support fish spawning areas. The proposed NWP E authorized discharges into intermittent and ephemeral streams, and authorized the relocation or diversion of intermittent and small perennial streams. In the proposed NWP 44, aggregate mining activities can occur in lower perennial streams or streams where the average annual flow is 1 cubic foot per second or less. Intermittent streams with average annual flows of greater than 1 cubic foot per second cannot be mined for aggregates under this NWP. Hard rock/mineral mining is not authorized in streams.

One commenter stated that the NWP should authorize hard rock mining activities in other waters of the United States, in addition to dry washes and arroyos. Three commenters requested that definitions of the terms "dry washes" and "arroyos" should be included in the NWPs. One commenter said that ephemeral streams, dry washes, and arroyos should not be included in the NWP because of the recent *United States v. James J. Wilson*, 133 F. 3d 251 (4th Cir. 1997) decision.

We do not agree that hard rock/mineral mining activities should be authorized in streams because the potential for more than minimal adverse effects on the aquatic environment is too great. To further protect streams from the adverse effects of hard rock/mineral mining activities, we are proposing to add a condition to this NWP requiring that beneficiation and mineral processing cannot occur within 200 feet of the ordinary high water mark of any open waterbody. Since we have removed the terms "dry washes" and "arroyos" from the NWP, we do not need to include definitions of these terms. It is important to note that the *United States v. James J. Wilson* decision applies only to the states in the 4th Circuit (*i.e.*, Maryland, West Virginia, Virginia, North Carolina, and South Carolina). Other areas of the country are not subject to this decision.

Authorized Activities: One commenter stated that several paragraphs of NWP E appear to duplicate each other and should be combined to simplify the NWP. Another commenter said that the types of mining authorized by this NWP generally result in similar impacts and do not need to be distinguished between each other in the NWP. A large number of commenters stated that the term "filling" should be used where

appropriate when describing the authorized activities and the acreage limits for those activities. One commenter recommended that the NWP clearly define what types of activities are considered to be mining activities, because many mining sites are managed for multiple land uses. This commenter stated that the NWP should not allow use of this NWP for the mining activity and another NWP for another activity on that parcel of land. One commenter recommended that the NWP include a condition addressing mechanized landclearing when that activity results in a deepening of waters of the United States instead of replacing those areas with dry land. One commenter stated that this NWP should be limited to authorizing access corridors for mining drag lines and prospecting activities, not the actual mining activity.

We have removed the duplication within the proposed NWP to make it simpler and easier to understand. In this NWP, we use the term "discharges of dredged or fill material" instead of "filling" because it is the standard terminology for the Section 404 program. "Filling" is not the only activity that can result in a discharge into waters of the United States. In certain circumstances, excavating, draining, or flooding waters of the United States can be considered as discharges regulated under Section 404 of the Clean Water Act. On a case-by-case basis, district engineers will determine what constitutes "mining" for the purposes of this NWP. If a tract of land is managed for multiple uses, district engineers must determine if each land use constitutes a separate single and complete project (*i.e.*, each activity has independent utility from the other activities on the parcel). If an activity on the land tract has independent utility and constitutes a separate single and complete project, another NWP can be used to authorize that activity, if it meets the terms and conditions of that NWP. Mechanized landclearing that changes the use of a water of the United States must be calculated in the acreage loss for the mining activity, but we do not believe that it is necessary to add a condition to this NWP to address this specific situation. Limiting this NWP to the construction of access corridors for mining draglines and prospecting activities rather than the mining activity is illogical, because Section 404 authorization is still likely to be required for the mining activity itself. If an individual permit is required for the mining activity, that permit would authorize the construction of the access

corridor, if it is constructed in waters of the United States.

One commenter suggested that aggregate mining activities authorized by this NWP should include the mining of fill dirt, shell, and clay, including Fuller's earth and kaolin. Another commenter recommended that NWP E should be modified to authorize the mining of fill material for levee and embankment construction, reconstruction, and repair.

We do not agree that clay mining should be included in the NWP, because it is a mining activity that is best addressed at a district level through regional general permits. The excavation of fill dirt from waters of the United States, particularly wetlands, is likely to result in more than minimal adverse effects on the aquatic environment, because fill dirt for construction, including the construction and repair of levees, can be easily obtained from upland areas, and authorizing the extraction of soil from wetlands to construct levees and embankments by an NWP is unwarranted. If fill material cannot be obtained from upland areas, then the removal of soil from waters of the United States to provide fill material can be authorized by another NWP, such as NWP 18, a regional general permit, or an individual permit.

The mining of shell is also inappropriate for authorization by this NWP, because the potential impacts of this type of mining activity may be more than minimal, especially in estuarine waters where areas of fossil shell provide valuable habitat for fish. Proponents of shell mining can obtain authorization through the individual permit process or other available general permits.

Two commenters objected to the exclusion of hard rock/mineral mining from intermittent and ephemeral streams. Two commenters objected to prohibiting hard rock/mineral mining activities in lower perennial riverine systems. Another commenter requested clarification as to which types of hard rock/mineral mining activities are authorized by this NWP and the categories of waters in which those activities can take place. One commenter suggested that the NWP prohibit beneficiation and mineral processing in waters of the United States, to minimize potential spills and releases of toxic substances.

Hard rock/mineral mining activities have greater potential for more than minimal adverse effects on the aquatic environment than aggregate mining activities. There are considerable differences in the impacts associated with extracting and processing these

materials. Hard rock/mineral mining activities require processing that may result in discharges of chemical compounds in the water column, which can substantially alter water quality. Hard rock/mineral mining activities often require a Section 402 National Pollution Discharge Elimination System permit for effluent discharges associated with ore processing techniques. Hard rock/mineral mining is authorized only in isolated waters and non-tidal wetlands adjacent to headwater streams (i.e., streams where the average annual flow is less than 5 cubic feet per second). No hard rock/mineral mining is authorized in waters of the United States within 100 feet of ordinary high water mark of streams. The proposed NWP does not authorize hard rock/mineral mining, including place mining, in any streams, including lower perennial riverine systems. To protect streams and other open waters, we are proposing to condition this NWP to prohibit beneficiation and mineral processing within 200 feet of the ordinary high water mark of any open waterbody.

One commenter stated that the NWP should not authorize discharges of fill material into waters of the United States for support features such as haul roads, crushers or other ore processors, and berms. Two commenters requested clarification concerning which stormwater management facilities can be authorized as mining support activities and which stormwater management facilities can be authorized under the new NWP for stormwater management facilities.

Support facilities are essential components of a mining operation and should be authorized as part of the single and complete mining project. Support facilities authorized by this NWP include berms, access and haul roads, rail lines, dikes, road crossings, settling ponds and settling basins, ditches, stormwater and surface water management facilities, head cut prevention, sediment and erosion controls, and mechanized landclearing. District engineers will review preconstruction notifications for mining activities authorized by this NWP to determine if the mining activity, and any associated support activities in waters of the United States, will result in more than minimal adverse effects on the aquatic environment. Stormwater management facilities that are required for a mining activity can be authorized by this NWP as a support activity. District engineers will determine on a case-by-case basis which types of stormwater management facilities may be authorized by this NWP. Due to the

proposed modification of General Condition 15, this NWP usually would not be combined with NWP 43 for stormwater management facilities, since the maximum acreage loss cannot exceed the acreage limit of the NWP with the highest specified acreage limit. Since NWP 44 has a limit of 1 acre for support activities, including stormwater management facilities, NWP 43 cannot be used with NWP 44 to authorize a stormwater management facility that results in the loss of greater than 1 acre of waters of the United States.

Several commenters objected to the provision in this NWP that requires measures to prevent adverse effects to groundwater resources, stating that protection of groundwater is the responsibility of the states. We agree with this comment, and have removed this provision from the proposed NWP.

A large number of commenters stated that stream relocation and diversion activities for aggregate mining activities should be authorized in ephemeral and intermittent streams and small perennial streams. One commenter requested that the Corps clarify whether the phrase "small perennial stream relocations" refers to the size of the stream to be relocated or the amount of stream to be relocated. One commenter stated that channel relocation should not include decreasing the length of the stream channel. Another commenter requested that the Corps explain why other mining activities cannot be conducted in intermittent and small perennial streams, other than relocation and diversion. One commenter suggested that the Corps specify whether or not the discharge of dredged or fill material into ephemeral or intermittent streams is authorized by the stream relocation/diversion provisions of the NWP. One commenter recommended prohibiting stream relocation and diversion activities, as well as the construction of berms, from this NWP.

Due to the potential for more than minimal adverse effects on the aquatic environment, especially fish habitat, we have removed stream relocation and diversion as a specific activity authorized by this NWP. For the proposed NWP, in-stream aggregate mining activities are limited to lower perennial streams (i.e., lower perennial riverine subsystems described in the Cowardin classification system) and streams where the average annual flow is 1 cubic foot per second or less. This NWP does not authorize hard rock/mineral mining activities in streams, including stream diversion or relocation. In stream segments where the average annual flow is 1 cubic foot

per second or less, the stream channel may be excavated by the aggregate mining activity.

Acreage Limits: In the July 1, 1998, **Federal Register** notice, we requested comments on the proposed acreage limit for this NWP. We proposed 2 acre and 3 acre limits for the NWP. Two commenters supported the 3 acre limit. Many commenters recommended the 2 acre limit. Several commenters stated that a 3 acre limit is too high. Two commenters suggested a limit of $\frac{1}{4}$ acre. Many commenters said that the 3 acre limit is too low. One commenter suggested an acreage limit of 5 acres, stating that mine operators are proficient at site reclamation and wetland construction. Several commenters recommended a 10 acre limit for this NWP. A large number of commenters advocated the use of a sliding scale to determine the acreage limit for this NWP. Many commenters recommended the use of a sliding scale similar to the one proposed for NWP B for master planned development activities.

To ensure that this NWP authorizes only those mining activities that result in minimal adverse effects on the aquatic environment, we are proposing a 2 acre limit for a single and complete mining project. We do not believe that it would be practical to utilize a sliding scale to determine the acreage limit for this NWP, because a primary purpose of a sliding scale is to encourage the prospective permittee to further avoid and minimize losses of waters of the United States. For aggregate and hard rock/mineral mining activities, on-site avoidance and minimization is more difficult to accomplish because the miners need to extract materials from specific areas (i.e., where sufficient aggregates have accumulated or where the densest deposits of ore are located) and in quantities sufficient to make the mining activity economically feasible.

One commenter stated that different acreage limits for different types of waters is too confusing and suggested a single acreage limit for the NWP. One commenter recommended that impacts to lower perennial riverine systems, isolated wetlands, and dry washes and arroyos should be limited to 1 acre. Another commenter suggested an average 1 acre limit for each type of water listed in the NWP. One commenter asked why the acreage limits for losses of open waters and wetlands was 2 acres but the loss of intermittent and ephemeral stream bed was limited to 1 acre. Several commenters supported a higher acreage limit for activities in ephemeral streams. One commenter stated that the 1 acre limit for support

activities is too low for the permit to be useful.

We are proposing a single acreage limit for this NWP (*i.e.*, 2 acres for a single and complete project, including a maximum of 1 acre for support activities). We have also simplified the applicable waters for the proposed NWP. The acreage limit applies to all of the activities authorized by this NWP, for a single and complete project. We believe that the 1 acre limit for support activities is adequate. If the project proponent requires additional impacts for support activities, the mining activity may be authorized by another NWP, a regional general permit, or an individual permit.

A commenter stated that the NWP should have similar acreage limits to the other new NWPs, because there is no justification for more restrictive limits. A number of commenters suggested imposing linear limits on stream impacts. One commenter recommended a 250 linear foot limit whereas another commenter recommended a 500 linear foot limit. A few commenters supported the lack of a linear limit for stream impacts.

We believe that an acreage limit is more appropriate for mining activities because the proposed NWP substantially limits the amount of in-stream mining that can be authorized by this NWP. For aggregate mining activities in streams where the average annual flow is 1 cubic foot per second or less, the adjacent land will usually be mined with the stream bed. This is another reason to use an acreage limit instead of a linear foot limit. In addition, the use of acres instead of linear feet to determine the limit for this NWP allows consistent application of the NWP limits across the different categories of applicable waters. Aggregate mining activities in lower perennial streams are adequately assessed on a acreage basis since lower perennial streams tend to have large channels.

One commenter stated that acreage limit calculations should be based solely on the direct effects of the dredging or filling activities, not indirect effects. One commenter said that a relocated stream channel which duplicates the functions and values of the original stream channel should not be considered a loss and should not be counted towards the acreage limit of the NWP.

The acreage loss of waters of the United States that results from filling, excavating, draining, or flooding is used to determine whether the proposed work exceeds the terms and limits of the NWP (see the definition of "loss of

waters of the United States" in the "Definitions" section of the NWPs). This is the standard definition used in the NWP program. Although stream relocation and diversion activities no longer constitute a specific part of the proposed NWP, these activities may occur in aggregate mining operations in streams where the average annual flow is 1 cubic foot per second or less, because the adjacent land will usually be mined with the stream bed. The stream channel may be reestablished in a different location after the mining activity is completed. Stream relocation and diversion activities that fill and excavate the stream bed cause the loss of waters of the United States. It may take years before the relocated or diverted stream channel achieves similar aquatic functions to the original stream channel. Any stream relocation and diversion activities are included in the acreage loss measurement for this NWP.

Notification Thresholds: In the proposed NWP, preconstruction notification (PCN) was required for all authorized activities. One commenter concurred with this notification threshold. Several commenters recommended imposing notification thresholds similar to the other proposed NWPs. Two commenters suggested that PCNs should be required for activities impacting 150 linear feet or more of stream bed or $\frac{1}{3}$ acre or greater of wetlands. One commenter proposed that PCNs should be required only for activities impacting 1 acre or more of waters of the United States. A number of commenters suggested that the PCN threshold for activities in dry washes and arroyos should be higher than for activities in other types of waters. One of these commenters recommended a 5 acre PCN threshold for activities in ephemeral streams, with agency coordination for the loss of 10 acres or greater of ephemeral stream bed. One commenter suggested agency notification for mining activities impacting greater than $\frac{1}{3}$ acre. Another commenter suggested extending the agency coordination period to 30 days to allow those agencies to conduct a more thorough review of potential water quality impacts.

We are proposing to retain the original PCN threshold for this NWP, which requires preconstruction notification for all activities authorized by this NWP. District engineers will review proposed mining activities, including measures to minimize or avoid adverse effects to waters of the United States and reclamation plans. This PCN requirement is necessary to ensure that the NWP authorizes only

those activities with minimal adverse effects on the aquatic environment, individually or cumulatively. Agency coordination will be conducted for mining activities resulting in the loss of greater than 1 acre of waters of the United States. Compliance with General Condition 9, including the proposed requirement for a water quality management plan, will help ensure that the authorized work will not result in more than minimal adverse effects on local water quality.

Notification Requirements: In the proposed NWP E, the notification was required to include a description of all waters of the United States impacted by the project, a discussion of measures taken to minimize or prevent adverse effects to waters of the United States, a description of measures taken to comply with the conditions of the NWP, and a reclamation plan.

One commenter supported the requirement that the applicant must submit a reclamation plan with the PCN. A couple of commenters recommended that the applicant should submit a statement from the agency approving the reclamation plan. One commenter requested that the Corps define the term "reclamation plan" and several commenters asked the Corps to specify what should be included in the plan. One commenter asked if the requirement for a reclamation plan refers to the complete plan for the entire mining site that may be required by law or a plan for restoring affected waters of the United States and providing compensatory mitigation for the losses authorized by the NWP. Several commenters stated that the requirement for a reclamation plan should be eliminated. A number of commenters said that the reclamation plan requirement is redundant with other Federal and state laws and should not be included in the NWP.

The requirement for submission of a reclamation plan with the PCN is not intended to supersede other Federal or State requirements. The District Engineer will not require reclamation *per se*, but will review the reclamation plan to determine if compensatory mitigation is required to offset losses of waters of the United States and ensure that the individual or cumulative adverse effects of the mining activity on the aquatic environment are minimal. The prospective permittee may submit a statement from the Federal or State agency that approves the reclamation plan, with a brief description of reclamation plan, especially the type and quantity of aquatic habitats such as wetlands and streams that will be restored, enhanced, created, and/or

preserved for the mined land reclamation. If there are no Federal or State requirements for a reclamation plan for a particular mining activity, the applicant should state that fact in the PCN. The District Engineer may require compensatory mitigation for that project, to ensure that the adverse effects on the aquatic environment are minimal. If the reclamation plan required by Federal or State law adequately addresses compensation for losses of waters of the United States, then the District Engineer will not require additional compensatory mitigation, unless there are additional concerns for the aquatic environment.

A large number of commenters stated that the reclamation plan requirement needs to be changed because some mining activities, such as in-stream dredging, do not require reclamation. In addition, these commenters were unsure if this requirement applies to mining activities outside of the Corps jurisdiction. For land-based aggregate mining, reclamation may be required at the end of the mining activity, but the mining activity may occur for many years. These commenters expressed concern that when a prospective permittee applies for authorization under NWP E, reclamation for previously authorized mining activities may not be completed. One commenter said that the NWP should contain more specific reclamation requirements. This commenter believes that the mining company should be required to submit a reclamation plan for each phase of a large mining operation, as each phase proceeds. This commenter also recommended that the mining site should be restored within a year after operations cease, if possible. One commenter stated that the Corps ability to deny NWP authorization based on failure to complete reclamation for previously authorized activities exceeds the Corps authority because it is not reasonably related to water quality or the discharge of dredged or fill material. One commenter said that a mining activity that may be eligible for authorization by NWP may not have done any reclamation, but is still in compliance with its reclamation plan. This commenter said that it is unreasonable to require the submission of a separate reclamation plan because of the regulatory oversight by other agencies.

For those mining activities that do not require reclamation, the applicant should include a statement in the PCN that neither State nor Federal regulations require reclamation for the proposed mining activity. If there are portions of a mining activity outside of

the Corps jurisdiction (e.g., mining of upland areas), it is unnecessary for the prospective permittee to submit a reclamation plan for those activities. Long-term single and complete mining projects may be authorized by this NWP, provided terms and conditions of the NWP are met. The applicant can submit a conceptual reclamation plan with the PCN or a statement describing the reclamation plan and intended schedule, if the reclamation will not take place until after the long-term mining activity. The Corps can deny NWP authorization if the prospective permittee has not complied with the terms and conditions of previous Corps permits, such as requirements to restore affected waters of the United States.

Conditions of the NWP: One commenter stated that the measures to minimize stream impacts are too vague and inadequate to protect stream stability and integrity. A commenter objected to this NWP, stating that the authorized work results in significant changes in stream morphology and the NWP should require specific measures to prevent those significant changes. Another commenter recommended modifying the prohibition against excavating fish spawning areas or shellfish beds to require avoidance of activities causing degradation of these habitats through excavation, filling, sedimentation caused by upstream work, or other harmful activities. One commenter recommended adding the phrase "where practicable" in the requirement for necessary measures to prevent increases in stream gradient for mining activities in dry washes and arroyos. Another commenter stated that the conditions of this NWP are unenforceable, because field verification of spawning areas must be done by agency personnel with expertise in that area. One commenter stated that the use of NWP E would result in non-compliance with Section 402 of the Clean Water Act.

The conditions of the proposed NWP that require measures to minimize stream impacts will help ensure that the aggregate mining activities authorized by this NWP will result in minimal adverse effects on the aquatic environment. The size of streams in which this NWP can be used has been substantially reduced, which will also protect the stability and integrity of streams. For example, paragraph (e) of the proposed NWP requires the permittee to implement measures to prevent increases in stream gradient and water velocities to prevent adverse effects to channel morphology. This requirement allows the aggregate miner to remove only the upper surface of the

stream bed to extract the sand, gravel, and crushed and broken stone. Aggregate mining is authorized only in lower perennial streams or those stream segments where the average annual flow is 1 cubic foot per second or less. In lower perennial streams, larger amounts of sand can be removed without substantially altering stream gradient and water velocities because these streams tend to occur on land with gentler slopes. Paragraph (e) requires the permittee to conduct the mining activity so that the authorized work does not have more than minimal adverse effects on channel morphology downstream of the site of the in-stream mining activity.

Paragraph (d) of the proposed NWP states that the authorized activity must not substantially alter the sediment characteristics of concentrated shellfish beds or fish spawning areas, either through discharges of dredged or fill material or sediment that was suspended in the water column by work upstream of the shellfish bed or fish spawning area. We are proposing to modify General Condition 20, Spawning Areas, to require that activities authorized by NWP cannot physically destroy important spawning areas by smothering those areas with suspended sediment generated upstream. In other words, an in-stream mining activity authorized by this NWP must be conducted so that it does not generate a cloud of suspended sediment that will move downstream and smother important spawning areas.

District engineers will rely on local knowledge, including any available documented locations of important spawning habitat and concentrated shellfish beds to ensure compliance with paragraph (d) and General Conditions 17 and 20. Federal and State natural resource agencies may have maps of these areas that district engineers can use during their review of PCNs for these activities. Division engineers can also regionally condition this NWP to restrict or prohibit its use in designated waterbodies that contain important fish spawning areas or shellfish beds. Authorization of mining activities by this NWP does not preclude the permittee from complying with the requirements of Section 402 of the Clean Water Act.

Use of this NWP with other NWPs: Many commenters supported the use of this NWP with other NWPs because of the acreage limits of NWP 44. One commenter recommended that the use of NWP E with other NWPs should be allowed without imposing an acreage limit.

NWP 44 can be used with other NWPs, such as NWP 33, provided the

NWPs authorize a single and complete project and comply with the proposed modification of General Condition 15, Use of Multiple Nationwide Permits.

Mitigation Requirements: Some commenters said that the compensatory mitigation requirements for this NWP were unclear in the July 1, 1998, **Federal Register** notice. A number of commenters suggested the NWP should require restoration when the mining activity is complete. A couple of commenters said that on-site mitigation should be preferred since the mining industry has demonstrated its ability to perform successful mitigation. A few commenters stated that requiring compensatory mitigation for these activities replicates State law and exceeds the mitigation requirements for other activities. A couple of commenters stated that the NWP should include a requirement that the permittee avoid or minimize impacts. A commenter suggested that mitigation plans should include monitoring and evaluation standards to assist agencies in evaluating the effectiveness of the mitigation. Three commenters stated that lands which were not previously waters of the United States and which develop wetland characteristics as a result of mining reclamation should be eligible for compensatory mitigation credit.

The July 1, 1998, **Federal Register** notice contained a general statement that compensatory mitigation would normally be required for NWP activities that require notification to the District Engineer. For this NWP, compensatory mitigation may be provided through the reclamation of the mined site, if reclamation is required by other Federal or State laws. If reclamation is not required, the District Engineer can require compensatory mitigation to offset losses of waters of the United States resulting from the authorized work and ensure that the adverse effects on the aquatic environment are minimal. Compensatory mitigation can be provided through the establishment and maintenance of vegetated buffers adjacent to streams and other open waters, especially in the 100-foot wide zone where no aggregate or hard rock/mineral mining activities can occur (see paragraph (k) and the last paragraph of proposed NWP 44).

We are proposing to add a condition to this NWP requiring the permittee to avoid and minimize discharges into waters of the United States to the maximum extent practicable and to include a statement detailing compliance with this condition with the PCN (see paragraph (c)). Compensatory mitigation requirements, including

monitoring and evaluation standards, are at the discretion of district engineers. Mine operators that create wetlands in uplands as part of a reclamation plan can use those created wetlands as compensatory mitigation for other activities that result in the loss of wetlands, if those created wetlands are self-sustaining and the land will not be reverted to uplands in the future. However, it is at the discretion of the District Engineer to determine, on a case-by-case basis, if those areas can be used as compensatory mitigation.

A couple of commenters said that mitigation requirements for activities in ephemeral streams should be less because these areas provide minimal aquatic resources. Another commenter stated that compensatory mitigation requirements should specify in-kind stream replacement. One commenter said that compensatory mitigation in excess of a 1:1 ratio is unfair. Another commenter stated that mitigation requirements should be the same as for proposed NWPs A and B. One commenter expressed concern that mining activities will result in substantial cumulative impacts, and recommended that the Corps encourage mining companies to create on-site mitigation banks to compensate for losses of waters of the United States before they occur as a result of the mining activity. A couple of commenters believe that mine reclamation results in waters with higher value than the impacted waters and that it is counterproductive to place restrictive conditions on this NWP. Two commenters suggested that the creation of vegetated littoral shelves should count towards satisfying mitigation requirements.

Specific compensatory mitigation requirements will be determined on a case-by-case basis by district engineers. We do not believe that it is practical to require mining companies to create on-site mitigation banks to compensate for losses of waters of the United States before the mining activity is conducted. Mined land reclamation, if required, can address compensation for losses of waters of the United States, if the District Engineer determines that the reclamation adequately offsets losses of waters of the United States.

Clarification of Jurisdiction: In the July 1, 1998, **Federal Register** notice, we requested comments on a position intended to clarify a long-standing jurisdictional debate as to what areas should be considered waters of the United States as a result of mining, processing, and reclamation activities. In the July 1, 1998, **Federal Register**

notice, we proposed the following position:

"Water-filled depressions and pits, ponds, etc., created in any area not a 'water of the United States,' as a result of mining, processing, and reclamation activities, shall not be considered 'waters of the United States' until one of the following occurs:

(1) All construction, mining, or excavation activities, processing activities and reclamation activities have ceased and the affected site has been fully reclaimed pursuant to an approved plan of reclamation; or

(2) All construction, mining, or excavation activities, processing activities and reclamation activities have ceased for a period of fifteen (15) consecutive years or the property is no longer zoned for mineral extraction, the same or successive operators are not actively mining on contiguous properties, or reclamation bonding, if required, is no longer in place; and the resulting body of water and adjacent wetlands meet the definition of 'waters of the United States' (33 CFR 328.3 (a))."

We received many comments concerning the proposed position. Many commenters supported the proposed position, including the 15-year term. One commenter recommended incorporating that text into NWP E. Another commenter supported the proposed position, but suggested that the text include a provision stating that water-filled depressions will not be considered waters of the United States as long as the area is actively mined, including reclamation activities.

We do not believe it is necessary to incorporate the text of this position into the text of NWP 44. The position clearly requires that the mining activity must have stopped, and the reclamation completed, before the area can be considered a water of the United States.

Several commenters opposed this clarification, because borrow pits can be idle for many years before they are used again for mining activities. One commenter objected to the proposed position, stating that it is a constitutional taking of property, especially since the Corps has taken the position that water-filled depressions on landfill caps are not waters of the United States. One commenter believes that the proposed position is too restrictive. Another commenter objected to the proposed position, stating that these water-filled depressions become valuable habitats and help compensate for mining damages. A commenter opposed this position because it contradicts the national goal of net wetland gains advocated in the Clean Water Action Plan. One commenter stated that the Corps should assert jurisdiction over areas subject to voluntary abandoned mine land

reclamation only when they are accepted by the Corps as compensatory mitigation for unavoidable impacts and losses caused by mining activities.

The purpose of imposing a specific time period in the text of this position is to ensure that it is consistently applied throughout the country and provide certainty for the regulated public. This position is not contrary to the Clean Water Action Plan. It is intended to comply with the Administration's wetlands plan by providing fairness to the regulated public. By stating a specific time period, mining companies can anticipate when the water-filled depressions they have created can be considered waters of the United States, if the area meets the definition of "waters of the United States" at 33 CFR Part 328. The development of water-filled depressions on landfill caps and the creation of water-filled depressions as a result of mining activities are completely different situations, and have substantially different public interest and health implications. Water-filled depressions on landfill caps are not waters of the United States, as stated elsewhere in this **Federal Register** notice. The repair of the landfill cap is necessary to reduce air and groundwater pollution. In contrast, water-filled depressions created by mining activities can develop into waters of the United States, and provide valuable functions, such as waterfowl habitat. Activities that create aquatic habitats from upland areas are not limited to compensatory mitigation activities.

Two commenters said that the water-filled depressions should be considered waters of the United States 2 years after the mining operation ceases. A number of commenters recommended a 5 year period before those areas are considered waters of the United States. Two of these commenters said that a 5 year period is consistent with the current regulatory interpretations of "normal circumstances." One commenter expressed concern that the 15 year period is too long, and would set an inappropriate precedent for the rest of the regulatory program. One commenter suggested that there should be no time limit.

For the purpose of consistency in the regulatory program, we are proposing to change the time period from 15 years to 5 years. The 5-year time period was chosen because a 5-year period is used by the Natural Resources Conservation Service to determine if an area has been abandoned for the purposes of making a wetland determination. If prior converted cropland has not been maintained for a 5 year period and

wetland characteristics have developed, then that site is no longer considered prior converted cropland. Therefore, for both agricultural and mining activities, if the area has not been used for any of those purposes for 5 years or longer, it can be considered abandoned, and if the area has developed characteristics of waters of the United States, including wetlands, during that period of abandonment, the area will be subject to Section 404.

One commenter was uncertain whether the proposed position is intended to be prospective, retroactive, or both. A commenter suggested modifying the definition of "waters of the United States" to include water-filled depressions created as a result of any extraction activities. A commenter stated that the zoning of the land, the mine operator, and reclamation bonding are irrelevant to the status of the mining pits as waters of the United States. One commenter requested that paragraph (1) contain the phrase " * * * reclamation bond release has been obtained, if such bond exists * * * " after the phrase " * * * site has been fully reclaimed * * * ." This commenter also recommended adding a definition of the word "cease" to the text, because there may be different interpretations as to when the 15-year period started. This commenter also stated that not all property is zoned for mining and this requirement may cause confusion if zoning is necessary to determine if an area is a water of the United States. Another commenter stated that paragraph (2) is difficult to understand and should be rewritten to make it clearer. One commenter recommended that the 15-year time period should apply to mining sites requiring reclamation as well as those mining sites that do not require reclamation.

This proposed position will take effect on the effective date of this NWP. If a jurisdictional determination is conducted on an area that was previously mined, then this position will be used to help determine if the area can be considered a water of the United States or is part of an on-going mining operation and not a water of the United States. This position is applicable only to mining activities, not other types of extraction activities. The preamble to 33 CFR Part 328.3 in the November 13, 1986, **Federal Register** notice (51 FR 41206-41260) adequately addresses water-filled depressions created by other extraction activities. We do not believe it is necessary to add language addressing the release of the bond, because the important criterion is whether the site has been fully reclaimed. A definition of the term

"cease" is not needed, because it is the same definition in common usage. The 5-year period will start when all construction, mining, extraction, processing, and reclamation activities have stopped. The zoning of the land is only one criterion that may be used to determine if a site will continue to be mined. The zoning classification is not necessary to determine if an area is a water of the United States. If a tract of land was previously zoned for mining, and that zoning classification was changed to residential, then the District Engineer would use that information to determine that the mining activity has ceased. This position applies to all mining sites, whether or not reclamation is required.

One commenter stated that voluntary abandoned mined land reclamation and remining can facilitate abandoned mined land reclamation and result in water quality improvements in the watershed. This commenter believes that if the Corps considers artificial waters constructed for voluntary abandoned mined land reclamation and remining to be waters of the United States, it would deter voluntary reclamation and/or remining because of permit burdens and mitigation costs. Two commenters suggested that the Corps assert jurisdiction over water-filled depressions only when they have been accepted as compensatory mitigation. One commenter recommended that NWP 21 contain this position statement.

We do not believe that the proposed position will discourage voluntary abandoned mined land reclamation, especially if such reclamation can be used as a mitigation bank. NWP 27 can be used to authorize wetland enhancement, restoration, and creation activities in waters of the United States in areas that may have been previously mined. We do not agree that only areas accepted as compensatory mitigation should be considered waters of the United States. District engineers can use this position to determine if an area is a water of the United States in conjunction with mining activities authorized by NWP 21.

Based on the comments discussed above, we are proposing to modify the position to make it easier to read, as follows:

"Water-filled depressions (e.g., pits, ponds, etc.) created in any area not previously considered a "water of the United States," as a result of mining, processing, and reclamation activities, shall not be considered "water of the United States" until one of the following situations occurs:

(1) All construction, mining, excavation, processing, and reclamation activities have

ceased and the affected site has been fully reclaimed pursuant to an approved reclamation plan; or

(2) The resulting body of water and adjacent wetlands meet the definition of "waters of the United States" (see 33 CFR Part 328.3 (a)), and any one of the following criteria are met:

(a) all construction, mining, excavation, processing, and reclamation activities have ceased for a period of five (5) consecutive years; or

(b) the property is no longer zoned for mineral extraction; or

(c) the same or successive operators are not actively mining on contiguous properties; or

(d) reclamation bonding, if required, is no longer in place."

The only substantive change in the position is changing the time period from 15 years to 5 years, as discussed above.

Recommended Additional Conditions: Several commenters suggested additional conditions to incorporate into this NWP. Many of these suggestions are best addressed through the regional conditioning process, so we will only address those recommendations that have national applicability in this section.

One commenter suggested that the NWP should not be used in watersheds with substantial historic aquatic resource losses. Another commenter recommended that the NWP should contain a condition addressing the disposal of dredged or excavated material, wastes from washing minerals, and resuspension of stream bed materials that may be contaminated. One commenter suggested prohibiting the NWP in areas inhabited by State-listed endangered or threatened species, species of special concern, or wild trout. A commenter recommended that the NWP contain a provision requiring zero pollutant runoff or groundwater contamination from the site, as well as a bond to cover expenses incurred by surrounding communities if the mine is abandoned. One commenter recommended adding a condition to the NWP requiring that the current mine site must be successfully reclaimed prior to receiving another Section 404 permit for another mining activity in the same stream reach, and limiting the losses within that stream reach to 2 acres.

Division and district engineers can condition this NWP to prohibit or restrict its use in areas where the individual and cumulative adverse effects of Section 404 activities on the aquatic environment may be more than minimal. A Section 402 permit, if required, should address discharges of wastes from washing materials and runoff from processing areas. District

engineers can exercise discretionary authority to restrict or prohibit the use of this NWP to conduct mining activities that will result in the suspension of contaminated sediments in the water column. This issue can also be addressed in the water quality management plan required for activities authorized by this NWP (see General Condition 9). District engineers will review PCNs for proposed mining activities to determine which mining activities constitute separate single and complete projects with independent utility.

Additional Issues: A number of commenters recommended removing all references to excavation from the NWP. Another commenter stated that the proposed NWP appears to violate the invalidation of the Tulloch rule. One commenter suggested that the final NWP clarify that proposed mining activities will be reviewed on a case-by-case basis to determine if there is a discharge regulated under Section 404 of the Clean Water Act.

Excavation activities can result in discharges of dredged or fill material into waters of the United States. Many of these activities were regulated under Section 404 of the Clean Water Act prior to the implementation of the Tulloch rule in 1993. Therefore, we have not removed references to excavation from this NWP. District engineers will review PCNs to determine if the proposed mining activity requires a Section 404 permit.

A number of commenters said that this NWP should contain a provision requiring the prospective permittee to demonstrate that the work complies with the National Historic Preservation Act. One of these commenters objected to the proposed NWP, stating that mining activities have resulted in the destruction of numerous archeological sites eligible for listing in the National Register of Historic Places.

General Condition 12 already addresses this issue. This general condition requires compliance with the requirements of the National Historic Preservation Act prior to commencing the authorized activity.

A number of commenters stated that the NWP 26 data collected by the Corps for mining activities is misleading because the data has been collected for only a short time, the 500 linear foot limit for filling or excavating stream beds in NWP 26 made many mining activities ineligible for NWP 26 authorization, and the Tulloch decision and enforcement policy has been inconsistently implemented.

Although data concerning mining activities authorized by NWP 26 has

been collected for only a short period of time, we believe that this data can be used to provide estimates of the potential losses of waters of the United States that may be authorized by this NWP, since the scope of applicable waters is more restrictive than for NWP 26 (with the exception of aggregate mining activities in lower perennial streams). In our environmental assessment for this NWP, we will consider additional sources of information to estimate future impacts.

One commenter recommended that this NWP should include a definition of a single and complete project. Another commenter suggested that the term "mining" should be clarified, since mining in Florida refers to the excavated material leaving the mining site; under Florida's definition the extraction of material for on-site grading and filling would not be considered mining. One commenter recommended that the Corps develop a separate NWP for reclamation projects authorized under Title IV Abandoned Mine Land Program of the Surface Mining Control and Reclamation Act of 1977 or equivalent State laws.

The term "single and complete project" is already defined at 33 CFR Part 330.2(i). The District Engineer will determine if the proposed activity constitutes mining for the purposes of this NWP. This NWP authorizes reclamation activities in waters of the United States associated with the mining activity.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 44 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. Notification to the District Engineer is required for all discharges into impaired waters and their adjacent wetlands. General Condition 27 prohibits the use of NWP 44 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

The proposed NWP will be used to authorize aggregate and hard rock/mineral mining activities in certain waters of the United States, including

wetlands. In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities. Proposed NWP E is designated as NWP 44, with the modifications discussed above.

IV. Comments and Responses on Nationwide Permit Conditions

A. Consolidation of General Conditions and Section 404 Only Conditions

In an effort to ensure consistent application of the conditions for the NWPs, we proposed in the July 1, 1998, **Federal Register** notice to consolidate the "General Conditions" and "Section 404 Only" conditions into one set of general conditions for the NWPs. This consolidation is practical because most of the Section 404 Only conditions apply to activities in Section 10 waters. This consolidation does not increase the scope of analysis for determining if a particular project qualifies for authorization under the NWP program. As a result of the number of comments we received in favor of this consolidation, all of the NWP conditions will be combined into one "General Conditions" section in the NWPs. The opening language of former Section 404 Only conditions 1, 2, 3, 4, 5, 7, and 8 (now designated as General Conditions 16, 17, 18, 19, 20, 22, and 23, respectively) has been modified to read "activity [or activities], including structures and work in navigable waters of the United States and discharges of dredged or fill material," to reflect their application in Section 10 waters. Due to the changes in the NWP general conditions discussed below, the numbers of some general conditions differ from the numbering scheme in the July 1, 1998, **Federal Register** notice.

B. Comments on Specific General Conditions

In response to the July 1, 1998, **Federal Register** notice we received many comments on specific NWP general conditions. As a result of our review of those comments, we are proposing some changes to the NWP general conditions, as discussed below. Any changes made to the NWP general conditions will apply to all of the NWPs, including the existing NWPs issued in the December 13, 1996, **Federal Register** notice (61 FR 65874–

65922), when the proposed new and modified NWPs become effective.

4. Aquatic Life Movements: One commenter requested that we eliminate the word "substantially" from Condition 4. Another commenter recommended replacing the phrase "substantially disrupt" with "more than minimally disrupt."

We recognize that most work in waters of the United States will result in some disruption of movement of those aquatic species that are indigenous to, or pass through, those waters. District engineers will determine if an NWP activity results in substantial disruption of the movement of aquatic organisms. The word "substantially" has been retained in this general condition. We are also proposing to add a sentence to this general condition to require that if culverts are placed in a stream as part of the authorized work, they must be installed so that low stream flows will continue to flow through the culverts.

9. Water Quality: In the July 1, 1998, **Federal Register** notice, we proposed to modify General Condition 9 by changing its title from "Water Quality Certification" to "Water Quality" and changing the text of the general condition to require a water quality management plan for activities authorized by existing NWPs 12, 14, 17, 18, 21, 32, and 40 and the new NWPs 39, 42, 43, and 44 (proposed as NWPs A, D, C, and E, respectively; NWP B was later withdrawn from the new and modified NWPs) if such a plan is not required by the State or Tribal 401 water quality certification. The purpose of the water quality management plan is to ensure that the project will have minimal adverse effects on the aquatic environment, especially by preventing or reducing adverse effects to downstream water quality and aquatic habitat. An important part of a water quality management plan can be the establishment and maintenance of vegetated buffers adjacent to waters of the United States.

The majority of the commenters asserted that the Corps had no statutory authority to impose Section 401 and Section 402 requirements for water quality and storm water management plans and stated that these requirements overlap or duplicate, and often conflict with, State water quality certification and National Pollutant Discharge Elimination System (NPDES) programs. One commenter stated that the Section 401 water quality certification must be issued prior to initiating the work under the NWP, which makes the Corps imposition of these additional requirements under this general condition redundant and unnecessary.

Another commenter stated that these requirements would significantly add to the regulatory burden of permit applicants and increase the Corps workload. Several commenters stated that requiring a water quality management plan would increase the scope of the NWP program beyond the expertise of Corps regulatory personnel.

A goal of the Clean Water Act, which provides the Corps with its authority to regulate discharges of dredged or fill material into waters of the United States, is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. We believe that the requirement for a water quality management plan to prevent or reduce adverse effects to water quality as a result of work authorized under Section 404 of the Clean Water Act is within our statutory authority. However, the terms of the proposed modification of this general condition are not intended to replace existing State or Tribal Section 401 requirements, if those programs adequately address water quality concerns. Instead, the requirements of the general conditions provide the Corps the opportunity to protect or improve local open water quality. In states with strong water quality programs, district engineers will defer to State and local requirements and will not require water quality management plans as special conditions of NWP authorizations. If the 401 agency does not require adequate measures to protect downstream water quality, we have the authority to require measures, including the construction of stormwater management facilities or the establishment or maintenance of vegetated buffers adjacent to waters of the United States, that will minimize adverse effects to downstream water quality. If the adverse effects to local water quality resulting from the proposed work are minimal without the need for the implementation of a water quality management plan, then such a plan is not required. This general condition is not an absolute requirement because the criterion is minimal degradation, not no degradation. If a project proponent does not want to implement a water quality management plan, and the plan is necessary to ensure that the NWP authorizes only minimal adverse effects on the aquatic environment, then he or she can apply for an individual permit.

The language of the proposed modification of this general condition is intended to allow flexibility and minimize the amount of information necessary to determine compliance with its requirements. District engineers will use their discretion to qualitatively

determine if a particular project complies with this general condition and will not require extensive analysis or review. Detailed studies will not be required. If a water quality management plan is unnecessary due to the nature of the work and the surrounding area, then the plan is not required. For example, the District Engineer may determine that a water quality management plan is not required for an activity in a watershed that is not substantially developed. If a water quality management plan is required by the District Engineer for a particular NWP authorization, it does not increase the Corps scope of analysis. For example, if the permit area includes an entire subdivision, the District Engineer will determine if a water quality management plan is necessary to address impacts to water quality resulting from the construction and use of the subdivision. However, if a Corps permit is required only for a small portion of the development, such as a single road crossing to provide access to an upland development, the water quality management plan will not apply to the entire project site. District engineers cannot require a water quality management plan for a poorly designed upland development. By limiting our analysis to the qualitative assessment of compliance with this general condition, the increase to the Corps workload will be minor and compliance will be easily assessed by Corps regulatory personnel.

Many commenters recognized the importance of vegetated buffers and agreed that they should be required. One commenter stated that the general condition should not require the establishment of vegetated buffers. Another commenter stated that this general condition would needlessly take private property without compensation. One commenter stated that this condition would cause unreasonable financial burdens on NWP applicants and that future landowners cannot be expected to know if areas adjacent to waters of the United States are upland mitigation areas required for the NWP authorization or the proper width of the buffers. One commenter asked if drainage districts would be allowed to clear the buffer areas and to place excavated material on these areas during future ditch maintenance activities.

We are proposing to modify the general condition to provide district engineers with the flexibility to determine whether or not the establishment or maintenance of a vegetated buffer adjacent to open waters is necessary. The requirement for a water quality management plan does not constitute a taking of private property. It is merely an NWP condition that will

help ensure that the authorized activity causes only minimal adverse effects to water quality. This requirement still allows the landowner viable economic use of his or her property. If the District Engineer determines that a water quality management plan is necessary to ensure that the activities authorized by NWPs result only in minimal adverse effects on water quality, and the landowner or developer does not want to implement the water quality management plan, then he or she can request authorization through the individual permit process. NWPs are optional permits, and anyone who does not want to comply with the terms and limits of the NWPs can request authorization through either a regional general permit, if available for the proposed activity, or an individual permit. We disagree that the requirement for a water quality management plan will result in unnecessary financial burdens on the regulated public.

Project-specific requirements for vegetated buffers adjacent to waters of the United States should be incorporated into NWP authorizations as special conditions, based on site conditions. Vegetated buffer requirements may also be regional conditions of the NWPs. The vegetated buffer requirements will be included in the NWP authorization issued to the project proponent, either as special or regional conditions. The NWP authorization will include a description of the width and composition of the vegetated buffer and may contain a plan of the project site showing the location and extent of those buffers. These documents will ensure that the permittee knows the location and extent of those buffers. Since the establishment and maintenance of vegetated buffers adjacent to waters of the United States can be considered as a form of out-of-kind compensatory mitigation for authorized losses of waters of the United States, district engineers may require the protection of vegetated buffers by conservation easements, deed restrictions, or other forms of legal protection.

If a drainage district needs to periodically remove sediments from a waterway where vegetated buffers were established as a condition of an NWP authorization, and those vegetated buffers are protected by a conservation easement or other legal means, the drainage district must notify the District Engineer of its intent to remove the vegetated buffer to conduct the maintenance activity. The drainage district may be required to reestablish of the vegetated buffer upon completion of the maintenance work.

One commenter recommended modifying the general condition to require vegetated buffers adjacent to all waters of the United States, not just open waters, because of the scientific support for buffers adjacent to wetlands and open water as essential for maintaining aquatic functions. One commenter requested a definition of the term "vegetated buffer" and that the Corps specifically state the width required for the buffer zone. Two commenters suggested changing the term "vegetated buffer" to "permanently vegetated buffer." Some commenters recommended requiring vegetated buffers to be composed of native species. Another commenter recommended making this general condition applicable to NWPs 19, 25, 33, 34, and 36. One commenter stated that the concept of a wetland buffer is better suited for large open space projects than it would be for linear road projects and recommended eliminating buffer requirements from road projects within existing right-of-ways. A commenter requested a definition of the term "to the maximum extent practicable" for the vegetated buffer requirement. This commenter also stated that the vegetated buffer requirement is inconsistent with channel relocation authorized by NWP 40 and the removal of undesirable species in NWP 27.

The purpose of the vegetated buffer requirement in this general condition is to prevent more than minimal degradation of the water quality of streams and other open waters. For that reason, we have not included a requirement for vegetated buffers adjacent to wetlands. This does not prevent district engineers from requiring the establishment and maintenance of vegetated buffers adjacent to wetlands as conditions of NWP authorizations. The width and species composition of the required vegetated buffer is at the discretion of the District Engineer. In a previous section of this **Federal Register** notice, we recommend minimum widths for vegetated buffers, as well as the plant sizes and species that should be used. These recommendations are merely guidance; it is the District Engineer's decision as to what constitutes an adequate vegetated buffer for the purposes of a specific NWP authorization. Vegetated buffers should be as wide as possible. The phrase "to the maximum extent practicable" provides district engineers with flexibility. The vegetated buffer requirement is not inconsistent with NWPs 40 and 27, because vegetated buffers can be established by planting

appropriate species after drainage ditch or channel relocation activities and the removal of undesirable plant species, such as noxious weeds or invasive species. We have removed NWP 21 from the list of NWPs that may require a water quality management plan, because Title V of the Surface Mining Control and Reclamation Act already has a similar requirement.

11. Endangered Species: In the July 1, 1998, **Federal Register** notice, we did not propose any changes to this general condition. In response to this **Federal Register** notice, one commenter requested that the Corps define the phrase "in the vicinity" and another commenter recommended deleting this phrase from the general condition.

The definition of this term is at the discretion of the District Engineer for a particular Federally-listed endangered or threatened species. The area defined as the "vicinity" varies from species to species. For example, the "vicinity" of an endangered bird species will be different from the "vicinity" of an endangered species of orchid. The Standard Local Operating Procedures for Endangered Species established between most Corps districts and the FWS and NMFS will provide more effective protection of endangered and threatened species and their critical habitat, and can provide local definitions of the term "vicinity." General Condition 11 contains provisions requiring notification for activities in designated critical habitat. We are proposing to modify General Condition 11 to clarify that the notification is required for any NWP activity proposed in designated critical habitat. We are proposing to add a provision to General Condition 13, Notification, to require the prospective permittee to provide the name(s) of the Federally-listed endangered or threatened species that may be adversely affected by the proposed work.

12. Historic Properties: In the July 1, 1998, **Federal Register** notice, the Corps did not propose any changes to this general condition. Several commenters believe that General Condition 12 adequately address the Corps responsibilities under Section 106 of the National Historic Preservation Act (NHPA). One commenter recommended that the Corps require that prospective permittees submit with the PCN either an inventory of historic properties prepared by a qualified individual, a letter from the State Historic Preservation Officer (SHPO) concerning potential impacts to historic properties, or some other evidence that demonstrates that the requirements of

NHPA have been satisfied. One commenter requested that the notification contain a statement concerning potential effects to historic property. Another commenter stated that General Condition 12 should include a requirement that the permittee notify the District Engineer of the discovery of any artifacts or deposits that may constitute an eligible property while the authorized work is in progress and take steps to protect those potentially eligible properties until the requirements of NHPA are fulfilled. One commenter suggested that if the permittee avoids adverse effects to historic properties by incorporating those properties into "open space" or greenbelts on the project site, then those historic properties must be protected by deed restrictions, protective covenants, or other legal means as a condition of the NWP authorization. Another commenter expressed concern as to how Tribal coordination is conducted for potential effects to Tribal cultural or historic resources.

We believe that the current wording of General Condition 12 adequately addresses compliance of the NWP program with NHPA. In 33 CFR Part 325, Appendix C, the Corps has established the procedures necessary to ensure compliance with Section 106 of the NHPA. This general condition already requires that the prospective permittee notify the District Engineer if the proposed work may affect historic properties listed in, or may be eligible for listing in, the National Register of Historic Places. The District Engineer will review the notification and conduct any necessary coordination with the SHPO to ensure compliance with NHPA. The prospective permittee cannot commence work until the requirements of NHPA have been fulfilled. If the permittee discovers previously unknown historic properties during the course of conducting the authorized work, he or she must stop work and notify the District Engineer of the presence of previously unknown historic properties. Work cannot continue under the NWP until the requirements of NHPA have been fulfilled.

If the permittee avoids adverse effects to historic properties, we cannot require the permittee to preserve those properties in open space with a conservation easement or deed restriction. Tribal cultural resources are subject to the same requirements as other cultural and historic resources. The original wording of General Condition 12 will be retained as published in the December 13, 1996, **Federal Register** (61 FR 68574-65922).

We are proposing to add a provision to General Condition 13, Notification, to require the prospective permittee to state, in the PCN, which historic property may be affected by the proposed work or to include a vicinity map indicating the location of the historic property.

13. Notification: In the July 1, 1998, **Federal Register** notice, we proposed to require notification for all of the new and modified NWPs, with various notification thresholds, but in general most of these NWPs had a PCN threshold of $\frac{1}{3}$ acre. We also proposed to conduct agency coordination for discharges authorized by proposed NWPs A, B, C, E, and 40 that result in the loss of greater than 1 acre of waters of the United States. Notifications for activities that result in the loss of 1 acre of waters of the United States or less would be subject to Corps-only review. In this section, we will address only those comments relating to the notification process; comments concerning PCN thresholds for specific NWPs are addressed in the preamble discussions for each NWP.

Several commenters stated that one PCN threshold should be applied to all of the NWPs. We disagree, because one of the purposes of the PCN process is to provide district engineers the opportunity to review specific NWP activities to ensure that they will result only in minimal adverse effects on the aquatic environment. There is a wide range of activities that are authorized by the existing NWPs and the proposed NWPs. Each of these activities may require different PCN thresholds because they can have different adverse effects on the aquatic environment. We have attempted to make the PCN thresholds for the proposed NWPs as consistent as possible. Most of the proposed NWPs require submission of a PCN for losses of greater than $\frac{1}{4}$ acre of waters of the United States, but PCN thresholds for steam impacts vary for these NWPs.

One commenter believes that notification should not be required for projects where the Corps accepts compensatory mitigation plans for less than 1 acre of wetland impact, for activities exempt under Section 404(f)(1) of the Clean Water Act, or for the removal of accumulated sediments at stream crossings. Another commenter recommended that notification should be required for all NWP activities where the State has not issued an unconditional WQC. One commenter suggested that all activities impacting stream beds or riparian zones should require a PCN with agency coordination.

We disagree with these recommendations. We require notification for NWP activities that may result in more than minimal adverse effects on the aquatic environment. Activities that are exempt under Section 404(f)(1) of the Clean Water Act do not require a Section 404 permit and are not subject to PCN requirements. For the proposed modification of NWP 3, we are proposing to require notification for all removal of accumulated sediments in the vicinity of existing structures (see the preamble discussion for NWP 3). If an unconditional WQC has not been issued for the NWP by the Section 401 agency, the State or Tribe will have the opportunity to review each activity and determine if it complies with State or Tribal water quality standards. Notification to the Corps is unnecessary unless the Division Engineer regionally conditions the NWP to require notification. The District Engineer will review the PCN to determine if the proposed work complies with the terms of the NWP and if any compensatory mitigation is necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment.

Several commenters addressed the 30-day PCN time period in paragraph (a)(3) of General Condition 13. Two commenters supported the 30-day PCN time period for the new NWPs. One commenter recommended deleting the 30-day time period because the project proponent should not have to wait 30 days to receive an NWP authorization. One commenter stated that the 30-day time period is unjustified and is contrary to the intent of the NWP program. One commenter said that PCN time period should be reduced from 30 days to 15 days. Three commenters stated that the 30-day PCN time period is too short to conduct an adequate review of the proposed work. One of these commenters recommended a 60-day time period and another commenter suggested a 45-day time period.

The PCN time period provides fairness to the regulated public by requiring the Corps to respond to PCNs in a timely manner. Due to the higher workloads that are expected to result from the proposed new and modified NWPs, we are proposing to change paragraph (a) of General Condition 13 by increasing the PCN review period to 45 days for a complete notification. The District Engineer will have 30 days from the PCN receipt date to request additional information that is necessary to make the PCN complete and begin the PCN review process. If the PCN is incomplete, the District Engineer can make only one request for additional

information necessary to make the PCN complete. If the applicant does not supply the requested information, the District Engineer will not proceed with the PCN review and the applicant cannot assume that the project is authorized by the NWP 45 days later. If the applicant does not provide all of the requested information, the District Engineer may notify the applicant, either by letter or telephone, that the PCN is not complete and that the PCN review process will not begin until all of the requested information is furnished to the Corps. Upon receipt of a complete PCN, the District Engineer has 45 days to determine if the proposed work qualifies for authorization under the NWP or exercise discretionary authority to require a standard permit. If the District Engineer does not respond to the PCN within 45 days of receipt of a complete application, then the proposed activity is authorized by NWP unless the District Engineer modifies, suspends, or revokes the default NWP authorization in accordance with 33 CFR Part 330.5(d)(2).

Many commenters believe that the information requirements for PCNs are too extensive and confusing. They requested that the Corps provide a checklist to simplify the notification process. Three commenters requested that the requirement for submission of a delineation of special aquatic sites for certain NWPs be deleted from General Condition 13. One of these commenters specifically recommended excluding NWP 12 activities that are not subject to an acreage limit from the delineation requirement. Another commenter stated that wetland delineations are too costly to be required for PCNs.

The format of General Condition 13 clearly outlines the information required for the notification process. Corps districts can, if they choose to do so, provide a checklist with their permit applications to help prospective permittees ensure that they have provided all the required information. The proposed modifications to NWP 12 require the submission of a delineation of special aquatic sites. We are proposing to add NWP 7 to the list of NWPs that require submission of delineations of special aquatic sites with the PCN. NWP 7 was added because there may be some intake or outfall maintenance activities that could adversely affect submerged aquatic vegetation beds.

A few commenters believe that the prospective permittee should not be required to notify the National Ocean Service (NOS) for the construction or installation of utility lines in navigable waters and that this provision should be

removed from General Condition 13. We concur with this comment and are proposing to modify NWP 12 to require the Corps to provide NOS with a copy of the PCN and NWP authorization, so that NOS can chart the utility line to protect navigation.

We received many comments concerning interagency coordination of PCNs. Some commenters stated that the Corps should not consider agency comments for NWP activities. Other commenters suggested that agencies should have the opportunity to comment on every PCN. One commenter recommended that agency coordination should be conducted for all activities authorized by NWPs. Several commenters pointed out discrepancies between different discussions of the agency coordination process in the July 1, 1998, **Federal Register** notice. In the preamble discussion for the proposed modifications of General Condition 13, we proposed to conduct agency coordination for NWPs authorizing discharges resulting in the loss of greater than 1 acre of waters of the United States. However, in the proposed revisions General Condition 13, we specifically stated that agency coordination would be conducted only for NWPs A, B, C, E, and 40, where the loss of waters of the United States is greater than 1 acre and for NWPs 12, 21, 29, 33, 37, and 38, regardless of the acreage loss. Many commenters stated that the agency coordination period should be greater than 5 calendar days and some of these commenters said that the Corps should provide responses to agency comments. One commenter recommended that Tribes implementing the Section 401 program should be included in the agency coordination process. Two commenters requested that the Corps put the optional agency coordination process back into General Condition 13, to allow the Regional Administrator of EPA or the Regional Directors of FWS or NMFS to request agency coordination for activities authorized by certain NWPs.

We are proposing to modify the agency coordination thresholds in paragraph (e) to require agency coordination for any NWP activity requiring notification to the District Engineer that results in the loss of greater than 1 acre of waters of the United States. Because of the proposed modification of NWP 40, we have removed the provision for coordination with the FWS for NWP 40 activities resulting in the loss of greater than 1/3 acre of playas, prairie potholes, and vernal pools. We have not put the optional agency notification process

back into General Condition 13. We believe that agency coordination is unnecessary for NWP activities resulting in the loss of 1 acre or less of waters of the United States. Due to the increase complexity of the NWPs, we have modified the time periods for agency coordination. With the exception of NWP 37, these agencies will have 10 calendar days from receipt of the PCN to notify the District Engineer that they intend to provide substantive, site-specific comments within their area of expertise. If so notified, the District Engineer will wait an additional 15 calendar days before making a decision on the PCN. Therefore, these agencies have up to 25 days to provide comments on a PCN. Districts will involve any Tribes with Section 401 programs in the agency notification process, if the proposed activity occurs in an area subject to a Tribal Section 401 program.

One commenter recommended that the mitigation requirements in paragraph (g) should explicitly state that compensatory mitigation must fully offset permanent, temporary, and secondary losses of functions, values, and acreage of aquatic resources to satisfy the "no net loss" goal of the Section 404 program. One commenter asked which functional assessment method would be required for mitigation to determine compliance with paragraph (g) of General Condition 13. A commenter requested that the Corps provide compensatory mitigation guidelines for permit applicants to help them better understand and comply with compensatory mitigation requirements. One commenter suggested that the Corps provide guidance for appropriate mitigation ratios. Another commenter asked how the requirements of paragraph (g) of this general condition differ from the analysis required by the Section 404(b)(1) Guidelines. One commenter stated that vegetated buffers should not be considered as compensatory mitigation. This commenter also said that in lieu fee programs should not be used as compensatory mitigation.

For those NWP activities that require notification, district engineers will determine if the proposed compensatory mitigation adequately offsets losses of waters of the United States. To determine if the proposed compensatory mitigation is appropriate, district engineers will consider what is best for the local aquatic environment. The District Engineer is not required to utilize a formal assessment method. It would be inappropriate to issue national standards for compensatory mitigation, because of the regional differences in aquatic resource functions and values

across the country. Nationwide permittees are not required to fully offset losses of aquatic resource functions, values, and acreage resulting from permanent, temporary, or secondary impacts. For the NWP program, compensatory mitigation is necessary only to ensure that the adverse effects of the authorized work on the aquatic environment are minimal, individually or cumulatively. The "no net loss" goal is not a statutory requirement of the Section 404 program. Other Federal wetlands programs, such as the Wetland Reserve Program, help increase the quantity of the Nation's wetlands and achieve the "no net loss" goal. Compensatory mitigation requirements are established by district engineers on a case-by-case or district-wide basis. Therefore, we will not establish national compensatory mitigation guidelines. Compensatory mitigation requirements are addressed in more detail elsewhere in this **Federal Register** notice. Vegetated buffers are an important type of out-of-kind compensatory mitigation that helps protect the quality of the local aquatic environment, especially water quality. District engineers will consider vegetated buffers as part of the compensatory mitigation required for activities authorized by Section 404 permits. In paragraph (g) of General Condition 13, we have specified that in lieu fee programs, mitigation banks, and other consolidated mitigation approaches are preferred methods of providing compensatory mitigation. In lieu fee programs are an important means of providing consolidated compensatory mitigation projects, especially in areas where mitigation banks are uncommon.

For the NWP program, permittees are only required to avoid and minimize impacts on-site to the maximum extent practicable. Off-site alternatives analyses cannot be required for activities authorized by NWPs because the NWPs authorize only those activities with minimal adverse effects on the aquatic environment. If the adverse effects on the aquatic environment are more than minimal, then the District Engineer will exercise discretionary authority and require an individual permit for the proposed work. In accordance with 40 CFR Part 230.7, each NWP is subjected to a Section 404(b)(1) Guidelines analysis before it is issued, but that analysis is not conducted for each activity authorized by the NWP.

One commenter recommended modification of General Condition 13 to require, in addition to preconstruction notification, postconstruction

notification for all NWPs. Another commenter requested modification of General Condition 13 to include requirements for the prospective permittee to apply for water quality certification (WQC), in those instances where WQC has been denied, once the notification process has been completed.

We do not agree that postconstruction notification should be required for all activities authorized by NWPs. We believe that General Condition 9, Water Quality, adequately addresses the WQC requirements for the NWPs.

14. Compliance Certification: We did not propose any changes to this general condition, but one commenter recommended that this general condition specify that the Corps will verify the certification by a site visit within 90 days of receipt of the certification from the permittee.

We disagree with this recommendation and will not incorporate it into this general condition. Corps districts will review compliance certifications at their discretion.

15. Use of Multiple Nationwide Permits: Although we did not propose any changes to this general condition, we received many general comments opposing the use of more than one NWP to authorize a single and complete project. We also received comments opposing the provisions of this general condition. One commenter recommended a prohibition against the use of more than one NWP to authorize a single and complete project that results in above-grade wetland fills. Another commenter stated that the use of multiple NWPs for a project should be unrestricted because of the low acreage limits of the NWPs and the unlikely probability that projects authorized by more than one NWP would result in significant adverse effects on the aquatic environment.

We are proposing to modify General Condition 15 to prohibit the use of more than one NWP to authorize a single and complete project, except when the acreage loss of waters of the United States is less than the highest specified acreage limit for the NWPs used to authorize the activity. For example, NWP 13 may be used with NWP 39 to authorize bank stabilization in unvegetated tidal waters at the project site for the construction of a 100-acre residential subdivision that will result in the filling of non-tidal wetlands. In this case, the acreage loss of waters of the United States cannot exceed the indexed acreage limit under NWP 39. Since the project area is 100 acres, the maximum acreage loss for this

particular project is 2.25 acres, and includes the subdivision, attendant features, and bank stabilization.

We are also proposing to modify the title of this general condition to more accurately describe its purpose. The previous title, "Multiple Use of Nationwide Permits" implied that the general condition addresses the use of an NWP more than once for a single and complete project. By changing the title to "Use of Multiple Nationwide Permits," we believe that the title more accurately reflects its purpose, which is controlling the use of more than one NWP to authorize a single and complete project.

17. Shellfish Beds: We did not propose any changes to this general condition, except to change it from a "Section 404 Only" condition to a general condition and include activities in Section 10 waters, as discussed above. During our review of the comments received in response to the July 1, 1998, and October 14, 1998, **Federal Register** notices, we determined that this general condition requires clarification to ensure that the NWPs do not authorize activities that may result in more than minimal adverse effects on shellfish. In the text of the general condition we are proposing to change the word "production" to "populations" because the word "production" is too limiting and the condition should apply to all areas of concentrated shellfish populations, not just where shellfish are harvested commercially. This general condition was previously entitled "Shellfish Production." We are proposing to modify the title of this general condition to "Shellfish Beds" to reflect the proposed change in the general condition.

18. Suitable Materials: We did not propose any changes to this general condition, except to include activities in Section 10 waters of the United States, as discussed above. One commenter requested that the general condition prohibit the use of asphalt, tires, and construction and demolition debris. Another commenter supported the current wording of the general condition, provided it does not authorize the use of fill that contains deleterious materials, such as trash. One commenter recommended modifying this general condition to state that materials used in construction must not be cumulatively toxic, even though they may not be toxic in the amounts discharged for the project.

This NWP condition already contains examples of material that are considered unsuitable, such as trash, debris, car bodies, and asphalt. It is impractical to provide a comprehensive list of

unsuitable materials. District engineers will determine on a case-by-case basis which materials are unsuitable. Division engineers can regionally condition the NWPs to prohibit the use of certain materials, if those materials are commonly used in a particular geographic region and are considered toxic. We do not believe that it is necessary to specify that discharged materials must not be cumulatively toxic, because the discharge of toxic pollutants is addressed under Section 307 of the Clean Water Act. We are proposing to retain this general condition as published in the July 1, 1998, **Federal Register** notice.

19. Mitigation: In the July 1, 1998, **Federal Register** notice, we proposed to modify this former Section 404 Only condition by deleting the words "* * *" unless the District Engineer approves a compensation plan that the District Engineer determines is more beneficial to the environment than on-site minimization and avoidance measures." We also proposed to modify this general condition to require restoration, creation, enhancement, or preservation of aquatic resources to offset losses of functions and values of waters of the United States due to authorized impacts and to include the establishment of vegetated buffers as part of a compensatory mitigation plan.

A few commenters stated that mitigation is defined too narrowly in the general condition, and should include avoidance and minimization. Some commenters stated that compensatory mitigation should not be required for activities authorized by NWPs because the adverse effects of those activities on the aquatic environment can only be minimal. Other commenters stated that compensatory mitigation should be required for all NWP activities that require a PCN. Some commenters said that compensatory mitigation should be required for all impacts to the aquatic environment. A few commenters stated that compensatory mitigation should not be used to "buy down" losses of waters of the United States authorized by NWPs to ensure that the adverse effects on the aquatic environment are minimal.

The text of General Condition 19 includes all three steps of the mitigation process (i.e., avoidance, minimization, and compensation). Permittees are required to avoid and minimize impacts to the aquatic environment on-site to the maximum extent practicable. The consideration of off-site alternatives cannot be required for activities authorized by NWPs. For NWP activities that require notification to the District Engineer, compensatory mitigation may

be required to ensure that the net adverse effects on the aquatic environment are minimal, individually or cumulatively. However, if the adverse effects on the aquatic environment are minimal, without compensatory mitigation, the District Engineer may determine that compensatory mitigation is unnecessary and authorize the activity with the NWP. The use of compensatory mitigation to reduce the adverse effects of the authorized work to the minimal level is an essential component of the NWP program, and included in the NWP regulations at 33 CFR Part 330.1(e)(3).

One commenter stated that the NWP program has become a way to avoid an alternatives analysis, but another commenter views the NWPs as similar to the individual permit process because it requires an on-site alternatives analysis. One commenter said that the avoidance requirement of this general condition is meaningless because the resource agencies do not have enough time to review the applicant's avoidance analysis in the PCN. One commenter recommended removing the avoidance requirement from this general condition because there are currently no standards for determining if the requirement has been met.

General Condition 19 requires the consideration of on-site alternatives, including changes to the proposed work to avoid and minimize adverse effects to waters of the United States. District engineers will review the PCN to determine if additional avoidance and minimization is practicable and necessary. If the proposed work meets the terms and conditions of the NWP and results in minimal adverse effects on the aquatic environment (with or without any compensatory mitigation required by the District Engineer) it is not necessary to require additional avoidance and minimization.

Two commenters believe that the requirement for restoration, creation, enhancement, or preservation of aquatic resources to offset authorized impacts to ensure that the adverse effects of the work are minimal is a major change to the NWP program and does not accurately reflect the concept of using compensatory mitigation to ensure that the adverse effects on the aquatic environment caused by activities authorized by NWPs are minimal. Another commenter stated that this requirement is problematic because it requires compensatory mitigation for any activity that requires a PCN even if the adverse effects of the activity on the aquatic environment are minimal. This commenter recommended changing this part of the general condition to read

“* * * of other aquatic resources only as necessary to offset authorized impacts to the extent that adverse environmental effects to the aquatic environment otherwise would be minimal.” Two commenters objected to the inclusion of preservation as a form of compensatory mitigation.

We believe that this part of the general condition accurately reflects 33 CFR Part 330.1(e)(3), which is the section of the NWP regulations that allows the District Engineer to require compensatory mitigation to offset losses of waters of the United States authorized by NWPs, to ensure that the adverse effects on the aquatic environment are minimal. The phrase “at least to the extent that adverse environmental effects to the aquatic environment are minimal” provides district engineers with the flexibility to determine that compensatory mitigation is unnecessary if the authorized adverse effects on the aquatic environment are already minimal. If no compensatory mitigation is necessary to reduce the adverse effects on the aquatic environment to the minimal level, then the District Engineer does not need to require compensatory mitigation. Preservation of aquatic resources is an important type of compensatory mitigation, because it can be used to augment the restoration, creation, and enhancement of aquatic habitats. Preservation can also be used to protect rare or high-value aquatic resources.

Several commenters requested that the Corps not delete the language from the original version of Section 404 Only condition 4 published in the December 13, 1996, issue of the **Federal Register**. This language allowed the District Engineer to determine that off-site compensatory mitigation is more beneficial to the aquatic environment, because of the flexibility allowed by this wording. One commenter objected to the use of the term “aquatic environment” in the general condition and stated that the 1990 Memorandum of Agreement (MOA) between the Corps and EPA on mitigation only refers to wetlands. Two commenters recommended that the Corps emphasize that compensatory mitigation may be required for impacts to other aquatic resources, not just wetlands. Other commenters stated that the Corps needs to provide guidelines for replacement ratios, functional assessment methods, and monitoring requirements.

The proposed changes to this general condition do not prohibit the District Engineer from considering and approving off-site compensatory mitigation to offset the adverse effects of the authorized work on the aquatic

environment. Off-site and out-of-kind compensatory mitigation can be used to offset losses of waters of the United States, if such compensation is beneficial to the aquatic environment. Mitigation banks, in lieu fee programs, and other consolidated mitigation approaches are also important sources of compensatory mitigation. The 1990 mitigation MOA applies only to the evaluation of standard Corps permits, not general permits such as the NWPs. With the proposed new and modified NWPs, we are placing more emphasis on other types of aquatic resources, such as streams. Vegetated buffers adjacent to open or flowing waters are an excellent form of compensatory mitigation to offset adverse effects on the aquatic environment caused by the activities authorized by the NWPs. Restoration of degraded streams can be used as compensatory mitigation for stream impacts. It is important to note that compensatory mitigation is not necessary for all activities authorized by NWPs. The District Engineer will determine, on a case-by-case basis, if compensatory mitigation is necessary to ensure that the adverse effects on the aquatic environment are minimal for activities authorized by NWPs. We disagree that the NWPs should contain guidance for replacement ratios, functional assessment methods, and monitoring requirements for compensatory mitigation. District engineers will decide the appropriateness of compensatory mitigation on a case-by-case basis, using any replacement ratios, functional assessment methods, or monitoring requirements they believe are appropriate.

Several commenters addressed the use of vegetated buffers as compensatory mitigation. Some commenters stated that the Corps lacks the legal authority to require vegetated buffers, particularly upland buffers, and recommended that the Corps delete the reference to vegetated buffers from the general condition. A commenter objected to use of vegetated buffers as compensatory mitigation for impacts to waters of the United States, particularly as a substitute for the restoration and creation of aquatic habitats. Another commenter recommended using upland vegetated buffers as compensatory mitigation only after the permittee has conducted a one-to-one replacement of aquatic habitats. One commenter recommended modifying the general condition to require planting the vegetated buffer with native vegetation. One commenter said that vegetated buffers should be required adjacent to

all open waters. Two commenters recommended including specific width requirements for vegetated buffers in the general condition.

Our legal authority to require vegetated buffers adjacent to waters of the United States is discussed in a previous section of this **Federal Register** notice. Vegetated buffers adjacent to open waters or streams can provide more benefits to the local aquatic environment than wetland creation efforts. District engineers will determine how much the vegetated buffer will count towards any compensatory mitigation requirements. We are proposing to add text to this general condition stating that the vegetated buffer should consist of native species. However, if the vegetated buffer is already inhabited by trees and shrubs, it should be maintained, even if some of the plant species are not native to the region. If the vegetated buffer is inhabited by woody non-native species that do not provide habitat for locally important aquatic species, district engineers can condition the NWP authorization to require the removal of those non-native species and the planting of beneficial native species.

Since two general conditions address mitigation requirements for the NWPs, we are proposing to add a sentence General Condition 19, referring to the additional information concerning mitigation requirements in paragraph (g) of General Condition 13. We are also proposing to add a similar sentence to paragraph (g) of General Condition 13, referring to the mitigation requirements of General Condition 19.

20. Spawning Areas: One commenter suggested that we remove the word “important” from General Condition 20 to prohibit activities in any fish spawning area. Two other commenters objected to the addition of this word to the general condition because it does not define what an “important” spawning area is and would result in subjective determinations by Corps personnel. Another commenter recommended that the word “structures” be added to the examples of activities that can physically destroy a spawning area.

We added the word “important” to this general condition to limit the prohibition to spawning areas used by species that are harvested commercially for human consumption. Spawning areas used exclusively by other aquatic species are not subject to this general condition. We are proposing to retain the word “important” in this general condition. Division engineers can add regional conditions to the NWPs to prohibit the use of NWPs (or require

notification for NWP activities) in known locations of important spawning habitat. We do not believe it is necessary to include the placement of structures in this general condition as an example of an activity that physically destroys a spawning area because the general condition already clearly states that authorized activities, including structures in navigable waters, cannot result in the physical destruction of important spawning areas.

21. *Management of Water Flows:* In the July 1, 1998, **Federal Register** notice, we proposed to modify this former Section 404 Only general condition and change the title of the condition from "Obstruction of High Flows" to "Management of High Flows." We proposed to modify this NWP to require permittees to design their projects to maintain, to the maximum extent practicable, preconstruction downstream flow conditions and reduce impacts such as flooding or draining, unless the primary purpose of the project is to impound water or reestablish drainage.

Several commenters fully supported the proposed modification to this general condition. Another commenter stated that the general condition should also include water quality control. A number of commenters requested clarification of the proposed general condition. One commenter stated that the condition should be modified to include functionally related components, such as outfalls and developed flows, with the project. Another commenter stated that the condition should be clarified to allow impoundment of water for beneficial use if that is the primary purpose of the project. Many commenters requested clarification of terms used in the preamble discussion relating to this general condition, including "as close as feasible" and "more than minimally flooded or dewatered." Other commenters asked if the Corps is relating the preconstruction flows to particular events, such as 50- or 100-year storm flows, or all flows. A commenter requested clarification as to whether the general condition requires on-site detention, if watershed detention is a better solution.

The NWPs are already conditioned to address water quality concerns resulting from activities authorized by NWPs. General Condition 9 requires that the permittee obtain a water quality certification and, for certain NWP activities, develop and implement a water quality management plan to prevent more than minimal degradation of downstream water quality. We do not agree that General Condition 21 requires

modification to include outfalls and developed flows with the project because this condition applies to general flow patterns of waters of the United States in the vicinity of the project, not to any specific part of the project. The proposed modification of this condition already contains language allowing the impoundment of water, if that is the primary purpose of the authorized activity. The phrase "as close as feasible" as used in the preamble is synonymous with the phrase "to the maximum extent practicable," which is used throughout the text of the general condition. The phrase "more than minimally flooded or dewatered" used in the preamble relates to the requirement that the NWPs authorize only those activities with minimal adverse effects on the aquatic environment. District engineers will determine if any changes to surface water flows resulting from the authorized work exceeds the requirements of this general condition.

This general condition applies to the general flow patterns of surface waters over the course of a year, not to any specific storm event. For example, a project authorized by NWP may not cause more than minimal increases in downstream water flows that result in downcutting of the stream bed and substantial increases in stream bed and bank erosion. This general condition does not require any particular method to achieve compliance with the requirements of the general condition. We are proposing to modify the text of the general condition to require the permittee to maintain, to the maximum extent practicable, surface water flow conditions from the site that are similar to preconstruction flow conditions. The text in the July 1, 1998, **Federal Register** notice required the establishment of flow rates similar to preconstruction conditions.

Some commenters stated that the management of water flows is the responsibility of State or local agencies that regulate stormwater management. A number of commenters asked if the Corps or the permittee will be responsible for ensuring compliance with this condition, and what will be required in terms of design and documentation. A couple of commenters asked what type of hydraulic analysis will be required to verify compliance with this condition. Some commenters believe that the Corps should develop consistent standards, guidance, and training programs for the practicable measures that should be incorporated into project plans to comply with this general condition. One commenter requested

that the Corps modify the language of the condition to state that project modifications that decrease water supply yield or substantially increase the cost of the water supply yield are not considered practicable for the purposes of the general condition. A commenter recommended modifying the condition to state that practicability determinations will include consideration of costs, benefits, and technical feasibility.

The purpose of the proposed modification of this general condition is to improve protection of the aquatic environment and private property by preventing substantial changes to local surface water flow patterns, as a result of activities authorized by NWPs. If State or local agencies have adequate requirements to manage water flows that accomplish the goals of this general condition, district engineers will normally defer this issue to those agencies. To determine compliance with General Condition 21, district engineers will use discretion, based on general knowledge of local water flow patterns, and will not require a detailed hydrologic analysis or engineering study. The language of this general condition provides district engineers with flexibility to determine if a particular project complies with the general condition. This general condition is not an absolute requirement for maintaining identical preconstruction and postconstruction water flow patterns. In addition, it does not require that the project be designed or constructed to have no effect on water flows. The general condition requires that postconstruction water flow patterns are not more than minimally different from preconstruction water flow patterns.

One commenter stated that the general condition should be modified to allow additional runoff where it can be demonstrated that the increased runoff can be collected by the receiving waterbody and the permittee has received permission from the local flood control agency to add this runoff to the waterbody. For the maintenance of ditches and channelized streams, another commenter recommended modifying this general condition to specify that the flow patterns in the restored ditch will be used to define the preconstruction flow pattern. This commenter said that the deteriorated ditch should not be used to establish the preconstruction flow pattern. A commenter requested modification of this general condition so that it would apply only to off-site areas, not the project site.

If the primary purpose of the proposed work does not include impounding water, and the activity will increase flooding, then the proposed work does not comply with General Condition 21. The project proponent can apply for authorization through the individual permit process or request a regional general permit authorization, if applicable. The maintenance of ditches, including the maintenance of channelized streams used as drainage ditches, may be exempt under Section 404(f) and not require a Section 404 permit. General Condition 21 does not apply to activities exempt from Section 404 permit requirements. Modifying this general condition to allow increases in downstream flows on-site, but prohibiting increases in downstream flows off-site, is impractical. Unless the project site is extremely large, it is likely that any increases in downstream water flows on the project site will extend to off-site areas.

A number of commenters objected to the proposed modifications to this condition. Some commenters stated that the Corps failed to demonstrate the need for the proposed modification. A few commenters said that the Corps does not have the authority to require this condition under the Clean Water Act. Several commenters stated that the Corps does not possess the expertise to enforce this condition and should not regulate activities within floodplains. A commenter believes that the proposed changes to this general condition are contrary to the Corps goal of streamlining the regulatory process. A number of commenters stated that the proposed changes to this general condition would make most projects ineligible for NWP authorization.

Some activities in waters of the United States result in adverse effects on local surface water flow patterns, including increased flooding upstream and downstream of the project site. The purpose of the proposed modifications to General Condition 21 is to require permittees to design and construct their projects to maintain preconstruction downstream flow conditions, unless the primary purpose of the fill is to impound water. Large changes to surface water flow patterns can result in substantial adverse effects on the aquatic environment, by destroying aquatic habitat and impairing water quality. Higher rates of surface runoff caused by increases in the amount of impervious surface in a watershed can create substantial changes in stream morphology, affecting the quality of aquatic habitat and species inhabiting the stream. Water quality will be degraded by increasing the amount of

suspended sediment in the water column. For example, the construction of a commercial development, including buildings and parking lots, near a stream can increase storm flows to local streams, which can result in downcutting of the stream bed and increases in bank erosion, destroying aquatic habitat. The proposed modification of this general condition is intended to address these types of changes to surface water flows.

The Clean Water Act provides the Corps with the authority to require this condition, because it is related to the activities regulated under Section 404 of the Clean Water Act. Corps personnel will qualitatively evaluate proposed NWP activities to determine if they comply with this condition. This condition does not expand the Corps regulatory authority to include activities in floodplains; it merely addresses adverse effects to surface water flows that may result from activities in waters of the United States. The proposed modification of General Condition 21 is not contrary to the Corps goal of streamlining the regulatory process, because it requires only a qualitative analysis, not a detailed hydraulic or engineering study, to determine compliance. The phrase "to the maximum extent practicable" is used throughout the general condition, and provides district engineers with the flexibility to determine if a particular project complies with this condition. Since this general condition is not an absolute requirement to maintain preconstruction flows, we do not agree that the requirements of this general condition will result in a substantial number of projects becoming ineligible for NWP authorization. We are proposing to modify the last sentence of this general condition to clarify its requirements.

23. Waterfowl Breeding Areas: Although we did not propose any changes to this general condition in the July 1, 1998, **Federal Register** notice, except to consolidate it with the other general conditions, one commenter recommended changing the title of this condition to "Migratory Bird Breeding Areas" and adding the phrase "other migratory birds" after the phrase "migratory waterfowl."

We do not agree with this recommendation, because the inclusion of other migratory birds is outside the scope of the Corps regulatory authority. A goal of the Corps regulatory program is to maintain the quality of the aquatic environment. Including other migratory birds in this general condition would result in an inappropriate increase in the Corps scope of analysis because

many migratory bird species are not dependent on wetlands and other waters of the United States. We are not proposing any changes to this general condition.

Proposed General Condition 16, Subdivisions: In the July 1, 1998, **Federal Register** notice, we proposed a new general condition, General Condition 16, entitled "Subdivisions" to ensure that only single and complete projects are authorized by the proposed NWPs for residential, commercial, and institutional activities and master planned development activities (i.e., proposed NWPs A and B). A few comments were received in response to this proposed general condition. A commenter remarked that the subdivision date is arbitrary and could allow the NWPs affected by the proposed general condition to authorize activities with more than minimal adverse effects on the aquatic environment. Another commenter stated that subdivisions created after October 5, 1984, should be allowed to use proposed NWP A only once. One commenter recommended that single and complete projects should be determined by the subdivision date, not any phasing schedule for the development. Another commenter stated that the acreage limits for subdivisions should be consistent with regional EPA requirements.

Since the proposed NWP for master planned developments was withdrawn in the October 14, 1998, **Federal Register** notice, we are withdrawing the proposed general condition and placing a modified version of the text in proposed NWP 39, since NWP 39 is the only NWP for which this subdivision provision is currently applicable. NWP 29 has its own subdivision provision. The October 4, 1984, subdivision date is not arbitrary, but this date was chosen to be consistent with the subdivision provision for NWP 26. The reasons for adding a subdivision provision to NWP 26 were addressed in the November 22, 1991, **Federal Register** notice for the reissuance of NWP 26 (see 56 FR 59114). The October 5, 1984, date was selected because it was the date the 1-acre and 10-acre limits were added to NWP 26. A subdivision date was incorporated into NWP 26 to address the issue of single and complete projects, recognizing that most subdivisions are actually individual projects with interrelated components. To provide fairness to the regulated public, we will utilize the same subdivision date for NWP 39.

25. Designated Critical Resource Waters: In response to the comments received in response to the October 14,

1998, **Federal Register** notice concerning the use of NWP in designated critical resource waters, we are proposing a new NWP general condition that addresses this issue. The proposed general condition prohibits the use of NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity in the following critical resource waters, including wetlands adjacent to these waters. Activities authorized by NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38 can be conducted in these designated critical resources, including adjacent wetlands, provided the permittee notifies the District Engineer in accordance with General Condition 13 and the proposed work will result in minimal adverse effects on the aquatic environment. For the purposes of proposed General Condition 25, no additional notification is required for activities in designated critical resource waters and adjacent wetlands that are authorized by NWPs not listed in the text of this general condition, although notification may be required by other conditions.

For the purposes of the proposed general condition, designated critical resource waters include: NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally-listed threatened or endangered species, coral reefs, State natural heritage sites, or outstanding national resource waters officially designated by the state where those waters are located. Outstanding national resource waters and other waters having particular environmental or ecological significance must be officially designated through an official State process (e.g., adopted through regulatory or statutory processes, approved through State legislation, or designated by the Governor). In those circumstances where a waterbody has been designated by the State, the District Engineer will publish a notice advising the public that such waters will be added to the list of designated critical resource waters. The District Engineer may designate additional critical resource waters after notice and opportunity for public comment.

Paragraph (a) of General Condition 25 refers to General Condition 7 for activities in National Wild and Scenic Rivers. General Condition 25 also states that the NWPs cannot authorize discharges in designated critical habitat for Federally-listed threatened or endangered species unless the activity complies with General Condition 11 and the U.S. Fish and Wildlife Service or the National Marine Fisheries Service has

concurred in a determination of compliance with that general condition.

The comments received in response to the October 14, 1998, **Federal Register** notice related to this new general condition are discussed in detail in a previous section of this **Federal Register** notice.

26. Impaired Waters: As a result of the comments received in response to the October 14, 1998, **Federal Register** notice concerning the use of NWPs in impaired waters, we have proposed a new NWP general condition that restricts the use of NWPs in waterbodies that have been designated as impaired through the Clean Water Act Section 303(d) process. This proposed general condition also applies to wetlands adjacent to those impaired waterbodies. For the purposes of this general condition, "impaired waters" are defined as those waters of the United States that have been identified by States or Tribes through the Clean Water Act Section 303(d) process as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, or the loss of wetlands.

General Condition 26 is based on a presumption that discharges into an impaired waterbody, or wetlands adjacent to that impaired waterbody, will result in further impairment of the waterbody. NWPs cannot be used to authorize discharges of dredged or fill material that result in the loss of greater than 1 acre of impaired waters of the United States and wetlands adjacent to those impaired waters. For activities authorized by NWP 3, this prohibition does not apply, provided the prospective permittee notifies the District Engineer in accordance with General Condition 13 and demonstrates that the work will not result in further impairment of the waterbody. For discharges of dredged or fill material resulting in the loss of 1 acre or less of impaired waters of the United States, including adjacent wetlands, this presumption can be refuted by clear evidence that the proposed project will not further impair the waterbody. To refute this presumption and qualify for NWP authorization, the prospective permittee must submit a notification to the District Engineer in accordance with General Condition 13. The notification must contain a statement explaining how the proposed work will not result in further impairment of the waterbody. Any compensatory mitigation required to offset the losses of impaired waters of the United States, including adjacent

wetlands, and ensure that the work results in minimal adverse effects on the aquatic environment should be designed to contribute to the reduction of sources of pollution contributing to the impairment. For example, the establishment and maintenance of a vegetated buffer adjacent to a stream impaired due to nutrients will reduce nutrient inputs to that stream (the functions and values of vegetated buffers are discussed in a previous section of this **Federal Register** notice). That vegetated buffer would be considered as compensatory mitigation for a loss of wetlands adjacent to that impaired stream.

If the proposed discharge will result in the loss of greater than $\frac{1}{4}$ acre of impaired waters and adjacent wetlands, then the District Engineer will coordinate with the State 401 agency in accordance with the procedures in paragraph (e) of General Condition 13. The District Engineer will consider any comments provided by the 401 agency to determine if the proposed work, excluding mitigation, will result in further impairment of the waterbody.

The comments received in response to the October 14, 1998, **Federal Register** notice are discussed in detail in an earlier section of this **Federal Register** notice.

27. Fills Within the 100-year Floodplain: In response to the comments received in response to the October 14, 1998, **Federal Register** notice concerning the use of NWPs to authorize permanent, above-grade fills in waters of the United States within 100-year floodplains, we have proposed NWP General Condition 27. The comments received in response to the 100-year floodplain restriction proposed in the October 14, 1998, **Federal Register** notice are discussed in detail in a previous section of this **Federal Register** notice.

General Condition 27 is based on a presumption that certain NWP activities resulting in permanent, above-grade fills in waters of the United States within 100-year floodplains will cause more than minimal adverse effects on surface hydrology and the functions and values of 100-year floodplains. General Condition 27 prohibits the use of NWPs 21, 29, 39, 40, 42, 43, and 44 to authorize permanent, above-grade fills in waters of the United States within 100-year floodplains. For NWPs 12 and 14, this presumption can be refuted if the prospective permittee clearly demonstrates to the District Engineer that the proposed work and associated mitigation, not decrease the flood-holding capacity of the waterbody and its 100-year floodplain and the proposed

work will not result in more than minimal adverse effects on hydrology, flow regimes, or volumes of water associated with the 100-year floodplain. This demonstration must include proof that the Federal Emergency Management Agency (FEMA) or a state or local flood control authority through a licensed professional engineer, has approved the proposed project and provided a statement that the activity will not increase flooding or result in more than minimal adverse effects to floodplain hydrology or flow regimes. The other NWP's are not subject to the requirements of General Condition 27.

To implement General Condition 27, FEMA's Flood Insurance Rate Maps (FIRMs) will be used to identify 100-year floodplains, provided those maps reflect the current extent of 100-year floodplains. If there are no FIRMs published for the project area, or if the latest FIRM does not represent the current 100-year floodplain, information from the appropriate local floodplain authority will be used to determine the boundaries of the 100-year floodplain. Projects located in a 100-year floodplain at the point in the watershed that has a drainage area of less than 1 square mile are not subject to General Condition 27.

General Condition 27 prohibits the use of NWP's 21, 29, 39, 42, 43, and 44 to authorize permanent, above-grade fills in waters of the United States within 100-year floodplains. For activities authorized by these NWP's, the prospective permittee must notify the District Engineer in accordance with General Condition 13. The notification must include documentation that the proposed work will not be located in the 100-year floodplain or will not result in permanent, above-grade fills in waters of the United States within the 100-year floodplain. Activities authorized by NWP's 21, 29, 39, 42, 43, and 44 that occur within 100-year floodplains but do not result in permanent, above-grade fills in waters of the United States within the 100-year floodplain are not subject to General Condition 27. The term "permanent above-grade fill" is defined in the "Definitions" section of the NWP's. The District Engineer will make the final determination as to whether a project is actually located in the 100-year floodplain or whether the project results in permanent, above-grade fills in waters of the United States.

General Condition 27 does not prohibit the use of NWP's 12 and 14 to authorize discharges into waters of the United States resulting in permanent, above-grade wetland fills in waters of the United States within 100-year floodplains, provided the prospective permittee clearly demonstrates to the

District Engineer that the activity will not decrease flood-holding capacity and will not result in more than minimal modifications of hydrology, flow regime, or volume of waters associated with the 100-year floodplain. The prospective permittee must notify the District Engineer in accordance with General Condition 13 if the proposed work will result in permanent, above-grade wetland fills in waters of the United States within the 100-year floodplains. The notification must include documentation that clearly demonstrates that the project will not increase flooding or result in more than minimal changes to floodplain hydrology or flow regimes. This documentation must include proof that FEMA, or a state or local flood control authority through a licensed professional engineer, has approved the proposed project and provided a statement that the project does not increase flooding or cause more than minimal alterations to floodplain hydrology or flow regimes. Activities authorized by NWP's 12 and 14 that occur within 100-year floodplains but do not result in permanent, above-grade fills in waters of the United States within the 100-year floodplain are not subject to General Condition 27.

V. Comments and Responses on Nationwide Permit Definitions

General

In the July 1, 1998, **Federal Register** notice, we proposed to add a definition section to the NWP's to promote consistency in the implementation of the NWP's. We requested comments on the definitions presented in the **Federal Register** notice. Approximately 45 commenters addressed the proposed definitions.

One commenter stated that the Corps has replaced a simple measurement of 5 cubic feet per second for headwaters determinations for the purposes of NWP 26 with confusing terms and conditions for the new and modified NWP's. This commenter believes that requiring permit applicants to distinguish between perennial, intermittent, and ephemeral streams, contiguous and noncontiguous wetlands, non-tidal wetlands and tidal wetlands, and Section 10 and non-Section 10 waters is too confusing and will undermine the NWP program. One commenter asked if it is the intent of the Corps to expand the applicability of the new NWP's to non-contiguous but adjacent waters.

We believe that the terms used with the proposed new and modified NWP's will promote consistency in the NWP program, make the NWP program easier

to implement, and provide District personnel with the means to better assess impacts to the aquatic environment. These terms help Corps personnel to classify some types of aquatic resources and make determinations of minimal adverse effects. The three types of streams cited in the **Federal Register** notice are generally accepted stream types, based on the duration of water flow in the stream channel. We have modified the applicable waters for most of the proposed new NWP's to prohibit their use in non-tidal wetlands adjacent to tidal waters. Non-tidal and tidal wetlands have some different functions and values. For years, Corps personnel have had to distinguish between tidal and non-tidal wetlands and between Section 10 and non-Section 10 waters. Corps personnel have had to identify these types of waters to determine which type of authorization a particular project may require.

In the July 1, 1998, **Federal Register** notice, we proposed definitions for the three different types of streams. One commenter suggested that the Corps provide clarification or a definition to help determine when a stream has sufficient flow to be considered a "water of the United States." This commenter recommended that a stream should be considered a water of the United States only if it is shown as a perennial or intermittent stream on a United States Geological Survey (U.S.G.S.) quadrangle map. Two commenters stated that many perennial, intermittent, and ephemeral streams are perched above the water table and that the definitions of these stream types should be based on flow hydrographs measured over the course of a year, not the relationship between the stream bed and the water table. One commenter said that the different stream types cannot be differentiated in the field and asked whether perennial, intermittent, and ephemeral streams have identifiable beds and banks.

The Corps regulations state that non-tidal waters of the United States, including perennial, intermittent, and ephemeral streams, are waters of the United States up to the ordinary high water mark (see 33 CFR Part 328.4(c)). These three stream types typically have a bed and bank, but the presence of a bed and bank should not be used to identify streams; a gully created by erosion can also be considered to have a bed and bank. If a landscape feature with a bed and bank does not have an ordinary high water mark, it is not a water of the United States unless it contains jurisdictional wetlands. We do not agree that U.S.G.S. maps should be used to determine the limits of

intermittent and perennial streams. The upper reaches of streams are often inaccurately mapped on U.S.G.S. quadrangles. These maps typically do not accurately depict the location and extent of intermittent or ephemeral streams. They are useful for identifying perennial streams, but they should be used with caution. Distinguishing between these three stream types will often require field observations.

Stream beds can be located above or below the water table. Influent streams contribute water to the groundwater because their beds are usually located above the water table. Groundwater provides flowing water to effluent streams because the beds of effluent streams are located below the water table. The interaction between groundwater and stream flows also depends on local geologic features. Perennial streams are mostly effluent streams, flowing even during dry periods. Intermittent streams can be either effluent or influent, depending on the time of year and local precipitation patterns. During wetter months, when the water table is high or at normal elevations, intermittent streams are usually effluent. Intermittent streams are also effluent during short dry periods. During substantial dry periods, intermittent streams are usually influent. Ephemeral streams are always influent, because their beds are located above the water table year round.

Although the focus of the definitions of these stream types is the duration of flowing water over the course of a year, it is important to consider the source of the water flowing in the channel. We believe that it is appropriate to consider the source of water when classifying streams as ephemeral, intermittent, or perennial. However, as with any classification scheme for natural systems, there are exceptions. For example, in some mountain ranges there may be streams with flowing water almost year round due to snow melt. Some of these stream channels may receive no water from groundwater; the only source of water is melting snow. In these areas, stream channels with flowing water year round due to snow melt should be considered perennial. If flowing water is present in the channel for long periods of time due to snow melt, but water flow is not year round, those streams should be considered intermittent.

Artificial sources of water should not affect determinations of stream types. For example, pumping water into an ephemeral stream channel for a long period of time should not cause that stream to be classified as an intermittent stream. We recognize that the

definitions proposed in the July 1, 1998, **Federal Register** notice do not completely address all possible factors that can influence the classification of stream types based on duration of flow, but by basing the definitions of perennial, intermittent, and ephemeral streams on the contribution of groundwater to flow patterns, Corps district personnel can consistently apply these definitions in a simple and effective manner in most parts of the country, without the need to do extensive hydrology studies. District engineers will use their discretion to distinguish between ephemeral, intermittent, and perennial streams. These determinations should be based on their general knowledge of flow patterns in the area. District engineers can consider any additional information the permit applicant provides, based on actual measurements or modeling.

It is also important to note that, with the exception of proposed NWP 43, classifying streams as perennial, intermittent, or ephemeral is used only to determine whether or not a PCN is required. For example, proposed NWP 42 requires a PCN for discharges causing the loss of greater than 500 linear feet of perennial or intermittent stream bed. NWP 43 does not authorize the construction of stormwater management facilities in perennial streams. District engineers can regionally condition the NWPs to require notification for certain stream types and exercise discretionary authority when a particular activity may result in more than minimal adverse effects on the aquatic environment.

A commenter stated that the boundary between tidal waters and non-tidal wetlands is not well-defined or readily discernible in some parts of the country and that it will be difficult to determine the precise landward limits of tidal influence and which NWP is applicable. Another commenter said that the proposed definitions of tidal and non-tidal wetlands appear to exclude freshwater wetlands.

The boundary between tidal wetlands and non-tidal wetlands can be estimated by identifying the species of plants inhabiting the area. Tidal wetlands often have a different plant species composition than non-tidal wetlands, which may be used as an indicator of the extent of tidal waters. In most cases, judgement will be required to estimate the location of the high tide line. Wrack lines can be used to locate the high tide line. However, it is not our intent to require permit applicants to conduct land surveys or utilize tide gages to determine the limit of tidal waters. The definitions of tidal and non-tidal wetlands do not exclude freshwater

wetlands. Tidal wetlands can be inundated by saline (*i.e.*, marine or estuarine) water or freshwater. Non-tidal wetlands are mostly freshwater wetlands, but there are non-tidal saline marshes in some parts of the country.

Specific Definitions

The following paragraphs discuss the comments received in response to the July 1, 1998, **Federal Register** notice concerning the proposed definitions for the NWPs.

Aquatic Bench: Two commenters stated that the definition of this term should not be limited to stormwater management facilities. They said that these areas are found in natural waterbodies, such as ponds or lakes.

This term is defined for the purposes of NWP 43, Stormwater Management Facilities. It refers to a specific type of area within a stormwater management facility that is constructed for the purpose of providing a substrate in water depths shallow enough to support populations of emergent aquatic vegetation that may enhance the functions of the stormwater management facility. Although these types of areas can be found naturally in ponds and lakes, we would simply consider them to be wetlands. Aquatic benches constructed in stormwater management facilities may or may not be considered waters of the United States for the purposes of Section 404, depending on the circumstances in which they are found. If they are constructed wetlands intended to improve the quality of water retained in the stormwater management facility, they are not considered jurisdictional wetlands. We are proposing to retain this definition as originally proposed.

Best Management Practices: No comments were received concerning this term. We are proposing to retain this definition as originally proposed.

Channelized stream: We received several comments concerning the proposed definition of this term. One commenter said that not all stream channelization results in increases in flow rate or water capacity. Another commenter stated that a channelized stream has been manipulated to fix the channel location, not to increase conveyance, and that the definition should focus on the fixed nature of stream channels, not water flow rates. One commenter asked whether the proposed definition includes transportation activities that change the channel cross-section or other aspects of channel geometry of a stream. This commenter stated that construction of a road embankment may require filling some stream bed and moving the stream

channel to protect the embankment. According to this commenter, this work does not increase conveyance of water, but changes the channel geometry. This commenter wanted assurance that these types of activities are exempt from Section 404 permit requirements. Another commenter recommended that the Corps add a statement to the definition to clarify that stream channelization requires a Section 404 and/or Section 10 permit from the Corps.

Changing the morphology of the stream channel to increase the rate of flow through the stream channel constitutes stream channelization. Relocating the stream channel is not necessarily "stream channelization" unless the relocation is intended to increase the rate of water flow through the stream channel. Streams can be relocated, with natural morphology such as meanders, with little or no changes in water flow rates. Stabilizing stream banks near a road crossing (either a bridge or culvert) is not considered stream channelization, unless the stream bed is armored and/or excavated for a substantial distance from the road crossing to increase the rate of water flow. Stream bank stabilization does not necessarily result in channelization, even though it may fix the position of the stream bed in the landscape. If only one bank is covered with rip rap to reduce or prevent bank erosion, then we do not consider that activity as stream channelization. However, lining the stream bed and banks with concrete to increase the rate of water flow through the stream channel is a method of stream channelization that does not necessarily change the location of the stream bed. For the purposes of NWP 14 and other NWPs that can be used to authorize road crossings, stabilizing stream banks near culverts or bridge abutments to prevent erosion near the road crossings, is not considered stream channelization. The construction of a road embankment by filling some of the stream and/or relocating the stream bed is not exempt from Section 404 permit requirements, because these activities are not included in Section 404(f) of the Clean Water Act and they involve discharges of dredged or fill material into waters of the United States. We do not believe it is necessary to include a sentence in the definition stating that a Section 404 or Section 10 permit is required for stream channelization activities.

One commenter requested clarification as to whether stream channelization, when done in conjunction with the construction of a road crossing, is part of the road

crossing or requires separate authorization. Another commenter requested that the definition clarify whether the use of culverts to construct a road crossing results in a channelized stream. This commenter stated that some Corps districts consider culverts as channel modifications, while others do not.

Channel modifications in the immediate vicinity of a stream crossing that are conducted to allow the water to flow more efficiently through the crossing or prevent erosion of the soil near the crossing are not considered stream channelization and are part of the single and complete road crossing project. Channel modifications outside of the immediate vicinity of the crossing may constitute stream channelization, and may require a separate authorization at the discretion of the District Engineer. When stream channelization is performed with the construction of a road crossing, both activities should be considered as a single and complete project, which may be authorized by NWPs or another form of authorization, such as a regional general permit or an individual permit. The installation of a culvert in a stream bed does not channelize the stream, provided the length and width of the culvert is limited to the minimum necessary to construct the road crossing and the amount of rip rap placed to protect the culvert is the minimum necessary.

One commenter objected to the last sentence of the proposed definition, stating that this sentence is contrary to the Section 404(f) exemption for drainage ditches. We concur with this comment and have removed the last sentence from this definition.

In the proposed new and modified NWPs, we used different terms relating to stream channelization. For consistency, we will use the term "stream channelization" throughout the proposed new and modified NWPs. Stream channelization results from modifications to increase the rate of water flow through the stream channel. Placing rip rap along a stream bank to stabilize the bank and reduce erosion does not necessarily constitute stream channelization, but lining the stream bed and bank with concrete or rip rap to increase the rate of water flow through the stream channel is stream channelization.

We are proposing to replace the term "channelized stream" with "stream channelization" and modify the definition as discussed above.

Contiguous wetland: We received many comments concerning the proposed definition of this term. Some

commenters stated that the definition is unclear. Another commenter stated that the geographic scope of new NWPs is confusing and that the definition appears to provide inconsistent guidance describing when a non-tidal wetland is contiguous to tidal waters. Two commenters requested that the Corps utilize the term "adjacent" instead of "contiguous" to limit the use of the new NWPs. One commenter expressed concern that the term "surface waters" would exclude wetlands that are inundated or saturated primarily by groundwater. This commenter recommended the inclusion of groundwater to establish the contiguous connection.

One commenter requested that the Corps clarify the phrase "normally contiguous to the nearest open water," as contained in the proposed definition. Another commenter questioned why a wetland can act as a surface water connection for a contiguous wetland but a channel cannot, even though a stream channel contains a surface water. One commenter recommended that this definition should state that culverts and tide gates constitute a surface water connection and that the definition is confusing and should be field tested in different areas of the country. This commenter also stated that it is difficult enough to distinguish between tidal and non-tidal areas of a channel without having to worry about small tributaries or sloughs draining into the larger waterbody. The commenter requested that the Corps clarify the definition to state whether the required surface water connection has to be present at low, normal, or high flows or associated with a certain size flood event. Another commenter asked if tide gates break up the contiguous connection. One commenter stated that the proposed definition appears to be a significant change for the purpose of circumventing the decision in the United States Court of Appeals for the Fourth Circuit decision in the *United States v. Wilson*, 133 F. 3d 251 (4th Cir. 1997). This commenter believes that the proposed definition will result in the regulation of all isolated waters and wetlands, regardless of the type of connection, and that the definition must be clarified to recognize the different connections between waters of the United States to determine if a particular wetland is isolated. The commenter also believes that the proposed definition eliminates the distinction between natural streams and man-made connections to waters of the United States.

To increase protection of the aquatic environment, we are proposing to prohibit the use of most of the new

NWPs in non-tidal wetlands adjacent to tidal waters instead of prohibiting the use of those NWPs in non-tidal wetlands contiguous to tidal waters. Therefore, the definition of the term "contiguous wetland" has been removed from the "Definitions" section of the NWPs.

Drainage ditch: We received a variety of comments concerning the proposed definition of this term. One commenter supported the proposed definition. Another commenter agreed that drainage ditches constructed in uplands are not waters of the United States. A commenter stated that a drainage ditch is not a stream and that all activities associated with drainage ditches should be exempt from all permits. A number of commenters stated that channelized streams are not drainage ditches and that the Corps should retain that part of the proposed definition. A commenter requested that the Corps identify methods that will be used to distinguish between a drainage ditch constructed in wetlands and a channelized stream. Two commenters opposed the exclusion of channelized streams in the definition and stated that the proposed definition is contrary to the 404(f)(1) exemption, which considers streams that are channelized to improve drainage to be drainage ditches. Another commenter stated that some drainage ditches are constructed in intermittent and ephemeral streams.

We concur with the last two comments in the previous paragraph, and have removed the last two sentences from the proposed definition. Channelized streams that are maintained as drainage ditches are waters of the United States, but maintenance of these drainage ditches is exempt from Section 404 permit requirements as long as the maintenance activity does not exceed the original drainage ditch design and configuration.

One commenter stated that the portion of the proposed definition that includes the phrase "otherwise extends the ordinary high water line of existing waters" is not clear and that this part of the proposed definition could expand the Corps jurisdiction into waters that have always been thought of as man-made extensions which were not considered by some Corps districts as jurisdictional.

This part of the proposed definition is consistent with 33 CFR 328.5, which states that man-made changes may affect the limits of waters of the United States, but "permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer." Therefore, activities that extend the

ordinary high water mark may, at the discretion of the District Engineer, expand waters of the United States.

We are proposing to modify the definition of the term "drainage ditch" as discussed above.

Ephemeral stream: Two commenters stated that the proposed definition is too broad and subject to various interpretations. One of these commenters recommended that the Corps develop a more specific definition of the limits of jurisdiction, such as drainage area. One commenter suggested that the definition should be changed to exclude drainage ditches.

Using drainage area to differentiate between stream types is not practical because there are many factors, in addition to drainage area, that influence the duration of water flow in streams channels. It is not appropriate to change the definition to specifically exclude drainage ditches, because some drainage ditches may be channelized streams, which are waters of the United States.

A number of commenters disagreed that ephemeral streams are waters of the United States. One of these commenters requested that the Corps specify the circumstances under which ephemeral streams are, or are not, waters of the United States. One commenter requested that the Corps issue guidance to its districts to identify ephemeral streams and provide prospective permittees with maps of streams that require PCNs under the NWP program.

Ephemeral streams are waters of the United States as long as an ordinary high water mark is present and the waterbody meets the criteria in 33 CFR Part 328. If there is no ordinary high water mark, and there are no adjacent wetlands, the area is not a water of the United States. The limit of non-tidal waters of the United States is discussed at 33 CFR Part 328.4(c). It would be too resource intensive to provide maps of streams that require a PCN for the purposes of the NWPs. Instead, districts will determine on a case-by-case basis whether or not a particular stream is ephemeral, intermittent, or perennial. We are proposing to retain the definition.

Farm: For the purposes of the proposed modification of NWP 40, we proposed a definition of the term "farm" to help determine what constitutes a single and complete project. Two commenters stated that the proposed definition is too narrow and will add unnecessary complexity for farmers, because using Internal Revenue Service (IRS) tax criteria to identify farms is too complicated.

Because of the changes to the modification of NWP 40, we will use the

term "farm tract" instead of "farm" to determine what constitutes a single and complete project for the purposes of NWP 40. Farm tract determinations are not based on IRS criteria. The Farm Service Agency of the U.S. Department of Agriculture identifies farm tracts. The rationale for basing the single and complete project on farm tracts for NWP 40 is discussed in more detail in the preamble for NWP 40. In the "Definitions" section of the NWPs, we are proposing to use the Farm Service Agency's definition of the term "farm tract," as found at 7 CFR Part 718.2, to replace the proposed definition for "farm."

Intermittent stream: We received similar comments to those received for the proposed definition of "ephemeral stream," which were discussed above. A number of commenters stated that it is difficult for permit applicants to distinguish between intermittent and ephemeral streams and requested further clarification. One of these commenters recommended that the Corps utilize the ordinary high water mark to distinguish between intermittent and ephemeral streams: if an ordinary high water mark (OHWM) is present, the stream is intermittent; if an OHWM is absent, the stream is ephemeral. Two commenters recommended that the definition distinguish between intermittent streams and man-made ditches. Another commenter stated that intermittent streams should be excluded from the NWPs because under the proposed definition, a swale in a pasture would qualify as a stream.

The proposed definition is adequate to differentiate between intermittent and ephemeral streams. Determinations as to whether a particular stream is perennial, intermittent, or ephemeral will be made by district engineers on a case-by-case basis. These determinations should be based on their general knowledge of flow patterns in the area. District engineers will consider any additional information the permit applicant provides based on actual measurements or modeling. Using the OHWM to distinguish between ephemeral and intermittent streams would be contrary to 33 CFR Part 328. The limit of jurisdiction for intermittent and ephemeral streams is the OHWM. If no OHWM is present, then that channel is not a water of the United States. We do not agree that it is necessary to distinguish between intermittent streams and man-made ditches. An intermittent stream may have been channelized to improve local drainage. Man-made ditches can be constructed in wetlands and other waters of the United

States, such as perennial and intermittent streams, as well as uplands. Man-made ditches constructed in waters of the United States are still considered waters of the United States. If a swale possess an OHWM, it would be considered a water of the United States, if it meets the criteria in 33 CFR Part 328. If a swale lacks an OHWM, but possess wetland hydrology, hydric soils, and a hydrophytic plant community, it may be considered a jurisdictional wetland, unless the swale was constructed in uplands and has not been abandoned. A swale that lacks an OHWM or does not exhibit wetland characteristics is not a water of the United States.

Another commenter requested further clarification to address situations where there is extensive groundwater pumping for crop irrigation. Except in extremely wet years, this activity causes some streams to dry up entirely; without groundwater pumping for irrigation, many of these streams would have flowing water during most of the year or year round.

Adjacent land use changes can affect water flow patterns of streams. Removal of large amounts of groundwater can decrease the duration of water flow through the stream channel over the course of a year. District engineers should base their stream classification determinations on normal circumstances and whether or not the region is experiencing normal rainfall patterns. For example, if the stream has flowing water for only part of a typical year due to normal pumping of groundwater for irrigation or domestic uses, then that stream should be classified as "intermittent," even though it may have been a perennial stream prior to the introduction of the activities that changed the flow pattern. We are proposing to retain this definition.

Loss of waters of the United States: A number of commenters objected to the proposed definition because it includes excavation. These commenters cited the recent decisions by the United States District Court for the District of Columbia in *American Mining Congress v. United States Army Corps of Engineers* and the United States Court of Appeals for the District of Columbia Circuit in *National Mining Association et al. v. U.S. Army Corps of Engineers*. In these decisions, the District Court overturned the Corps and EPA's revisions to the definition of "discharge of dredged material," which were promulgated on August 25, 1993 (see 58 FR 45008) and the Court of Appeals affirmed the District Court's decision. These commenters said that the definition should not include

excavation. Three commenters asserted that the definition should not include, in addition to excavation activities, flooding and draining activities. A number of commenters stated that the definition does not contain any discussion concerning what constitutes an adverse effect.

These recent court decisions do not affect the definition of the term "loss of waters of the United States." Because of these decisions, the Corps does not regulate excavation of waters of the United States under Section 404 of the Clean Water Act if the excavation activity results only in incidental fallback of excavated material. Excavation activities that result in more than incidental fallback of dredged material into waters of the United States require a Section 404 permit and may be authorized by NWP. District engineers will determine whether or not a particular excavation activity requires a Section 404 permit based on the degree of the discharge associated with the excavation activity. In summary, if the discharge resulting from the excavation activity is only incidental fallback, then no Section 404 permit is required. We believe that retaining excavation activities in this definition will reduce confusion for the regulated public because some excavation activities in waters of the United States are still regulated under Section 404 and to exclude excavation activities from this definition would be misleading.

Since the Corps and EPA's revisions to the definition of "discharge of dredged material" promulgated on August 25, 1993, were overturned, the criteria concerning what constitutes an adverse effect for the purposes of Section 404 of the Clean Water Act has become narrower in scope. Regulatory Guidance Letters 90-5 and 88-06 were issued prior to the August 25, 1993, rule and provide guidance relevant to this issue. An activity that converts a wetland to another use can be considered a loss of waters of the United States and regulated under Section 404 if that activity causes the loss of, or substantially modifies, waters of the United States by eliminating or greatly reducing the principal valuable functions of those waters. Losses of waters of the United States can occur either by direct impacts (e.g., covering by fill) or by closely-related indirect impacts (e.g., the changes in vegetation that occur after a swamp is flooded by constructing a dam, killing all of the trees in the flooded area). Any indirect adverse effects factored into the acreage measurement of "loss of waters of the United States" must eliminate or substantially impair the principal

valuable functions that the waterbody provided prior to conducting the activity. Indirect adverse effects such as backwater flooding and dewatering are more strongly related to the discharge and should be included in the loss of waters of the United States if they result in substantial, long-term adverse effects on the aquatic environment. Excavation activities that result only in incidental fallback and waters affected by that excavation activity should not be calculated into the acreage loss unless the permittee cannot conduct the excavation activity without the associated discharge that is regulated under Section 404.

For the purposes of the proposed NWP notification thresholds, we have modified the sentence addressing the loss of stream bed by adding the phrase "perennial and intermittent" before the word stream, because the proposed NWPs require notification only for those activities that result in the discharge of dredged or fill material into waters of the United States due to filling or excavating perennial or intermittent stream beds.

One commenter requested that the definition of "loss of waters of the United States" include the effects of habitat fragmentation, which could adversely affects some functions and values of waters of the United States.

We disagree, because this effect is beyond the Corps scope of analysis for Section 404 activities. Many activities that result in habitat fragmentation do not result in a discharge of dredged or fill material into waters of the United States, and are not regulated under Section 404 of the Clean Water Act.

We have added sentences to this definition to differentiate between permanent and temporary losses of waters of the United States. Temporary losses of waters of the United States are not included in the measurement of loss of waters of the United States. We are proposing to modify the definition of the term "loss of waters of the United States" as discussed above.

Noncontiguous wetland: In response to the proposed definition, we received comments that were similar to the comments received for the proposed definition of "contiguous wetland," which were discussed above. Several commenters stated that the proposed definition is unclear. A commenter stated that noncontiguous wetlands are isolated wetlands. Another commenter recommended that the break between contiguous and non-contiguous waters should be based on topography or hydrologic influence, not the type of channel between the wetland and the waterbody. Another commenter stated

that the part of the definition referring to "a linear aquatic system with a defined channel to the otherwise contiguous wetland" needs to be clarified and that the term "linear aquatic system" needs to be defined. This commenter also recommended that the Corps include examples and explanatory statements to describe how contiguous and noncontiguous wetlands differ from each other. One commenter recommended that the definition should state that noncontiguous wetlands do not share a common groundwater connection with other waters of the United States.

To increase protection of the aquatic environment, we are proposing to prohibit the use of most of the new NWP in non-tidal wetlands adjacent to tidal waters instead of prohibiting the use of these NWPs in non-tidal wetlands contiguous to tidal waters. Therefore, the definition of the term "noncontiguous wetland" has been removed from the "Definitions" section of the NWPs.

Non-tidal wetland: No comments were received on the proposed definition. We are proposing to retain this definition.

Perennial stream: One commenter requested that the Corps, in the definition of this term, distinguish between perennial streams and drainage ditches. Another commenter stated that the definition should be based on the duration of flow, not on the position of stream bed relative to the water table.

The definition of this term should not distinguish between perennial streams and drainage ditches because some streams have been channelized to improve local drainage. These streams, which are still waters of the United States, are considered drainage ditches for the purposes of Section 404(f). The maintenance of these channelized streams as drainage ditches is exempt from Section 404 permit requirements. As previously discussed in this section, we believe that it is appropriate to consider the source of water when classifying streams as ephemeral, intermittent, or perennial. The definitions for these stream types focus on how long flows in the channel over the course of a year, but the source of the flowing water is also important. It is important to distinguish between natural and artificial sources of water when classifying stream types for the purposes of the NWPs. We have modified the second sentence of the definition, to make it clearer that the water in the stream channel is due to the relative position of the water table (*i.e.*, groundwater flows into the stream channel, because the water table is

above the stream bed). We are proposing to modify the definition of this term as discussed above.

Riffle and pool complexes: One commenter questioned whether or not riffle and pool complexes are limited to perennial streams. Another commenter stated that the definition should include a reference to 40 CFR Part 230.45. One commenter remarked that the word "of" should be removed from before the word "movement." Two commenters stated that riffle and pool complexes are not limited to perennial streams but may occur in intermittent and ephemeral streams. One commenter agreed that the definition should be limited to perennial streams and suggested that the definition should recognize that riffle and pool complexes are often important spawning habitats. A commenter requested that the definition provide a minimum threshold for the ratio of riffles, pools, and flats that would be considered as riffle and pool complexes because some Corps districts consider all ratios except 100% flat as riffle and pool complexes.

We agree that the definition should be the same as the definition in 40 CFR Part 230.45 and have replaced the proposed definition with the definition found at 40 CFR Part 230.45. We cannot provide a minimum threshold for the ratio of riffles, pools, and flats to be considered as a riffle and pool complex. District engineers will determine which segments of streams contain riffle and pool complexes. We are proposing to modify the definition of this term as discussed above.

Stormwater management: One commenter recommended that the definition should include replenishment of groundwater as one of the purposes of stormwater management. Another commenter stated that the definition should specifically refer to changes in water turbidity. Two commenters said that the definition should not be limited to the mitigation of negative impacts resulting from urbanization, but should recognize that stormwater management is used to mitigate land modification, such as the construction of roads in rural areas. One commenter suggested that the definition state that stormwater management reduces adverse impacts on aquatic resources.

The primary purposes of stormwater management are to reduce degradation of water quality and aquatic habitat quality and reduce flooding. Although certain stormwater management techniques are used to increase infiltration of stormwater into the soil, it is not our intent to list every function provided by stormwater management in

the definition. Stormwater infiltration techniques are often used to offset losses of local infiltration due to increases in the amount of impervious surface in the project area, so that increases in stormwater runoff do not increase downstream erosion, water quality degradation, and flooding.

We disagree that the definition should specifically reference changes in water turbidity. Turbidity is simply one measure of water quality, and is already adequately addressed in the definition. We concur that the definition should not be limited to urbanization, and will replace this word with the phrase "changes in land use." We will add the phrase "on the aquatic environment" to the end of the definition to provide further clarification of the purpose of stormwater management. We are proposing to modify the definition of this term as discussed above.

Stormwater management facilities: One commenter stated that the proposed definition is far more limited and does not include the full description provided in text of the NWP for stormwater management facilities. This commenter recommended that the definition include the following stormwater management activities: water control structures, outfall structures, emergency spillways, constructed wetland basins, wetland bottom channels, filter basins, infiltration basins, channels, and ditches. Another commenter recommended that the definition should also include debris basins and dams, storm drains, levees, and channels. A third commenter suggested that the definition include retarding basins.

It is not our intent to include a comprehensive list of stormwater management techniques, practices, or structures in the definition. The inclusion of stormwater retention and detention ponds and best management practices in the definition is intended only to provide examples. We are proposing to retain this definition.

Tidal wetland: One commenter stated that the definition at 33 CFR Part 328.3(d) does not include the qualification that the high tide line must be inundated by tidal waters at least 2 times per month and recommended that this part of the proposed definition should be eliminated from the definition because of the great differences in daily tide heights. Two commenters said that tidal waters occur only below the mean high water line and that the Corps is attempting to extend its jurisdictional authority by defining tidal waters to include spring high tides. One of these commenters stated that the proposed definition is

contrary to Section 10 of the Rivers and Harbors Act.

The definition proposed in the July 1, 1998, **Federal Register** notice is not contrary to current Corps regulations and definitions. All waters subject to the ebb and flow of the tide are waters of the United States, including spring high tides. Spring high tides occur two times per lunar month when the sun, moon, and earth are aligned with each other and exert the greatest gravitational influence on tidal waters, resulting in the highest and lowest tides that occur during the tidal cycle. It is important to recognize that spring high tides occur only two times per lunar month to differentiate between high tides regularly caused by gravitational interactions of the sun, moon, and earth and storm surges of tidal waters caused by atmospheric phenomena. To provide further clarification, we will insert the word "lunar" before the word "month" in the last sentence of this definition.

Tidal waters extend landward of the mean high tide line. The "mean high tide line" is an average of tidal heights over the course of a complete monthly tidal cycle. Therefore, half of the monthly tides will be landward of the mean high tide line and half of the monthly tides will be channelward of the mean high tide line. Tidal waters landward of the mean high tide line are waters of the United States, but they are not navigable waters of the United States. Therefore, tidal waters landward of the mean high tide line are subject to Section 404 of the Clean Water Act, but not Section 10 of the Rivers and Harbors Act. See 33 CFR 329.12 for a discussion of the geographic and jurisdictional limit of oceanic and tidal waters relative to Section 10 of the Rivers and Harbors Act. The definition of this term has been modified as discussed above.

Vegetated shallows: No comments were received concerning the proposed definition of this term. We are proposing to retain this definition.

Waterbody: One commenter is unsure why a definition is required for this term because, according to the commenter, the definition does not appear anywhere else in the Corps regulatory program. This commenter also stated that wetlands are waterbodies, but often do not have discernible high water marks. This commenter recommended the elimination of this term from the "Definitions" section of the NWP. Another commenter stated that the proposed definition does not have a frequency threshold for the establishment of an ordinary high water mark (OHWM) and recommended that the definition include such a threshold.

One commenter stated that the Corps should clarify how the definition relates to open waters and that the definition should clarify that waterbodies may or may not be regulated under Section 404 of the Clean Water Act. Another commenter recommended that the definition exclude farm ponds.

The word "waterbody" was used throughout the July 1, 1998, **Federal Register** notice for the proposed new and modified NWP. It is also used in the NWP regulations issued on November 22, 1991 (56 FR 59110–59147), particularly for the definition of the term "single and complete project" at 33 CFR Part 330.2(i). This word is also used in NWP 29 and General Condition 4. The intent of the definition is to ensure consistent application of the term for the NWP.

Waterbodies consist of open and flowing waters, as well as contiguous wetlands. We will modify this definition to include contiguous wetlands, which may not have an OHWM. For example, a lake may be surrounded by a wetland fringe inhabited by emergent wetland vegetation. The OHWM may or may not be the same as the wetland boundary, which may extend beyond the OHWM. Wetlands contiguous to open or flowing waters should be considered as part of the same waterbody. A wetland can be considered a waterbody if it is inundated with flowing or standing water.

To provide further clarification to distinguish between wetlands and open and flowing waters, we have added a definition for the term "open water," which is often used in these NWPs. We are proposing to modify this definition as discussed above.

Additional Definitions: In response to the July 1, 1998, **Federal Register** notice, we received several comments requesting definitions of additional terms used in the NWP program. Some of these terms will be added to the definition section of the NWPs, as discussed below.

For the purposes of NWP 27 and the NWP conditions addressing compensatory mitigation, we are proposing to add definitions of the terms "compensatory mitigation," "restoration," "creation," "enhancement," and "preservation." The definitions for these terms that were developed for the "Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks," published in the November 28, 1995, issue of the **Federal Register** (60 FR 58605–58614) will be used in the "Definitions" section of the NWPs.

Two commenters requested that the Corps include a definition of the word "aquatic" in the NWPs. They believe that the Corps should include a definition of this word that reflects the limits of its regulatory authority or replace this word with the phrase "waters of the United States" or "navigable waters."

We believe that it is not necessary to include a definition of this word for the NWP program. If an aquatic area is not a water of the United States, then it is not subject to either Section 404 or Section 10.

In response to comments received in response to our proposed definition of the term "waterbody," we are proposing to add a definition of the term "open water" because this term is used in NWPs 27 and 39 and General Conditions 9 and 19.

One commenter requested a definition of the phrase "projects that may have more than minimal adverse effects on the aquatic environment." This commenter believes that a definition is necessary to provide clarification to district engineers and regulated public.

We disagree with this comment. For every request for NWP authorization, district engineers must determine whether or not that particular project will result in more than minimal adverse effects. This determination is made on a case-by-case basis, and depends on many factors which cannot be captured in a simple definition. Therefore, we will not include a definition of this phrase.

Another commenter suggested including a definition of "region," because division and district engineers should utilize this term consistently.

We do not agree that it is necessary to define the term "region" for the NWPs, because no specific definition is required. A region is simply a geographic area. For the purposes of regional conditioning or revocation of the NWPs, a region may be a waterbody, watershed, sub-watershed, county, state, or Corps district. Corps districts review cumulative adverse effects on the aquatic environment on a watershed basis. Division or district engineers can determine which scale of region is appropriate. If cumulative adverse effects are more than minimal in a single sub-watershed, then it would be appropriate to suspend or revoke NWP only in that sub-watershed. If the cumulative adverse effects on the aquatic environment due to an NWP are more than minimal in an entire state, then the appropriate region would be the state. For these reasons, we will not add a definition of the term "region" to the NWPs.

One commenter requested that we add a definition of the term "restored channel" to the NWP.

We disagree that such a definition is necessary because "restoration," as presently used for wetland compensatory mitigation projects, can apply to streams as well. The restoration of a stream channel reestablishes the stream channel where it previously existed.

Two commenters recommended that we include a definition of the term "single and complete project" with the NWPs. One commenter stated that the definition in 33 CFR Part 330.2(i) is confusing and difficult to implement, especially with respect to the cumulative adverse effects that occur when a linear project crosses single waterbody several times. Another commenter requested a definition of this term that would include all current and future phases of development of land under a single common ownership which has been subdivided or transferred to facilitate development.

We believe that this term does not need to be redefined. For convenience, we are proposing to add a definition of the term "single and complete project" to the "Definitions" section of the NWPs, which paraphrases the definition at 33 CFR Part 330.2(i). For linear projects, district engineers will continue to assess cumulative adverse effects on the aquatic environment to determine if the project can be authorized by NWPs. If the adverse effects on the aquatic environment are more than minimal, individually or cumulatively, the District Engineer will exercise discretionary authority and require an individual permit for the project. For subdivisions, the subdivision provision of proposed NWP 39 as well as 33 CFR Part 330.2(i) will be used to determine acreage limits for particular subdivisions. In addition, district engineers will consider whether or not each phase of a multi-phase project can be considered as a separate single and complete project. If each phase has independent utility, then each phase can be considered a separate single and complete project.

One commenter requested that the definition of the term "small perennial stream," which was used in NWPs 40 and 44, should be included in the "Definitions" section of the NWPs.

We have deleted the reference to small perennial streams from NWPs 40 and 44. Therefore, no definition of this term is needed.

One commenter recommended that the Corps include a definition of the term "stream" in the NWPs. Another commenter requested the inclusion of a

definition of "stream bed" because the definition on page 36042 of the July 1, 1998, **Federal Register** notice is a definition of "stream," not "stream bed." The term "stream bed" is also used throughout the NWPs.

We agree that the definition on page 36042 of the July 1, 1998, **Federal Register** notice is actually a definition of the term "stream" and believe that it is unnecessary to include a definition of "stream" in the NWPs since the term "stream bed" is used throughout the NWPs, particularly in the context of the 500 linear foot notification requirement. Therefore, we are proposing to add a definition of the term "stream bed" to the "Definitions" section of the NWPs. The limits of the stream bed are identified by the location of the ordinary high water marks on either side of the stream bed. Any wetlands contiguous to the stream bed, but outside of the ordinary high water mark, are not part of the stream bed.

Due to changes in the NWPs made in response to the comments received in reply to the July 1, 1998, **Federal Register** notice, we are proposing to add definitions for several more terms used in the NWPs. These terms include: "project area" and "independent utility." We are also proposing to add a definition of the term "permanent above-grade fill" to the "Definitions" section since this term is used in proposed General Condition 27.

One commenter requested that the Corps include definitions of "important spawning areas" and "water quality management plan" in this section.

We disagree that definitions of these terms are necessary. District engineers will determine which areas are important spawning areas. The content of the water quality management plan, if required by General Condition 9, is also at the discretion of the District Engineer.

VI. Comments on Other Issues in July 1, 1998, Federal Register Notice

Other Suggested NWPs

In response to the December 13, 1996, **Federal Register** notice, several commenters recommended additional replacement NWPs. We do not believe that development of more new NWPs is warranted at this time. Some of the recommended NWPs are for activities in areas that are not considered waters of the United States and others are for activities that are exempt from permit requirements of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

Maintenance of Landfill Surfaces: Most commenters agreed with the

statement that routine maintenance of landfill surfaces does not require a Section 404 permit. Several commenters requested that we reiterate such language in the final **Federal Register** notice for the NWPs, and further requested that the Corps also include a discussion of the 9th Circuit decision in the *Resource Investment Incorporated (RII) v. Corps of Engineers* case. One commenter disagreed with the statement that most landfills are constructed in uplands, stating that there are a number of landfills constructed on wetlands.

Ponded areas that develop on landfill surfaces are not waters of the United States. Although a landfill may be constructed in wetlands, the landfill replaces the waterbody with dry land. Therefore, that area is no longer a water of the United States. The landfill cap may develop ponded areas that may be inhabited by wetland vegetation, but these areas must be repaired to prevent additional air and water pollution. These maintenance activities do not require a Section 404 permit because these ponded areas are not waters of the United States. The preamble to 33 CFR Part 328 in the November 13, 1986, **Federal Register** (51 FR 41217, Section 328.3) states that "water filled depressions created in dry land incidental to construction activity * * *" are not considered waters of the United States " * * * until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States." The landfill is not abandoned because of the routine maintenance required by law to keep the landfill surface at the designed grade. Since routine maintenance of landfill surfaces does not require a Section 404 permit, we will not be developing an NWP for this activity. With regard to requests to include a discussion of the RII case, this matter is still in litigation and such a discussion is inappropriate at this time.

Maintenance and Filling of Ditches Adjacent to Roads and Railways

Although a few commenters requested a new NWP authorizing the maintenance and filling of ditches adjacent to roads and railways, such a NWP is not necessary. In response to the July 1, 1998, **Federal Register** notice, most commenters stated that this activity is exempt from regulation or is outside of the Corps jurisdiction. One commenter stated that wet weather conveyances should not be regulated because it would greatly increase the Corps workload. Another commenter noted that, to meet safety design standards, transportation agencies often

widen and flatten side slopes of the embankment by adding fill to one side of the ditch.

The maintenance of roadside or railroad ditches constructed in uplands does not require a Section 404 permit since these ditches are not waters of the United States, even though they may support wetland vegetation. The preamble to 33 CFR Part 328.3, as published in the November 13, 1986, issue of the **Federal Register** (51 FR 41217), states that "non-tidal drainage or irrigation ditches excavated on dry land" are generally not considered to be waters of the United States. Filling these ditches to widen the road or railroad bed does not require a Section 404 permit.

If these roadside or railroad ditches are constructed in waters of the United States, the maintenance of these ditches is exempt from Section 404 permit requirements (see CFR Part 323.4(a)(3)), provided the ditch is restored to its original dimensions and configuration. However, the construction of these ditches in waters of the United States requires a Section 404 permit and may be authorized by an NWP, an individual permit, or a regional general permit. A Corps permit is required to widen the road or railroad bed if the ditches adjacent to the existing road or railroad bed were constructed in waters of the United States. The construction or maintenance of roadside and railroad ditches in navigable waters of the United States requires a Section 10 permit. Furthermore, if the maintenance of a roadside ditch includes reconfiguring that ditch, the activity does not qualify for the exemption at 33 CFR Part 323.4(a)(3).

Maintenance of Water Treatment Facilities

A commenter requested that the Corps consider a new NWP for the maintenance of water treatment facilities, such as the removal of material from constructed settling lagoons and associated constructed wetlands, maintenance and de-watering of stock ponds for livestock, and maintenance of recharge ponds for water supplies. One commenter said that the Corps description on page 36063 of the July 1, 1998, **Federal Register** notice characterizing exempt activities related to stock ponds contained errors (e.g., water quality benefits "test").

Water treatment facilities constructed in uplands do not require a Section 404 permit for maintenance activities. We do not generally consider "[a]rtificial lakes or ponds created by excavating and/or diking dry land to collect and

retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing" to be waters of the United States. (Refer to the preamble for 33 CFR Part 328.3, as published in the November 13, 1986, issue of the **Federal Register** (51 FR 41217).)

The proposed modifications to NWP 3 and NWP 7, which authorize the removal of accumulated sediment in the vicinity of existing structures, should address some of these issues. Removal of sediments from detention and settling basins constructed with a Section 404 permit may be authorized by NWP 7 as long as the maintenance activity is associated with an intake or outfall structure. Maintenance of recharge ponds constructed in uplands does not require a Section 404 permit, but the maintenance of these ponds constructed in waters of the United States may be authorized by existing NWPs, such as NWPs 3, 13, or 18. Therefore, these activities have not been specifically included in the proposed NWPs.

With regard to comments relating to stock pond exemptions, we provide the following clarification: The construction of stock ponds is an exempt activity; thus, activities necessary for the construction and maintenance of stock ponds are exempt from Section 404 permit requirements. Maintenance activities, such as the deepening of a stock pond, do not require a Section 404 permit provided the activity does not increase in the lateral extent of the pond. Additionally, the construction or maintenance activity may not bring a water into a use to which it was not previously subject and it may not impair the flow or circulation or reduce the reach of such waters.

NWP 31: In the July 1, 1998, **Federal Register** notice, we responded to a request to expand the scope of NWP 31 to authorize other maintenance activities associated with flood control and maintenance of water supply facilities. In response to this part of the July 1, 1998, **Federal Register** notice, several commenters addressed issues related to NWP 31. Two commenters suggested that routine maintenance activities should be omitted from the requirements of the Corps regulatory program. Another requested that the Corps explain why a single activity may be authorized by three different NWPs, in this case NWP 3, 7, or 18 to authorize removal of accumulated sediments.

Any maintenance activity that involves a discharge of dredged or fill material into waters of the United States requires a Section 404 permit, unless that activity qualifies for the exemption under Section 404(f). We cannot expand

the exemptions in Section 404(f); adding other maintenance activities to Section 404(f) requires modification of the Clean Water Act through the legislative process. Therefore, routine maintenance activities cannot be omitted from the Corps Regulatory Program.

NWPs 3, 7, and 18 were developed to authorize specific activities. Although we are proposing to modify both NWPs 3 and 7 to authorize the removal of accumulated sediments, this activity is subject to different terms in these NWPs, based on the nature of the work. The removal of accumulated sediments in the vicinity of existing structures authorized by paragraph (ii) of NWP 3 will allow permittees to restore the waterway in the immediate vicinity of structure and protect that structure with rip rap. The purpose of part (ii) of NWP 7 is to restore outfalls, intakes, small impoundments, and canals to original design capacities design configurations. NWP 7 authorizes maintenance dredging or maintenance excavation of canals associated with intakes and outfalls; paragraph (ii) of NWP 3 does not authorize that activity. NWP 18 authorizes minor discharges, which is not the same as the activities authorized by NWPs 3 and 7.

We continue to believe that NWP 31 does not require further modification at this time, for the same reasons discussed in the July 1, 1998, **Federal Register** notice.

Regional Conditioning of Nationwide Permits: Concurrent with this **Federal Register** notice, District Engineers are issuing local public notices. Division and district engineers have proposed regional conditions or revocation of some or all of the NWPs contained in this **Federal Register** notice. Regional conditions may also be required by State Section 401 water quality certification or Coastal Zone Management Act consistency determinations. District engineers will announce regional conditions or revocations by issuing local public notices. Information on regional conditions and revocation can be obtained from the appropriate District Engineer, as indicated below or at the District's Internet home page. Furthermore, this and additional information can be obtained on the Internet at the Corps Regulatory Home Page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

ALABAMA

Mobile District Engineer, ATTN: CESAM-OP-S, 109 St. Joseph Street, Mobile, AL 36602-3630

ALASKA

Alaska District Engineer, ATTN: CEPOA-CO-R, P.O. Box 898, Anchorage, AK 99506-0898

ARIZONA

Los Angeles District Engineer, ATTN: CESPL-CO-R, P.O. Box 2711, Los Angeles, CA 90053-2325

ARKANSAS

Little Rock District Engineer, ATTN: CESWL-CO-P, P.O. Box 867, Little Rock, AR 72203-0867

CALIFORNIA

Sacramento District Engineer, ATTN: CESPK-CO-O, 1325 J Street, Sacramento, CA 95814-4794

COLORADO

Albuquerque District Engineer, ATTN: CESPA-CO-R, 4101 Jefferson Plaza NE, Room 313, Albuquerque, NM 87109

CONNECTICUT

New England District Engineer, ATTN: CENAE-OD-R, 696 Virginia Road, Concord, MA 01742-2751

DELAWARE

Philadelphia District Engineer, ATTN: CENAP-OP-R, Wannamaker Building, 100 Penn Square East Philadelphia, PA 19107-3390

FLORIDA

Jacksonville District Engineer, ATTN: CESAJ-CO-R, P.O. Box 4970, Jacksonville, FL 32202-4412

GEORGIA

Savannah District Engineer, ATTN: CESAS-OP-F, P.O. Box 889, Savannah, GA 31402-0889

HAWAII

Honolulu District Engineer, ATTN: CEPOH-ET-PO, Building 230, Fort Shafter, Honolulu, HI 96858-5440

IDAHO

Walla Walla District Engineer, ATTN: CENWW-OP-RF, 210 N. Third Street, City-County Airport, Walla Walla, WA 99362-1876

ILLINOIS

Rock Island District Engineer, ATTN: CEMVR-RD, P.O. Box 004, Rock Island, IL 61204-2004

INDIANA

Louisville District Engineer, ATTN: CELRL-OR-F, P.O. Box 59, Louisville, KY 40201-0059

IOWA

Rock Island District Engineer, ATTN: CEMVR-RD, P.O. Box 2004, Rock Island, IL 61204-2004

KANSAS

Kansas City District Engineer, ATTN: CENWK-OD-P, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106-2896

KENTUCKY

Louisville District Engineer, ATTN: CELRL-OR-F, P.O. Box 59, Louisville, KY 40201-0059

LOUISIANA

New Orleans District Engineer, ATTN: CEMVN-OD-S, P.O. Box 60267, New Orleans, LA 70160-0267

MAINE

New England District Engineer, ATTN: CENAE-OD-R, 696 Virginia Road, Concord, MA 01742-2751

MARYLAND

Baltimore District Engineer, ATTN: CENAB-OP-R, P.O. Box 1715, Baltimore, MD 21203-1715

MASSACHUSETTS

New England District Engineer, ATTN: CENAE-OD-R, 696 Virginia Road, Concord, MA 01742-2751

MICHIGAN

Detroit District Engineer, ATTN: CELRE-CO-L, P.O. Box 1027, Detroit, MI 48231-1027

MINNESOTA

St. Paul District Engineer, ATTN: CEMVP-CO-R, 190 Fifth Street East, St. Paul, MN 55101-1638

MISSISSIPPI

Vicksburg District Engineer, ATTN: CEMVK-OD-F, 4155 Clay Street, Vicksburg, MS 39183-3435

MISSOURI

Kansas City District Engineer, ATTN: CENWK-OD-P, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106-2896

MONTANA

Omaha District Engineer, ATTN: CENWO-OP-R, 215 N. 17th Street, Omaha, NE 68102-4978

NEBRASKA

Omaha District Engineer, ATTN: CENWO-OP-R, 215 N. 17th Street, Omaha, NE 68102-4978

NEVADA

Sacramento District Engineer, ATTN: CESPK-CO-O, 1325 J Street, Sacramento, CA 95814-2922

NEW HAMPSHIRE

New England District Engineer, ATTN: CENAE-OD-R, 696 Virginia Road, Concord, MA 01742-2751

NEW JERSEY

Philadelphia District Engineer, ATTN: CENAP-OP-R, Wannamaker Building, 100 Penn Square East, Philadelphia, PA 19107-3390

NEW MEXICO

Albuquerque District Engineer, ATTN: CESWA-CO-R, 4101 Jefferson Plaza NE, Room 313, Albuquerque, NM 87109

NEW YORK

New York District Engineer, ATTN: CENAN-OP-R, 26 Federal Plaza, New York, NY 10278-9998

NORTH CAROLINA

Wilmington District Engineer, ATTN: CESAW-CO-R, P.O. Box 1890, Wilmington, NC 28402-1890

NORTH DAKOTA

Omaha District Engineer, ATTN: CENWO-OP-R, 215 North 17th Street, Omaha, NE 68102-4978

OHIO

Huntington District Engineer, ATTN: CELRH-OR-F, 502 8th Street, Huntington, WV 25701-2070

OKLAHOMA

Tulsa District Engineer, ATTN: CESWT-OD-R, P.O. Box 61, Tulsa, OK 74121-0061

OREGON

Portland District Engineer, ATTN: CENWP-PE-G, P.O. Box 2946, Portland, OR 97208-2946

PENNSYLVANIA

Baltimore District Engineer, ATTN: CENAB-OP-R, P.O. Box 1715, Baltimore, MD 21203-1715

RHODE ISLAND

New England District Engineer, ATTN: CENAE-OD-R, 696 Virginia Road, Concord, MA 01742-2751

SOUTH CAROLINA

Charleston District Engineer, ATTN: CESAC-CO-P, P.O. Box 919, Charleston, SC 29402-0919

SOUTH DAKOTA

Omaha District Engineer, ATTN: CENWO-OP-R, 215 North 17th Street, Omaha, NE 68102-4978

TENNESSEE

Nashville District Engineer, ATTN: CELRN-OR-F, P.O. Box 1070, Nashville, TN 37202-1070

TEXAS

Ft. Worth District Engineer, ATTN: CESWF-OD-R, P.O. Box 17300, Ft. Worth, TX 76102-0300

UTAH

Sacramento District Engineer, ATTN: CESPK-CO-O, 1325 J Street, CA 95814-2922

VERMONT

New England District Engineer, ATTN: CENAE-OD-R, 696 Virginia Road, Concord, MA 01742-2751

VIRGINIA

Norfolk District Engineer, ATTN: CENAO-OP-R, 803 Front Street, Norfolk, VA 23510-1096

WASHINGTON

Seattle District Engineer, ATTN: CENWS-OP-RG, P.O. Box 3755, Seattle, WA 98124-2255

WEST VIRGINIA

Huntington District Engineer, ATTN: CELRH-ORF, 502 8th Street, Huntington, WV 25701-2070

WISCONSIN

St. Paul District Engineer, ATTN: CEMVP-CO-R, 190 Fifth Street East, St. Paul, MN 55101-1638

WYOMING

Omaha District Engineer, ATTN: CENWO-OP-R, 215 North 17th Street, NE 68102-4978

DISTRICT OF COLUMBIA

Baltimore District Engineer, ATTN: CENAB-OP-R, P.O. Box 1715, Baltimore, MD 21203-1715

PACIFIC TERRITORIES

Honolulu District Engineer, ATTN: CEPOH-ET-PO, Building 230, Fort Shafter, Honolulu, HI 96858-5440

PUERTO RICO & VIRGIN ISLANDS

Jacksonville District Engineer, ATTN: CESAJ-CO-R, P.O. Box 4970, Jacksonville, FL 32202-4412

Dated: July 13, 1999.

Approved:

Hans A. Van Winkle,
Brigadier General, U.S. Army, Deputy
Commander for Civil Works.

Authority

Accordingly, we are proposing to issue new NWP, modify existing NWP, and add conditions and to add NWP definitions under the authority of Section 404(e) of the Clean Water Act

(33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act (33 U.S.C. 403).

Nationwide Permits, Conditions, Further Information, and Definitions

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B. Nationwide Permits and Conditions

3. Maintenance. Activities related to:

(i) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement are permitted, provided the adverse environmental effects resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This nationwide permit authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(ii) Discharges of dredged or fill material, including excavation, into all waters of the United States to remove accumulated sediments and debris in the vicinity of, and within, existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and the placement of new or additional rip rap to protect the structure, provided the permittee notifies the District Engineer in accordance with General Condition 13. The removal of sediment is limited to the minimum necessary to

restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 200 feet in any direction from the structure. The placement of rip rap must be the minimum necessary to protect the structure or to ensure the safety of the structure. All excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the District Engineer under separate authorization. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the District Engineer.

(iii) Discharges of dredged or fill material, including excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event, including the construction, placement, or installation of upland protection structures and minor dredging to remove obstructions in a water of the United States. (Uplands lost as a result of a storm, flood, or other discrete event can be replaced without a Section 404 permit provided the uplands are restored to their original pre-event location. This NWP is for the activities in waters of the United States associated with the replacement of the uplands.) The permittee must notify the District Engineer, in accordance with General Condition 13, within 12 months of the date of the damage and the work must commence, or be under contract to commence, within two years of the date of the damage. The permittee should provide evidence, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. The restoration of the damaged areas cannot exceed the contours, or ordinary high water mark, that existed prior to the damage. The District Engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this permit. Minor dredging to remove obstructions from the adjacent waterbody is limited to 50 cubic yards below the plane of the ordinary high water mark, and is limited to the amount necessary to restore the pre-existing bottom contours of the waterbody. The dredging may not be done primarily to obtain fill for any restoration activities. The discharge of dredged or fill material and all related work needed to restore the upland must be part of a single and complete project. This permit cannot be used in conjunction with NWP 18 or NWP 19 to

restore damaged upland areas. This permit cannot be used to reclaim historic lands lost, over an extended period of time, to normal erosion processes.

Maintenance dredging for the primary purpose of navigation and beach restoration are not authorized by this permit. This permit does not authorize new stream channelization or stream relocation projects. Any work authorized by this permit must not cause more than minimal degradation of water quality, more than minimal changes to the flow characteristics of the stream, or increase flooding (See General Conditions 9 and 21).

Note: This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Section 404(f) exemption for maintenance. For example, the repair and maintenance of concrete-lined channels are exempt from Section 404 permit requirements. (Sections 10 and 404)

7. Outfall Structures and Maintenance. Activities related to: (i) Construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act), and (ii) maintenance excavation, including dredging, to remove accumulated sediments blocking or restricting outfall and intake structures, accumulated sediments from small impoundments associated with outfall and intake structures, and accumulated sediments from canals associated with outfall and intake structures, provided that the activity meets all of the following criteria:

- a. The permittee notifies the District Engineer in accordance with General Condition 13;
- b. The amount of excavated or dredged material must be the minimum necessary to restore the outfalls, intakes, small impoundments, and canals to original design capacities and design configurations (*i.e.*, depth and width);
- c. The excavated or dredged material is deposited and retained at an upland site, unless otherwise approved by the District Engineer under separate authorization; and
- d. Proper soil erosion and sediment control measures are used to minimize reentry of sediments into waters of the United States.

The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure. For

maintenance excavation and dredging to remove accumulated sediments, the notification must include information regarding the original design capacities and configurations of the facility and the presence of special aquatic sites (*e.g.*, vegetated shallows) in the vicinity of the proposed work. (Sections 10 and 404)

12. Utility Line Activities. Activities required for the construction, maintenance and repair of utility lines and associated facilities in waters of the United States as follows:

(i) **Utility lines:** The construction, maintenance, or repair of utility lines, including outfall and intake structures and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in preconstruction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication (see Note 1, below). Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United States, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The District Engineer may extend the period of temporary side casting not to exceed a total of 180 days, where appropriate. In wetlands, the top 6" to 12" of the trench should normally be backfilled with topsoil from the trench. Furthermore, the trench cannot be constructed in such a manner as to drain waters of the United States (*e.g.*, backfilling with extensive gravel layers, creating a french drain effect). For example, utility line trenches can be backfilled with clay blocks to ensure that the trench does not drain the waters of the United States through which the utility line is installed. Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

(ii) **Utility line substations:** The construction, maintenance, or expansion of a substation facility associated with a power line or utility line in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the activity does not result in the loss of greater than 1 acre of non-tidal waters of the United States.

(iii) **Foundations for overhead utility line towers, poles, and anchors:** The construction or maintenance of

foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

(iv) **Access roads:** The construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1 acre of non-tidal waters of the United States. Access roads shall be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes the adverse effects on waters of the United States and as near as possible to preconstruction contours and elevations (*e.g.*, at grade corduroy roads or geotextile/gravel roads). Access roads constructed above preconstruction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows. All access roads will be constructed with pervious surfaces.

The term "utility line" does not include activities which drain a water of the United States, such as drainage tile, or french drains; however, it does apply to pipes conveying drainage from another area. For the purposes of this NWP, the loss of waters of the United States includes the filled area plus waters of the United States that are adversely affected by flooding, excavation, or drainage as a result of the project. Waters of the United States temporarily affected by filling, flooding, excavation, or drainage, where the project area is restored to preconstruction contours and elevations, are not included in the calculation of permanent loss of waters of the United States. This includes temporary construction mats (*e.g.*, timber, steel, geotextile) used during construction and removed upon completion of the work. Where certain functions and values of waters of the United States are permanently adversely affected, such as the conversion of a forested wetland to a herbaceous wetland in the permanently maintained utility line right-of-way, mitigation will be required to reduce the adverse effects of the project to the minimal level.

Mechanized landclearing necessary for the construction, maintenance, or repair of utility lines and the construction, maintenance and expansion of utility line substations, foundations for overhead utility lines,

and access roads is authorized, provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained as near as possible. The area of waters of the United States that is filled, excavated, or flooded must be limited to the minimum necessary to construct the utility line, substations, foundations, and access roads. Excess material must be removed to upland areas immediately upon completion of construction. This NWP may authorize utility lines in or affecting navigable waters of the United States, even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322).

Notification: The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:

- (a) Mechanized land clearing in a forested wetland for the utility line right-of-way;
- (b) A Section 10 permit is required;
- (c) The utility line in waters of the United States, excluding overhead lines, exceeds 500 feet;
- (d) The utility line is placed within a jurisdictional area (*i.e.*, a water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area;
- (e) Discharges associated with the construction of utility line substations that result in the loss of greater than $\frac{1}{4}$ acre of waters of the United States; or
- (f) Permanent access roads constructed above grade in waters of the United States for a distance of more than 500 feet.

Note 1: Overhead utility lines constructed over Section 10 waters and utility lines that are routed in or under Section 10 waters without a discharge of dredged or fill material require a Section 10 permit; except for pipes or pipelines used to transport gaseous, liquid, liquefiable, or slurry substances over navigable waters of the United States, which are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material associated with such pipelines will require a Corps permit under Section 404.

Note 2: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work and the area restored to preconstruction contours, elevations, and wetland conditions. Temporary access roads for construction may be authorized by NWP 33.

Note 3: Where the proposed utility line is constructed or installed in navigable waters of the United States (*i.e.*, Section 10 waters), copies of the PCN and NWP verification will be sent by the Corps to the National Oceanic

and Atmospheric Administration, National Ocean Service, for charting the utility line to protect navigation. (Sections 10 and 404)

14. Linear Transportation Crossings. Activities required for the construction, expansion, modification, or improvement of linear transportation crossings (e.g., highways, railways, trails, airport runways, and taxiways) in waters of the United States, including wetlands, provided that the activity meets the following criteria:

a. This NWP is subject to the following acreage and linear limits:

(1) For *public linear transportation projects* in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1 acre of waters of the United States;

(2) For *public linear transportation projects* in tidal waters or non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than $\frac{1}{3}$ acre of waters of the United States and the length of fill for the crossing in waters of the United States does not exceed 200 linear feet; or

(3) For *private linear transportation projects* in all waters of the United States, provided the discharge does not cause the loss of greater than $\frac{1}{3}$ acre of waters of the United States and the length of fill for the crossing in waters of the United States does not exceed 200 linear feet;

b. The permittee must notify the District Engineer in accordance with General Condition 13 if any of the following criteria are met:

(1) The discharge causes the loss of greater than $\frac{1}{4}$ acre of waters of the United States; or

(2) There is a discharge in a special aquatic site, including wetlands;

c. The notification must include a mitigation proposal to offset permanent losses of waters of the United States to ensure that those losses result only in minimal adverse effects to the aquatic environment and a statement describing how temporary losses will be minimized to the maximum extent practicable;

d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of the affected special aquatic sites;

e. The width of the fill is limited to the minimum necessary for the crossing;

f. This permit does not authorize stream channelization, and the authorized activities must not cause more than minimal changes to the hydraulic flow characteristics of the stream, increase flooding, or cause more than minimal degradation of water

quality of any stream (see General Conditions 9 and 21);

g. This permit cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars; and

h. The crossing is a single and complete project for crossing a water of the United States. Where a road segment (*i.e.*, the shortest segment of a road with independent utility that is part of a larger project) has multiple crossings of streams (several single and complete projects) the Corps will consider whether it should use its discretionary authority to require an individual permit.

Note: Some discharges for the construction of farm roads, forest roads, or temporary roads for moving mining equipment may be eligible for an exemption from the need for a Section 404 permit (see 33 CFR 323.4). (Sections 10 and 404)

27. Stream and Wetland Restoration Activities. Activities in waters of the United States associated with the restoration of former waters, the enhancement of degraded tidal and non-tidal wetlands and riparian areas, the creation of tidal and non-tidal wetlands and riparian areas, and the restoration and enhancement of non-tidal streams and non-tidal open water areas as follows:

(a) The activity is conducted on:

(1) Non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration, or creation agreement between the landowner and the U.S. Fish and Wildlife Service (FWS) or the Natural Resources Conservation Service (NRCS) or voluntary wetland restoration, enhancement, and creation actions documented by the NRCS pursuant to NRCS regulations; or

(2) Any Federal land; or

(3) Reclaimed surface coal mined lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining or the applicable state agency (the future reversion does not apply to streams or wetlands created, restored, or enhanced as mitigation for the mining impacts, nor naturally due to hydrologic or topographic features, nor for a mitigation bank); or

(4) Any private or public land;

(b) **Notification:** For activities on any private or public land that are not described by paragraphs (a)(1), (a)(2), or (a)(3) above, the permittee must notify the District Engineer in accordance with General Condition 13; and

(c) Only native plant species should be planted at the site, if permittee is vegetating the project site.

Activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or creation of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or create stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation; mechanized landclearing to remove undesirable vegetation; and other related activities.

This NWP does not authorize the conversion of a stream to another aquatic use, such as the creation of an impoundment for waterfowl habitat. This NWP does not authorize stream channelization. This NWP does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. However, this NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands, on the project site provided there are net gains in aquatic resource functions and values. For example, this NWP may authorize the creation of an open water impoundment in a non-tidal emergent wetland, provided the non-tidal emergent wetland is replaced by creating that wetland type on the project site. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Reversion. For enhancement, restoration, and creation projects conducted under paragraphs (a)(2) and (a)(4), this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion. For restoration, enhancement, and creation projects conducted under paragraphs (a)(1) and (a)(3), this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (*i.e.*, prior to the restoration,

enhancement, or creation activities) within five years after expiration of a limited term wetland restoration or creation agreement or permit, even if the discharge occurs after this NWP expires. This NWP also authorizes the reversion of wetlands that were restored, enhanced, or created on prior-converted cropland that has not been abandoned, in accordance with a binding agreement between the landowner and NRCS or FWS (even though the restoration, enhancement, or creation activity did not require a Section 404 permit). The five-year reversion limit does not apply to agreements without time limits reached under paragraph (a)(1). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate State agency executing the agreement or permit. Prior to any reversion activity the permittee or the appropriate Federal or State agency must notify the District Engineer and include the documentation of the prior condition. Once an area has reverted back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. (Sections 10 and 404)

Note: Compensatory mitigation is not required for activities authorized by this NWP, provided the authorized work results in a net increase in aquatic resource functions and values in the project area. This NWP can be used to authorize compensatory mitigation projects, including mitigation banks, provided the permittee notifies the District Engineer in accordance with General Condition 13, and the project includes compensatory mitigation for impacts to waters of the United States caused by the authorized work. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition.

39. Residential, Commercial, and Institutional Developments. Discharges into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of residential, commercial, and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, stormwater management facilities, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development). The construction of new ski areas or oil and gas wells is not

authorized by this NWP. Residential developments include multiple and single unit developments. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The activities listed above are authorized, provided that the activities meet all of the following criteria:

a. The acreage limit for this NWP is determined by using the following index (see Note 1, below):

Acreage limit = $\frac{1}{4}$ acre + 2% of the project area (in acres)

The maximum acreage limit for this NWP is 3 acres of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters. This acreage limit is achieved for a project area of 137.5 acres or more.

b. The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:

(1) The discharge causes the loss of greater than $\frac{1}{4}$ acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters; or

(2) The discharge causes the loss of any open waters, including perennial or intermittent streams, below the ordinary high water mark (see Note 2, below).

c. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands;

d. The discharge is part of a single and complete project;

e. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification, when required, must include a written statement explaining how avoidance and minimization of losses of waters of the United States were achieved on the project site.

Compensatory mitigation will normally be required to offset the losses of waters of the United States. The notification, when required, must also include a compensatory mitigation proposal for offsetting unavoidable losses of waters of the United States. If an applicant believes that the project impacts are minimal without mitigation, then the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration;

f. When this NWP is used in conjunction with any other NWP, any

combined total permanent loss of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, exceeding $\frac{1}{4}$ acre requires that the permittee notify the District Engineer in accordance with General Condition 13;

g. Any work authorized by this NWP must not cause more than minimal degradation of water quality or more than minimal changes to the flow characteristics of any stream (see General Conditions 9 and 21);

h. For discharges causing the loss of $\frac{1}{4}$ acre or less of waters of the United States, the permittee must submit a report, within 30 days of completion of the work, to the District Engineer that contains the following information: (1) The name, address, and telephone number of the permittee; (2) The location of the work; (3) A description of the work; (4) The type and acreage (or linear feet) of the loss of waters of the United States (e.g., $\frac{1}{10}$ acre of emergent wetlands and 50 linear feet of stream bed); and (5) The type and acreage (or linear feet) of any compensatory mitigation used to offset the loss of waters of the United States (e.g., $\frac{1}{10}$ acre of emergent wetlands created on-site);

i. If there are any open waters or streams within the project area, the permittee will establish and maintain, to the maximum extent practicable, wetland or upland vegetated buffers adjacent to those open waters or streams consistent with General Condition 19. Deed restrictions, conservation easements, protective covenants, or other means of land conservation and preservation are required to protect and maintain the vegetated buffers established on the project site; and

j. Stream channelization or stream relocation downstream of the point on the stream where the annual average flow is 1 cubic foot per second is not authorized by this NWP.

Only residential, commercial, and institutional activities with structures on the foundation(s) or building pad(s), as well as the attendant features, are authorized by this NWP. For the purposes of this NWP, the term "project area" is defined in the definition section of the NWPs. The compensatory mitigation proposal required in paragraph (e) of this NWP may be either conceptual or detailed. The wetland or upland vegetated buffer required in paragraph (i) of this NWP will normally be 50 to 125 feet wide, but the District Engineer will determine the appropriate width of the vegetated buffer. The required wetland or upland vegetated buffer is part of the overall compensatory mitigation requirement for this NWP. If the project site was

previously used for agricultural purposes and the farm owner/operator used NWP 40 to authorize activities in waters of the United States to increase production or construct farm buildings, NWP 39 cannot be used by the developer to authorize additional activities in waters of the United States on the project site in excess of the indexed acreage limit for NWP 39 (i.e., the combined acreage loss authorized under NWPs 39 and 40 cannot exceed the indexed acreage limit based on project area in paragraph (a), above).

Subdivisions: For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to paragraph (b) of this NWP is required for any discharge which would cause the aggregate total loss of waters of the United States for the entire subdivision to exceed $\frac{1}{4}$ acre. Any discharge in any real estate subdivision which would cause the aggregate total loss of waters of the United States in the subdivision to exceed the indexed acreage limit based on project area as determined by paragraph (a) is not authorized by this NWP; unless the District Engineer exempts a particular subdivision or parcel by making a written determination that: (1) The individual and cumulative adverse environmental effects would be minimal and the property owner had, after October 5, 1984, but prior to July 21, 1999, committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate the property owner's investment-backed expectations, or (2) that the individual and cumulative adverse environmental effects would be minimal, high quality wetlands would not be adversely affected, and there would be an overall benefit to the aquatic environment. Once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 39. For the purposes of NWP 39, the term "real estate subdivision" shall be interpreted to include circumstances where a landowner or developer divides a tract of land into smaller parcels for the purpose of selling, conveying, transferring, leasing, or developing said parcels. This would include the entire area of a residential, commercial, or other real estate subdivision, including all parcels and parts thereof. (Sections 10 and 404)

Note 1: For example, if the project area is 15 acres, the acreage limit for a single and complete project under this NWP is 0.55 acres. For any project area of 137.5 acres or more, the acreage limit under this NWP is 3

acres of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters.

Note 2: Areas where there is no wetland vegetation are determined by the presence or absence of an ordinary high water mark or bed and bank. Areas that are waters of the United States based on this criteria would require a PCN even though water is infrequently present in the stream channel.

40. Agricultural Activities. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the purpose of improving agricultural production and the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized landclearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities, provided the permittee complies with the following terms and conditions:

a. For discharges into non-tidal wetlands to improve agricultural production, the following criteria must be met if the permittee is a USDA program participant:

(1) The permittee must obtain an exemption or a minimal effects with mitigation determination from NRCS in accordance with the provisions of the Food Security Act (16 U.S.C. 3801 *et seq.*) and the National Food Security Act Manual (NFSAM);

(2) The discharge into non-tidal wetlands does not result in the loss of greater than 2 acres of non-tidal wetlands on a farm tract;

(3) The discharge into playas, prairie potholes, and vernal pools does not exceed the acreage limit as determined by the following index (see Note, below):

Acreage limit = $\frac{1}{10}$ acre + 1% of farm tract size (in acres)

The maximum acreage loss of playas, prairie potholes, and vernal pools authorized by this NWP is 1 acre;

(4) The permittee must have an NRCS-certified wetland delineation;

(5) The permittee must implement an NRCS-approved compensatory mitigation plan that fully offsets wetland losses; and

(6) The permittee must submit a report, within 30 days of completion of the authorized work, to the District Engineer that contains the following information: (a) The name, address, and telephone number of the permittee; (b) The location of the work; (c) A description of the work; (d) The type and acreage (or square feet) of the loss of wetlands (e.g., $\frac{1}{2}$ acre of emergent wetlands); and (e) The type, acreage (or

square feet), and location of compensatory mitigation (e.g., $\frac{3}{4}$ acre of emergent wetlands on the farm tract); or

b. For discharges into non-tidal wetlands to improve agricultural production, the following criteria must be met if the permittee is not a USDA program participant:

(1) The discharge into non-tidal wetlands does not result in the loss of greater than 2 acres of non-tidal wetlands on a farm tract;

(2) The discharge into playas, prairie potholes, and vernal pools does not exceed the acreage limit as determined by the following index (see Note, below):

Acreage limit = $\frac{1}{10}$ acre + 1% of farm tract size (in acres)

The maximum acreage loss of playas, prairie potholes, and vernal pools authorized by this NWP is 1 acre;

(3) The permittee must notify the District Engineer in accordance with General Condition 13, if the discharge results in the loss of greater than $\frac{1}{4}$ acre of non-tidal wetlands, including playas, prairie potholes, and vernal pools;

(4) The notification must include a delineation of affected wetlands; and

(5) The notification must include a compensatory mitigation proposal to offset losses of waters of the United States; or

c. For the construction of building pads for farm buildings, the discharge does not cause the loss of greater than 1 acre of non-tidal wetlands that were in agricultural production prior to December 23, 1985, (i.e., farmed wetlands) and the permittee must notify the District Engineer in accordance with General Condition 13; or

d. Any activity in other waters of the United States is limited to the relocation of existing serviceable drainage ditches constructed in non-tidal streams. For the relocation of greater than 500 linear feet of drainage ditches constructed in non-tidal streams, the permittee must notify the District Engineer in accordance with General Condition 13.

The term "farm tract" refers to a parcel of land identified by the Farm Service Agency. The Corps will identify other waters of the United States on the farm tract. For the purposes of this NWP, the terms "playas," "prairie potholes," and "vernal pools" are defined in the "Definitions" section. NRCS will determine if a proposed agricultural activity meets the terms and conditions of paragraph (a) of this NWP, except as provided below. For those activities that require notification, the District Engineer will determine if a proposed agricultural activity is authorized by paragraphs (b), (c), and/or

(d) of this NWP. USDA program participants requesting authorization for discharges of dredged or fill material into waters of the United States authorized by paragraphs (c) or (d) of this NWP, in addition to paragraph (a), must notify the District Engineer in accordance with General Condition 13 and the District Engineer will determine if the entire single and complete project is authorized by this NWP. Discharges of dredged or fill material into waters of the United States associated with the construction of the compensatory mitigation are authorized by this NWP, but are not calculated in the acreage loss of waters of the United States. This NWP does not affect, or otherwise regulate, discharges associated with agricultural activities when the discharge qualifies for an exemption under Section 404(f) of the Clean Water Act, even though a minimal effect/mitigation determination by NRCS pursuant to the Food and Security Act may be required. Activities authorized by paragraphs (c) and (d) are not included in the indexed acreage limit for the farm tract. If the site was used for agricultural purposes and the farm owner/operator used either paragraphs (a), (b), or (c) of this NWP to authorize activities in waters of the United States to increase agricultural production or construct farm buildings, and the current landowner wants to use NWP 39 to authorize residential, commercial, or industrial development activities in waters of the United States on the site, the combined acreage loss authorized by NWPs 39 and 40 cannot exceed the indexed acreage limit based on project area for a single and complete project in paragraph (a) of NWP 39. (Section 404)

Note: For example, under paragraphs (a)(3) or (b)(2) above, for a 20-acre farm tract, the maximum acreage loss authorized for playas, prairie potholes, and vernal pools on the farm tract under this NWP is 0.3 acre. For any farm tract 90 acres or more in size, the acreage limit of this NWP is 1 acre of playas, prairie potholes, and vernal pools.

41. Reshaping Existing Drainage Ditches. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of existing serviceable drainage ditches constructed in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. The reshaping of the ditch cannot increase drainage capacity beyond the original design capacity or expand the area drained by the ditch as originally designed (i.e., the capacity of the ditch must be the same as originally designed and it cannot drain additional wetlands

or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality (e.g., by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, increase uptake of nutrients and other substances by vegetation, etc.). The permittee must notify the District Engineer in accordance with General Condition 13, if material excavated during ditch reshaping is proposed to be sidecast into waters of the United States or if greater than 500 linear feet of drainage ditch is to be reshaped. This NWP does not apply to reshaping drainage ditches constructed in uplands, since these areas are not waters of the United States, and thus no permit from the Corps is required, or to the maintenance of existing drainage ditches to their original dimensions and configuration, which does not require a Section 404 permit (see 33 CFR 323.4(a)(3)). This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects. (Section 404)

42. Recreational Facilities. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction of expansion of recreational facilities, provided the activity meets all of the following criteria:

a. The discharge does not cause the loss of greater than 1 acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;

b. For discharges causing the loss of greater than $\frac{1}{4}$ acre of non-tidal waters of the United States, or the loss of greater than 500 linear feet of perennial or intermittent stream bed, the permittee notifies the District Engineer in accordance with General Condition 13;

c. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of affected special aquatic sites, including wetlands; and

d. The discharge is part of a single and complete project.

For the purposes of this NWP, the term "recreational facility" is defined as a recreational activity that has low-impact on the aquatic environment, is integrated into the natural landscape, and consists primarily of open space that does not substantially change

preconstruction grades or deviate from natural landscape contours. For the purpose of this permit, the primary function of recreational facilities does not include the use of motor vehicles, buildings, or impervious surfaces. Examples of recreational facilities that may be authorized by this NWP include: hiking trails, bike paths, horse paths, nature centers, and campgrounds (excluding trailer parks). The construction or expansion of golf courses and the expansion of ski areas may be authorized by this NWP, provided the golf course or ski area does not substantially deviate from natural landscape contours and is designed to minimize adverse effects to waters of the United States and riparian areas through the use of such practices as integrated pest management, adequate stormwater management facilities, vegetated buffers, reduced fertilizer use, etc. The facility must have an adequate water quality management plan in accordance with General Condition 9, such as a stormwater management facility to ensure that the recreational facility results in no substantial adverse effects to water quality. This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity. This NWP does not authorize other buildings, such as hotels, restaurants, etc. The construction or expansion of playing fields (e.g., baseball, soccer, or football fields), basketball and tennis courts, racetracks, stadiums, arenas, and the construction of new ski areas are not authorized by this NWP. (Section 404)

43. Stormwater Management Facilities. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction and maintenance of stormwater management facilities, including activities for the excavation of stormwater ponds/facilities, detention basins, and retention basins; installation and maintenance of water control structures, outfall structures and emergency spillways; and the maintenance dredging of existing stormwater management ponds/facilities and detention and retention basins provided that the activity meets all of the following criteria:

a. The discharge or excavation for the construction of new stormwater management facilities does not cause the loss of greater than 2 acres of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge of dredged or fill material for the construction of new stormwater management facilities in perennial streams is not authorized;

c. For discharges or excavation for the construction of new stormwater management facilities or for the maintenance of existing stormwater management facilities causing the loss of greater than $\frac{1}{4}$ acre of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, or causing the loss of greater than 500 linear feet of intermittent stream bed, the permittee notifies the District Engineer in accordance with General Condition 13. In addition, the notification must include:

(1) A maintenance plan. The maintenance plan should be in accordance with State and local requirements, if any such requirements exist;

(2) For discharges in special aquatic sites, including wetlands and submerged aquatic vegetation, the notification must include a delineation of affected areas; and

(3) A compensatory mitigation proposal that offsets the loss of waters of the United States. Maintenance in constructed areas will not require mitigation provided such maintenance is accomplished in designated maintenance areas and not within compensatory mitigation areas (i.e., district engineers may designate non-maintenance areas, normally at the downstream end of the stormwater management facility, in existing stormwater management facilities). (No mitigation will be required for activities which are exempt from Section 404 permit requirements);

d. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification must include a written statement to the District Engineer detailing compliance with this condition (i.e., why the discharge must occur in waters of the United States and why additional minimization cannot be achieved);

e. The stormwater management facility must comply with General Condition 21 and be designed using best management practices (BMPs) and watershed protection techniques. Examples may include forbays (deeper areas at the upstream end of the stormwater management facility that would be maintained through excavation), vegetated buffers, and siting considerations to minimize adverse effects to aquatic resources. Another example of a BMP would be bioengineering methods incorporated

into the facility design to benefit water quality and minimize adverse effects to aquatic resources from storm flows, especially downstream of the facility, that provide, to the maximum extent practicable, for long term aquatic resource protection and enhancement;

f. Maintenance excavation will be in accordance with an approved maintenance plan and will not exceed the original contours of the facility as approved and constructed; and

g. The discharge is part of a single and complete project. (Section 404)

44. Mining Activities. Discharges of dredged or fill material into: (i) Isolated waters, streams where the annual average flow is 1 cubic foot per second (cfs) or less, and non-tidal wetlands adjacent to headwater streams, for aggregate mining (i.e., sand, gravel, and crushed and broken stone) and associated support activities; (ii) lower perennial streams, excluding wetlands adjacent to lower perennial streams, for aggregate mining activities (support activities in lower perennial streams or adjacent wetlands are not authorized by this NWP); and (iii) isolated waters and non-tidal wetlands adjacent to headwater streams, for hard rock/mineral mining activities (i.e., extraction of metalliferous ores from subsurface locations) and associated support activities, provided the discharge meets the following criteria:

a. The mined area within waters of the United States, plus the acreage loss of waters of the United States resulting from support activities, cannot exceed 2 acres;

b. The acreage loss of waters of the United States resulting from support activities cannot exceed one acre;

c. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification must include a written statement to the District Engineer detailing compliance with this condition (i.e., why the discharge must occur in waters of the United States and why additional minimization cannot be achieved);

d. In addition to General Conditions 17 and 20, activities authorized by this permit must not substantially alter the sediment characteristics of areas of concentrated shellfish beds or fish spawning areas. Normally, the mandated water quality management plan should address these impacts;

e. The permittee must implement necessary measures to prevent increases in stream gradient and water velocities, to prevent adverse effects (e.g., head cutting, bank erosion) on upstream and downstream channel conditions;

f. Activities authorized by this permit must not result in adverse effects on the course, capacity, or condition of navigable waters of the United States;

g. The permittee must utilize measures to minimize downstream turbidity;

h. Wetland impacts must be compensated through mitigation approved by the Corps;

i. Beneficiation and mineral processing may not occur within 200 feet of the ordinary high water mark of any open waterbody. Although the Corps does not regulate discharges from these activities, a Clean Water Act Section 402 permit may be required;

j. All activities authorized by this NWP must carefully adhere to General Conditions 9 and 21. Further, if determined necessary by the District Engineer, the Corps may require modifications to the required water quality management plan;

k. No aggregate mining can occur within stream beds where the average annual flow is greater than 1 cubic foot per second or in waters of the United States within 100 feet of the ordinary high water mark of headwater stream segments where the average annual flow of the stream is greater than 1 cubic foot per second (aggregate mining can occur in areas immediately adjacent to the ordinary high water mark of a stream where the average annual flow is 1 cubic foot per second or less), except for aggregate mining in lower perennial streams;

l. *Single and complete project:* The discharges must be for a single and complete project, including support activities. Multiple mining activity discharges into several designated parcels of a mining project may be included together as long as the 2 acre limit is not exceeded; and

m. *Notification:* The permittee must notify the District Engineer in accordance with General Condition 13. The notification must include: (1) A description of measures proposed to minimize or prevent adverse effects (e.g., head cutting, bank erosion, turbidity, water quality) to waters of the United States; (2) A written statement to the District Engineer detailing compliance with paragraph (c), above (i.e., why the discharge must occur in waters of the United States and why additional minimization cannot be achieved); (3) A description of measures taken to meet the criteria associated with the discharge being permitted (i.e., how the proposed work complies with paragraphs (d) through (g), above); and (4) A reclamation plan (for aggregate mining in isolated waters and non-tidal

wetlands adjacent to headwaters and hard rock/mineral mining only).

This NWP does not authorize hard rock/mineral mining, including placer mining, in streams. No hard rock/mineral mining can occur in waters of the United States within 100 feet of the ordinary high water mark of headwater streams. The terms "headwaters" and "isolated waters" are defined in 33 CFR Parts 330.2(d) and (e), respectively. For the purposes of this NWP, the term "lower perennial streams" is the same as the lower perennial riverine subsystem described in the Cowardin classification system of wetlands and deepwater habitats of the United States. (Sections 10 and 404)

C. Nationwide Permit General Conditions

The following general conditions must be followed in order for any authorization by an NWP to be valid:

1. Navigation. No activity may cause more than a minimal adverse effect on navigation.

2. Proper Maintenance. Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

3. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date.

4. Aquatic Life Movements. No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.

5. Equipment. Heavy equipment working in wetlands must be placed on mats, or other measures must be taken to minimize soil disturbance.

6. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions which may have been added by the division engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the State or tribe in its Section 401 water quality certification and Coastal Zone Management Act consistency determination.

7. Wild and Scenic Rivers. No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by

Congress as a "study river" for possible inclusion in the system, while the river is in an official study status; unless the appropriate Federal agency, with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation, or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

8. Tribal Rights. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

9. Water Quality. In certain States and tribal lands an individual 401 water quality certification must be obtained or waived (See 33 CFR 330.4(c)). For NWPs 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44 where the State or tribal 401 certification (either generically or individually) does not require/approve a water quality management plan, the permittee must include design criteria and techniques that provide for protection of aquatic resources. The project must include a method for stormwater management (whether required by the State or not) that minimizes degradation of the downstream aquatic system, including water quality. To the maximum extent practicable, a vegetated buffer zone (including wetlands, uplands, or both) adjacent to open waters of the river, stream, or other open waterbody will be established and maintained, if the project occurs in the vicinity of such an open waterbody. The District Engineer will determine the proper width of the buffer and in which cases it will be required. Normally, the vegetated buffer will be 50 to 125 feet wide.

10. Coastal Zone Management. In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived (see Section 330.4(d)).

11. Endangered Species. (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which will destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or is located in the designated critical habitat and shall

not begin work on the activity until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. For activities that may affect Federally-listed endangered or threatened species or designated critical habitat, the notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work.

(b) Authorization of an activity by a nationwide permit does not authorize the "take" of a threatened or endangered species as defined under the Federal Endangered Species Act. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, both lethal and non-lethal "takes" of protected species are in violation of the Endangered Species Act. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. Fish and Wildlife Service and National Marine Fisheries Service or their world wide web pages at <http://www.fws.gov/r9endspp/endspp.html> and http://www.nfms.gov/prot_res/esahome.html, respectively.

12. Historic Properties. No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR Part 325, Appendix C. The prospective permittee must notify the District Engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)). For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the notification must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

13. Notification. (a) Timing: Where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a preconstruction notification (PCN) as early as possible. The District Engineer must determine if the notification is complete within 30 days of the date of receipt and can request additional information necessary for the evaluation of the PCN only once. However, if the prospective permittee does not provide all of the requested information, then the District Engineer will notify the prospective permittee that the notification is still incomplete and the PCN review process will not commence until all of the requested information has been received by the District Engineer. The prospective permittee shall not begin the activity:

(1) Until notified in writing by the District Engineer that the activity may proceed under the NWP with any special conditions imposed by the District or Division Engineer; or

(2) If notified in writing by the District or Division Engineer that an individual permit is required; or

(3) Unless 45 days have passed from the District Engineer's receipt of the complete notification and the prospective permittee has not received written notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) Contents of Notification: The notification must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity; and

(4) For NWPs 7, 12, 14, 18, 21, 34, 38, 39, 41, 42, and 43, the PCN must also include a delineation of affected special aquatic sites, including wetlands, vegetated shallows (e.g., submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (see paragraph 13(f));

(5) For NWP 7, Outfall Structures and Maintenance, the PCN must include information regarding the original design capacities and configurations of those areas of the facility where

maintenance dredging or excavation is proposed.

(6) For NWP 21, Surface Coal Mining Activities, the PCN must include an Office of Surface Mining (OSM) or State-approved mitigation plan.

(7) For NWP 29, Single-Family Housing, the PCN must also include:

(i) Any past use of this NWP by the individual permittee and/or the permittee's spouse;

(ii) A statement that the single-family housing activity is for a personal residence of the permittee;

(iii) A description of the entire parcel, including its size, and a delineation of wetlands. For the purpose of this NWP, parcels of land measuring $\frac{1}{2}$ acre or less will not require a formal on-site delineation. However, the applicant shall provide an indication of where the wetlands are and the amount of wetlands that exists on the property. For parcels greater than $\frac{1}{2}$ acre in size, a formal wetland delineation must be prepared in accordance with the current method required by the Corps. (See paragraph 13(f));

(iv) A written description of all land (including, if available, legal descriptions) owned by the prospective permittee and/or the prospective permittee's spouse, within a one mile radius of the parcel, in any form of ownership (including any land owned as a partner, corporation, joint tenant, co-tenant, or as a tenant-by-the-entirety) and any land on which a purchase and sale agreement or other contract for sale or purchase has been executed;

(8) For NWP 31, Maintenance of Existing Flood Control Projects, the prospective permittee must either notify the District Engineer with a PCN prior to each maintenance activity or submit a five year (or less) maintenance plan. In addition, the PCN must include all of the following:

(i) Sufficient baseline information so as to identify the approved channel depths and configurations and existing facilities. Minor deviations are authorized, provided the approved flood control protection or drainage is not increased;

(ii) A delineation of any affected special aquatic sites, including wetlands; and,

(iii) Location of the dredged material disposal site.

(9) For NWP 33, Temporary Construction, Access, and Dewatering, the PCN must also include a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources.

(10) For NWPs 39, 43, and 44, the PCN must also include a written statement to the District Engineer

explaining how avoidance and minimization of losses of waters of the United States were achieved on the project site and either a compensatory mitigation proposal that offsets unavoidable losses of waters of the United States or justification explaining why compensatory mitigation should not be required.

(11) For NWP 40, Agricultural Activities, the PCN must include information regarding the past use of this NWP on the farm.

(12) For NWP 43, Stormwater Management Facilities, the PCN must include, for the construction of new stormwater management facilities, a maintenance plan (in accordance with State and local requirements, if applicable) and a compensatory mitigation proposal to offset losses of waters of the United States.

(13) For NWP 44, Mining Activities, the PCN must include a description of all waters of the United States adversely affected by the project, a description of measures taken to minimize adverse effects to waters of the United States, a description of measures taken to comply with the criteria of the NWP, and a reclamation plan (for all aggregate mining activities except for aggregate mining activities in lower perennial streams and any hard rock/mineral mining activities).

(c) Form of Notification: The standard individual permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PCN and must include all of the information required in (b)(1)–(7) of General Condition 13. A letter containing the requisite information may also be used.

(d) District Engineer's Decision: In reviewing the PCN for the proposed activity, the District Engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The prospective permittee may, optionally, submit a proposed mitigation plan with the PCN to expedite the process and the District Engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, the District Engineer will notify the

permittee and include any conditions the District Engineer deems necessary.

Any compensatory mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the District Engineer will expeditiously review the proposed compensatory mitigation plan. The District Engineer must review the plan within 45 days of receiving a complete PCN and determine whether the conceptual or specific proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant stating that the project can proceed under the terms and conditions of the nationwide permit.

If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the District Engineer determines that mitigation is required in order to ensure no more than minimal adverse effects on the aquatic environment, the activity will be authorized within the 45-day PCN period, including the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level. When conceptual mitigation is included, or a mitigation plan is required under item (2) above, no work in waters of the United States will occur until the District Engineer has approved a specific mitigation plan.

(e) Agency Coordination: The District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's

compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

For activities requiring notification to the District Engineer that result in the loss of greater than 1 acre of waters of the United States, the District Engineer will, upon receipt of a notification, provide immediately (e.g., via facsimile transmission, overnight mail, or other expeditious manner), a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the District Engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 15 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(f) Wetlands Delineations: Wetland delineations must be prepared in accordance with the current method required by the Corps. For NWP 29 see paragraph (b)(6)(iii) for parcels less than ½ acre in size. The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 45-day period will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

(g) Mitigation: Factors that the District Engineer will consider when determining the acceptability of appropriate and practicable mitigation necessary to offset impacts on the aquatic environment that are more than minimal include, but are not limited to:

(i) To be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project purposes. Examples of mitigation that may be appropriate and practicable include, but are not limited to: reducing the size of the project; establishing and maintaining wetland or

upland vegetated buffer zones to protect aquatic resource values; and replacing the loss of aquatic resource values by creating, restoring, enhancing, or preserving similar functions and values, preferably in the same watershed;

(ii) To the extent appropriate, permittees should consider mitigation banking and other appropriate forms of compensatory mitigation. If the District Engineer determines that compensatory mitigation is necessary to offset the losses of waters of the United States and ensure that the net adverse effects of the authorized work on the aquatic environment are minimal, mitigation banks, in lieu fee programs, and other consolidated mitigation approaches will be the preferred method of providing compensatory mitigation, unless the District Engineer determines that activity-specific compensatory mitigation is more appropriate, based on what is best for the aquatic environment. These types of mitigation are preferred because they involve larger blocks of protected aquatic environment, are more likely to meet the mitigation goals, and are more easily checked for compliance. If a mitigation bank, in lieu fee program, or other consolidated mitigation approach is not available in the watershed, the District Engineer will consider other appropriate forms of compensatory mitigation to offset the losses of waters of the United States to ensure that the net adverse effects of the authorized work on the aquatic environment are minimal. In addition, compensatory mitigation must address wetland impacts, such as functions and values, and cannot be used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the NWP (e.g., for NWP 14, 1/2 acre of wetlands cannot be created to change a 3/4-acre loss of wetlands to a 1/4 acre loss; however, 1/2-acre of created wetlands can be used to reduce the impacts of a 1/3-acre loss of wetlands). If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. (Refer to General Condition 19 for additional information concerning mitigation requirements for the NWPs.)

14. Compliance Certification. Every permittee who has received a Nationwide permit verification from the Corps will submit a signed certification regarding the completed work and any required mitigation. The certification will be forwarded by the Corps with the authorization letter and will include: (a) A statement that the authorized work was done in accordance with the Corps authorization, including any general or

specific conditions; (b) A statement that any required mitigation was completed in accordance with the permit conditions; and (c) The signature of the permittee certifying the completion of the work and mitigation.

15. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3 acre.

16. Water Supply Intakes. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may occur in the proximity of a public water supply intake except where the activity is for repair of the public water supply intake structures or adjacent bank stabilization.

17. Shellfish Beds. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4.

18. Suitable Material. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.) and material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

19. Mitigation. Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material into waters of the United States, must be minimized or avoided to the maximum extent practicable at the project site (i.e., on-site). Furthermore, the District Engineer will require restoration, creation, enhancement, or preservation of other aquatic resources in order to offset the authorized impacts, at least to the extent that adverse environmental effects to the aquatic environment are minimal. An important element of any mitigation plan for projects in or near streams or other open waters is the requirement of vegetated buffers (wetland, upland, or both) adjacent to the open water areas. The vegetated buffer should consist of

native species and will constitute a portion, as determined by the District Engineer, of the required compensatory mitigation. The District Engineer will determine the proper width of the vegetated buffer and in which cases it will be required. Normally, the vegetated buffer will be 50 to 125 feet wide. (Refer to paragraph (g) of General Condition 13 for additional information concerning mitigation requirements for the NWPs.)

20. Spawning Areas. Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., excavate, fill, or smother downstream by substantial turbidity) of an important spawning area are not authorized.

21. Management of Water Flows: To the maximum extent practicable, the project must be designed to maintain preconstruction downstream flow conditions (e.g., location, capacity, and flow rates). Furthermore, the project must not permanently restrict or impede the passage of normal or expected high flows (unless the primary purpose of the fill is to impound waters) and the structure or discharge of dredged or fill material must withstand expected high flows. The project must provide, to the maximum extent practicable, for retaining excess flows from the site and for maintaining surface flow rates from the site similar to preconstruction conditions. To the maximum extent practicable, the authorized work must not increase water flows from the project site, relocate water, or redirect water flow beyond preconstruction conditions, to reduce adverse effects such as flooding or erosion downstream and upstream of the project site.

22. Adverse Effects From Impoundments. If the activity, including structures and work in navigable waters of the United States or discharge of dredged or fill material, creates an impoundment of water, adverse effects on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.

23. Waterfowl Breeding Areas. Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

24. Removal of Temporary Fills. Any temporary fills must be removed in their

entirety and the affected areas returned to their preexisting elevation.

25. Designated Critical Resource Waters. Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally listed threatened and endangered species, coral reefs, State natural heritage sites, and outstanding national resource waters or other waters officially designated by a State as having particular environmental or ecological significance and identified by the District Engineer after notice and opportunity for public comment.

(a) Except as noted below, discharges of dredged or fill material into waters of the United States are not authorized by NWP 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters. Discharges of dredged or fill materials into waters of the United States may be authorized by the above NWPs in National Wild and Scenic Rivers if the activity complies with General Condition 7. Further, such discharges may be authorized in designated critical habitat for Federally listed threatened or endangered species if the activity complies with General Condition 11 and the U.S. Fish and Wildlife Service or the National Marine Fisheries Service has concurred in a determination of compliance with this condition.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with General Condition 13, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The District Engineer may authorize activities under these NWPs only after he determines that the impacts to the critical resource waters will be no more than minimal.

26. Impaired Waters. Impaired waters are those waters of the United States that have been identified by States or Tribes through the Clean Water Act Section 303(d) process as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, or the loss of wetlands. For the purposes of this general condition, the impaired waterbody includes any adjacent wetlands.

(a) Discharges of dredged or fill material causing the loss of more than one acre of impaired waters of the

United States, including adjacent wetlands to such impaired waters, except for activities authorized by NWP 3 in such waters, are not authorized by nationwide permit.

(b) For discharges of dredged or fill material causing the loss of less than one acre of impaired waters of the United States, including adjacent wetlands to such impaired waters, or any activity authorized by NWP 3 in such waters, it is presumed that the project will, unless clearly demonstrated otherwise, directly or indirectly result in the further impairment of the listed water. Such activities in an impaired water or adjacent wetlands will be not be authorized by nationwide permit, unless the District Engineer determines that the prospective permittee has clearly demonstrated that the authorized project will not result in the further impairment of the listed water. For such discharges, the prospective permittee must notify the District Engineer in accordance with General Condition 13. In the notification to the District Engineer, the prospective permittee must submit a statement explaining how the proposed project, excluding mitigation, will not result in further impairment. Also, in accordance with the procedures in paragraph (e) of General Condition 13, the District Engineer will coordinate with the State 401 agency for NWP activities resulting in the loss of greater than $\frac{1}{4}$ acre of impaired waters of the United States. In addition, mitigation for any permitted discharges in impaired waters or their adjacent wetlands should be designed to offset impacts to aquatic functions and values being impacted by the project, as well as contribute to the reduction of sources of pollution contributing to the impairment (e.g., by restoring wetlands that intercept non-point sources of sediment or nutrient laden runoff).

27. Fills Within the 100-year Floodplain. The 100-year floodplain will be defined by an up to date Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map, or in the absence of such map, the appropriate local floodplain authority through a licensed professional engineer.

(a) Except as provided below, discharges of dredged or fill material into waters of the United States resulting in permanent above-grade fills in the 100-year floodplain are not authorized by NWPs 21, 29, 39, 40, 42, 43, and 44. Prospective permittees must notify the District Engineer in accordance with General Condition 13, of any discharge of dredged or fill material in 100-year floodplains as

defined above. The notification must include documentation that the proposed project will not involve discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills in waters of the United States within the FEMA mapped 100-year floodplain. For those areas where no FEMA map exists or the map is out of date (e.g., the map no longer reflects current flooding conditions), the documentation should be from the local floodplain authority (or local official with authority to issue development permits within the floodplain). Based on such documentation, the District Engineer will make the final determination as to whether the proposed project is actually located within the 100-year floodplain.

(b) For NWPs 12 and 14, where there are discharges of dredged or fill material resulting in permanent, above-grade wetland fills in waters of the United States within the 100-year floodplain, it is presumed that such discharges will result in more than minimal adverse effects. Such discharges are not authorized by NWPs 12, and 14, unless the District Engineer determines that the prospective permittee has clearly demonstrated that the project, and associated mitigation, will not decrease the flood-holding capacity and no more than minimally alter the hydrology, flow regime, or volume of waters associated with the floodplain.

Prospective permittees attempting to rebut this presumption must notify the District Engineer in accordance with General Condition 13. The notification must include documentation, which demonstrates that the project will not result in increased flooding or more than minimally alter floodplain hydrology or flow regimes. This documentation must include proof that FEMA, or a state or local floodplain authority through a licensed professional engineer, has approved the proposed project and provided a statement that the project does not increase flooding or more than minimally alter floodplain hydrology or flow regimes.

(c) Notwithstanding (a) and (b) above, projects located in the 100-year floodplain at a point in a watershed which drains less than one square mile are not subject to this condition.

D. Further Information

1. District engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other Federal, State, or local permits, approvals, or authorizations required by law.

3. NWP's do not grant any property rights or exclusive privileges.

4. NWP's do not authorize any injury to the property or rights of others.

5. NWP's do not authorize interference with any existing or proposed Federal project.

E. Definitions

Aquatic bench: Aquatic benches are those shallow areas around the edge of a permanent pool stormwater management facility that support aquatic vegetation, both submerged and emergent.

Best management practices: Best Management Practices (BMP's) are policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMP's are categorized as structural or non-structural. A BMP policy may affect the limits on a development.

Compensatory mitigation: For purposes of Section 10/404, compensatory mitigation is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Creation: The establishment of a wetland or other aquatic resource where one did not formerly exist.

Drainage ditch: A linear excavation or depression constructed for the purpose of conveying surface runoff or groundwater from one area to another. An "upland drainage ditch" is a drainage ditch constructed entirely in uplands (*i.e.*, not waters of the United States) and is not a water of the United States, unless it becomes tidal or otherwise extends the ordinary high water line of existing waters of the United States. Drainage ditches constructed in waters of the United States (*e.g.*, by excavating wetlands or stream channelization) remain waters of the United States even though they are heavily manipulated to increase drainage. A drainage ditch may be constructed in uplands or wetlands or other waters of the United States.

Enhancement: Activities conducted in existing wetlands or other aquatic resources which increase one or more aquatic functions.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round.

Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Farm tract: A unit of contiguous land under one ownership which is operated as a farm or part of a farm.

Independent utility: A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases are not built can be considered as separate single and complete projects with independent utility.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that include the filled area and other waters that are permanently adversely affected by flooding, excavation, or drainage as a result of the regulated activity. Permanent adverse effects include permanent above-grade, at-grade, or below-grade fills that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is the threshold measurement of the impact to existing waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and values. The loss of stream bed includes the linear feet of perennial or intermittent stream that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to preconstruction contours and elevations after construction, are not included in the measurement of loss of waters of the United States.

Non-tidal wetland: A non-tidal wetland is a wetland (*i.e.*, a water of the United States) that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (*i.e.*, spring high tide line).

Open water: An area that, during a year with normal patterns of

precipitation, has standing or flowing water for sufficient duration to establish an ordinary high water mark. Aquatic vegetation within the area of standing or flowing water is non-emergent, vegetated shallows, sparse, or absent. This term includes rivers, streams, lakes, and ponds.

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Permanent above-grade fill: A discharge of dredged or fill material into waters of the United States, including wetlands, that results in a substantial increase in ground elevation and permanently converts part or all of the waterbody to dry land. Structural fills authorized by NWP's 3, 25, 36, etc. are not included.

Playa: A type of marsh found on the high plain of northern Texas and eastern New Mexico that is characterized by small, seasonally flooded basins with clay or fine sandy loam hydric soils and emergent hydrophytic vegetation.

Prairie pothole: A type of marsh found on glacial till in Minnesota, Iowa, North Dakota, South Dakota, and Montana that is characterized by small seasonally or permanently flooded depressions and emergent hydrophytic vegetation.

Preservation: The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the overall aquatic ecosystem.

Project area: The acreage of land, including waters of the United States and uplands, utilized for the single and complete project. The acreage is determined by the amount of land cleared, graded, and/or filled to construct the single and complete project, including any buildings, utilities, stormwater management facilities, roads, yards, and other attendant features. The project area also includes any other land that is used in conjunction with the single and complete project, such as open space. Roads constructed by State or local governments for general public use are not included in the project area.

Restoration: Re-establishment of wetland and/or other aquatic resource characteristics and function(s) at a site where they have ceased to exist, or exist in a substantially degraded state.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Steep gradient sections of streams are sometimes characterized by riffle and pool complexes. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. Pools are characterized by a slower stream velocity, a streaming flow, a smooth surface, and a finer substrate.

Single and complete project: The term "single and complete project" is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers (see definition of independent utility). For linear projects, the "single and complete project" (*i.e.*, a single and complete crossing) will apply to each crossing of a separate water of the United States (*i.e.*, a single waterbody) at that location. An exception is for linear projects crossing a single waterbody several times at separate and distant locations: Each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and

flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and BMPs, which retain water for a period of time to control runoff and/or improve the quality (*i.e.*, by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream channel to increase the rate of water flow through the stream channel. Manipulation may include deepening, widening, straightening, armoring, or other activities that change the stream cross-section or other aspects of stream channel geometry to increase the rate of water flow through the stream channel. A channelized stream remains a water of the United States, despite the modifications to increase the rate of water flow.

Tidal wetland: A tidal wetland is a wetland (*i.e.*, a water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b)

and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line (*i.e.*, spring high tide line) and are inundated by tidal waters two times per lunar month, during spring high tides.

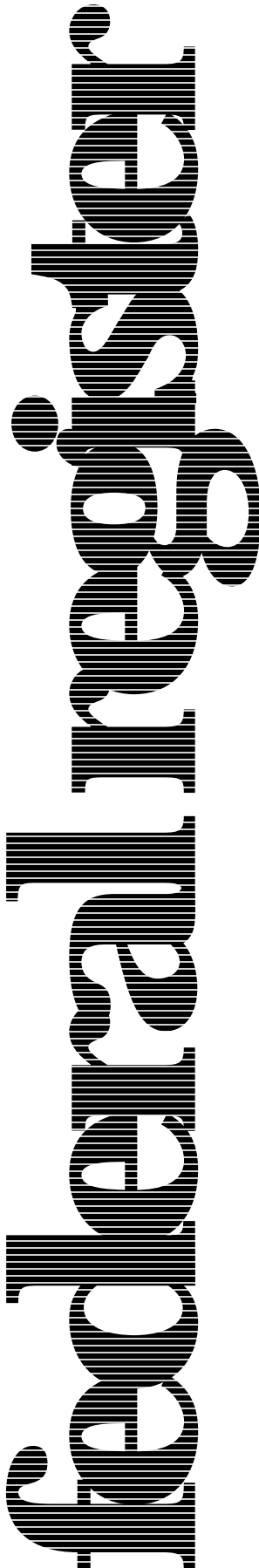
Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Vernal pool: A type of marsh found in Mediterranean-type climates (*i.e.*, wet winters and dry summers), especially on coastal terraces in southwestern California, the central valley of California, and areas west of the Sierra Mountains, that is characterized by shallow, seasonally flooded wet meadows with emergent hydrophytic vegetation.

Waterbody: A waterbody is any area that in a normal year has water flowing or standing above ground to the extent that evidence of an ordinary high water mark is established. Wetlands contiguous to the waterbody are considered part of the waterbody.

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Wednesday
July 21, 1999

Part IV

Department of Health and Human Services

Centers for Disease Control and
Prevention

Implementation of the Fertility Clinic
Success Rate and Certification Act of
1992—A Model Program for the
Certification of Embryo Laboratories;
Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Disease Control and Prevention****Implementation of the Fertility Clinic Success Rate and Certification Act of 1992—A Model Program for the Certification of Embryo Laboratories**

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Final notice.

SUMMARY: The Fertility Clinic Success Rate and Certification Act of 1992 (Pub. L. 102-493, 42 U.S.C. 263a-1 *et seq.*) requires that the Secretary, HHS, through the CDC, develop a model program for the certification of embryo laboratories, to be carried out voluntarily by interested States.

This notice sets forth the model certification program requirements, including definitions, administrative requirements, and embryo laboratory standards. The model program incorporates comments received by CDC on the proposed model certification program that was published in the **Federal Register** on November 6, 1998 (63 FR 60178).

FOR FURTHER INFORMATION CONTACT: Robert Martin, Dr.P.H., Division of Laboratory Systems, CDC, telephone (770) 488-8295

SUPPLEMENTARY INFORMATION:**Introduction**

The Fertility Clinic Success Rate and Certification Act of 1992 (FCSRCA), Public Law 102-493 (42 U.S.C. 263a-1 *et seq.*), was intended to provide the public with comparable information concerning the effectiveness of infertility services and to assure the quality of such services by providing for the certification of embryo laboratories.

Section 2 of the statute requires that the Secretary, HHS, through the CDC, define pregnancy success rates, and seek public comment on the proposed definitions. In addition, Section 2 requires each assisted reproductive technology (ART) program to annually report its pregnancy success rates to the CDC, along with the identity of each embryo laboratory used by the program, and whether the laboratory is certified under Section 3 or has applied for such certification. Section 2 was addressed in a **Federal Register** notice published on August 26, 1997 (62 FR 45259).

Section 3(a) of the FCSRCA requires that the CDC "develop a model program for the certification of embryo laboratories * * * to be carried out by

the States." In developing the model certification program, CDC is to consult with "appropriate consumer and professional organizations with expertise in using, providing, and evaluating professional services and embryo laboratories associated with assisted reproductive technology programs."

Section 3(b) lists State officials who are to receive a description of the model certification program, and requires that the Secretary encourage States to adopt such a program.

Section 3(c) includes the requirements for administration of the certification program by the States, with provisions for the inspection and certification of embryo laboratories by States or approved accreditation organizations, and the requirement for application to the State by an embryo laboratory that seeks certification.

Section 3(d) specifies the embryo laboratory standards that are to be in the model certification program. These include a standard to assure consistent performance of laboratory procedures; a standard for a quality assurance and quality control program; standards for the maintenance of all laboratory records (including laboratory tests and procedures performed, as well as personnel and equipment records); and a standard for personnel qualifications.

Section 3(e) includes provisions for a State to adopt the model certification program if it applies to the Secretary, and is approved, and Section 3(f) allows for the use of accreditation organizations, approved under the requirements described in Section 4, to inspect and certify embryo laboratories in States that have adopted the program.

Section 3(g) requires that States which qualify to adopt the model certification program conduct embryo laboratory inspections to determine if the laboratories meet the requirements of the program. Inspections are to be unannounced or be announced in circumstances in which the likelihood of discovering deficiencies in the operations of an embryo laboratory is not diminished. Section 3(g) also requires the Secretary to seek public comment on the circumstances under which announced inspections may be conducted. In addition, inspection results (including deficiencies and any subsequent corrections to those deficiencies) are to be reported and made available to the public.

Section 3(h) provides for the Secretary to conduct validation inspections of embryo laboratories certified by a State or an approved accreditation organization to determine if the laboratories are being operated in

accordance with the standards in the model certification program. If a validation survey demonstrates that an embryo laboratory is not in compliance with such standards, the statute specifies requirements for notification of the State, or as applicable, the accreditation organization. A subsequent investigation and inspection of additional certified embryo laboratories are to be conducted to determine if the State or accreditation organization is reliably identifying laboratory deficiencies. The Secretary may revoke the approval of the State certification program or accreditation organization if requirements applicable to the program are not being met.

Section 3(i) limits the Secretary in developing the model certification program, and the States in adopting such program, from establishing any regulation, standard, or requirement that has the effect of exercising supervision or control over the practice of medicine in ART programs.

Section 3(j) states that the Secretary may define the term of the certification issued by a State or an accreditation organization in a State, through the public comment process, and provides for application for recertification to be submitted when there is a change in ownership or administration of a certified embryo laboratory.

Section 4 calls for the Secretary, through the CDC, to promulgate criteria and procedures for the approval and use of accreditation organizations to inspect and certify embryo laboratories in States which have adopted the model certification program, as well as in States which have not adopted the program. The section also includes provisions for annual evaluation of approved accreditation organizations by the Secretary, through the inspection of a representative sample of accredited embryo laboratories and other such appropriate means.

Section 5 specifies the conditions under which a certification issued by a State or an accreditation organization shall be revoked or suspended, and the effect that such revocation or suspension would impose on the certification and application for recertification of the laboratory.

Section 6 mandates that the Secretary, through the CDC, annually publish pregnancy success rates as reported by ART programs (Section 2); the names of ART programs that fail to report pregnancy success rates; the identity and certification status of each embryo laboratory located in a State which has adopted the model certification program; the identity of each embryo laboratory in a State which has not

adopted the certification program and which has been certified by an approved accreditation organization; and in the case of an embryo laboratory which is not certified, whether the laboratory has applied for certification. The annual publication is to be distributed to States and the public. This section was also addressed in the previously mentioned **Federal Register** notice published on August 26, 1997 (62 FR 45259). The first report, 1995 Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports, was published in December 1997. The second report, 1996 Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports, was published in February 1999. Copies of these reports may be obtained by contacting CDC by calling 1-770-488-5372 or via the Internet at www.cdc.gov/nccdphp/drh/art96/.

Section 7 authorizes the Secretary to charge sufficient fees to cover the cost of administering the FCSRCA and authorizes States adopting the certification program to charge sufficient fees to cover the cost of administering their program.

Section 8 includes a definition of assisted reproductive technology and provides for seeking public comment on any proposed expansion of the definition.

Background

In accordance with the FCSRCA, in developing the model certification program, the CDC consulted with individuals, professional organizations and consumer groups with expertise and interest in ART. The organizations represented reproductive medicine—the American Society for Reproductive Medicine (ASRM) and the Society for Assisted Reproductive Technology, laboratory professionals—the College of American Pathologists (CAP) and the American Association of Bioanalysts, and a consumer group that serves to educate the public on infertility diagnosis and treatment—RESOLVE. The CDC also sought input from State programs and Federal agencies with regulatory responsibilities related to laboratory practice, tissue banking and ART.

A useful example in developing the model certification program was the voluntary Reproductive Laboratory Accreditation Program (RLAP) developed jointly by the CAP and the ASRM, and administered by the CAP. The CAP/ASRM RLAP currently provides oversight of at least one third of embryo laboratories affiliated with ART programs and clinics in the United

States and served as the basis for many of the standards in the proposed model program. Standards and guidelines from other professional organizations, State, Federal, and international programs were also used as resources, and the CDC made a number of site visits to embryo laboratories to observe the daily operation of these facilities. In addition, between November 1996 and August 1997, the CDC held several work sessions with technical consultants to obtain individual expert input on specific issues related to the embryo laboratory and the model certification program, including personnel qualifications and responsibilities, quality assurance and quality control (quality management), recordkeeping, specific definitions as they would apply to the model certification program, and State administration of the program.

Subsequently, on November 6, 1998, the CDC published in the **Federal Register** (63 FR 60178) a notice soliciting public comment on a proposed model program for the certification of embryo laboratories. As mentioned above, the FCSRCA required the Secretary to facilitate public comment on specific aspects of the model certification program and the definitions as they relate to the model. To ensure appropriate consideration during the public comment period, the CDC highlighted the following issues in the preamble to the proposed model program:

- Based on the comments received during the previously mentioned work sessions with technical consultants (63 FR 60170), the proposed model's definitions for "assisted reproductive technology" and "embryo laboratory", have been elaborated from the definitions specified in the FCSRCA. The issue is whether the revised definitions are appropriate and accurate for use in the model certification program.
- The proposed model permits announced initial and routine inspections and unannounced inspections for complaint investigations. The issues are under what circumstances should announced inspections be permitted so as not to diminish the likelihood of discovering deficiencies in the operation of an embryo laboratory, and whether there are circumstances that should require unannounced inspections.
- The proposed model specifies a 2-year term for embryo laboratory certification. The issue is whether this is an appropriate period of time for the term of certification of a laboratory (*i.e.*, renew biennially).

In addition, we were interested in receiving comments on the following issue which was not specifically addressed in the proposed model certification program but could have been considered for inclusion in the finalized model:

- Proficiency testing (PT) currently available for the embryo laboratory is limited to determining whether culture media samples provided by the PT program are suitable for in vitro mouse embryo culture. While the performance of PT is not required in the proposed model, the model's standards do require a laboratory to perform quality control procedures to monitor the reliability of the ART procedures performed (including culture media checks). Equipment and instrument maintenance and function checks are also required to ensure their adequate performance. In addition, the laboratory must track and evaluate procedural outcomes such as fertilization rates, cleavage rates and embryo quality as a means of monitoring the quality of the procedures and services provided by the laboratory. The issue is whether these standards provide a sufficient means for monitoring laboratory performance or if a standard requiring PT should be included in the model.

During the 60-day comment period the public had the opportunity to submit concerns and recommendations in response to the issues highlighted above, as well as any other aspect of the proposed model program. The letters we received provided helpful information for finalizing the model certification program. A summary of the comments and our responses to them are included below.

Other information that was useful in finalizing this model certification program for embryo laboratories was data provided in a Survey of Assisted Reproductive Technology Embryo Laboratory Procedures and Practices, conducted under a CDC Task Order Contract with Research Triangle Institute and performed by Analytical Sciences, Inc. The purpose of this survey was to provide the CDC with an enumeration of those ART embryo laboratory procedures and practices that are currently in use. The final report of the survey was completed on January 29, 1999, and can be accessed via the Internet at www.phppo.cdc.gov/dls/pdf/art/ARTsurvey.pdf. A copy of the report may also be obtained by calling the CDC at (770) 488-8295.

Responses to Comments

In response to our request for comments to the proposed model certification program, we received a total of 15 letters, four of which were from professional organizations, one from a consumer advocacy group, one from a manufacturer, and the rest from individuals employed in embryo laboratories or affiliated with infertility clinics/programs. The letters contained approximately 60 comments, 14 of which were in response to the issues highlighted for consideration in the proposed model program. Six of the commenters, which included two

professional organizations, expressed support for and/or complimented our efforts to develop a model certification program. There was no opposition to the model in its entirety, but rather the respondents provided comments on specific aspects of the proposed model. Comments to the highlighted issues and additional comments are addressed below.

1. Are the revised definitions for "assisted reproductive technology" and "embryo laboratory" appropriate and accurate for use in the model certification program?

One commenter believed that the definition for "assisted reproductive technology" was overly broad and could be interpreted as including intra uterine insemination (IUI) and intra vaginal culture (IVC), procedures which do not require the same level of quality control, quality assurance, etc., as do other ART procedures. The commenter suggested that the model be revised to contain new categories for IUI and IVC with requirements consistent with the complexity level of the procedures. Another commenter stated that while the term "embryo laboratory" is technically correct, these laboratories would be more appropriately named "embryology laboratories" to reflect the science of the work performed in them.

Response: The proposed definition for assisted reproductive technology (ART) was based on the definition of ART provided in the FCSRCA, which was modified for clarity based on the comments received during our work sessions with technical consultants. We do not agree with the comment that the ART definition is overly broad for use in the model certification program. The definition appropriately and accurately specifies ART as "all clinical and laboratory treatments which involve the handling of human oocyte and sperm, or embryos, with the intent of establishing a pregnancy." The commenter's interpretation is incorrect; IUI is not covered by this definition of ART, as IUI is a procedure that involves the manipulation of sperm only rather than oocytes and sperm. However, IVC is covered by the ART definition, since it is a procedure in which oocytes and sperm are mixed and incubated together. In addition, we disagree with this commenter's viewpoint that IVC does not require the same level of quality control or quality assurance as other ART laboratory procedures. In performing IVC, oocytes and embryos must be accurately identified just as they are for other ART laboratory procedures, requiring qualified personnel with appropriate training and expertise, written procedures and

policies outlining criteria for the identification of oocytes and embryos, etc., to ensure quality patient care.

In response to the comment suggesting that the term "embryology laboratory" be used in place of "embryo laboratory", we are retaining "embryo laboratory" because it is the term used throughout the statute (FCSRCA). Although embryology refers to the science of studying the origin and development of an individual organism, in using the term embryo, we are specifically referring to the intended goal of the procedures performed in these laboratories—the manipulation of human gametes to produce viable human embryos.

2. Under what circumstances should announced inspections be permitted so as not to diminish the likelihood of discovering deficiencies in the operation of an embryo laboratory, and are there circumstances that should require unannounced inspections?

Five commenters, two of which were professional organizations, expressed concern with the proposed model's option to permit unannounced inspections for complaint investigations. The commenters cited the potential for disrupting embryo laboratory procedures and interfering with patient treatment. Maintaining patient confidentiality during an inspection was also of concern. Three commenters suggested providing the laboratory 48 hours notice to allow rescheduling of patient procedures or other alternative measures to reduce the risk to eggs, sperm and embryos. The consumer advocacy group supported unannounced inspections if precautions are taken to prevent interference with patient treatment and safeguard patient confidentiality.

Response: We understand the commenters' concerns, and agree that the nature of the work performed in embryo laboratories is delicate and time sensitive, and that disruptions or delays in the process could have deleterious effects. We also agree that maintaining patient confidentiality during a laboratory inspection is of utmost importance. When performing inspections, it is not the intent to disrupt the laboratory's operations or divulge confidential patient information. In general, Federal, State and professional accreditation organization laboratory inspectors are health professionals with pertinent education, qualifications, and experience. They receive special training and are instructed to make every effort to avoid interrupting the routine workflow when conducting an inspection. They are also aware of the

importance of safeguarding confidential patient information.

The proposed model program did not mandate that unannounced inspections *must* be performed for complaint investigations, but it did provide the State that chooses to adopt the model the option to do so. We included this option so that investigations of complaints of truly egregious behavior could be conducted immediately and unannounced. In addition, this option would allow the State to incorporate embryo laboratory inspections into an already existing laboratory or health care facility regulatory program that may require unannounced complaint inspections. Based on the comments we received, and because of the unique nature of the procedures performed in embryo laboratories, we agree that in some cases there may be a need to allow 48 hours notice prior to conducting a complaint inspection. This could be done to give the laboratory time to reschedule ART procedures, if necessary, and to ensure that adequate staffing and the appropriate individuals are available on the day of inspection. In addition, we do not believe that a 48 hour notice would significantly diminish the likelihood of discovering systemic deficiencies in a laboratory's operation. Therefore, if a State determines that it is appropriate to provide some advance notice of a complaint inspection, the model certification program as written allows the State to provide the laboratory a 48 hour notice.

3. Is two years an appropriate period of time for the term of certification of a laboratory (i.e., renew biennially)?

Two individuals provided comments on the time period for the term of certification. One of the commenters viewed a two year term as reasonable. The other commenter suggested that three to five years would be more appropriate as long as there was no significant change in the laboratory's personnel, no change in the laboratory's location, or no complaints registered against the laboratory.

Response: A two year term of laboratory certification is consistent with other similar laboratory licensure or accreditation programs currently in existence. Maintaining this consistency among programs may allow for easier coordination of inspections if a laboratory participates in more than one program offered by the same organization or agency. For example, a facility that has both a clinical laboratory and a reproductive laboratory accredited by the CAP may be able to have a joint inspection for both of the programs. For this reason, we agree with

the commenter who stated that a two year term is reasonable, and have not revised this requirement in the model certification program.

4. Do the proposed embryo laboratory standards provide a sufficient means for monitoring laboratory performance or should a standard requiring PT be included in the model?

Each of the four professional organizations commenting on the proposed model addressed the issue of PT. Three of the organizations did not support the inclusion of a PT requirement in the model certification program. They did not believe appropriate PT was available or could be developed and standardized due to the specimens (human gametes and embryos) used in the embryo laboratory. They stated this is especially true if the purpose of PT is to measure a laboratory's performance by replicating ART laboratory procedures. One organization strongly believed PT must be applied to embryo laboratories as it is applied to laboratories performing clinical laboratory testing; not doing so would undermine any potential effectiveness of the model program.

Response: We agree that, at this time, the inclusion of PT in the model certification program for embryo laboratories is not appropriate. Proficiency testing monitors laboratory performance by comparing the laboratory's evaluation or measurement of external samples that mimic patient samples to known test results, or results obtained by standardized methods. Proficiency testing results should be comparable to results that would be obtained when testing similar patient samples. Definitive PT programs are available for andrology procedures (sperm counts and microscopic semen evaluations), however, the one program currently available for embryo laboratories evaluates whether a laboratory's bioassay system can detect toxicity in culture media samples sent to the laboratory by the program. It does not test a laboratory's ability to examine oocytes and embryos, or successfully perform other embryo laboratory procedures. Standardized methods for monitoring these laboratory procedures have not yet been developed, in part due to the fact that the ultimate measure of the performance of most embryo laboratory procedures is a viable human embryo.

Proficiency testing is only one measure of a laboratory's quality. Other measures such as quality control, personnel standards, and monitoring laboratory practices must also be considered in determining the overall quality of laboratory performance. As

mentioned in the preamble to the proposed model, these measures are all included in the model certification program. Since appropriate, standardized PT is not available at this time for embryo laboratory procedures, we have not included it in the model certification program. At such time as definitive PT becomes available for embryo laboratory procedures, States that adopt the model certification program or develop an equivalent program should consider including it in their program as an additional indicator of laboratory performance.

5. Additional comments.

Comment: One commenter requested clarification of what regulations take priority, or must be met, when there is a conflict/difference between Federal and State laboratory requirements.

Response: A laboratory must meet all applicable Federal, State and local requirements, and when differences exist among regulations, the laboratory must meet the most stringent requirement. By doing this, the laboratory should meet corresponding regulations that are less stringent.

Comment: One professional organization strongly urged the CDC to approve accreditation organizations for embryo laboratory certification purposes. The organization believes that CDC approval of the CAP/ASRM Reproductive Laboratory Accreditation Program (RLAP) and others that could be developed would be the best means to protect the public health without creating overly burdensome and redundant regulation. An additional commenter endorsed the existing CAP/ASRM RLAP as the means to assure constructive assessment of embryologic methods and improvement in the quality of ART programs.

Response: The CDC recognizes there are existing voluntary accreditation programs currently available that provide oversight of ART embryo laboratories and have had a positive impact on laboratory quality without Federal oversight. These programs were reviewed and served as examples in developing the model certification program for embryo laboratories, and could provide an excellent resource for States that wish to develop their own certification program. One such program is the CAP/ASRM RLAP, mentioned above.

While we agree that Federal approval of an accreditation organization(s) could be beneficial to laboratories in States which do not adopt the model or have an equivalent certification program, as explained below, this would go beyond the proposed model's implementation plan which permits States to approve

accreditation organizations to certify laboratories within their respective State. As stated earlier in the preamble, the FCSRCA authorizes the Secretary and States to charge fees to cover the costs of the model certification program. Since this is a voluntary program, and laboratories have not indicated they would opt into such a self-supporting program, at this time, the CDC is deferring the implementation of the approval and subsequent monitoring of accreditation organizations to States that choose to adopt the model certification program and wish to use an accreditation organization for State certification purposes.

Although we have not officially approved any accreditation programs or determined their equivalency to the model certification program, as data become available, the CDC will publish the certification/accreditation status of embryo laboratories affiliated with ART programs or clinics in conjunction with future annual publications of the ART Success Rates reports.

Comment: One commenter asserted that any fees charged for certification must not be unduly excessive or burdensome to the laboratory. The commenter suggested the cost of certification be adjusted with respect to the laboratory's level of activity, *i.e.*, higher volume laboratories should be charged more than smaller volume laboratories. A professional organization commented that the Federal government should share the costs of the certification and accreditation programs.

Response: It will be up to each State that adopts the model program to develop fee schedules and the methodology for determining fees charged to the laboratory for certification. Many existing licensing/certification programs do establish fees based on volume of testing or number of procedures performed. The requirement that addresses fees at Part II., B., 8. of the model certification program was included to reiterate the FCSRCA's provision (Pub. L. 102-493, sec. 7) that allows charging such fees necessary to recoup the cost of administering a certification program.

To date, the Federal government has assumed the cost of implementing the FCSRCA, in development of the laboratory standards and administrative process for the model certification program for embryo laboratories and publication of both the proposed and finalized model programs. In addition, the CDC will distribute this model program to State officials and health authorities as outlined in the statute and will provide the certification/accreditation status of embryo

laboratories affiliated with infertility clinics and ART programs in its annual publication of ART Success Rates.

Comment: Two commenters expressed concern over the model's administrative requirement for the State, or as applicable, accreditation organization to make available to the public, upon request, the laboratory's specific inspection findings, including deficiencies identified and any subsequent corrections to those deficiencies. One of the commenters believed this would discourage a laboratory's participation in the voluntary certification program and that the public would be unable to interpret the published inspection findings.

Response: The requirement to make a laboratory's inspection findings available to the public upon request was mandated by the FCSRCA. This requirement is part of the overall effort in the legislation to provide the public with consistently reliable and comparable information about the effectiveness of infertility services provided by ART clinics. It is one piece of the information that may be used by consumers in choosing a clinic for ART services. We disagree that this requirement would discourage laboratories that are maintaining good laboratory practices from participation in the voluntary model certification program. In fact, successful participation in a voluntary program such as the model certification program could be viewed as an asset for a laboratory or ART program seeking new clients. We also disagree with the commenter that the public would not be able to interpret inspection findings. The model certification program requires States and accreditation organizations to include the necessary explanatory information for the public to interpret the findings.

Comment: Two professional organizations were concerned the model did not sufficiently address due process procedures for laboratories found to be out of compliance with the certification program's standards.

Response: Due process procedures for laboratories that are not in compliance with certification program requirements are not described in the model program because such a process would be developed and performed at the State level and may vary from State to State. The reference to State development of due process procedures is found at Part II., B., 7., a. of the model certification program.

Comment: One commenter disagreed with the model's proposed guideline at Part III., A., that the laboratory employ one individual for every 90–150 ART

cycles performed by the laboratory annually. The commenter suggested one individual for every 100 ART cycles is more appropriate.

Response: We disagree. We included the recommended range as a guideline for adequate staffing of a laboratory, recognizing that some embryo laboratories do not provide as extensive service as others and may not need as many employees. In addition, a laboratory's workload may vary over time, and it may not be possible to keep the staffing level at an exact number. By giving an appropriate range as a guideline for staffing, we are providing some guidance for laboratories while maintaining flexibility for the reasons stated above.

Comment: A few commenters promoted requiring board certification for laboratory directors with a doctoral degree, with one of the commenters stating, "Board examinations are the only comprehensive measure available of a candidate's command of a unified fund of laboratory specific knowledge and are crucial in establishing a minimum competence level for laboratory directorship in our field." One of the commenters misinterpreted the requirements of the model, thinking it would allow an individual with a doctoral degree in English (or other non-science major) to qualify as a laboratory director.

Response: We agree it is beneficial for the director of the embryo laboratory to be board certified, especially if that certification is specific to reproductive laboratory science. However, we do not believe it is the only way to ensure that a laboratory director is qualified for this position. Therefore, while not making board certification a requirement, we are adding language at Part III., A., 1., b., recommending board certification in embryology for doctoral scientist laboratory directors.

In response to the commenter who misread the model certification program requirements for a doctoral degree, Part I., Definitions, specifies the earned doctoral degree must be in a chemical, physical, biological or medical laboratory science. This would preclude an individual with a doctoral degree in English or other nonscience from fulfilling the qualification requirements for an embryo laboratory director.

Comment: Several commenters, which included three professional organizations provided their opinions on the use of documented hours of training and numbers of ART cycles in an embryo laboratory as an appropriate qualification requirement for laboratory personnel, in particular the laboratory director. Reasons given by commenters

for not requiring a specific number of hours and/or cycles of training/experience included the following:

Training should bear a logical relationship to the complexity of procedures performed. Some ART laboratory procedures may require fewer or greater number of repetitions to ensure competency, *i.e.*, intracytoplasmic sperm injection (ICSI) requires more manipulation and skill than *in vitro* fertilization (IVF) and should have a higher hour/cycle requirement assigned;

The laboratory director should determine the adequacy of each employee's training/experience and not be locked into requiring an exact number of hours and/or cycles;

Consideration must be given to the laboratory director, who may not always perform bench work;

The number of hours/cycles may be impossible to document if a current laboratory director was trained several years in the past; and

Requiring the laboratory director to have 60 cycles of experience in ART procedures including IUI, IVC, conventional IVF, gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), ICSI, and assisted hatching, etc., if these procedures are not offered by a facility is unreasonable.

On the other hand, one professional organization stated that, for laboratory directors, the number of ART laboratory cycles performed is a better measure of training and experience than a specific number of hours of training. This organization suggested 60 ART cycles and six months full time in an IVF laboratory is sufficient training for reproductive endocrinologists. Another professional organization agreed if the laboratory director was performing bench work, a requisite number of hours and cycles correlating with the skill level for a specific procedure should be met. Both organizations stated the model program should be flexible and accommodate future changes in embryo laboratory procedures.

Response: Professional guidelines such as the ASRM's revised minimum standards for IVF, GIFT, and related procedures (see References) were a valuable resource in developing the model certification program. The ASRM guidelines recommend the embryo laboratory director or supervisor should have had at least six months training and completed at least 60 ART procedures in a program that performs at least 100 IVF procedures per year with a minimum annual 10% IVF live birth rate per retrieval cycle. The ASRM defines an ART procedure as "a combination of the examination of

follicular aspirates, insemination, documentation of fertilization and preparation for embryo transfer." These guidelines also recommend that embryo laboratory technologists have evidence of completion of 30 complete IVF procedures under continuous supervision of the laboratory director or supervisor.

The ASRM recommendations for personnel training are similar to those proposed in the model certification program. The model's proposed training requirement for the laboratory director and supervisor of one thousand hours of laboratory training is approximately equal to the ASRM's requirement of six months of full-time (40 hour week) training. The ASRM's recommendation for completion of 60 ART laboratory procedures is synonymous with the model's requirement for "performing, at a minimum, each laboratory component of the human ART cycle 60 times". For the reproductive biologist, the model program proposed to require training that included performing the ART laboratory procedure(s) to be performed in the laboratory, at a minimum, 30 times under direct and constant supervision.

We do not agree with the commenters who recommended we not require a specific number of hours of documented training, and/or performance of a certain number ART laboratory procedures for laboratory director, laboratory supervisor, or reproductive biologist. Although we recognize it can be difficult to impose a blanket training requirement for the skill level needed for a diverse group of laboratory procedures, we believe the requirements in the model certification program are consistent with the ASRM guidelines and appropriate (with minor revisions) as *minimum* training requirements for the majority of ART laboratory procedures and job duties to be performed by each respective personnel category. We agree with the commenters who suggested some ART laboratory procedures require more extensive technical skill and manipulation (e.g., ICSI) and may need additional repetitions prior to assuring competence of an individual. As stated in the model, it is the responsibility of the laboratory director to ensure all personnel receive appropriate training, and can demonstrate reliable performance of procedures prior to working on patient specimens (Part III., A., 2., k.). If the director determines it is necessary to increase the number of repetitions for some ART laboratory procedures, he or she should require such for adequate personnel training.

For clarification of the requirements in the model certification program and for consistency with the ASRM guidelines, we have replaced the laboratory director requirement at Part III., A., 1., b., ii., and c., ii., for at least "1000 hours" of documented training with "six months." In this same section, and at Part III., A., 3., b., ii., and c., ii., we have substituted "each ART laboratory procedure 60 times" for "each laboratory component of the human assisted reproductive technology cycle 60 times." Although we have deleted the word "human" from this requirement, the model's definition for ART laboratory procedures specifies these are "all laboratory procedures for the handling and processing of human oocytes and sperm, or embryos, with the intent of establishing a pregnancy."

In response to the comments regarding the role of the laboratory director, as outlined in the model program, the laboratory director is responsible for the overall operation, administration, and *technical* and scientific oversight of the embryo laboratory. Although in some laboratories this may not include day-to-day performance of ART laboratory procedures, it does require the director to have knowledge and technical skills pertaining to the ART laboratory procedures selected/developed and performed in the facility. He or she must also ensure all personnel receive appropriate training for the ART laboratory procedures to be performed, and the laboratory supervisor is technically qualified for that position. Based on these responsibilities, we believe it is necessary for the laboratory director to have at least six months training in an embryo laboratory, and have performed each ART laboratory procedure at least 60 times as part of the training process.

Since the laboratory supervisor is responsible for day-to-day supervision and oversight of the embryo laboratory and may perform the laboratory director responsibilities if authorized in writing by the director, the model program also requires the supervisor to have training which includes performing each ART laboratory procedure at least 60 times. We note that in finalizing the model program, we have clarified at Part III., A., 2., that the laboratory director may delegate performance of his or her responsibilities to an individual qualified as a laboratory supervisor or laboratory director.

In response to the commenter who was concerned about documentation of an individual's training if that person had been working for a number of years, the part of the training that may be

difficult to document would be the number of ART laboratory procedures performed by that individual. In such cases, laboratory worksheets or logbooks, or other forms of laboratory documentation showing completion of ART laboratory procedures by a specific individual may be used as the documentation that adequate training has been completed.

The commenter who interpreted the qualification requirements for laboratory director as being 60 cycles of IUI, IVC, * * * etc., misinterpreted the model program. As explained above, the model requires the laboratory director to perform at least 60 ART *laboratory* procedures as part of his or her training. Performing medical procedures that may be part of an ART cycle, such as IUI, GIFT, and ZIFT is not required. ART laboratory procedures do include, but are not limited to, "the examination of follicular aspirates, oocyte classification, sperm preparation, oocyte insemination, assessment of fertilization, assessment of embryo development, preparation of embryos for embryo transfer, and cryopreservation of specimens." We believe it is appropriate for both the laboratory director and laboratory supervisor to be trained in the performance of all of these procedures to adequately carry out their duties and provide oversight of reproductive biologists who are performing any of these procedures. Although procedures such as ICSI, assisted hatching or other micromanipulative techniques are laboratory procedures, they are specific techniques for oocyte insemination and assessment of embryo development. We would not expect the laboratory director and supervisor to be trained in these specialized techniques, unless they perform them in their laboratory.

Comment: One individual stated there should be a requirement for the laboratory director and supervisor to each perform at least 25 ART cycles per year.

Response: We agree with the commenter that, to maintain their skills and expertise, embryo laboratory personnel performing ART laboratory procedures should perform a minimum number of these procedures on an annual basis. The ASRM guidelines, described in the previous response, recommend each staff embryologist (including the laboratory director or supervisor) perform at least 20 ART procedures a year, in contrast to the 25 ART cycles suggested by the commenter. We believe performance of a minimum of 20 ART laboratory procedures per year is a reasonable number to recommend if an individual

performs ART laboratory procedures as part of his or her responsibilities. Since it is consistent with what is recommended by the ASRM professional guidelines, we are recommending at Parts III., 1., d., ii. and 3., d., ii., for the laboratory director and laboratory supervisor, that if the individual serving in either position performs ART laboratory procedures in the laboratory, he or she should perform each of these laboratory procedures at least 20 times annually. We have also added a recommendation at Part III., 5., d., ii. that each reproductive biologist perform each of the ART laboratory procedures he or she performs in the laboratory at least 20 times annually.

Comment: One commenter was concerned the proposed model's personnel qualification requirements fail to address formal and specific education in reproductive medicine and promotes on-the-job training as the only option to fulfill the educational requirement because the model program would "grandfather" currently employed individuals who do not have an appropriate college degree. The commenter asked that we consider adding provisions that would allow formal education in reproductive laboratory science as an option to on-the-job training. A professional organization also suggested the proposed "grandfather" clauses at Part III., A., 3, c., and 5., c., include a minimum educational standard, specifically a bachelor's degree for the laboratory supervisor and an associate's degree for the reproductive biologist.

Response: We agree with the commenter that it is appropriate to include reproductive laboratory science in the list of acceptable academic degrees for all categories of embryo laboratory personnel. However, we do not agree that having this degree is sufficient to delete the training or experience requirements for any of the personnel categories. In this rapidly changing field, where accurate performance of laboratory procedures is dependent on the skill and expertise of the individual performing the procedures, we believe in addition to an academic degree, it is critical to obtain adequate hands-on training and experience prior to working with human gametes and embryos. This is especially true for procedures that may differ significantly from one laboratory to another.

We do not agree with the comment made by the professional organization that minimum educational standards should be included in the "grandfather" clauses at Part III., A., 3, c., and 5., c. of the model certification program. In

developing standards for this relatively new area of laboratory technology, we do not wish to create a situation where individuals who have been working in the field would not meet the qualifications specified for their positions. In the model certification program, we have specified educational requirements which must be met by individuals who first become employed in an embryo laboratory after the date of this **Federal Register** notice. For the reason stated above, individuals serving in these positions on or before July 20, 1999 who have the specified experience and/or training requirements for their respective positions will be considered qualified.

Comment: A professional organization and two individuals commented on the proposed requirements for the laboratory director, supervisor and reproductive biologist to obtain 12 contact hours of continuing education per year in ART or clinical laboratory practice. While the professional organization expressed the view that continuing education for non-supervisory personnel as specified in the proposed model program is acceptable, one of the individual commenters felt that 12 contact hours was excessive for non-supervisory personnel as well as costly for the ART program. This commenter suggested reducing the requirement to 12 contact hours every two years. The other individual commenter noted the proposed requirement at Part III., A., 2., l., made the laboratory director responsible for ensuring each employee obtain the required continuing education. The commenter felt this should also be the reproductive biologist's responsibility and that reading appropriate literature should count as continuing education.

Response: We agree with the professional organization that in this rapidly evolving field of science and technology, it is appropriate and necessary for all levels of laboratory personnel to maintain current knowledge and skills relevant to ART embryo laboratory procedures. We do not believe requiring 12 contact hours of continuing education (CE) on an annual basis is excessive. At the same time, we recognize there may be some cost to the laboratory or individual to obtain the continuing education. However, we believe the benefits outweigh the costs, especially when there are a number of ways in which CE may be provided, including video or audioconferencing seminars or self-study educational materials. As the one commenter suggested, reading relevant journal articles is another cost-effective way to

obtain CE. However, we note that to meet the model's CE requirement, the specific vehicle used for earning CE contact hours must have been approved by an approved continuing education provider such as the International Association of Continuing Education and Training or other provider specified by the State implementing the model certification program.

We agree that each reproductive biologist, as well as laboratory supervisor, should be pro-active in obtaining appropriate CE. However, as stated previously, it is the laboratory director who is ultimately responsible for the overall operation, administration and technical and scientific oversight of the laboratory. This includes employing qualified personnel and ensuring they receive appropriate training and continuing education to maintain and update their knowledge and skills in ART and laboratory practice.

Comment: One commenter requested clarification of the proposed requirements at Part III., B., 1., and C., 2., which require the laboratory to have "adequate" space and "sufficient" equipment for the type and volume of ART laboratory procedures performed. Specifically, the commenter would like guidelines that address the number of procedures per square foot of space and the number of procedures per cell freezer, etc.

Response: Although we appreciate the commenter's suggestion to more specifically define adequate space and sufficient equipment for an embryo laboratory, we have not specified exact laboratory measurements or numbers of required equipment in the model certification program in an effort to allow flexibility in the configuration and arrangement of laboratory facilities and equipment contained therein. Requirements may differ depending on the number and types of procedures performed, and the number of individuals that are employed by or using each laboratory. As noted in the proposed model standards, the physical space, utilities, and laboratory equipment must be able to accommodate the volume of ART laboratory procedures performed at its busiest time, in a manner that will reduce the potential for spilled, lost or misplaced patient specimens while they are being handled or stored. The laboratory must be secure and have limited access, and must include an isolated area for performing sterile techniques under aseptic conditions. The laboratory and administrative space must be conveniently located, but separate from patient areas, and immediate communication must be

possible with the oocyte retrieval and transfer room. As long as these requirements can reasonably be met, the space and equipment are considered adequate and sufficient.

Comment: Four individuals pointed out the proposed requirement at Part III., B., 3., b., for animal specimens to be incubated separately from human specimens would disallow the use of an incubator containing human specimens when performing the mouse embryo bioassay for quality control purposes.

Response: We agree with the commenters that the proposed requirement noted above could be interpreted to prohibit quality control procedures that require mouse embryos to be held in the same incubator as human specimens. However, there are acceptable alternative procedures (i.e., human sperm survival) that may be used for quality control if a laboratory does not have access to a separate incubator for checking media, glassware, pipettes, etc. The quality control for an incubator itself includes monitoring temperature, humidity and gas concentration, and does not require a bioassay to be performed.

Although not mentioned by commenters, the use of live cells, tissues, organs from a nonhuman animal source transplanted or implanted into a human, or used for ex vivo contact with human body fluids, cells, tissues, organs that are subsequently given to a human recipient (xenotransplantation), raises a major public health dilemma. In its Guidance For Industry, Public Health Issues Posed by the Use of Nonhuman Primate Xenografts in Humans (April 1999), The Food and Drug Administration, in consultation with other Federal agencies, concluded that further scientific research, evaluation and public discussion is needed in order to obtain sufficient information to adequately assess and potentially reduce the risks (particularly the transmission of infectious agents) posed by the use of nonhuman primate cells, tissues and organs. A Federal Advisory Committee on Xenotransplantation is currently under development within the Department of Health and Human Services to address these issues, conduct discussions, and make recommendations regarding the use of nonhuman primate xenografts.

To assure consistency with applicable Federal, State or local requirements as they are developed, we are revising the requirement at Part III., B., 3., to state, "If live nonhuman animal cells, tissues, and/or organs are used, all applicable Federal, State and local regulations regarding their handling, storage and use must be met." We believe this

revision is appropriate and necessary in light of the serious public health issues that need to be addressed with their use in humans.

Comment: One commenter expressed concern with the proposed requirement at Part III., C., 4., c., that states for oral requests for changes to the original written or electronic request for an ART laboratory procedure, the laboratory must receive written or electronic documentation within 24 hours from the authorized person requesting the change. The commenter states particularly in programs where the physicians and/or laboratory staff have multiple work sites, it is sometimes difficult to receive written confirmations within a 24-hour time frame.

Response: It is critical for embryo laboratories to obtain written or electronic orders for procedures to be performed and that these orders are communicated clearly in a timely manner. This enables the laboratory to ensure adequate and appropriate staffing for scheduled procedures and, more importantly, it ensures that the patient's specimens used in the ART embryo laboratory procedures are handled appropriately. Some of the procedures are of a sensitive nature, and the laboratory could be subject to liability if an unauthorized laboratory procedure is accidentally performed due to miscommunication or lack of communication. The model certification program requires a written or electronic request by an authorized person *prior* to performing any procedure. It is only when there is a change to the original request that the model allows 24 hours for written or electronic verification of the change. We do not agree with the commenter that this time frame should be extended to 48 hours. In most cases, it is desirable to have written or electronic verification of revised orders at the time the decision is made to change the patient's treatment protocol. Allowing 24 hours provides a minimal amount of leeway for extenuating circumstances.

Comment: One commenter was confused by the proposed requirement at Part III., C., 4., i., which states that clinical laboratory testing on specimens obtained by the embryo laboratory must be performed in accordance with the Clinical Laboratory Improvement Amendments of 1988 (CLIA) regulations.

Response: Examinations of materials derived from the human body to provide information for the diagnosis, prevention, or treatment of disease, or assessment of the health of human beings must be performed in accordance

with the regulations (42 CFR Part 493) implementing CLIA. Examples of specimens that may be obtained by the embryo laboratory that would be subject to the CLIA regulations include blood or serum samples for endocrinology or hematology testing or microbiology culture samples. If the embryo laboratory performs this testing it must have a valid CLIA certificate for the testing to be performed, or if the laboratory is in a CLIA-exempt State it must be licensed by the State in which it is located. If the embryo laboratory refers specimens for clinical laboratory testing, the testing must be performed by a laboratory that meets the CLIA requirements. To clarify the requirement at Part III., C., 4., i., we are specifying the purpose of clinical laboratory testing is to "provide information for the diagnosis, prevention or treatment of disease, or assessment of the health of human beings."

Comment: One professional organization suggested the quality control standards include an additional statement at Part III., C., 6., e., iv., that "The use of blood-based media prepared in-house is not recommended. However, if such products are used then * * *". This statement is to preface the proposed quality management requirement that the laboratory test blood-based media supplements prepared in-house for several communicable diseases.

Response: We agree with the commenter that it is not a recommended practice for the laboratory to prepare blood-based media or a blood-based media supplement that could potentially contain and transmit communicable diseases. However, if blood-based media or supplements are prepared in-house, blood from the donor(s) used to make the media/supplement must be tested to ensure the donor(s) is negative/nonreactive for significant disease agents. We have added language to the requirement at Part III., C., 6., e., iv., to state that the in-house preparation of blood-based media or a blood-based media supplement is not recommended. In addition, we have clarified that the blood donor(s) must be tested for the communicable diseases listed using FDA licensed, approved or cleared tests for markers of these diseases. Also, to maintain consistency with the FDA's requirements for the testing of blood and tissue product donors, we have added human T-cell lymphotropic virus, Type II, to the communicable diseases listed in this requirement.

Comment: One commenter recommended that the proposed quality assurance requirement at Part III., C., 7.,

b., for the laboratory to track and evaluate procedural outcomes (e.g., fertilization rates and embryo quality) should be incorporated into the current Society for Assisted Reproductive Technology (SART) reporting computer program. The commenter believes capturing the data in the SART program would help to reduce the amount of additional paperwork for the laboratory.

Response: We recognize that for some laboratories, it may be possible to maintain the data listed at Part III., C., 7., b. in a database similar to that used by SART to collect data on ART programs and clinics. However, we do not agree this should be required by the model certification program for several reasons. First, the data collected by SART is not specific to embryo laboratory activities, but their data relates to clinical ART practices and pregnancy success rates reported by ART programs/clinics. In addition, there are many instances in which there is not a direct, one-to-one relationship between ART programs/clinics and the embryo laboratories used by these facilities, and not all ART programs report to SART. To meet the standards in the model certification program, laboratories must record and track the data described in the model. These data are part of the laboratory's internal system to monitor the ongoing quality of its activities.

Comment: One professional organization commented that the proposed ten year period for record retention is excessive and should be reduced to a five year period, while a consumer advocacy group felt indefinite record-keeping should be considered since consumers of ART procedures need to know if they, or their children, have ever had exposure to contaminants through laboratory procedures.

Response: While we appreciate the consumer advocacy group's concerns, requiring indefinite retention of all laboratory records could be extremely burdensome for some laboratories. We proposed the ten year period for record retention because it was consistent with similar requirements mandated by the Food and Drug Administration for human tissue intended for transplantation. We continue to believe this time period is reasonable and have not changed the requirement in the model certification program. However, we note that the 1998 Survey of Assisted Reproductive Technology Embryo Laboratory Procedures and Practices conducted by the CDC indicated the majority of embryo laboratories are retaining most of their records indefinitely. If consumers are concerned they may not have indefinite

access to pertinent laboratory records, it may be possible for them to request the laboratory provide them with all relevant information at the time of an ART procedure. The consumer could then maintain this information for as long as desired.

Additional Revisions to the Proposed Model Certification Program

Although written comment was not received on the following, we are making a few additional revisions to the administrative requirements proposed in the model certification program for the reasons stated below.

- At Part II., B., 2., d., vi., we are extending the time frame in which the approved accreditation organization must provide the State advanced written notice of the effective date of any proposed changes in the organization's requirements from "at least 30 days" to "at least 60 days." We believe that this revision will provide the State a more reasonable period of time to review the organization's proposed changes for continued equivalency to the State's certification program.

- At Part II., B., 4., a., we are revising the language that states "Initial inspections are performed when the laboratory applies for certification and may be performed for recertification after the laboratory has had a change in ownership or administration," to include a change in the laboratory's location. We believe a change in the laboratory's location may require an onsite inspection to ensure that the laboratory continues to meet the certification program's requirements for adequate space and appropriate environmental conditions. A conforming change is also being made at Part II., B., 3., ii., which requires the embryo laboratory to submit changes in its ownership or administration to the State within 30 days of the change.

A Model Program for the Certification of Embryo Laboratories

With this publication, CDC has provided a model program for the certification of embryo laboratories which incorporates the definitions and laboratory standards called for in the FCSRCA and has included administrative requirements for States which choose to adopt the model program. CDC will distribute the model certification program to State officials and health authorities as outlined in the statute, and encourage their assistance in the State adopting the program.

As stated in the preamble to the proposed model certification program, CDC will defer implementation of the approval of State certification programs

or accreditation organizations, as well as Federal validation inspections of embryo laboratories certified by States adopting the model or accredited by an accreditation program for embryo laboratories. While Congress anticipated that the cost of Federal and State monitoring and oversight of embryo laboratories would be covered by the fees paid by participating laboratories, participation by embryo laboratories is voluntary and laboratories not willing to pay these fees would not be limited in their ability to operate. To date, embryo laboratories have not indicated they would opt into such a voluntary oversight program.

While the model certification program for embryo laboratories does not provide for a Federal oversight role, we believe that this model provides an excellent resource for States that wish to develop their own programs and professional organizations with an interest in establishing or adopting standards for the embryo laboratory. In addition, as mentioned previously in this preamble, as the data become available, the CDC will publish the certification/accreditation status of embryo laboratories affiliated with ART programs or clinics in conjunction with future annual publications of the ART Success Rates reports.

Organization of the Model Certification Program

This notice describes a model certification program for embryo laboratories and includes definitions (Part I), administrative requirements (Part II), and embryo laboratory standards (Part III). References are also provided as an addendum to this notice for background and educational purposes.

Dated: July 14, 1999.

Thena M. Durham,

Acting Associate Director for Management and Operations, Centers for Disease Control and Prevention.

A Model Certification Program for Embryo Laboratories

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Part I. Definitions

Accredited institution. A school or program which—

(a) Admits as a regular student only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such certificate;

(b) Is legally authorized within the State to provide a program of education beyond secondary education;

(c) Provides an educational program for which it awards a bachelor's degree or provides not less than a 2-year program which is acceptable toward such a degree, or provides an educational program for which it awards a master's or doctoral degree; and

(d) Is accredited by a nationally recognized accrediting agency or association.

This definition includes any foreign institution of higher education that HHS or its designee determines meets substantially equivalent requirements.

Approved accreditation organization. An accreditation organization that has formally applied for and received the State's approval based on the organization's compliance with this model certification program and other requirements as specified by the State.

ART. Assisted reproductive technology.

Assisted hatching. A micromanipulation technique which involves making a small opening in the zona wall of the embryo to enhance implantation.

Assisted reproductive technology. All clinical treatments and laboratory procedures which include the handling of human oocytes and sperm, or embryos, with the intent of establishing a pregnancy. This includes, but is not limited to, in vitro fertilization, gamete intrafallopian transfer, zygote intrafallopian transfer, embryo cryopreservation, oocyte or embryo donation, and gestational surrogacy.

Assisted reproductive technology cycle. Any cycle in which (1) ART has been used, (2) in which the woman has undergone ovarian stimulation or monitoring with the intent of undergoing ART, (3) a woman has donated oocytes, or (4) in the case of cryopreserved embryos, in which embryos have been thawed with the intent of transfer. ART cycles can be stimulated (use of ovulation induction) or unstimulated (natural cycle).

Assisted reproductive technology laboratory procedures. All laboratory procedures for handling and processing of human oocytes and sperm, or embryos, with the intent of establishing a pregnancy. These procedures include, but are not limited to, the examination of follicular aspirates, oocyte classification, sperm preparation, oocyte insemination, assessment of fertilization, assessment of embryo development, preparation of embryos for embryo transfer, and cryopreservation of specimens.

Assisted reproductive technology program or clinic. A legal entity practicing under State law, recognizable to the consumer, that provides ART to couples who have experienced infertility or are undergoing ART for other reasons. This can be an individual physician or a group of physicians who practice together, and share resources and liability.

Authorized person. An individual authorized under State law to order ART procedures.

CDC. The Centers for Disease Control and Prevention.

CLIA. The Clinical Laboratory Improvement Amendments of 1988.

Certification. The certification of an embryo laboratory by a State certification program or through accreditation by an approved accreditation organization.

Certification program. The model certification program for embryo laboratories described in this notice or a State certification program for embryo laboratories which meets or exceeds the requirements of the model certification program.

Cryopreservation. A technique to preserve biologic material through freezing.

Doctoral scientist. An individual holding an earned doctoral degree in a chemical, physical, biological, medical or reproductive laboratory science from an accredited institution. As defined here, doctoral scientist also includes individuals holding an earned doctoral degree in veterinary medicine.

Embryo. The normal (2 pronuclei) fertilized egg that has undergone one or more divisions.

Embryo laboratory. A facility in which human oocytes and sperm, or embryos, are subject to ART laboratory procedures.

Embryo transfer. Introduction of an embryo(s) into a woman's uterus after in vitro fertilization.

Fertilization. The penetration of the egg by the sperm and fusion of genetic materials to result in the development of a fertilized egg (or zygote).

Gamete intrafallopian transfer. An ART procedure that involves removing eggs from the woman's ovary, combining them with sperm, and immediately injecting the eggs and sperm into the fallopian tube. Fertilization takes place inside the fallopian tube.

HHS. The U.S. Department of Health and Human Services, or its designee.

Intracytoplasmic sperm injection. The placement of a single sperm into the ooplasm of an oocyte by micro-operative techniques.

In vitro fertilization. A method of assisted reproduction that involves removing eggs from a woman's ovaries, combining them with sperm in the laboratory and, if fertilized, replacing the resulting embryo(s) into the woman's uterus.

Laboratory. Unless otherwise specified in this notice, means embryo laboratory.

Micromanipulation. Microtechniques such as intracytoplasmic sperm injection and assisted hatching commonly used to overcome fertilization disorders.

Oocyte. The female reproductive cell, also called an egg.

Physician. An individual with a doctor of medicine or doctor of osteopathy degree who is licensed by the State to practice medicine or osteopathy within the State in which the embryo laboratory is located.

Procedural outcome. The outcome of the ART laboratory procedure performed e.g., fertilization assessment—the presence of two pronuclei in the ooplasm.

Specimen. Human biologic material (includes human reproductive tissue such as oocytes, sperm, zygotes and embryos).

Sperm. The male reproductive cell that has completed the process of meiosis and morphological differentiation.

State. Includes, for purposes of this model certification program, each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and other territories of the United States, and a political subdivision of a State where the State, acting pursuant to State law, has expressly delegated powers to the political subdivision sufficient to authorize the political subdivision to act for the State in enforcing requirements equal to or more stringent than the model certification program.

Zygote. A normal (2 pronuclei) fertilized egg before cell division begins.

Zygote intrafallopian transfer. Eggs are collected and fertilized, and the resulting zygote is then transferred to the fallopian tube.

Part II. Administrative Requirements

A. Overview

The certification program for embryo laboratories is a model program developed by the Centers for Disease Control and Prevention (CDC) in accordance with Pub. L. 102-493 (42 U.S.C. 263a-1 *et seq.*) and is to be administered by interested States.

B. Requirements for State Administration of the Model Certification Program for Embryo Laboratories

The State may adopt and administer the model certification program for embryo laboratories described in this notice or administer a State certification program for embryo laboratories that meets or exceeds the requirements of the model certification program, and must, at a minimum, meet the following provisions—

1. Certification Under State Programs.

A State may qualify to adopt and administer the model certification program if the State submits an attestation to the CDC, Public Health Practice Program Office, Division of Laboratory Systems, 1600 Clifton Rd., Atlanta, GA 30333, providing—

a. Assurances that the certification program for embryo laboratories administered by the State meets or exceeds the requirements of the model certification program specified in this notice.

b. An agreement that in administering the certification program, a State will not establish any regulation, standard, or requirement which has the effect of exercising supervision or control over the practice of medicine in ART programs or clinics.

c. An agreement that the term of State certification/recertification issued to an embryo laboratory is for a period of not more than two years.

d. An agreement to investigate, when appropriate and to the extent necessary, complaints received about an embryo laboratory certified under the State's program.

e. An agreement to annually report to the CDC, Public Health Practice Program Office, Division of Laboratory Systems, 1600 Clifton Rd., Atlanta, GA 30333, the identity and certification status of each embryo laboratory in the State as well as any such laboratory which has applied for certification, and the ART programs or clinics with which each embryo laboratory is associated, for annual publication by the CDC.

f. Information about any proposed use and approval and revocation of approval of accreditation organizations in accordance with paragraphs 2. and 5. of this section.

g. An agreement to make such reports as the Secretary of the Department of Health and Human Services (through the CDC) may require.

2. Use and Approval of Accreditation Organizations. Accreditation organizations approved by the State may be used to inspect and accredit embryo laboratories for the purpose of State

certification and such accreditation shall constitute certification. The criteria and procedures used by the State to approve accreditation organizations must include, at a minimum, the following:

a. The accreditation organization must provide assurances satisfactory to the State that its standards and requirements for accreditation of embryo laboratories meet or exceed the requirements of the certification program;

b. The accreditation organization must, at a minimum, conduct inspections of embryo laboratories in accordance with the requirements under paragraph 4. of this section which includes making available to the public, upon request, the specific findings (with any explanatory information required to interpret the findings), including deficiencies identified in an inspection, and any subsequent corrections to those deficiencies, no later than 60 days after the date of the inspection;

c. The accreditation organization must agree to revoke or suspend a laboratory's accreditation for one year, if the accreditation organization finds, on the basis of inspections, that the owner or operator of the laboratory, or any employee of the laboratory—

i. Has been guilty of misrepresentation in obtaining the accreditation.

ii. Has failed to comply with any standards of the accreditation program.

iii. Has refused a request of the accreditation organization or State for permission to inspect the laboratory, its operations, and records; and

d. The accreditation organization must agree to submit such reports and maintain such records as the State, or HHS, may require, to include, but not be limited to, the following:

i. Notification to the State of each newly accredited embryo laboratory within the State within 30 days of the laboratory obtaining accreditation;

ii. Notification to the State of any embryo laboratory within the State that has its accreditation denied, suspended, withdrawn or revoked, or that has had any other adverse action taken against it by the accreditation organization within 30 days of the action taken;

iii. Notification to the State within 10 days of a deficiency identified in any accredited embryo laboratory within the State where the deficiency poses an immediate jeopardy to the laboratory's patients or a hazard to the general public;

iv. Notification to the State if the accreditation organization finds, on the basis of inspections, that the owner or

operator of the laboratory, or any employee of the laboratory—

A. Has been guilty of misrepresentation in obtaining the accreditation.

B. Has failed to comply with any standards of the accreditation program.

C. Has refused a request of the accreditation organization for permission to inspect the laboratory, its operations, and records;

v. Provide inspection schedules as requested by the State for the purpose of conducting onsite validation inspections of laboratories; and

vi. Provide the State written notification at least 60 days in advance of the effective date of any proposed changes in its requirements.

3. Embryo Laboratory Application Requirements. The State must provide for the submission of an application to the State by an embryo laboratory requesting certification, in such form as may be specified by the State. Such an application must include the following:

a. Assurances satisfactory to the State that the embryo laboratory will be operated in accordance with the standards of the certification program;

b. An agreement by the embryo laboratory to—

i. Annually report to the State the ART programs or clinics with which the laboratory is associated.

ii. Submit changes in the ownership, administration, or location of the laboratory to the State within 30 days of the change.

iii. Permit the State to conduct onsite inspections including, as applicable, initial, routine, validation and complaint inspections, upon presentation of identification to the owner, operator, or agent in charge of the laboratory, during the laboratory's regular hours of operation to determine compliance with the certification program.

iv. Permit the State to have access to all facilities, equipment, materials, records, and information which the State requires to determine if the laboratory is being operated in accordance with the standards of the certification program.

v. Permit the State to copy any material, record, or information inspected, or submit such, upon request by the State.

vi. Permit the State to make available, upon request, to the public, the laboratory's specific inspection findings (with any explanatory information required to interpret the findings), including deficiencies identified in an inspection, and any subsequent corrections to those deficiencies;

c. If the State allows certification of an embryo laboratory on the basis of the laboratory's accreditation by an approved accreditation organization (e.g., issues a certificate of accreditation), the laboratory must, in addition to the requirements of subparagraphs 3.a. and 3.b. of this section—

i. Submit proof of current accreditation.

ii. Permit the accreditation organization to have access to all facilities, equipment, materials, records, and information which the accreditation organization requires to determine if the laboratory is being operated in accordance with the standards of the accreditation organization program.

iii. Permit the accreditation organization to copy any material, record, or information inspected, or submit such, upon request by the accreditation organization.

iv. Permit the accreditation organization to make available, upon request, to the public, the laboratory's specific inspection findings (with any explanatory information required to interpret the findings), including deficiencies identified in an inspection, and any subsequent corrections to those deficiencies.

v. Agree to authorize the accreditation organization to submit to the State or HHS such laboratory-specific information or reports as the State or HHS may require; and

d. Such other information, agreements and assurances as the State finds necessary.

4. Initial, Routine and Complaint Inspections. Inspections must be conducted to determine if embryo laboratories applying for or renewing their certification meet the requirements of the certification program. In addition, inspections may be performed as part of the State's investigation of complaints received about a certified embryo laboratory. The inspections may be carried out by the State or, as applicable, by an accreditation organization approved by the State in accordance with paragraph 2. of this section.

a. Initial inspections for embryo laboratory certification must be performed during the laboratory's regular hours of operation and may be announced. Initial inspections are performed when the laboratory applies for certification and may be performed for recertification after the laboratory has had a change in ownership, administration, or location.

b. Routine inspections for renewal of the laboratory's certification must be performed biennially, during the

laboratory's regular hours of operation and may be announced.

c. Inspections to investigate complaints received by the State about a laboratory may be performed unannounced, during the laboratory's regular hours of operation.

d. Inspection of a laboratory may be made only upon the presentation of identification to the owner, operator, or agent in charge of the laboratory being inspected.

e. In conducting an inspection, the State or approved accreditation organization must have access to all facilities, equipment, materials, records, and information which the State or approved accreditation organization requires to determine if the laboratory is being operated in accordance with the standards of the certification program.

f. The State or approved accreditation organization may copy any material, record, or information inspected or require it to be submitted to the State or, as applicable, to the approved accreditation organization.

g. The specific findings (with any explanatory information required to interpret the findings), including deficiencies identified in an inspection, and any subsequent corrections to those deficiencies must be made available to the public upon request beginning no later than 60 days after the date of the inspection.

5. Validation Inspections. The State must annually evaluate the performance of each approved accreditation organization by performing validation inspections of a sufficient number of embryo laboratories within the State accredited by the organization, to allow a reasonable estimate of the performance of such organization.

a. The State may enter and inspect, during regular hours of operation, embryo laboratories which have been accredited by an approved accreditation organization for the purpose of determining whether the laboratory is being operated in accordance with the standards of the certification program.

b. A validation inspection of a laboratory may be announced and be made only upon the presentation of identification to the owner, operator, or agent in charge of the laboratory being inspected.

c. In conducting a validation inspection, the State must have access to all facilities, equipment, materials, records, and information which the State requires to determine if the laboratory is being operated in accordance with the standards of the certification program.

d. The State may copy any material, record, or information inspected or require it to be submitted to the State.

e. If the State determines as a result of a validation inspection that the embryo laboratory is not in compliance with the standards of the certification program, the State must—

i. Notify the accreditation organization which accredited the laboratory.

ii. Make available to the public the inspection findings (with any explanatory information required to interpret the findings), including deficiencies identified in the inspection, and any subsequent corrections to those deficiencies.

iii. Conduct additional inspections of other embryo laboratories accredited by the accreditation organization to determine if the accreditation organization is reliably identifying the deficiencies of the laboratories.

f. If the State determines that the accreditation organization has not met the requirements of paragraph 2. of this section, the State may (under such notice and hearing standards to be developed by the State) revoke the approval of the accreditation program.

6. Revocation of an Accreditation Organization's State Approval. If the State revokes approval of an accreditation organization under subparagraph 5.f., of this section—

a. The State must notify each laboratory, accredited by the organization under the State certification program, that it has revoked its approval of the organization within 10 days of the revocation.

b. The certification of any embryo laboratory accredited by the organization will continue in effect for 60 days after the laboratory is notified by the State of the withdrawal of approval, except that the State may extend the period during which the certification may remain in effect if the State determines that the laboratory submitted an application to another approved accreditation organization for accreditation or to the State, as applicable, in a timely manner after receipt of such notice.

7. Embryo Laboratory Certification Revocation and Suspension.

a. A certification issued by a State for an embryo laboratory must be revoked or suspended if the State or, as applicable, approved accreditation organization finds, on the basis of inspections and after reasonable notice and opportunity for hearing (under such notice and hearing standards to be developed by the State) to the owner or operator of the laboratory, that the

owner or operator or any employee of the laboratory—

- i. Has been guilty of misrepresentation in obtaining the certification.
- ii. Has failed to comply with any standards of the certification program.
- iii. Has refused a request of the State or approved accreditation organization for permission to inspect the laboratory, its operations, and records.

b. If the certification of an embryo laboratory is revoked or suspended, the certification of the laboratory shall continue in effect for 60 days after the laboratory receives notice of the revocation or suspension, unless there is a finding that the laboratory's continued operation may constitute a public health threat, in which case the certification shall be immediately revoked or suspended.

c. If the certification of an embryo laboratory is revoked or suspended, the laboratory may apply for recertification after one year after the date of the revocation or suspension.

8. Fees. The State may require the payment of fees for the purpose of, and in an amount sufficient to cover the costs of, administering the certification program.

Part III. Embryo Laboratory Standards

A. Personnel Qualifications and Responsibilities

The embryo laboratory must have a sufficient number of individuals, who meet the qualification requirements, to perform the functions necessary to provide timely services appropriate for the size and volume of the ART program(s) or clinic(s) served by the laboratory. As a guideline, for every 90–150 ART cycles performed annually, the laboratory should employ one individual who is capable of performing all ART laboratory procedures provided by the embryo laboratory. Regardless of workload, at a minimum, two qualified individuals should be available to provide the appropriate laboratory services.

1. Laboratory Director Qualifications. The laboratory director must be qualified to manage and direct the laboratory personnel and the performance of ART laboratory procedures. The laboratory director must—

- a. Possess a current license as an embryo laboratory director issued by the State in which the laboratory is located, if such licensing is required.
- b. Be a physician or a doctoral scientist with a broad knowledge of the biochemistry, biology, and physiology of reproduction, and laboratory

operations including experimental design, statistics, and problem solving. It is recommended that a doctoral scientist serving as a laboratory director be board certified in embryology. In addition, the laboratory director must meet the following:

- i. Have two years documented pertinent experience in a laboratory performing ART procedures. This experience should include familiarity with laboratory quality control, sterile technique and cell culture; and
- ii. Have documented training of at least six months in an embryo laboratory which includes performing, at a minimum, each ART laboratory procedure 60 times.

Note: Documented experience and training may be acquired concurrently.

c. If not qualified under paragraph 1.b. of this section, be the director of an embryo laboratory on or before July 20, 1999 and meet the following:

- i. Have two years documented pertinent experience in a laboratory performing ART procedures. This experience should include familiarity with laboratory quality control, sterile technique and cell culture; and
- ii. Have documented training of at least six months in an embryo laboratory which includes performing, at a minimum, each ART laboratory procedure 60 times.

Note: Documented experience and training may be acquired concurrently.

d. In addition to meeting the qualification requirements above—

- i. Obtain at least 12 contact hours of continuing education annually in assisted reproductive technology or clinical laboratory practice; and
- ii. If the individual serving as the laboratory director performs ART laboratory procedures in the laboratory, it is recommended that he or she performs each of these procedures at least 20 times annually.

2. Laboratory Director Responsibilities. The laboratory director is responsible for the overall operation, administration, and technical and scientific oversight of the embryo laboratory, including the employment of personnel who are qualified to perform ART laboratory procedures, and record and report procedural outcomes promptly, accurately and proficiently. If the laboratory director delegates performance of his or her responsibilities to an individual qualified as an embryo laboratory director or laboratory supervisor, he or she must do so in writing. The laboratory director remains responsible for ensuring that all delegated duties are

properly performed. The laboratory director must—

a. Be accessible to the laboratory to provide on-site, telephone or electronic consultation as needed.

b. Ensure that the physical plant (space, facilities and equipment) and environmental conditions of the laboratory are appropriate for the laboratory procedures performed and provide a safe environment in which employees and other occupants are protected from physical, chemical, electrical and biological hazards.

c. Establish and monitor a program to ensure that aseptic conditions are maintained in the laboratory, as appropriate, for the ART laboratory procedures to be performed.

d. Ensure that ART laboratory procedures selected or developed by the laboratory are appropriate to provide quality patient care.

e. Ensure that adequate systems are in place to maintain patient confidentiality throughout those parts of the ART process under the laboratory's control.

f. Ensure that an approved procedure manual is available to all personnel responsible for performing ART laboratory procedures.

g. Establish and monitor a quality management program to assure the quality of laboratory services provided and to identify failures in quality as they occur.

h. Ensure that all necessary corrective actions are taken, documented and reviewed for effectiveness whenever failures in quality are identified.

i. Provide consultation to physicians and others, as appropriate, regarding the clinical significance of laboratory findings.

j. Employ a sufficient number of qualified personnel with the appropriate education and documented experience or training to supervise and perform the work of the laboratory. Written records of the qualifications of all personnel must be maintained.

k. Ensure that all personnel receive appropriate training for the ART laboratory procedures to be performed, and have demonstrated that they can perform the procedures reliably prior to working on patients' specimens. All training activities must be documented.

l. Ensure that all personnel acquire, on an annual basis, the required number of continuing education contact hours. A record of each employee's continuing education participation must be maintained.

m. Specify, in writing, the responsibilities and duties of each person who performs ART laboratory procedures, identifying which procedures each individual is

authorized to perform and whether supervision is required.

n. Ensure that policies and procedures are established for monitoring each employee's continued competence to perform ART laboratory procedures, and whenever necessary, provide remedial training or additional continuing education to improve skills.

o. Ensure that performance evaluations for each employee are performed and documented, at a minimum, annually.

3. **Laboratory Supervisor Qualifications.** The embryo laboratory must have one or more qualified supervisors who, under the direction of the laboratory director, provide day-to-day supervision of laboratory personnel performing ART laboratory procedures. In the absence of the director, the laboratory supervisor must be responsible for the proper performance of all ART laboratory procedures. The laboratory supervisor must—

a. Possess a current license issued by the State in which the laboratory is located, if such licensing is required.

b. Meet the qualification requirements for an embryo laboratory director under paragraph 1. of this section, or meet the following:

i. Have an earned master's or bachelor's degree in a chemical, physical, biological, medical technology, clinical or reproductive laboratory science from an accredited institution; and

ii. Have documented training which includes performing, at a minimum, each ART laboratory procedure 60 times.

c. If not qualified under subparagraph 3.b. of this section, be the supervisor of an embryo laboratory on or before July 20, 1999 and have documented training which includes performing, at a minimum, each ART laboratory procedure 60 times.

d. In addition to meeting the qualification requirements above—

i. Obtain at least 12 contact hours of continuing education annually in assisted reproductive technology or clinical laboratory practice. If also serving as the laboratory director, continuing education obtained to meet the laboratory director qualification requirements may be used to meet this requirement; and

ii. If the individual serving as the laboratory supervisor performs ART laboratory procedures in the laboratory, it is recommended that he or she performs each of these procedures at least 20 times annually.

4. **Laboratory Supervisor Responsibilities.** The laboratory supervisor is responsible for day-to-day

supervision or oversight of the embryo laboratory operation and personnel performing ART laboratory procedures. The laboratory supervisor must—

a. Be accessible to laboratory personnel at all times when ART laboratory procedures are performed to provide on-site, telephone or electronic consultation to resolve technical problems in accordance with policies and procedures established by the laboratory director.

b. Provide day-to-day supervision of laboratory personnel performing ART laboratory procedures.

c. Ensure direct and constant supervision of personnel undergoing training in ART laboratory procedures to fulfill the qualification requirements for a reproductive biologist.

d. Perform laboratory director responsibilities as authorized in writing by the laboratory director.

5. **Reproductive Biologist Qualifications.** Each individual performing ART laboratory procedures must—

a. Possess a current license issued by the State in which the laboratory is located, if such licensing is required.

b. Meet the qualification requirements for an embryo laboratory director under paragraph 1. of this section, laboratory supervisor requirements under paragraph 3. of this section, or meet the following:

i. Have an earned bachelor's degree in a chemical, physical, biological, medical technology, clinical or reproductive laboratory science from an accredited institution; and

ii. Have documentation of training appropriate for the ART laboratory procedure(s) to be performed before performing the procedure(s) without direct and constant supervision on patient specimens. Training must include performing the ART laboratory procedure(s), at a minimum, 30 times under direct and constant supervision.

c. If not qualified under subparagraph 5.b. of this section, be performing ART laboratory procedures in an embryo laboratory on or before July 20, 1999 and have documentation of training appropriate for the ART laboratory procedure(s) to be performed before performing the procedure(s) without direct and constant supervision on patient specimens. Training must include performing the ART laboratory procedure(s), at a minimum, 30 times under direct and constant supervision.

d. In addition to meeting the qualification requirements above—

i. Obtain at least 12 contact hours of continuing education annually in ART or clinical laboratory practice. If also serving as the laboratory director or

laboratory supervisor, continuing education obtained to meet the laboratory director or laboratory supervisor qualification requirements may be used to meet this requirement; and

ii. It is recommended that each reproductive biologist perform each of the ART laboratory procedures he or she performs in the laboratory at least 20 times annually.

6. **Reproductive Biologist Responsibilities.** The reproductive biologist is responsible for performing ART laboratory procedures, and recording and reporting procedural outcomes promptly, accurately and proficiently. The reproductive biologist must—

a. Perform only those ART laboratory procedures that are authorized by the laboratory director, and for which training has been documented. If appropriate training has not been documented, perform ART laboratory procedures only under direct and constant supervision.

b. Follow the laboratory's established policies and procedures for performing ART laboratory procedures, and recording and reporting procedural outcomes.

c. Adhere to the laboratory's quality management policies, document all specimen and procedure management, quality control and quality assurance activities, and equipment and instrument calibration, function verification and maintenance performed.

d. Identify problems that may adversely affect the performance of ART laboratory procedures and either immediately notify the laboratory supervisor or director, or correct the problem(s) in accordance with the laboratory's established policies and procedures and notify the laboratory supervisor or director of the problem(s) and the corrective action(s) taken.

e. Document all corrective actions taken when failures in quality are identified.

B. Facilities and Safety

The embryo laboratory must provide adequate space and the appropriate environmental conditions to ensure safe working conditions and quality performance of ART laboratory procedures.

1. **Requirements for Physical Space and Utilities.** The laboratory must be constructed and arranged so that—

a. The laboratory space, ventilation, and utilities are adequate for the volume of ART laboratory procedures performed during peak periods of activity.

b. ART laboratory procedures are carried out in a secure area with access limited to authorized personnel.

c. Movement of patient specimens and traffic around sensitive work areas is limited in order to reduce the potential for spilled or lost specimens.

d. Incubator and storage space are configured to ensure positive specimen identification and minimize the potential for errors due to misplaced specimens or retrieval of the wrong specimen.

e. Activities requiring sterile technique such as the handling, assessment and culturing of human oocytes and embryos, are performed under aseptic conditions in an area that is physically isolated from other laboratory activities.

f. All laboratory work areas (does not include administrative areas) are easily washed and disinfected.

g. The laboratory and administrative space are conveniently located, but are separate from patient areas.

h. Immediate communication can occur with the oocyte retrieval and transfer room(s).

2. Safety Requirements. Safety precautions, policies, and procedures must be established and posted, or readily available to all personnel, to ensure protection from physical, chemical, electrical and biological hazards.

a. All personnel must be knowledgeable about and abide by applicable Federal, State and local regulations regarding protection from physical, chemical, electrical and biological hazards.

b. Disposable materials should be used wherever possible for all procedures that involve exposure to tissue and body fluids.

c. The laboratory must store and dispose of tissue, body fluids, or other potentially biohazardous materials as outlined in Federal, State and local regulations.

d. Toxic chemicals, including toxic cleaning materials, must be used in a manner that is not harmful to patient specimens.

e. Radioisotopes must not be used in a laboratory that performs ART procedures.

f. The laboratory must have an emergency plan appropriate for its geographical location which specifies the actions to be taken to protect employees, patients, visitors and specimens in case of a natural disaster or other potentially devastating event.

3. Laboratory Animals/Nonhuman Animal Cells, Tissues, Organs.

a. If laboratory animals are used, all applicable Federal, State and local

regulations regarding animal care and use must be met.

b. If live nonhuman animal cells, tissues, and/or organs are used, all applicable Federal, State and local regulations regarding their handling, storage and use must be met.

C. Quality Management

The embryo laboratory must establish and follow written policies and procedures for a comprehensive quality management program that is designed to monitor and evaluate the ongoing and overall quality of the ART laboratory procedures performed and services provided. All quality management activities must be documented.

1. Procedure Manual. A written procedure manual including instructions for all ART laboratory procedures performed must be available in the embryo laboratory and followed by all laboratory personnel. The written procedures must be in sufficient detail to assure reproducibility and competence in the performance of the laboratory procedures.

a. The procedure manual must include the following, when applicable to the ART laboratory procedure performed:

i. Principle (scientific basis) of the ART laboratory procedure;

ii. Clinical significance of the ART laboratory procedure;

iii. Requirements for specimen collection and handling;

iv. Step-by-step instructions for performance of the ART laboratory procedure;

v. Preparation of required reagents, culture media, solutions, or other special supplies;

vi. Equipment and instrumentation required for the performance of the procedure, including necessary function checks and calibration protocols;

vii. Quality control procedures to be performed, including frequency of control testing, and criteria for acceptability;

viii. Remedial action to be taken when function checks, calibration or control results do not meet the laboratory's criteria for acceptability;

ix. Calculations and interpretation of procedural outcomes, including criteria for acceptable and unacceptable outcomes, and procedural outcomes requiring special notification;

x. The laboratory's system for recording and reporting procedural outcomes;

xi. Limitations in methodologies, including interfering substances and precautions;

xii. Pertinent literature references;

xiii. Description of the course of action to be taken if required equipment

or instrumentation malfunctions or is inoperable;

xiv. Criteria for the referral or transfer of specimens to another embryo laboratory for the performance of an ART laboratory procedure, including procedures for specimen submission and handling; and

xv. Procedure for safe and appropriate specimen disposal.

b. Manufacturers' instrument/equipment manuals and package inserts may be used, when applicable, to meet the requirements of this section.

i. Any of the items listed under subparagraph 1.a. of this section, not provided by the manufacturer must be provided by the laboratory.

ii. Any modifications to, or deviations from, the manufacturer's instructions, must be clearly documented and provided in the procedure manual.

c. Appropriate reference materials (e.g., slides, pictures, textbooks, etc.) should be available in the laboratory to allow, as needed, comparison with patient specimens.

d. Procedures must initially be approved, signed and dated by the laboratory director, and must thereafter, be reviewed by the laboratory director on an annual basis.

e. Procedures must be re-approved, signed and dated if the directorship of the laboratory changes.

f. Each change in a procedure must be approved, signed and dated by the current laboratory director.

g. The laboratory must retain a copy of each procedure with the dates of initial use and discontinuance in accordance with the requirements of section D., Maintenance of Records, of this part.

2. Equipment and Instrument Maintenance/Calibration. The embryo laboratory must perform and document equipment and instrument maintenance and, as applicable, calibration, and function verification that include(s) electronic, mechanical and operational checks necessary for the proper performance of ART laboratory procedures. The laboratory must—

a. Have sufficient equipment for the type and volume of ART laboratory procedures performed, which may include but is not limited to, incubators, freezers, refrigerators, hoods, thermometers, centrifuges, microscopes, pipettes, and warming devices.

b. Establish and follow written policies and procedures for equipment and instrument maintenance and, as applicable, calibration, and function checks, that ensure proper performance of the equipment and instruments used in ART laboratory procedures. The laboratory must—

i. Define acceptable limits for equipment and instrument maintenance and, as applicable, calibration, and function checks prior to their use in ART laboratory procedures.

ii. Perform maintenance and, as applicable, calibration, and function checks in accordance with the equipment/instrument manufacturer's instructions and at the frequency required to ensure adequate performance of the equipment and instruments used in ART laboratory procedures.

iii. Monitor environmental conditions, using an independent measuring device, in critical equipment, including but not limited to, incubators, controlled-rate freezers and liquid nitrogen storage tanks, at a frequency that ensures timely detection of conditions that are deleterious to specimens. These conditions include, if applicable:

- A. Temperature;
- B. Humidity;
- C. Gas concentration; and
- D. Liquid nitrogen levels.

iv. Maintain an alarm system on critical equipment that will immediately detect when pre-established limits for the environmental conditions listed in subparagraph 2.b.iii. (excluding humidity), of this section, are exceeded. The alarm system must be:

A. Checked periodically to ensure that it will be triggered when preestablished limits for environmental conditions are exceeded; and

B. Monitored 24 hours a day in the laboratory or at a remote site.

v. Protect critical equipment and instrumentation from fluctuations and interruptions in electrical current.

vi. Have available emergency back-up capability for critical equipment, including but not limited to, incubators, refrigerators and controlled-rate freezers.

vii. Document all maintenance, calibration, and function checks performed.

c. Identify, investigate, and correct problems with equipment or instrumentation that may adversely affect the performance of ART laboratory procedures.

d. Document all corrective actions taken when problems with equipment or instrumentation are identified.

3. Labeling, Handling, and Storage of Chemicals, Reagents, Solutions, Culture Media, Materials and Supplies. The embryo laboratory must label, handle and store chemicals, reagents, solutions, culture media, materials and supplies in a manner that ensures their positive identification, optimum integrity and

appropriate reactivity in ART laboratory procedures. The laboratory must—

a. Have a mechanism for ensuring sufficient chemicals, reagents, solutions, culture media, materials and supplies for the type and volume of ART laboratory procedures performed (e.g., inventory maintenance program).

b. Define criteria that are essential for proper storage of chemicals, reagents, solutions, and culture media, including the following, as applicable:

- i. Temperature;
- ii. Humidity; and
- iii. Other conditions necessary for proper storage.

c. Label all chemicals, reagents, solutions, and culture media to indicate the following, as applicable:

- i. Identity, and when significant, batch or lot number, titer, strength, or concentration;
- ii. Recommended storage conditions;
- iii. Expiration date; and
- iv. Other pertinent information required for proper use.

d. Verify that materials which come in contact with sperm, oocytes, and embryos have been tested and found to be non-toxic to sperm, oocytes, and embryos. Documentation supplied by the manufacturer may be used to meet this requirement.

e. Maintain records documenting the batch or lot number, date of receipt or preparation, and date placed in use, for all chemicals, reagents, solutions, and culture media.

f. Prepare, store, and handle chemicals, reagents, solutions, and culture media in a manner to ensure that they are not used when they have exceeded their expiration date, have deteriorated, or are of substandard quality.

4. Specimen and Procedure Management. The embryo laboratory must have written protocols and criteria for the laboratory procedures performed and employ and maintain a system that provides for proper patient identification and preparation; specimen collection, identification, and handling (transportation, processing, storage, preservation); and accurate recording and reporting of laboratory procedural outcomes.

a. The laboratory must have available and follow written policies and procedures for each of the following:

- i. Instructions for patient preparation, if applicable;
- ii. Methods used for the positive identification of patients;
- iii. Specimen collection;
- iv. The labeling of patient specimens to ensure positive identification from the time of specimen collection through final disposition or disposal;

v. Criteria for maintaining specimen integrity and viability during transport, storage and the performance of ART laboratory procedures including, as applicable, requirements for:

- A. Temperature;
- B. Humidity; and
- C. Gas concentration; and

vi. Criteria for specimen acceptability and, as appropriate, instructions for special handling of suboptimal specimens.

b. The laboratory must have adequate systems in place to ensure patient confidentiality throughout those parts of the ART process that are under the laboratory's control.

c. The laboratory may perform ART laboratory procedures only at the written or electronic request of an authorized person. Oral requests for changes to the original written or electronic request must be documented by the laboratory and followed by receipt of written or electronic documentation from an authorized person within 24 hours of the oral request. The patient's chart or medical record may be used for written authorization, but must be available to the laboratory at the time of the laboratory procedure. Written or electronic authorization must include the following:

- i. The patient's name and an unique identifier;
- ii. When applicable, the partner's or donor's name or other unique identifier;
- iii. The name and address or other suitable identifiers of the authorized person requesting the procedure, and the name of the individual communicating the request;
- iv. The procedure(s) to be performed;
- v. The date(s) and time(s) the procedure(s) is to be performed; and
- vi. Any additional information relevant and necessary to the performance of the procedure(s) including verification of informed patient consent, and as applicable, special handling instructions and any instructions stipulated by the patient.

d. As applicable, the laboratory must establish and follow written protocols, including documented criteria, for—

- i. Evaluation and assessment of oocyte morphology and maturity, fertilization, and embryo quality.
- ii. Insemination schedule relative to oocyte maturity.
- iii. Volume, numbers, and quality of sperm used for insemination of each oocyte.
- iv. Disposition of oocytes with an abnormal number of pronuclei.
- v. Disposition of excess oocytes.
- vi. The time period following insemination for examination of oocytes to determine fertilization.

vii. Micromanipulation of oocytes and embryos.

viii. Re-insemination of oocytes.

ix. Cryopreservation of specimens.

x. Embryo transfer procedures, which include the following:

A. The length of time embryos are cultured prior to transfer;

B. The medium and protein supplementation used for transfer, as applicable;

C. Disposition of excess embryos;

D. Types of catheters available, with circumstances for use of each;

E. Method of transfer; and

F. Technique for post transfer catheter check.

e. The laboratory must maintain a record system, for each patient's ART cycle, to ensure reliable identification and control of the patient's specimens as they are received and the laboratory procedure(s) performed. The record system must include documentation of the information specified in subparagraph 4.c. of this section, and—

i. The laboratory accession number, or other unique identification of the specimen.

ii. The date and time of specimen receipt into the laboratory and, as applicable, the number of oocytes retrieved and assessment of each oocyte or cumulus corona complex.

iii. The condition and disposition of all specimens including those that do not meet the laboratory's criteria for acceptability.

iv. The records and dates of all laboratory handling and procedures, including the following, as applicable:

A. Semen assessment before and after washing and concentration for insemination;

B. Outcome of insemination or micromanipulation procedures (e.g., fertilization);

C. Outcome of any culture (e.g., cleavage);

D. Relative timing of protocol events (incubation hours, etc.);

E. Assessment of the developmental status and quality of all embryos at transfer;

F. Verification that no embryos remain in the catheter following completion of transfer;

G. The identity and lot numbers of the media and media supplements used in each phase of the procedure; and

H. The identity of the laboratory personnel who handled the specimens and performed the procedures.

f. The laboratory must have a mechanism in place for promptly providing the authorized person who ordered the procedure a complete summary of all procedural outcomes and the occurrence of any unusual or

abnormal events, including the condition and disposition of specimens that do not meet the laboratory's criteria for acceptability.

g. The laboratory must have an accurate and reliable method of tracking cryopreserved specimens ensuring positive identification of each cryopreservation container. In addition, the cryopreservation container must be labeled with the patient's name or unique identifier, and the date the specimen(s) was frozen. All labeling must be of a permanent nature.

Documentation must be maintained in duplicate log books or files for each liquid nitrogen storage tank and include the following:

i. The patient's name or other unique identifier;

ii. A description of each cryopreservation container's contents;

iii. The freezing protocol used;

iv. Date frozen;

v. Type and location of cryopreservation container (e.g., straw, vial); and

vi. Final disposition/disposal of the cryopreserved specimen(s).

h. If cryopreserved specimens are received from or transferred to other facilities, the laboratory must have written policies and procedures for the receipt/transfer of cryopreserved specimens. Policies and procedures must include appropriate methods of transportation and the method for verifying the identification and number of cryopreservation containers received/transferred. In addition, documentation of the freezing protocol used, and copies of patient release forms and applicable log sheets must accompany the cryopreserved specimens.

i. Clinical laboratory testing on specimens obtained by the embryo laboratory to provide information for the diagnosis, prevention or treatment of disease, or assessment of the health of human beings must be performed in accordance with the regulations implementing CLIA at 42 CFR Part 493. In addition—

i. The referring embryo laboratory must not revise results or information directly related to the interpretation of results provided by the testing laboratory.

ii. The referring embryo laboratory may permit the testing laboratory to send the test result(s) directly to the authorized person who initially requested the testing. The embryo laboratory must retain or be able to produce an exact duplicate of the testing laboratory's report.

iii. The authorized person who orders a clinical laboratory test must be notified by the referring embryo

laboratory of the name and address of the testing laboratory.

5. Method Validation. All ART procedures selected or established by the embryo laboratory must be validated by the laboratory prior to routine patient use. The laboratory must determine appropriate performance measures and demonstrate that the procedure, when performed by the laboratory's staff, meets or exceeds acceptable levels of performance as defined by the laboratory. In addition, the laboratory must periodically verify, through its quality management activities (as specified in this part), each procedure's continued acceptable level of performance. All validations must be documented.

6. Quality Control. The embryo laboratory must establish and follow written quality control procedures at a frequency appropriate to monitor the reliability of the ART laboratory procedures performed. All quality control activities must be documented. The laboratory must—

a. Establish acceptability criteria for all quality control procedures.

b. Perform and document the remedial action(s) taken when problems are identified or quality control procedures do not meet the laboratory's criteria for acceptability.

c. For each laboratory procedure performed and, as applicable, culture media preparation—

i. Define and use the appropriate grade of water required.

ii. Periodically monitor water quality to ensure that its quality continues to meet the laboratory's specifications for its intended use. As applicable, adherence to manufacturers' storage and handling requirements, and expiration dates may meet this requirement.

d. As applicable, have and follow a written procedure for the preparation, washing and sterilization of glassware used in the laboratory's procedures that includes the following:

i. Rinsing all washable glassware with distilled or deionized water prior to drying; and

ii. If detergent is used, testing washed items for detergent removal.

e. Have and follow a written procedure for the quality control of culture media which includes a visual check for physical damage to the media container and evidence of media contamination prior to its use and—

i. For each batch of culture media prepared in-house, document the quality of the media by testing—

A. pH.

B. Osmolality.

C. Culture suitability using an appropriate bioassay system.

ii. For each batch of commercially prepared culture media—

A. Verify and document the quality of the media with an appropriate bioassay system. Documentation of quality control performed by the manufacturer may meet this requirement.

B. Follow the manufacturer's specifications for using the media.

iii. Test and document the quality of any media supplementation (e.g., protein), when appropriate, using a bioassay system.

iv. While the use of blood-based media or a blood-based media supplement (e.g., human fetal cord serum) prepared in-house is not recommended, if such media or supplements are prepared, the laboratory must test blood from the donor(s) used to make the media/supplement with a FDA licensed, approved, or cleared test and show the donor(s) to be negative/nonreactive for the following communicable diseases prior to use of the media/supplement:

A. Human immunodeficiency virus, Type 1 (e.g., anti-HIV-1);

B. Human immunodeficiency virus, Type 2 (e.g., anti-HIV-2);

C. Hepatitis B virus (e.g., HbsAg);

D. Hepatitis C virus (e.g., anti-HCV);

E. Human T-cell lymphotropic virus, Types I and II (e.g., anti-HTLV I/II); and

F. Such other diseases that may be later added to this list.

Note: A batch of media (solid, semi-solid, or liquid) consists of all tubes, plates, or containers of the same medium prepared at the same time in the laboratory; or, if received from an outside source or commercial supplier, consists of all of the plates, tubes or containers of the same medium that have the same lot numbers and are received in a single shipment.

7. **Quality Assurance.** The embryo laboratory must establish and follow written policies and procedures for a quality assurance program to monitor the quality of services provided by the laboratory, and resolve problems that are identified. The laboratory must have a mechanism to evaluate the effectiveness of its policies and procedures; identify and correct problems; and assure the adequacy and competency of the staff. As necessary, the laboratory must revise its policies and procedures based on the results of those evaluations. All quality assurance activities must be documented.

a. The laboratory must have an ongoing mechanism for monitoring, evaluating and revising, if necessary, based on the results of its evaluations, the following:

i. The criteria established for patient identification and specimen collection, identification, and handling;

ii. The information requested and maintained on each patient and for each laboratory procedure performed for its completeness, relevance and necessity;

iii. The timeliness and accuracy of recording and reporting procedural outcomes;

iv. The accuracy and reliability of tracking cryopreserved specimens;

v. The appropriate storage and retrieval of laboratory records such as procedural outcomes, and other data recorded and maintained; and

vi. The corrective actions taken for—

A. Problems identified during the evaluation of equipment and instrument maintenance, calibration, and function check data.

B. Problems identified during the evaluation of quality control data.

C. Errors detected in patient or specimen identification and handling.

D. Clerical or analytical errors detected in laboratory records.

b. The embryo laboratory must have an ongoing mechanism to—

i. Identify and evaluate laboratory procedural outcomes that appear inconsistent with the patient or donor history.

ii. Track and evaluate laboratory procedural outcomes including, but not limited to, fertilization rates, cleavage rates and embryo quality.

iii. Maintain a file of adverse reactions occurring as a result of errors made during the performance of ART laboratory procedures.

iv. Evaluate the effectiveness of its policies and procedures for assuring employee competence in performing ART laboratory procedures.

v. Document problems that occur as a result of a breakdown in communication between the laboratory and referring physicians or others involved in the ART procedures, and take corrective actions to resolve the problems and minimize future communications breakdowns.

vi. Assure that all complaints and problems reported to the laboratory are documented. Investigations of complaints must be made, when appropriate, and as necessary, corrective actions must be instituted.

vii. Document and assess problems identified during quality assurance reviews, and discuss them with the laboratory staff and, as appropriate, referring physicians and others involved in the ART procedures. The laboratory must take the necessary corrective actions to prevent recurrences.

D. Maintenance of Records

The embryo laboratory must retain records of all of its policies and procedures; personnel employment,

training, evaluations and continuing education activities; and quality management activities specified in this part.

1. **Record Format.** Laboratory records must be accurate, indelible, and legible. Records may be retained electronically, or as original paper records, or as true copies such as photocopies, microfiche, or microfilm.

2. **Retention Period.** Laboratory records must be retained in accordance with time frames specified by applicable Federal, State and local laws or for ten years beyond the date of final disposition or disposal of all specimens obtained during each patient's ART cycle, whichever is later. Records must be retained on site for two years. **Note:** Transfer of cryopreserved specimens to another facility constitutes final disposition for the transferring facility.

3. **Record Retrieval.** Laboratory records must be maintained in a manner which ensures timely, accurate and reliable retrieval.

4. **Laboratory Closure.** In the event that the laboratory ceases operation, the laboratory must make provisions for these records to be maintained for the time frame required above.

Addendum

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Miscellaneous Trade and Technical Corrections Act of 1999 (June 25, 1999; 113 Stat. 127)

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